ECLI:EU:C:2015:745

JUDGMENT OF THE COURT (Sixth Chamber)

11 November 2015 (*)

(Reference for a preliminary ruling — Social policy — Framework Agreement on part-time work — Organisation of working time — Directive 2003/88/EC — Right to paid annual leave — Calculation of entitlement to leave in the event of an increase in working time — Interpretation of the pro rata temporis principle)

In Case C-219/14,

REQUEST for a preliminary ruling under Article 267 TFEU from the Birmingham Employment Tribunal (United Kingdom), made by decision of 23 April 2014, received at the Court on 6 May 2014, in the proceedings

Kathleen Greenfield

v

The Care Bureau Ltd,

THE COURT (Sixth Chamber),

composed of F. Biltgen (Rapporteur), President of the Tenth Chamber, acting as the President of the Sixth Chamber, A. Borg Barthet and S. Rodin, Judges,

Advocate General: M. Szpunar,

Registrar: L. Hewlett, Administrator,

having regard to the written procedure and further to the hearing on 17 September 2015,

after considering the observations submitted on behalf of:

– The Care Bureau Ltd, by I. Pettifer, Solicitor,

– the United Kingdom Government, by L. Christie, acting as Agent, and G. Facenna, Barrister,

– the Spanish Government, by A. Gavela Llopis, acting as Agent,

– the Netherlands Government, by M. Bulterman and M. de Ree, acting as Agents,

– the Polish Government, by B. Majczyna, acting as Agent,

– the European Commission, by M. van Beek and J. Enegren, acting as Agents,

having decided, after hearing the Advocate General, to proceed to judgment without an Opinion,

gives the following

Judgment

1 This request for a preliminary ruling concerns the interpretation of clause 4.2 of the Framework Agreement on part-time work concluded on 6 June 1997 ('the Framework Agreement on part-time work'), annexed to Council Directive 97/81/EC of 15 December 1997 concerning the Framework Agreement on part-time work concluded by UNICE, CEEP and the ETUC (OJ 1998 L 14, p. 9), as amended by Council Directive 98/23/EC of 7 April 1998 (OJ 1998 L 131, p. 10), and 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 was made in proceedings between Ms Greenfield and The Care Bureau Ltd ('Care Bureau') concerning the calculation of the allowance in lieu of paid annual leave not taken to which Ms Greenfield considers she is entitled following termination of her employment contract.

Legal context

EU law

3 Clause 4 of the Framework Agreement on part-time work, headed 'Principle of non-discrimination', states:

'1. In respect of employment conditions, part-time workers shall not be treated in a less favourable manner than comparable full-time workers solely because they work part time unless different treatment is justified on objective grounds.

2. Where appropriate, the principle of *pro rata temporis* shall apply.'

4 Clause 6.1 of the Framework Agreement on part-time work states:

‘Member States and/or social partners may maintain or introduce more favourable provisions than set out in this agreement.’

5 In the words of recital 5 in the preamble to Directive 2003/88:

‘All workers should have adequate rest periods. The concept of “rest” must be expressed in units of time, i.e. in days, hours and/or fractions thereof. Community workers must be granted minimum daily, weekly and annual periods of rest and adequate breaks. It is also necessary in this context to place a maximum limit on weekly working hours.’

6 Article 7 of Directive 2003/88, headed ‘Annual leave’, is worded as follows:

‘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.’

7 Article 15 of that directive, headed ‘More favourable provisions’, provides:

‘This Directive shall not affect Member States’ right to apply or introduce laws, regulations or administrative provisions more favourable to the protection of the safety and health of workers or to facilitate or permit the application of collective agreements or agreements concluded between the two sides of industry which are more favourable to the protection of the safety and health of workers.’

8 Article 17 of that directive provides that Member States may derogate from certain provisions of that directive. However, no derogation is permitted with regard to Article 7 of the directive.

United Kingdom law

9 The Working Time Regulations 1998, SI 1998/1833, as amended by the Working Time (Amendment) Regulations 2007, SI 2007/2079, (‘the Working Time Regulations’) provide in regulation 13, in relation to the right to annual leave, that:

‘(1) Subject to paragraph (5), a worker is entitled to four weeks’ annual leave in each leave year.

…

(5) Where the date on which a worker's employment begins is later than the date on which (by virtue of a relevant agreement) his first leave year begins, the leave to which he is entitled in that leave year is a proportion of the period applicable under paragraph (1) equal to the proportion of that leave year remaining on the date on which his employment begins.'

10 Regulation 13A of the Working Time Regulations provides:

'(1) Subject to regulation 26A and paragraphs (3) and (5), a worker is entitled in each leave year to a period of additional leave determined in accordance with paragraph (2).

(2) The period of additional leave to which a worker is entitled under paragraph (1) is –

(a) in any leave year beginning on or after 1st October 2007 but before 1st April 2008, 0.8 weeks;

(b) in any leave year beginning before 1st October 2007, a proportion of 0.8 weeks equivalent to the proportion of the year beginning on 1st October 2007 which would have elapsed at the end of that leave year;

(c) in any leave year beginning on 1st April 2008, 0.8 weeks;

(d) in any leave year beginning after 1st April 2008 but before 1st April 2009, 0.8 weeks and a proportion of another 0.8 weeks equivalent to the proportion of the year beginning on 1st April 2009 which would have elapsed at the end of that leave year;

(e) in any leave year beginning on or after 1st April 2009, 1.6 weeks.

(3) The aggregate entitlement provided for in paragraph (2) and regulation 13(1) is subject to a maximum of 28 days.

(4) A worker's leave year begins for the purposes of this regulation on the same date as the worker's leave year begins for the purposes of regulation 13.

(5) Where the date on which a worker's employment begins is later than the date on which his first leave year begins, the additional leave to which he is entitled in that leave year is a proportion of the period applicable under paragraph (2) equal to the proportion of that leave year remaining on the date on which his employment begins.

…'

11 Under regulation 14 of the Working Time Regulations:

'(1) This regulation applies where:

(a) a worker's employment is terminated during the course of his leave year, and

(b) on the date on which the termination takes effect ("the termination date"), the proportion he has taken of the leave to which he is entitled in the leave year under regulation 13 and regulation 13A differs from the proportion of the leave year which has expired.

(2) Where the proportion of leave taken by the worker is less than the proportion of the leave year which has expired, his employer shall make him a payment in lieu of leave in accordance with paragraph (3).

(3) The payment due under paragraph (2) shall be –

(a) such sum as may be provided for the purposes of this regulation in a relevant agreement, or

(b) where there are no provisions of a relevant agreement which apply, a sum equal to the amount that would be due to the worker under regulation 16 in respect of a period of leave determined according to the formula –

$(A \times B) - C$

where –

A is the period of leave to which the worker is entitled under regulation 13 and regulation 13A;

B is the proportion of the worker's leave year which expired before the termination date, and

C is the period of leave taken by the worker between the start of the leave year and the termination date.

(4) A relevant agreement may provide that, where the proportion of leave taken by the worker exceeds the proportion of the leave year which has expired, he shall compensate his employer, whether by a payment, by undertaking additional work or otherwise.'

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

12 Ms Greenfield was employed by Care Bureau from 15 June 2009. She worked under a contract of employment in which it was stipulated that working hours and days differed from week to week. The remuneration payable for any week varied according to the number of days or hours of work performed.

13 Under both UK law and the contract of employment, Ms Greenfield was entitled to 5.6 weeks of leave per year. The leave year began on 15 June.

14 Ms Greenfield left Care Bureau on 28 May 2013. It is not disputed that she took 7 days of paid leave during the final leave year. She worked for a total of 1 729.5 hours and took a total of 62.84 hours of paid leave.

15 Ms Greenfield took those 7 days of paid leave in July 2012. During the 12-week period immediately preceding that holiday, her work pattern was 1 day per week.

16 From August 2012 Ms Greenfield began working a pattern of 12 days on and 2 days off taken as alternate weekends. That pattern amounted to an average of 41.4 hours of work per week. It was specified by Care Bureau that all Ms Greenfield's hours, including any overtime, would be used in the calculation of her entitlement to paid annual leave.

17 In November 2012 Ms Greenfield requested a week of paid leave. Care Bureau informed her that, as a result of the holiday taken in June and July 2012, she had exhausted her entitlement to paid annual leave. The entitlement to paid leave was calculated at the date on which leave was taken, based on the working pattern for the 12-week period prior to the leave. Since Ms Greenfield had taken her leave at a time when her work pattern was one day per week, she had taken the equivalent of 7 weeks of paid leave, and accordingly exhausted her entitlement to paid annual leave.

18 Taking the view that she was entitled to an allowance in lieu of paid leave not taken, Ms Greenfield brought proceedings against her employer in the Birmingham Employment Tribunal, which allowed her claim.

19 On 29 August 2013 Care Bureau requested the Birmingham Employment Tribunal to provide written reasons. On 8 October 2013 the tribunal proposed reconsidering its decision on the grounds that the law was sufficiently uncertain for a reference for a preliminary ruling from the Court of Justice to be required. Following the lodging of representations from the parties in writing, the tribunal concluded, however, that there was no need to make such a reference, and it gave written reasons for its decision.

20 On 19 December 2013, Care Bureau appealed against that decision to the Employment Appeal Tribunal, which stayed the appeal proceedings pending a decision of the Birmingham Employment Tribunal.

21 Meanwhile, on 12 December 2013, Care Bureau applied to the Birmingham Employment Tribunal to reconsider its judgment. The tribunal allowed that application at a hearing on 24 February 2014 and revoked its judgment, in part due to a mathematical error in the judgment, and in part in order to make a reference to the Court of Justice.

22 Before the Birmingham Employment Tribunal, Ms Greenfield argued that national law, read in conjunction with EU law, requires that leave already accrued and taken

should be retroactively recalculated and adjusted following an increase in working hours, for example, following a move from part-time to full-time work, so as to be proportional to the new number of working hours and not the hours worked at the time leave was taken.

23 Care Bureau maintains that EU law does not provide for a new calculation and that, therefore, Member States are not required to make such an adjustment under national law.

24 Having doubts as to the interpretation of EU law in the case before it, the Birmingham Employment Tribunal decided to stay the proceedings and to refer the following questions to the Court for a preliminary ruling:

'1. Is the "*pro rata temporis* principle", as set out in clause 4.2 of the Framework Agreement, to be interpreted as requiring a provision of national law, such as regulations 13, 13A and 14 of the Working Time Regulations, to have the effect that, in circumstances where there is an increase in the working hours of an employee, the amount of leave already accumulated must be adjusted proportionally to the new working hours, with the result that the worker who increases his/her working hours has his/her entitlement to accrued leave recalculated in accordance with the increased hours?

2. Is either clause 4.2 of the Framework Agreement or Article 7 of the Working Time Directive to be interpreted as precluding a provision of national law, such as regulations 13, 13A and 14 of the Working Time Regulations, from having the effect that in circumstances where there is an increase in the working hours of an employee, the amount of leave already accumulated is to be adjusted proportionally to the new working hours, with the result that the worker who increases his/her working hours has his/her entitlement to accrued leave recalculated in accordance with the revised hours?

3. If the answer to question 1 and/or 2 is yes, does the recalculation apply only to that portion of the holiday year during which the employee worked the increased hours or to some other period?

4. When calculating the period of leave taken by a worker, is either clause 4.2 of the Framework Agreement or Article 7 of the Working Time Directive to be interpreted as requiring a provision of national law, such as regulations 13, 13A and 14 of the Working Time Regulations, to have the effect of adopting a different approach as between calculating an employee's allowance in lieu of paid annual leave entitlement upon termination and when calculating an employee's remaining annual leave entitlement when they remain employed?

5. If the answer to question 4 is yes, what is the difference in approach required to be adopted?'

Consideration of the questions referred

Questions 1 to 3

25 By its first to third questions, which should be considered together, the referring tribunal asks, in essence, whether clause 4.2 of the Framework Agreement on part-time work and Article 7 of Directive 2003/88 on the organisation of working time must be interpreted as meaning that, in the event of an increase in the number of hours of work performed by a worker, the Member States are obliged to provide, or are prohibited from providing, that the entitlement to paid annual leave already accrued, and possibly taken, must be recalculated, if necessary retroactively, according to that worker's new work pattern and, if a recalculation must be performed, whether that relates only to the period during which the working time of the worker has increased, or to the whole leave year.

26 In that regard, it should be noted that, according to settled case-law, the right of every worker to paid annual leave must be regarded as a particularly important principle of European Union social law from which there can be no derogations and whose implementation by the competent national authorities must be confined within the limits expressly laid down (see, inter alia, judgments in *BECTU*, C-173/99, EU:C:2001:356, paragraph 43, and *Zentralbetriebsrat der Landeskrankenhäuser Tirols*, C-486/08, EU:C:2010:215, paragraph 28).

27 In addition, the Court has repeatedly emphasised that the entitlement of every worker to paid annual leave is, as a principle of European Union social law, expressly laid down in Article 31(2) of the Charter of Fundamental Rights of the European Union, which Article 6(1) TEU recognises as having the same legal value as the Treaties (see, inter alia, judgment in *Heimann and Toltschin*, C-229/11 and C-230/11, EU:C:2012:693, paragraph 22 and the case-law cited).

28 It is apparent, moreover, from that case-law that the right to paid annual leave may not be interpreted restrictively (see, inter alia, judgments in *Zentralbetriebsrat der Landeskrankenhäuser Tirols*, C-486/08, EU:C:2010:215, paragraph 29, and *Heimann and Toltschin*, C-229/11 and C-230/11, EU:C:2012:693, paragraph 23 and the case-law cited).

29 Furthermore, it is not disputed that the purpose of the entitlement to paid annual leave is to enable the worker to rest from carrying out the work he is required to do under his contract of employment (judgment in *KHS*, C-214/10, EU:C:2011:761, paragraph 31). Consequently, the entitlement to paid annual leave accrues and must be calculated with regard to the work pattern specified in the contract.

30 With regard, in the first place, to the unit of time on the basis of which that calculation must be performed, it should be noted that the unit used in Directive 2003/88 with respect to maximum weekly working time is the 'hour'.

31 Moreover, as follows from recital 5 in the preamble to Directive 2003/88, the EU legislature takes the view that the concept of rest used in that directive, particularly that of annual rest, must be expressed in days, hours and/or fractions of days or hours.

32 It follows that the entitlement to minimum paid annual leave, within the meaning of Directive 2003/88, must be calculated by reference to the days, hours and/or fractions of days or hours worked and specified in the contract of employment.

33 In the second place, concerning the period of work to which the right to paid annual leave relates, and the possible consequences that an alteration in the work pattern, in relation to the number of hours worked, can or must have on the total leave rights already accumulated and on the exercise of those rights over time, it should be noted that, according to the Court's settled case-law, the taking of annual leave in a period after the period during which the entitlement to leave has been accumulated has no connection to the time worked by the worker during that later period (judgment in *Zentralbetriebsrat der Landeskrankenhäuser Tirols*, C-486/08, EU:C:2010:215, paragraph 32).

34 The Court has also previously held that a change and, in particular, a reduction in working hours when moving from full-time to part-time employment cannot reduce the right to annual leave that the worker has accumulated during the period of full-time employment (judgment in *Zentralbetriebsrat der Landeskrankenhäuser Tirols,* C-486/08, EU:C:2010:215, paragraph 32, and order in *Brandes*, C-415/12, EU:C:2013:398, paragraph 30).

35 It follows that, as regards the accrual of entitlement to paid annual leave, it is necessary to distinguish periods during which the worker worked according to different work patterns, the number of units of annual leave accumulated in relation to the number of units worked to be calculated for each period separately.

36 That conclusion is not affected by the application of the *pro rata temporis* principle laid down in clause 4.2 of the Framework Agreement on part-time work.

37 While it is the case, as the Court has previously held, that the application of that principle is appropriate for the grant of annual leave for a period of part-time employment, since for such a period the reduction of the right to annual leave, in comparison to that granted for a period of full-time employment, is justified on objective grounds, the fact remains that that principle cannot be applied *ex post* to a right to annual leave accumulated during a period of full-time work.

38 However, whereas the provisions of clause 4.2 of the Framework Agreement on part-time work and those of Article 7 of Directive 2003/88 do not require Member States to make a new calculation of entitlement to annual leave already accumulated where a worker increases the number of hours worked, neither do they preclude the Member States adopting provisions more favourable to workers and making a new calculation.

39 As is apparent from clause 6.1 of the Framework Agreement on part-time work and Article 15 of Directive 2003/88, those two instruments, which only establish a minimum protection of certain rights of workers, do not restrict the power of the Member States and the social partners to apply, or to introduce, provisions that are more favourable to workers, and to provide for such a recalculation of the entitlement to paid annual leave.

40 It should be added that the distinction that should be made between different work patterns in relation to the accumulation of the entitlement to paid annual leave has, however, no effect on the exercise of accrued rights. As is apparent from the case-law, annual leave acquired during a reference period can be taken during a subsequent period, and the significance of the rest period acquired remains with regard to the positive effect of paid annual leave on the safety and health of the worker if it is taken not during the period in which it accrued, in which the worker worked full-time, but during a later period in which he works part-time (see, inter alia, judgments in *Federatie Nederlandse Vakbeweging*, C-124/05, EU:C:2006:244, paragraph 30, and *KHS*, C-214/10, EU:C:2011:761, point 32).

41 The same conclusion should be drawn *a fortiori* where the leave is not taken during the period in which it accrued, in which the worker worked part-time, but during a later period in which he works full-time.

42 In the third place, concerning the period to which the new calculation of the right to paid annual leave must relate, where, as in the case in the main proceedings, the worker, after accumulating rights to paid annual leave during a period of part-time work, increases the number of hours worked and moves to full-time work, it should be noted, as follows from paragraph 35 above, that the number of units of annual leave accumulated in relation to the number of hours worked must be calculated separately for each period.

43 In a situation such as that at issue in the main proceedings, EU law therefore requires a new calculation of rights to paid annual leave to be performed only for the period of work during which the worker increased the number of hours worked. The units of paid annual leave already taken during the period of part-time work which exceeded the right to paid annual leave accumulated during that period must be deducted from the rights newly accumulated during the period of work in which the worker increased the number of hours worked.

44 Having regard to all the above considerations, the answer to Questions 1 to 3 is that clause 4.2 of the Framework Agreement on part-time work and Article 7 of Directive 2003/88 must be interpreted as meaning that, in the event of an increase in the number of hours of work performed by a worker, the Member States are not obliged to provide that the entitlement to paid annual leave already accrued, and possibly taken, must be recalculated retroactively according to that worker's new work pattern. A new calculation must, however, be performed for the period during which working time increased.

Questions 4 and 5

45 By its fourth and fifth questions, the referring tribunal asks, in essence, whether clause 4.2 of the Framework Agreement on part-time work and Article 7 of Directive 2003/88 must be interpreted as meaning that the calculation of the entitlement to paid annual leave is to be performed according to different principles depending on whether what is being determined is the allowance in lieu of paid annual leave not taken where the

employment relationship is terminated, or the outstanding annual leave entitlement where the employment relationship continues.

46 In order to answer that question, it must first be observed that, as is apparent from the answer to the first to third questions, and in contrast to what the referring tribunal appears to suggest, whether the calculation of entitlement to paid annual leave is to be performed during the employment relationship or after it has ended has no effect on the way in which the calculation is performed.

47 Next, it is necessary to state that the calculation of entitlement to paid annual leave is independent of the calculation of the allowance due to the worker in lieu of paid annual leave not taken, since, in order to determine that allowance, it is necessary first to calculate the amount of that entitlement.

48 Lastly, it should be recalled that no provision of Directive 2003/88 expressly lays down the way in which the allowance in lieu of the minimum period or periods of paid annual leave must be calculated where the employment relationship is terminated (judgment in *Schultz-Hoff and Others*, C-350/06 and C-520/06, EU:C:2009:18, paragraph 57).

49 In that regard, it should be noted that the Framework Agreement on part-time work also does not contain any indication in relation to the rules for calculation of that allowance.

50 However, according to the case-law of the Court, the expression ‘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 in *Schultz-Hoff and Others*, C-350/06 and C-520/06, EU:C:2009:18, paragraph 58).

51 Moreover, the Court has held that, with regard to a worker who has not been able, for reasons beyond his control, to exercise his right to paid annual leave before termination of the employment relationship, the allowance in lieu to which he is entitled must be calculated so that the worker is put in a position comparable to that he would have been in had he exercised that right during his employment relationship. It follows that the worker’s normal remuneration, which is that which must be maintained during the rest period corresponding to the paid annual leave, is also decisive as regards the calculation of the allowance in lieu of annual leave not taken by the end of the employment relationship (judgment in *Schultz-Hoff and Others*, C-350/06 and C-520/06, EU:C:2009:18, paragraph 61).

52 Therefore, the calculation of the allowance in lieu of annual leave not taken must be carried out according to the same method as that used for the calculation of normal remuneration, the time when that calculation takes place being, in principle, irrelevant.

53 However, it is not impossible that the time when that calculation is to be performed may have an effect on the manner in which it is carried out.

54 It is apparent from the Court's case-law that, where remuneration is made up of several elements, the determination of normal remuneration requires a specific analysis. In such a situation it is for the national court or tribunal to assess, in the light of the principles identified in the case-law, whether, on the basis of an average over a reference period which is considered to be representative, the methods of calculating normal remuneration and the allowance in lieu of paid annual leave not taken achieve the objective pursued by Article 7 of Directive 2003/88 (see, to that effect, judgment in *Lock*, C-539/12, EU:C:2014:351, paragraph 34).

55 Even if it is not apparent from the documents before the Court that Ms Greenfield's remuneration consisted of several elements, a specific analysis similar to that described in the paragraph above would none the less be necessary in particular if the amount of the remuneration due during the annual leave and that of the allowance in lieu of leave not taken were to be different following a variation, in time and in relation to the unit of working time, in Ms Greenfield's remuneration.

56 In the case in the main proceedings, therefore, it is for the national tribunal to ascertain whether Ms Greenfield's remuneration consisted of several elements or, in the course of her last year of work, was subject to variations in relation to the unit of working time to which it referred, in order to determine whether the method laid down in national law for calculating the allowance in lieu of paid annual leave not taken is in accordance with the rules and the criteria laid down in the Court's case-law and with the objective pursued by Article 7 of Directive 2003/88.

57 In the light of the above considerations, the answer to Questions 4 and 5 is that clause 4.2 of the Framework Agreement on part-time work and Article 7 of Directive 2003/88 must be interpreted as meaning that the calculation of the entitlement to paid annual leave is to be performed according to the same principles, whether what is being determined is the allowance in lieu of paid annual leave not taken where the employment relationship is terminated, or the outstanding annual leave entitlement where the employment relationship continues.

Costs

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

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

1. **Clause 4.2 of the Framework Agreement on part-time work concluded on 6 June 1997, annexed to Council Directive 97/81/EC of 15 December 1997**

concerning the Framework Agreement on part-time work concluded by UNICE, CEEP and the ETUC, as amended by Council Directive 98/23/CE of 7 April 1998, and 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 must be interpreted as meaning that, in the event of an increase in the number of hours of work performed by a worker, the Member States are not obliged to provide that the entitlement to paid annual leave already accrued, and possibly taken, must be recalculated retroactively according to that worker's new work pattern. A new calculation must, however, be performed for the period during which working time increased.

2. **Clause 4.2 of the Framework Agreement and Article 7 of Directive 2003/88 must be interpreted as meaning that the calculation of the entitlement to paid annual leave is to be performed according to the same principles, whether what is being determined is the allowance in lieu of paid annual leave not taken where the employment relationship is terminated, or the outstanding annual leave entitlement where the employment relationship continues.**

[Signatures]

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* Language of the case: English.