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ECLI:EU:C:2021:987

Provisional text

JUDGMENT OF THE COURT (Second Chamber)

9 December 2021 (\*)

(Reference for a preliminary ruling – Directive 2003/88/EC – Organisation of working time – Protection of the health and safety of workers – Article 7(1) – Right to paid annual leave – Level of remuneration – Reduced remuneration due to incapacity for work)

In Case C-217/20,

REQUEST for a preliminary ruling under Article 267 TFEU from the Rechtbank Overijssel (District Court, Overijssel, Netherlands), made by decision of 20 May 2020, received at the Court on 25 May 2020, in the proceedings

**XXXX**

v

**Staatssecretaris van Financiën,**

THE COURT (Second Chamber),

composed of A. Arabadjiev, President of the First Chamber, acting as President of the Second Chamber, I. Ziemele (Rapporteur), T. von Danwitz, P.G. Xuereb and A. Kumin, Judges,

Advocate General: G. Hogan,

Registrar: A. Calot Escobar,

having regard to the written procedure,

after considering the observations submitted on behalf of:

– the Netherlands Government, by M.A.M. de Ree and M.K. Bulterman and by J.M. Hoogveld, acting as Agents,

– the European Commission, by H. van Vliet and by C. Valero, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 8 July 2021,

gives the following

## **Judgment**

1 This request for a preliminary ruling concerns the interpretation of Article 7 of Directive 2003/88/EC of the European Parliament and of the Council of 4 November 2003 concerning certain aspects of the organisation of working time (OJ 2003 L 299, p. 9).

2 The request has been made in proceedings between the applicant in the main proceedings and the Staatssecretaris van Financiën (State Secretary for Finance, Netherlands) concerning the amount of remuneration to which the applicant is entitled in respect of paid annual leave.

## **Legal context**

### *European Union law*

3 Recitals 2 and 4 to 6 of Directive 2003/88 state:

‘(2) Article 137 [EC] provides that the Community is to support and complement the activities of the Member States with a view to improving the working environment to protect workers’ health and safety. ...

...

(4) The improvement of workers’ safety, hygiene and health at work is an objective which should not be subordinated to purely economic considerations.

(5) All workers should have adequate rest periods. ...

(6) Account should be taken of the principles of the International Labour Organisation with regard to the organisation of working time, including those relating to night work.’

4 Article 1 of Directive 2003/88, entitled ‘Purpose and scope’, provides:

‘1. This Directive lays down minimum safety and health requirements for the organisation of working time.

2. This Directive applies to:

(a) minimum periods of ... annual leave ...

...’

5 Article 7 of that directive, entitled ‘Annual leave’, states:

- ‘1. Member States shall take the measures necessary to ensure that every worker is entitled to paid annual leave of at least four weeks in accordance with the conditions for entitlement to, and granting of, such leave laid down by national legislation and/or practice.
2. The minimum period of paid annual leave may not be replaced by an allowance in lieu, except where the employment relationship is terminated.’

### *Netherlands law*

6 Under Article 22(1) of the Algemeen Rijksambtenarenreglement (General State Civil Service Regulations), in the version applicable to the dispute in the main proceedings (‘the ARAR’), an official is entitled each year to leave with maintenance of his full remuneration.

7 Article 37 of the ARAR provides:

‘1. In the case of incapacity for work due to illness, the official shall be entitled to continued payment of his full remuneration for a period of 52 weeks. If, at the end of that period, the situation of incapacity for work persists, he shall receive 70% of the amount of his remuneration.

...

5. By way of derogation from the first paragraph, the official shall be entitled, following the end of the period of 52 weeks referred to in the first paragraph, to continued payment of his full remuneration for the number of hours performed or would have been performed by him had appropriate work been offered to him.’

### **The dispute in the main proceedings and the questions referred for a preliminary ruling**

8 The applicant in the main proceedings is employed by the Belastingdienst (Tax Administration, Netherlands). Since 24 November 2015, he has been partially incapacitated for work on a long-term basis due to illness and is engaged in a professional reintegration process.

9 In accordance with Article 37(1) of the ARAR, the applicant in the main proceedings received his full remuneration during the first year of incapacity for work, that is to say, until 24 November 2016, then 70% of that remuneration from that date. However, by virtue of Article 37(5) of the same regulations, he continued to receive his full remuneration for the hours for which he was considered fit to work.

10 During the annual leave taken by the applicant in the main proceedings from 25 July to 17 August 2017, he was paid an allowance equivalent to the remuneration received since 24 November 2016, namely 70% of his remuneration in respect of the hours corresponding to his incapacity for work and 100% of it in respect of the hours during which he was considered fit to work.

11 By an objection lodged with the State Secretary for Finance, the applicant in the main proceedings challenged the amount of that remuneration, claiming that, during that leave, he should have received his full remuneration. The State Secretary for Finance having rejected that objection by a decision of 13 October 2017, the applicant in the main proceedings brought an appeal against that decision before the Rechtbank Overijssel (District Court, Overijssel, Netherlands), the referring court.

12 That court notes that, under Article 22(1) of the ARAR, the official is entitled each year to paid leave with continuation of his ‘full remuneration’. It considers that that concept of ‘full remuneration’ relates to the remuneration due for the period of work preceding that during which annual leave is requested (‘the reference period’), namely, in the case in the main proceedings, the remuneration referred to in paragraph 10 of the present judgment. Consequently, the position of the State Secretary for Finance is in conformity with national legislation.

13 Moreover, the referring court notes that, although Directive 2003/88 guarantees entitlement to paid annual leave of at least four weeks, including in the event of total incapacity for work, it does not contain any indication as to the amount of remuneration to be paid during that annual leave.

14 That court recalls that, in its judgments of 16 March 2006, *Robinson-Steele and Others* (C-131/04 and C-257/04, EU:C:2006:177), and of 20 January 2009, *Schultz-Hoff and Others* (C-350/06 and C-520/06, EU:C:2009:18), the Court of Justice found that, during their annual leave, workers must receive their ‘normal’ remuneration. In that regard, the referring court indicates that the amount of remuneration received by the applicant in the main proceedings during his annual leave is the same as that which he received during the reference period.

15 However, the referring court also indicates that the Court of Justice, in paragraph 25 of the judgment of 20 January 2009, *Schultz-Hoff and Others* (C-350/06 and C-520/06, EU:C:2009:18), specified that the purpose of the right to paid annual leave is different from that of the right to sick leave.

16 In the light of that consideration, it asks whether taking account, for the purposes of determining the amount of remuneration due during a period of paid annual leave, of the reduction in remuneration following a situation of incapacity for work affects the right to paid annual leave of the worker concerned.

17 In those circumstances, the Rechtbank Overijssel (District Court, Overijssel) decided to stay proceedings and to refer the following questions to the Court for a preliminary ruling:

‘(1) Must Article 7(1) of [Directive 2003/88] be interpreted as meaning that a worker does not lose his remuneration, or part thereof, because he [or she] exercises his [or her] right to annual leave? Or should that provision be interpreted as meaning that a worker retains [his or her] remuneration while exercising [his or her] right to annual leave, irrespective of the reason for not working during the leave period?’

(2) Must Article 7(1) of [Directive 2003/88] be interpreted as precluding national provisions and practices whereby a worker who is incapacitated for work due to illness, when taking his [or her] annual leave, retains his [or her] remuneration at the level it was immediately prior to his [or her] taking annual leave, even if, on account of the long duration of his [or her] incapacity for work, that remuneration is lower than that paid in the event of full fitness for work?’

(3) Must the entitlement of every worker to paid annual leave under Article 7 of [Directive 2003/88] and under settled EU case-law be interpreted as meaning that reducing that remuneration during leave taken during incapacity for work runs counter to that entitlement?’

### **Consideration of the questions referred**

18 By its questions referred for a preliminary ruling, which it is appropriate to examine together, the referring court is asking, in essence, whether Article 7(1) of Directive 2003/88 must be

interpreted as precluding national provisions and practices under which, where a worker who is incapacitated for work due to illness exercises his or her right to paid annual leave, the reduction, following the incapacity for work, of the amount of remuneration that he or she received during the reference period preceding that during which his or her annual leave is requested, is taken into account to determine the amount of remuneration that will be paid to him or her in respect of his or her paid annual leave.

19 In the first place, it must be recalled that, as is apparent from the very wording of Article 7(1) of Directive 2003/88, that provision confers on every worker a right to paid annual leave of at least four weeks. That right must be regarded as a particularly important principle of EU social law, the implementation of which by the competent national authorities must be confined within the limits expressly laid down by Directive 2003/88 itself (see, to that effect, judgment of 25 June 2020, *Varhoven kasatsionen sad na Republika Bulgaria and Iccrea Banca SpA*, C-762/18 and C-37/19, EU:C:2020:504, paragraph 53 and the case-law cited).

20 In the second place, the right to paid annual leave being enshrined in Article 7(1) of Directive 2003/88, it should be noted that the provisions of that directive concern, as is apparent from recital 4 thereof, the improvement of workers' safety, hygiene and health at work.

21 Recital 5 of that directive specifies, moreover, that 'all workers should have adequate rest periods'.

22 Consequently, Article 1 of that directive provides that the latter lays down minimum safety and health requirements for the organisation of working time and that it applies to, inter alia, minimum periods of annual leave.

23 Having regard to those objectives, it is well established that the right to annual leave, laid down in Article 7 of Directive 2003/88, has the dual purpose of enabling the worker both to rest from carrying out the work he or she is required to do under his or her contract of employment and to enjoy a period of relaxation and leisure (judgment of 25 June 2020, *Varhoven kasatsionen sad na Republika Bulgaria and Iccrea Banca SpA*, C-762/18 and C-37/19, EU:C:2020:504, paragraph 57 and the case-law cited).

24 A worker must normally be entitled to actual rest, with a view to ensuring effective protection of his or her health and safety (see, to that effect, judgment of 20 January 2009, *Schultz-Hoff and Others*, C-350/06 and C-520/06, EU:C:2009:18, paragraph 23).

25 Furthermore, the purpose of the right to paid annual leave laid down in Article 7(1) of Directive 2003/88, which distinguishes that leave from other types of leave having different purposes, such as the right to sick leave which is meant to enable the worker to recover from illness (see, to that effect, judgment of 30 June 2016, *Sobczyszyn*, C-178/15, EU:C:2016:502, paragraph 25), is based on the premiss that the worker actually worked during the reference period. The objective of that directive, which is to enable workers to enjoy a period of rest, relaxation and leisure in order to preserve their health and safety, presupposes that that worker has previously been engaged in activities which justify his or her being given such a period. It follows that entitlement to paid annual leave must, in principle, be determined by reference to the periods of actual work completed under the employment contract (see, to that effect, judgment of 25 June 2020, *Varhoven kasatsionen sad na Republika Bulgaria and Iccrea Banca SpA*, C-762/18 and C-37/19, EU:C:2020:504, paragraph 58 and the case-law cited).

26 In the third place, in that context, the Court has stated that the term ‘paid annual leave’ in Article 7(1) of Directive 2003/88 means that, for the duration of ‘annual leave’ within the meaning of that directive, remuneration must be maintained and that, in other words, workers must receive their normal remuneration for that period of rest (judgment of 13 December 2018, *Hein*, C-385/17, EU:C:2018:1018, paragraph 32 and the case-law cited).

27 Workers must be put, when they exercise their right to paid annual leave, in a position which is, as regards salary, comparable to periods of work (judgment of 13 December 2018, *Hein*, C-385/17, EU:C:2018:1018, paragraph 33 and the case-law cited).

28 Therefore, although the structure of the ordinary remuneration of a worker is determined, as such, by the provisions and practices governed by the law of the Member States, that structure cannot affect the worker’s right to enjoy, during his period of rest and relaxation, economic conditions which are comparable to those relating to the exercise of his employment (judgment of 13 December 2018, *Hein*, C-385/17, EU:C:2018:1018, paragraph 34 and the case-law cited).

29 Furthermore, in certain specific situations in which the worker is incapable of carrying out his or her duties, the right to paid annual leave cannot be made subject by a Member State to a condition that the worker has actually worked (judgment of 25 June 2020, *Varhoven kasatsionen sad na Republika Bulgaria and Iccrea Banca SpA*, C-762/18 and C-37/19, EU:C:2020:504, paragraph 59 and the case-law cited).

30 The same applies, in particular, with regard to workers who are placed on sick leave during the reference period. As is clear from the Court’s case-law, with regard to entitlement to paid annual leave, workers who are absent from work on sick leave during the reference period are to be treated in the same way as those who have actually worked during that period (judgment of 25 June 2020, *Varhoven kasatsionen sad na Republika Bulgaria and Iccrea Banca SpA*, C-762/18 and C-37/19, EU:C:2020:504, paragraph 60 and the case-law cited).

31 The Court has found, in that regard, that incapacity for work due to illness is, as a rule, not foreseeable and beyond the worker’s control. That is, in essence, also what follows from Convention No 132 of the International Labour Organisation of 24 June 1970 concerning Annual Holidays with Pay, as revised, the principles of which must be taken into account, as stated in recital 6 of Directive 2003/88, when interpreting that directive. As is apparent from Article 5(4) of that convention, absences on account of illness must be regarded as being absences from work ‘for such reasons beyond the control of the employed person concerned’ which must be ‘counted as part of the period of service’ (see, to that effect, judgment of 4 October 2018, *Dicu*, C-12/17, EU:C:2018:799, paragraph 32).

32 It follows that the right of a worker to a paid minimum annual leave, guaranteed by European Union law, cannot be restricted on the ground that the worker could not fulfil his or her obligation to work during the reference period due to an illness (see, to that effect, judgment of 25 June 2020, *Varhoven kasatsionen sad na Republika Bulgaria and Iccrea Banca SpA*, C-762/18 and C-37/19, EU:C:2020:504, paragraph 63 and the case-law cited).

33 Thus, the Court has held that the purpose of normal remuneration being received during the period of paid annual leave is to allow the worker actually to take the days of leave to which he or she is entitled. When the remuneration paid on account of the entitlement to paid annual leave provided for by Article 7(1) of Directive 2003/88 is less than the normal remuneration that the worker receives during periods actually worked, the worker might well be encouraged not to take

his or her paid annual leave (judgment of 13 December 2018, *Hein*, C-385/17, EU:C:2018:1018, paragraph 44).

34 In the present case, it is common ground that, under the national provisions and practice applicable to the case in the main proceedings, the amount of remuneration paid to the applicant in the main proceedings during his paid annual leave is the same as that which he received during the reference period. From this the Netherlands Government concluded, in the written observations which it submitted to the Court, that the applicant in the main proceedings was thus placed, for the duration of the annual leave, in an economic situation comparable to that in which he was during the reference period.

35 Admittedly, it is not disputed that the applicant in the main proceedings thus enjoyed, during the period of annual leave, economic conditions which are comparable to those which are applicable to him during his periods of employment, within the meaning of the case-law cited in paragraph 27 of the present judgment.

36 However, it is appropriate to state, in the first place, that national legislation or practice under which the amount of remuneration received by a worker during his paid annual leave is the same as that which was paid to him or her during the reference period, without account being taken of the fact that the amount of that remuneration was reduced on account of a situation of incapacity for work due to illness, amounts, in essence, to making the right to paid annual leave conferred by Directive 2003/88 subject to a condition that the worker has worked full time during that period.

37 In the second place, as the Advocate General emphasised in point 31 of his Opinion, to allow for a worker exercising his or her right to paid annual leave to receive higher or lower remuneration according to whether or not he or she is unfit for work while exercising that right would make the value of that right dependent on when it is exercised.

38 In the third place, although, as the Netherlands Government notes, the applicant in the main proceedings received, during his paid annual leave, remuneration the amount of which corresponds to that which was paid to him during the reference period, the fact remains that that remuneration is lower than that which he would have received had he not been incapacitated for work due to illness during that period.

39 As is apparent from the case-law cited in paragraphs 25 and 30 of the present judgment, since incapacity for work due to illness is, as a rule, not foreseeable and beyond the control of the worker concerned, it is necessary to consider, in relation to the right to paid annual leave, that workers who are partially incapacitated from work due to illness during the reference period are treated in the same way as those who have actually worked during that period. Accordingly, entitlement to paid annual leave in such a case must, in principle, be determined by reference to the periods of actual work completed under the employment contract, without account being taken of the fact that the amount of that remuneration was reduced on account of a situation of incapacity of work due to illness.

40 Furthermore, having regard to the purpose of paid annual leave, as is recalled in paragraph 25 of the present judgment, the fact that the cause of the incapacity for work persists during the period of that paid annual leave of the worker cannot affect the right of that worker to receive remuneration without a reduction during that leave.

41 In the light of the foregoing considerations, the answer to the questions referred is that Article 7(1) of Directive 2003/88 must be interpreted as precluding national provisions and

practices under which, where a worker who is incapacitated for work due to illness exercises his or her right to paid annual leave, the reduction, following the incapacity for work, of the amount of remuneration that he or she received during the reference period, is taken into account to determine the amount of remuneration that will be paid to him or her in respect of his or her paid annual leave.

### **Costs**

42 Since these proceedings are, for the parties to the main proceedings, a step in the proceedings pending before the national court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Second Chamber) hereby rules:

**Article 7(1) of Directive 2003/88/EC of the European Parliament and of the Council of 4 November 2003 concerning certain aspects of the organisation of working time must be interpreted as precluding national provisions and practices under which, where a worker who is incapacitated for work due to illness exercises his or her right to paid annual leave, the reduction, following the incapacity for work, of the amount of remuneration that he or she received during the period of work preceding that during which annual leave is requested, is taken into account to determine the amount of remuneration that will be paid to him or her in respect of his or her paid annual leave.**

[Signatures]

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\* Language of the case: Dutch.

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