The European Court of Justice and EU social policy: a brief look at recent case law

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Introduction

Although somewhat absent from the Treaty of Rome, the social dimension of the European Union has gradually come to the fore as a result of socio-economic changes and the increasing economic and monetary integration of the Member States. Today that dimension is the source of a considerable Community acquis comprising over two hundred pieces of legislation (Yung, 2009), legislation whose application still raises questions of interpretation for the Court of Justice of the European Communities. Frequently called upon by national courts, the ECJ has had occasion as its case law has developed to define fundamental concepts such as equal pay for men and women, family benefits in the context of the coordination of social security schemes, and, for example, the concepts of transfers of undertakings, employer insolvency and working time.

In what follows, it is proposed to give an overview of that case law, although referring to only a small number of decisions handed down in 2009. We have decided to divide these into three groups relating to principles of equality and non-discrimination, social security for migrant workers, and the rights and obligations of workers and employers. This will afford an opportunity to discuss successively legal protection for pregnant workers in the event of dismissal, equal treatment in statutory social security schemes, the individual right of action of workers and the right to annual leave, among others.
1. The principles of equal treatment and non-discrimination

1.1 The right of pregnant workers to effective legal protection in the event of dismissal: the Pontin v T-Comalux SA case

Having been employed by T-Comalux since 2005, Ms Pontin was dismissed with immediate effect on 25 January 2007 on grounds of serious misconduct following an unauthorised absence of more than three days. The following day she informed T-Comalux that she was pregnant and claimed that the dismissal was null and void by virtue of the legal protection given to pregnant workers. Since there was no response from her employer and since Ms Pontin considered her dismissal to be wrongful, she brought proceedings before the Esch-sur-Alzette Tribunal du travail (Labour Court), seeking a declaration that her dismissal was null and void. The Tribunal du travail enquired of the Court of Justice whether the provisions of the Luxembourg Code du travail (Labour Code) transposing Directive 92/85/EEC (Council of the European Communities, 1992) which prohibits amongst other things the dismissal of female employees who have been medically certified as pregnant for twelve weeks following confinement, were incompatible with Community law. Indeed, the Luxembourg provisions impose short time-limits (fifteen days from the dismissal) in which pregnant workers who have been dismissed during their pregnancy can bring proceedings, time-limits liable to deny them the opportunity to bring proceedings to safeguard their rights and, at the same time, deprive them of the opportunity, available to any other employee, to bring an action for damages against the employer (provision is made only for an action for nullity of the dismissal and reinstatement).

The Court pointed out that Member States must take the necessary measures to enable wronged persons to exercise their rights in legal proceedings in accordance with the principle of the effective judicial protection of an individual’s rights under Community law. They have a duty to protect pregnant workers or those who have recently given birth or who are breastfeeding against the consequences of unlawful dismissal.

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1. Case C-63/08 Pontin [2009], not yet published in the Court Reports.
Basing itself on its case law in *Paquay*, the Court noted that domestic provisions must accordingly ‘ensure effective and efficient legal protection, must have a genuine dissuasive effect with regard to the employer and must be commensurate with the injury suffered’ (paragraph 42). It is for the national court, which has knowledge of the procedural rules governing remedies in domestic law, to ascertain whether those principles have been observed.

As regards the fifteen-day time-limit for bringing proceedings, the Court acknowledged that Member States can set reasonable periods in which to bring legal proceedings. Those time-limits must not however render ‘practically impossible or excessively difficult the exercise of rights conferred by Community law’. Here, the procedure for the action for nullity and reinstatement of a dismissed employee does seem to render particularly difficult the exercise of the rights of pregnant workers under Community law. According to the Court, the fifteen-day time-limit is rather a short time in which to obtain legal advice and to bring an action for nullity or for reinstatement. The Court also observed that ‘it appears from the case-file that some of the days included in that fifteen-day period may expire before the pregnant woman receives her letter of dismissal and is thus notified of the dismissal (...) The fifteen-day period begins to run, according to the case law of the Luxembourg courts, from the time the letter of dismissal is posted’ (paragraph 63). On that basis, it is for the national court to ascertain whether or not, on the facts, the fifteen-day limitation period complies with the principle of effective judicial protection of an individual’s rights under Community law. If it does not, that time-limit would contravene Directive 92/85.

The Court went on to address the subject of the action for damages. According to the referring court, the only remedy available to a pregnant woman dismissed during her pregnancy is an action for nullity and reinstatement. The Court found that ‘if it emerges, after verification by the referring court (...) that an action for nullity and reinstatement does not comply with the principle of effectiveness, such an infringement of the requirement to provide effective judicial protection laid down [by the Directive] would constitute “[l]ess favourable
treatment of a woman related to pregnancy” (paragraph 74) and would amount to discrimination within the meaning of Directive 76/207/EEC on the implementation of the principle of equal treatment for men and women (Council of the European Communities, 1976). ‘If the referring court were thus to find there had been such an infringement of the principle of equal treatment, within the meaning of (...) Directive 76/207, it would have to interpret the domestic jurisdictional rules in such a way that, wherever possible, they contribute to the attainment of the objective of ensuring effective judicial protection of a pregnant woman’s rights under Community law’ (paragraph 75).

1.2 Equality in statutory social security schemes: the Gómez-Limón case

Proceedings in Spain enabled the Court to examine in greater detail Directive 96/34/EC (Council of the European Union, 1996) in the context of a case on equality between men and women in relation to parental leave.

Ms Gómez-Limón Sánchez-Camacho had been employed full-time by Alcampo SA since 1986. From 6 December 2001 she benefited from the system of reduced working time applicable to workers with legal custody of a child under six, in accordance with the legislation in force. Her daily working time was reduced by a third. Alongside this, her remuneration and the amount of contributions paid both by the undertaking and by the claimant to the general social security scheme were reduced in the same proportion.

A decision of 30 June 2004 of the Instituto Nacional de la Seguridad Social found that Ms Gómez-Limón Sánchez-Camacho suffered from permanent total invalidity rendering her incapable of working in her usual occupation and that she was entitled to a pension of 55% of a basis of assessment of €920.33 per month. She brought an action in the Juzgado de lo Social No.30 de Madrid (Employment Court No.30, Madrid), before which she submitted that, although the calculation did take into account the contributions actually paid, those contributions...

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3. Case C-537/07 Gómez-Limón [2009], not yet published in the Court Reports.
were decreased in proportion to the reduction in her pay following the reduction in her working time during the period of parental leave granted to her to care for a child, whereas her pension should have been calculated on the basis of the amount of contributions corresponding to full-time work. According to Ms Gómez-Limón Sánchez-Camacho, the calculation applied to her amounted to negating the practical effectiveness of a measure intended to promote equality before the law and to eliminate discrimination on grounds of sex. The Spanish court therefore enquired of the ECJ as to the scope of Directive 96/34/EC and the impact of Directive 79/7/EEC (Council of the European Communities, 1979), since it is primarily women who take parental leave.

The Court found first of all that Clause 2(6) of the framework agreement safeguarding maintenance of rights acquired at the start of parental leave has direct vertical effect and can therefore be relied on by individuals before national courts. The same does not apply, however, to Clause 2(8) which requires Member States to examine social security questions relating to the framework agreement. Taken together, the two clauses do not preclude the taking into account, in calculating social security benefits, of periods of part-time work which gave rise to proportionate remuneration and contributions. Nor does the principle of equal treatment for men and women enshrined in Directive 79/7/EEC preclude taking such periods into account. Referring to its earlier case law, the Court pointed out that Article 7(1)(b) of the Directive, which deals with the acquisition of entitlement to benefits following periods of interruption of employment due to the bringing up of children, allows Member States to exclude those periods from the scope of application of the Directive, although it does not impose any obligation in that regard. Advocate General Sharpston quite correctly pointed this out in his Opinion. To reduce the risk of indirect discrimination resulting from an unequal sharing of family responsibilities and to ensure that the entitlement to parental leave is effective, Member States must ensure adequate social protection. As matters stand, however, Community law contains no obligation on them to do so (paragraphs 54 and 55 of the Opinion).

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We invite the reader to look at Stefan Clauwaert’s contribution in this volume. In it he looks at, amongst other matters, progress made by the social partners in reviewing the framework agreement on parental leave.

1.3 Discrimination on grounds of age: the *Age Concern England v Secretary of State for Business*\(^6\) and *Hütter*\(^7\) cases

Having confirmed the boundaries of the prohibition on discrimination on grounds of age, and returning explicitly to the question of whether or not there is a general principle of non-discrimination by reason of age\(^8\), the Court has again been asked as to the extent of the justifications for different treatment on grounds of age which are permitted by Directive 2000/78, which prohibits discrimination on grounds of age in employment and occupation (Council of the European Union, 2000).

The United Kingdom transposed Directive 2000/78/EC on the elimination of discrimination on grounds of age by means of the Employment Equality (Age) Regulations 2006. This instrument provides amongst other matters that employees who have reached their employer’s normal retirement age or, if the employer does not have one, 65, can be dismissed by reason of retirement without such treatment being considered discriminatory. The Regulations set out a number of criteria intended to verify that the reason for the dismissal is retirement and require compliance with a specific procedure.

Most unusually, the Court has to rule in relation to proceedings brought at the initiative not of a trade union but of another association with ‘a legitimate interest in ensuring that the provisions of this Directive are complied with’. Here, the National Council on Ageing (Age Concern England), a charity which promotes the welfare of older people, challenged the legality of the legislation on the ground that it does not properly transpose the Directive. According to Age Concern, the fact that an employee aged 65 or over can be dismissed by reason of

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\(^6\) Case C-388/07 Age Concern England [2009], not yet published in the Court Reports.

\(^7\) Case C-88/08 Hütter [2009], not yet published in the Court Reports.

\(^8\) Case C-144/04 Mangold [2005], ECR I 998.
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The Court stated first of all that '[t]he transposition of a directive into domestic law does not (...) always require that its provisions be incorporated formally in express, specific legislation' (paragraph 42). The Directive in question 'cannot be interpreted as requiring Member States to draw up (...) a specific list of the differences in treatment which may be justified by a legitimate aim' (paragraph 43). It added however that other elements, taken from the general context of the measure concerned, must 'enable the underlying aim of that measure to be identified for the purposes of review by the courts of its legitimacy and whether the means put in place to achieve that aim are appropriate and necessary' (paragraph 45). The Court notes that the aims which the Directive regards as 'legitimate' and capable of justifying derogation from the principle prohibiting discrimination on grounds of age 'are social policy objectives, such as those related to employment policy, the labour market or vocational training. By their public interest nature, those legitimate aims are distinguishable from purely individual reasons particular to the employer's situation' (such as a reduction in costs) (paragraph 46). The national court must therefore ascertain whether the United Kingdom legislation meets such a legitimate aim and whether the means chosen were appropriate and necessary to achieving it.

Whereas all the age discrimination cases which the Court has had occasion to hear until now have related to the end of working life, the Hütter case concerns the start. In Austria the legislation on the organisation of universities provides that, for the purposes of calculating the seniority for pay-related purposes of members of the technical staff, only periods of employment completed after the age of 18 are taken into account. Having worked as an apprentice between the ages of 15 and 19 for an institution covered by that legislation, Hütter, a young worker, claimed discrimination on grounds of age. On a referral by the Oberster Gerichtshof (Supreme Court), the Court of Justice held...
firstly that since the subject-matter of the proceedings related to an employment and working condition, it did indeed fall within the matters covered by Directive 2000/78/EC (Article 3(1)(c)). It had then to determine whether there were any objective and reasonable justifications within the meaning of Article 6(1).

According to the Austrian Government, the legislation in issue was intended to promote the employment of people who have been in vocational education and not to treat less favourably those leaving general secondary education, which is longer. According to the Court, the two aims are contradictory, and the means used in pursuing them therefore appear not to be appropriate and necessary. Furthermore, it continued, since the legislation in issue bases seniority for pay-related purposes on experience acquired during periods of employment, imposing an additional age criterion represents an inappropriate bias. The Austrian legislation in question therefore does infringe the Directive.

This judgment is likely to attract the attention of those Member States in which a number of public services still have in their pay structures the concept of an age group, that is to say the normal age of recruitment based on the length of the studies leading to the qualification required for the job, below which periods of employment are not taken into account (Jacqmain, 2009).

2. Social security for migrant workers

2.1 Benefits in kind relating to the risk of reliance on care: the von Chamier-Glisczinski case

Mrs von Chamier-Glisczinski, a German national living in Munich, since she was reliant on care, was in receipt of the care insurance benefits established in Paragraph 38 of Book XI of the SGB (Sozialgesetzbuch, Social Security Code) from the DAK, the social security organisation with

9. The Court had already accepted that criterion in its judgment in Cadman, Case C-17/05 Cadman [2006], ECR I-9583.
10. Case C-208/07 von Chamier-Glisczinski [2009], not yet published in the Court Reports.
which she was insured through her husband. On 27 August 2001 she applied to the DAK for the benefits in kind to which she was entitled under the German rules to be provided at a care home in Austria in which she wished to stay. That request was refused on the ground that, in such situations, Austrian law does not provide for the grant of benefits in kind to beneficiaries of its social insurance scheme. According to the DAK, Mrs von Chamier-Glisczinski could claim only the care allowance referred to in Paragraph 37 of Book XI of the Sozialgesetzbuch. Mrs von Chamier-Glisczinski accordingly brought proceedings before the Munich Sozialgericht (Social Court) but her action was dismissed by a judgment of 11 October 2005. She appealed to the Bayerisches Landessozialgericht (Regional Social Court of the Land of Bavaria) in Munich. That court referred two questions to the Court of Justice:

— Under Article 19(1)(a) of Regulation No.1408/71\(^1\), does the institution in the worker’s State of residence have to pay, on behalf of the competent institution, cash benefits, possibly in the form of the repayment or assumption of costs by the competent institution, where, unlike the social security system of the competent State, that of the State in question makes no provision for its insured persons to receive benefits in kind?

— Is there, in the light of Articles 18, 39 and 49 EC, any entitlement to payment – subject to prior approval – by the competent institution of the costs of in-patient care in a care home situated in another Member State, in the amount of the benefits payable in the competent Member State?

\(^{11}\) Article 19(1)(a) of Regulation No 1408/71 provides: ‘1. A worker residing in the territory of a Member State other than the competent State, who satisfies the conditions of the legislation of the competent State for entitlement to benefits, taking account where appropriate of the provisions of Article 18, shall receive in the State in which he is resident: (a) benefits in kind provided on behalf of the competent institution by the institution of the place of residence in accordance with the legislation administered by that institution as though he were insured with it; (b) cash benefits provided by the competent institution in accordance with the legislation which it administers. However, by agreement between the competent institution and the institution of the place of residence, such benefits may be provided by the latter institution on behalf of the former, in accordance with the legislation of the competent State. 2. The provisions of paragraph 1 (a) shall apply by analogy to members of the family who are residing in the territory of a Member State other than the competent State, where they are not entitled to such benefits under the legislation of the State in whose territory they reside.’
To answer the first question, the Court returned to its case law in *Molenaar*\(^\text{12}\) and interpreted Article 19 of Regulation No.1408/71 as meaning that an insured person is to receive, in the Member State in which they reside, benefits in kind in so far as the legislation of that State provides for the provision of benefits in kind designed to cover the same risks as those covered by the insurance concerned in the competent State. In addition, Article 19(2) extends the benefit of the protection to family members who are therefore entitled to receive benefits in kind provided by the institution of their place of residence within the limits and in accordance with the provisions of the legislation administered by that institution. Article 19 of Regulation No.1408/71/EEC should be interpreted as not requiring the provision of benefits in kind outside the competent State by or on behalf of the competent institution where, unlike the social security system of the competent State, that of the Member State of residence of the socially insured person does not provide for the provision of benefits in kind. The Court partially accepted the arguments advanced by the participating governments and the Commission whilst dismissing the suggestion that, in the case of residence in a Member State other than the competent State, the socially insured person’s access to benefits in kind is governed exclusively by the legislation of the Member State of residence, so that, where the legislation of the latter Member State does not provide for the grant of benefits in kind covering the risk in respect of which entitlement to such benefits is claimed, those provisions have the effect of preventing the competent institution from granting such benefits in kind.

The Court then examined whether the case fell within Articles 18, 39 and 49 of the EC Treaty. It pointed out that the definition of ‘worker’ in Article 39 EC has a specific Community meaning and must not be interpreted narrowly. However, it was apparent in the present case that the von Chamier-Gliszczinski were not exercising the freedom of movement guaranteed by Article 39 EC. That primary law provision cannot therefore be held to apply.

Article 49 EC relating to the freedom to provide services covers only provision on a temporary basis and not the situation of a national of one Member State who establishes their principal residence, on a permanent

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basis, in another Member State, as occurred in the present case. Article 49 EC cannot therefore apply.

However, by establishing her residence in Austria, the applicant did exercise her right to free movement and residence conferred on citizens of the European Union by Article 18 EC. The Court wished therefore to identify all the possible consequences of that exercise of the freedom under Article 18(1) EC. In terms of social security there is no such thing as Community harmonisation, only rules on the coordination of legislation. Article 18(1) EC cannot therefore guarantee to an insured person that a move to a different Member State will be neutral as regards social security. The Federal Republic of Germany and the Republic of Austria are at liberty to choose how they organise their sickness insurance schemes, and one of those schemes cannot be considered to be the cause of discrimination or a disadvantage for the sole reason that it has unfavourable consequences when it is applied in conjunction with the scheme of another Member State.

Article 18 EC does not preclude legislation such as that under Paragraph 34 of Book XI of the Social Security Code, on the basis of which a competent institution, independently of the mechanisms introduced by Paragraph 19 or, as the case may be, Paragraph 22(1)(b) of that legislation and for an unlimited period, refuses to assume the costs linked to a stay in a care home in the Member State of residence up to the amount of the benefits to which that person would have been entitled if they had received the same care in a care home – party to a service agreement – in the competent State.

2.2 Less favourable invalidity benefits for migrant workers: the Leyman case \textsuperscript{13}

Having been employed in Belgium from 1971 until 2003, Ms Leyman, a Belgian national, moved to Luxembourg in 1999 to take up employment in that country. From 2003 she was subject to the social security scheme of the Grand Duchy of Luxembourg. In July 2005 the

\textsuperscript{13}. Case C-3/08 Leyman [2009], not yet published in the Court Reports.
competent Luxembourg authorities found her to be incapable of work for the period from 8 July 2005 to 29 February 2012, the date of her retirement. Luxembourg granted her invalidity allowance for the insurance periods completed in Luxembourg. The Belgian social security system, for its part, granted her invalidity allowance from 8 July 2006, under Article 40(3)(b) of Regulation No.1408/71 and Article 93 of the 1994 Belgian Law. Dissatisfied with that situation, the applicant appealed the Belgian decision, seeking payment of the allowance from 8 July 2005.

The Nivelles Tribunal du travail (Labour Court) referred to the Court of Justice for a preliminary ruling on whether Article 39 EC and Article 42 EC must be interpreted as precluding a condition such as that contained in Article 93 of the 1994 Law which has the effect that a person such as Ms Leyman who, having worked and resided in Belgium – a Member State with type A legislation – went to live in another Member State, whose legislation was type B, was deprived of any allowance payable by the competent institution in the first Member State during the first year of incapacity to work and as meaning that the condition thereby gives rise to discrimination against a worker exercising their right to freedom of movement.

According to the Court, under Article 40(3)(b) of Regulation No.1408/71, a Member State may make the grant of those benefits subject to the expiry of an initial period during which the person concerned has either been incapable of work or has received cash sickness benefits, an opportunity which the Belgian legislature has taken up by providing, in Article 93 of the Law of 1994, for the expiry of a period of primary incapacity of one year before the right to such benefits is acquired.

Article 42 EC leaves in being both substantive and procedural differences between social security systems. However, the aim of Article 39 EC would not be met if, as a result of exercising their right to freedom of movement, migrant workers were to lose social security advantages guaranteed to them by the laws of a Member State. Such a consequence might discourage Community workers from exercising their right to freedom of movement enshrined in Article 39 EC and would inevitably constitute an obstacle to that freedom. The Belgian Law of 1994 draws no distinction between workers who have exercised their right to freedom of movement and those who have not.
Application of those provisions nevertheless has the effect of disadvantaging migrant workers for the first year. Whereas workers who have remained in Belgium can receive the primary incapacity allowance, workers, such as Ms Leyman, who have exercised their freedom of movement, have no entitlement to any similar allowance in Belgium or in Luxembourg and pay contributions on which there is no return as regards the first year of incapacity. The Court accordingly found that Article 39 EC must be interpreted as precluding application by the competent authorities of a Member State of national legislation which, in accordance with Article 40(3)(b) of Regulation No.1408/71, makes acquisition of the right to invalidity benefits subject to the condition that a period of primary incapacity of one year has elapsed, where such application has the result that a migrant worker has paid into the social security scheme of that Member State contributions on which there is no return and is therefore at a disadvantage by comparison with a non-migrant worker.

3. The rights and obligations of workers and employers

3.1 Calculation of compensation for dismissal in the event of part-time parental leave: the Meerts v Proost NV case

Employed by Proost NV on a full-time basis under an employment contract of indefinite duration since 1992, from 1996 Ms Meerts took various forms of career break. From November 2002 she worked half-time as a result of parental leave which was due to end on 17 May 2003. On 8 May 2003 she was dismissed with immediate effect subject to payment of compensation for dismissal equal to ten months’ salary, calculated on the basis of the salary she was receiving at the time, which was reduced by half because of the equivalent reduction in her working hours. She challenged the amount of that compensation for dismissal before the Arbeidsrechtbank van Turnhout (Labour Court, Turnhout), claiming that the compensation for dismissal should be calculated on the basis of the full-time salary which she would have been receiving if

14. Case C-116/08 Meerts v Proost NV [2009], not yet published in the Court Reports.
she had not reduced her working hours in connection with parental leave. The Hof van Cassatie (Court of Cassation), hearing the case, stayed proceedings and referred to the ECJ for interpretation of a number of provisions of Directive 96/34 putting into effect the framework agreement on parental leave (Council of the European Union, 1996).

The Court of Justice observed that ‘Clause 2.6 of the framework agreement on parental leave states that rights acquired or in the process of being acquired by the worker on the date on which parental leave starts are to be maintained as they stand until the end of parental leave’ (paragraph 38). The Court inferred from its wording and context that the ‘provision is intended to avoid the loss of or reduction in rights derived from an employment relationship, acquired or being acquired, to which the worker is entitled when he starts parental leave, and to ensure that, at the end of that leave, with regard to those rights, he will find himself in the same situation as that in which he was before the leave’ (paragraph 39).

Since the framework agreement on parental leave pursues the objective of equal treatment between men and women, Clause 2(6) must, according to the Court, be considered as articulating a particularly important principle of Community social law which cannot be interpreted restrictively. ‘Rights acquired or in the process of being acquired’ must be understood as ‘all the rights and benefits, whether in cash or in kind, derived directly or indirectly from the employment relationship, which the worker is entitled to claim from the employer at the date on which parental leave starts’ (paragraph 43). These include ‘all those relating to employment conditions, such as the right of a full-time worker on part-time parental leave to a period of notice in the event of the employer’s unilateral termination of a contract of indefinite duration, the length of which depends on the worker’s length of service in the company and the aim of which is to facilitate the search for a new job’ (paragraph 44). The Court also pointed out that this ‘body of rights and benefits would be compromised if, where the statutory period of notice was not observed in the event of dismissal during part-time parental leave, a worker employed on a full-time basis lost the right to have the compensation for dismissal due to him determined on the basis of the salary relating to his employment contract’ (paragraph 46).
The Court found therefore that national legislation which has the effect of reducing rights arising from the employment relationship in the event of parental leave could deter workers from taking that leave and could encourage employers to choose from amongst the workers to be dismissed those who are on parental leave. That would completely defeat the aim of reconciling working and family life pursued by the framework agreement.

That agreement must therefore be interpreted as precluding ‘where an employer unilaterally terminates a worker’s full-time employment contract of indefinite duration, without urgent cause or without observing the statutory period of notice, whilst the worker is on part-time parental leave, the compensation to be paid to the worker from being determined on the basis of the reduced salary being received when the dismissal takes place’ (paragraph 56).

3.2 Right to annual leave in the event of sickness: Joined Cases Schultz-Hoff and Stringer and Others

In these cases, on referral from the Landesarbeitsgericht Düsseldorf (Higher Labour Court, Düsseldorf) and the House of Lords (United Kingdom), the Court of Justice defined the right to paid annual leave established by the Working Time Directive (European Parliament and Council of the European Union, 2003) and in particular the right to paid annual leave for workers on sick leave.

In Schultz-Hoff, the German court, the Landesarbeitsgericht, had to rule on the allowance payable to a worker who was not able to exercise his right to paid annual leave as result of incapacity for work which led to his retirement. Paragraph 7(3) of the Federal Law on leave (Bundesurlaubsgesetz) provides that a worker’s entitlement to an allowance in lieu of paid annual leave not taken is extinguished at the end of the calendar year concerned and at the latest at the end of a carry-over period of three months. In the event of incapacity for work until the end of the carry-over period, no allowance may be paid, on

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15. Joined Cases C-350/06 and C-520/06 Schultz-Hoff and Stringer [2009], not yet published in the Court Reports.
termination of the employment relationship, in lieu of the paid annual leave not taken.

In *Stringer*, the House of Lords was hearing a claim for an allowance in lieu of annual leave not taken during the leave year set by United Kingdom law. The United Kingdom supreme court had to examine amongst other cases that of a worker who, during sick leave of indeterminate duration, asked her employer if she could take a number of days’ paid annual leave in the two months following the request.

In relation to the right to take paid annual leave during a period of sick leave, the Court of Justice stated that the right to sick leave and the conditions for exercise of that right are not governed by Community law (paragraph 27). It went on to point out that it is for Member States to lay down the conditions for the exercise and implementation of the right to paid annual leave, ‘by prescribing the specific circumstances in which workers may exercise the right, without making the very existence of that right, which derives directly from Directive 93/104, subject to any preconditions whatsoever’ (paragraph 28). The right to paid annual leave therefore precludes neither the grant of paid annual leave during a period of sick leave, nor refusal of that leave provided the worker in question has the opportunity to exercise their right to leave during another period.

The Court then looked at the right to paid annual leave in the case of sickness during all or part of the leave year, where the incapacity for work continues on expiry of that year or of a carry-over period determined by national law. In accordance with its case law in *Bectu* 16, the Court stated that ‘with regard to workers on sick leave which has been duly granted, the right to paid annual leave (...) cannot be made subject by a Member State to a condition concerning the obligation actually to have worked during the leave year laid down by that State’ (paragraph 41). This means, the Court found, that national provisions may establish that the right to paid annual leave is lost at the end of a leave year or of a carry-over period provided the worker in question has actually had the opportunity effectively to exercise their right to paid leave (paragraph 43). This is not what occurs where, on the one hand, a

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worker is on sick leave throughout the leave year and beyond a carry-over period set by national law, nor where, on the other hand, a worker has worked for part of the leave year before going on sick leave.

It found that the right to paid annual leave enshrined in the Directive ‘must be interpreted as meaning that it precludes national legislation or practices which provide that the right to paid annual leave is extinguished at the end of the leave year and/or of a carry-over period laid down by national law even where the worker has been on sick leave for the whole leave year and where his incapacity for work persisted until the end of his employment relationship, which was the reason why he could not exercise his right to paid annual leave’ (paragraph 49).

The Court concluded with the right, at the end of the employment relationship, to an allowance in lieu of paid annual leave not taken. In the Court’s view ‘the allowance in lieu (...) 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’ (paragraph 61).

3.3 Workers’ individual rights of action in the event of collective redundancy: the Mono Car Styling case

The Court of Justice had to rule for the first time on whether or not Directive 98/59 on collective redundancies (Council of the European Union, 1998) gives an individual right of action to employees wishing to challenge an infringement of the information and consultation procedure.

In the case, a manufacturer of automobile parts and accessories in Belgium, Mono Car Styling, had to make redundancies following a substantial drop in orders. In the context of the information and

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17. Case C-12/08 Mono Car Styling [2009], not yet published in the Court Reports.
consultation procedure, an agreement was reached with the staff representatives to set the number of employees to be made redundant at 30 and to take accompanying measures. However, a number of employees brought proceedings claiming non-compliance with the redundancy procedure. They were awarded damages at first instance, and the company appealed the decision to the Liège Cour du travail (Labour Court) which referred several questions to the ECJ for a preliminary ruling.

The Belgian legislation transposing Directive 98/59 lays down the information and consultation procedure. The employer is assumed to have complied with the procedure if it provides evidence that the four conditions listed by the transposing legislation have been complied with: it has presented a written report to the workers' representatives; it has assembled the representatives themselves; it has allowed them to ask questions and to put forward proposals; it has replied to any questions and proposals (Article 66(1) of the Belgian Law of 13 February 1998 on measures in favour of employment).

Only an allegation of non-observance of those four conditions enables a redundant employee to challenge the collective redundancy procedure, subject also to the staff representatives having notified any objections to the employer within 30 days from display of the notice of collective redundancy (Article 67 of the 1998 Law).

On the question of whether such a limitation on workers' individual right of challenge or the fact that exercise of the right is subject to the foregoing conditions may deprive the provisions of Directive 98/59 of useful effect or restrict the protection of workers established by the Directive, the Court replied that it did not. The Court stated that 'it is clear, first of all, from the text and scheme of Directive 98/59 that the right to information and consultation which it lays down is intended for workers' representatives and not for workers individually' (paragraph 38). It based itself on a teleological interpretation of the Directive: 'the information and consultation (...) are intended, in particular, to permit, first, the formulation of constructive proposals covering, at least, ways and means of avoiding collective redundancies or reducing the number of workers affected, and of mitigating the consequences of such redundancies and, secondly, the possible submission of comments to the competent public authority, workers' representatives are best placed
to achieve the objective which the directive seeks to attain’ (paragraph 40). The Court pointed out that this right is intended to benefit workers as a collective group and is therefore collective in nature.

It found in consequence that the national legislation gives those representatives a right of action which is not limited by specific conditions. The level of protection required by the Directive is therefore achieved. Nor does the legislation go against fundamental rights, in particular the right to effective judicial protection under Article 6 of the European Convention on Human Rights.

After that, the Court drew attention to the Community law principle that national law must be interpreted in conformity with Community law. The Court found in fact that the obligations imposed on the employer by the Belgian legislation in the event of collective redundancy did not reflect all the obligations referred to in Article 2 of Directive 98/59. Whilst it conceded that the Directive does not have direct effect (paragraph 59), it pointed out nevertheless that the national court was still bound to interpret that law, so far as possible, in the light of the wording and the purpose of the Directive in order to achieve the result sought by it (paragraph 60). That principle therefore requires the referring court to ensure that Directive 98/59 is given useful effect, so that the obligations on the employer are not reduced below those set out in Article 2 of the Directive.

Conclusion

The ECJ’s activity has been intense if nothing else. Whilst it has not delivered any extraordinary judgments, the decisions handed down do nonetheless give us a better understanding of the social aspects of Community law. The Court reaffirmed the right of pregnant workers to effective judicial protection in the event of dismissal (Pontin) and carried out an in-depth examination of Directive 96/34/EC in a case concerning gender equality in relation to parental leave, something which it had declined to do hitherto (Gómez-Limón). In the Age Concern England and Hütter cases the Court again ruled on the extent of the justifications permitted by Directive 2000/78 for differences in treatment on those grounds. It also shed light on the rules governing social security for migrant workers in Leyman and von Chamier-
Glisczinski. It likewise clarified aspects of rights to annual leave (Schultz-Hoff and Stringer) and workers' individual rights of action in the event of redundancy (Mono Car Styling).

Other issues will have to be determined in 2010. They will be many and varied. Amongst other matters, the Court will have to determine whether Article 11 of Directive 92/85/EEC (on the introduction of measures to encourage improvements in the safety and health at work of pregnant workers and workers who have recently given birth or are breastfeeding) has direct effect and whether the article creates a right for a female employee to continue receiving an allowance for on-call duty whilst away from work while pregnant and/or during maternity leave18. In Ingeniørforeningen, the task will be to define the scope of application ratione personae of Directive 2002/14 on employee information and consultation19. On conclusion of the Petersen case, the Court will have to determine whether Directive 2000/78/EC (establishing a general framework for equal treatment in employment and occupation) precludes a national measure under which authorisation to practise as a panel dentist expires at the end of the three-month period during which the dentist reaches 6820.

References


20. Case C-341/08 Petersen, Opinion of Advocate General Bot, delivered on 3 September 2009.


