Conforming interpretation of the collective agreement with EU law in determining the rights of sick employees

15/09/2021

Ruling of 15 September 2021, appeal no. 20-16.010

Ruling of the Social Chamber of 15 September 2021, appeal no. 20-16.010

Paragraph XIV, subparagraph 4, of the internal regulations appended to the national collective agreement for the staff of social security bodies of 8 February 1957 shall not apply to employees whose remuneration has been maintained during illness and who fall within the provisions of Article 38(d), paragraph 4, of the said collective agreement.

Accurately applying the treaty provisions interpreted in the light of Article 7 of Directive 2003/88/EC of the European Parliament and of the Council of 4 November 2003, the cour d'appel (Court of Appeal), after having noted that the employee had been off work due to illness recognised as a long-term illness from 27 December 2013 to 24 January 2016 and had benefited from continued salary payments, decided that this period did not lead to any reduction in the right to paid leave.

COUR DE CASSATION (COURT OF CASSATION)

Public hearing of 15 September 2021

Partial quashing

Mr CATHALA, President

Ruling No. 997 FS-B

Appeal No. R 20-16.010

F R E N C H R E P U B L I C

IN THE NAME OF THE FRENCH PEOPLE

RULING OF THE *COUR DE CASSATION* (COURT OF CASSATION), SOCIAL CHAMBER, OF 15 SEPTEMBER 2021

[Establishment 1], with its registered office at [Address 1], lodged appeal no. R 20-16.010 against the ruling delivered on 19 December 2019 by the cour d'appel (*Court of Appeal*) of Nancy (Social Chamber, Section 2), in its dispute with Ms [X] [O], residing at [Address 2], respondent in the quashing. Ms [O] lodged a cross-appeal against the same ruling.

In support of its appeal, the appellant relies on the two grounds of quashing appended to this ruling.

The appellant in the cross-appeal relies, in support of her appeal, on the single ground of quashing also appended to this ruling.

The file has been sent to the Prosecutor-General.

On the report of Mr Flores, Judge, the observations of SCP Spinosi, lawyer for [Establishment 1], SCP Rousseau et Tapie, lawyer for Ms [O], and the opinion of Ms Roques, Advocate-General Referee, after the arguments at the public hearing of 16 June 2021, at which were present Mr Cathala, President, Mr Flores, Reporting Judge, Mr Schamber, Elder Judge, Ms Cavrois, Ms Monge, Mr Sornay, Mr Rouchayrole, Ms Lecaplain-Morel, Judges, Ms Ala, Ms Prieur, Ms Thomas-Davost, Ms Techer, Judge Referees, Ms Roques, Advocate-General Referee, and Ms Jouanneau, Chamber Registrar,

the Social Chamber of the *Cour de cassation* (Court of cassation), composed, pursuant to Article R. 431-5 of the Judicial Code, of the aforementioned President and Judges, after having deliberated in accordance with the law, has rendered the present ruling.

Facts and procedure

1. According to the ruling under appeal (Nancy, 19 December 2019), Ms [O] was hired on 30 November 2006 as a prevention nurse by [Institution 1].

2. The employee was off work from 27 December 2013 to 24 January 2016.

3. The employee claimed that she had acquired leave during her absence from work and brought a claim before the labour court for payment of annual leave allowance and damages for indirect discrimination.

Reviewing pleas

On the first plea of the main appeal, in its first two parts

Statement of plea

4. The employer objects to the ruling for ordering it to pay the employee a sum in compensation for annual leave, whereas:

"1°/ Under the terms of Article XIV of the standard internal regulations appended to the national collective agreement of social security bodies of 8 February 1957, annual leave entitlement is not accrued in a given year by absences due to sick leave or long-term illness resulting in an interruption from work equal to or greater than twelve consecutive months. Entitlement begins to be accrued again on the date work is resumed, and the duration of the leave is established in proportion to the actual time worked which has not yet given rise to the granting of annual leave. In the case of sick leave of such a duration, this cannot mean that annual leave entitlement has been acquired with respect of the first twelve consecutive months, carrying over the credit of the paid leave entitlements thus acquired. However, it does mean that, if the sick leave has lasted for twelve months or more, no entitlement to annual leave would then be acquired by the employee. When the *cour d'appel* (Court of Appeal) considered that it would be appropriate to "interpret" the Article XIV of the standard internal regulations favourably for employees, thereby allotting an accrual of paid leave for those who find themselves in such a situation of being on sick leave for the first twelve months, which would thus be deferred in time and which would be available to be used once they return to the company, it misinterpreted its clear and precise meaning.

2° / On the other hand, Directive 2003/88/EC of the European Parliament and of the Council concerning certain aspects of the organisation of working time of 4 November 2003, which has not been transposed into domestic law, cannot allow the effects of a contrary provision of national law to be set aside in a dispute between individuals. The*cour d'appel* (Court of Appeal relied on "the purpose assigned to paid annual leave [by this] directive" to give rise to an entitlement to paid leave for Ms [O], who had been off work due to non-occupational illness for a period of more than twelve months, for part of that period, and this while cases such as hers were excluded from the benefit of the acquisition of paid annual leave rights by the combined operation of Articles 38 d) and 62 of the national collective agreement of social security bodies of 8 February 1957, XIV of the standard internal regulations appended to the latter and L. 3141-5 of the Labour Code. In so ruling, the *cour d'appel* (Court of Appeal), which thus gave Article 7 of the Directive of 4 November 2003 a direct horizontal effect which it could not have, infringed it, together with the other above-mentioned texts of national law, combined."

Court's response

5. It follows from the case law of the Court of Justice of the European Union that 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 makes no distinction between workers who are absent from work on sick leave during the reference period and those who have actually worked during that period. It follows that, in the case of workers on duly prescribed sick leave, the right to paid

annual leave conferred by that directive on all workers cannot be made subject by a Member State to the obligation to have actually worked during the reference period established by that State (CJEU Schultz-Hoff, 20 January 2009, C-350/06, point 41; CJEU 24 January 2012, C-282/10, Dominguez, point 20).

6. The Court of Justice of the European Union held that it is for the national court to determine, by taking into consideration the whole body of domestic law and applying the interpretative methods recognized by domestic law, whether it can find an interpretation of that law that allows the full effectiveness of Article 7 of Directive 2003/88/EC and achieves an outcome consistent with the objective pursued by that directive (CJEU, 24 January 2012, Case C-282/10, Dominguez). By ruling of 6 November 2018 (C-569/16 Stadt Wuppertal v. Bauer and C-570/16 Willmeroth v. Brossonn), the Court of Justice of the European Union ruled that where it is impossible to interpret national legislation in such a way as to ensure compliance with Article 7 of Directive 2003/88/EC and Article 31, paragraph 2 of the Charter of Fundamental Rights, the national court must disapply that national legislation. The Court of Justice of the European Union clarifies that this obligation is imposed on the national court by virtue of Article 7 of Directive 2003/88/EC and Article 31, paragraph 2 of the Charter of Fundamental Rights when the dispute is between a beneficiary of the right to leave and an employer who is a public authority, and by virtue of the second of these provisions when the dispute is between the beneficiary and an employer who is an individual.

7. According to Article 38 d), paragraph 4 of the national collective agreement for the staff of social security bodies of 8 February 1957, absences caused by compulsory attendance at professional courses, periods of compulsory reserve, days of absence for sickness certified by a doctor, authorised therapeutic spa treatment, accident at work, maternity leave with full pay, long-term illness, exceptional short-term leave granted during the year and the leave provided for in Article 12 shall, where they involve maintaining salary, be treated as time worked and may not, therefore, result in a reduction in annual leave.

8. According to paragraph XIV, subparagraph 4, of the internal regulations appended to the collective agreement, the right to annual leave shall not be accrued in a given year by absences due to illness or long-term illness, which have resulted in a break in work equal to or greater than twelve consecutive months, by absences for compulsory military service, by unpaid leave as provided for in Articles 410, 44 and 46 of the collective agreement.

9. It follows from the combination of the texts of the collective agreement that paragraph XIV, subparagraph 4 of the internal regulations appended to the collective agreement does not apply to employees whose remuneration has been maintained during the illness and who fall within the provisions of Article 38 d), paragraph 4 of the collective agreement.

10. Having noted that the employee had been absent from work due to illness recognised as a long-term illness from 27 December 2013 to 24 January 2016 and that she had benefited from continued pay, the*cour d'appel* (Court of Appeal), which interpreted the contractual provisions in the light of Article 7 of Directive 2003/88/EC, without giving direct effect to the latter, correctly decided that this period did not lead to any reduction in the right to paid leave.

11. The plea is therefore unfounded.

On the third part of the first plea of the main appeal

Statement of plea

12. The employer makes the same criticism, whereas "in any event, national provisions or practices may limit the accumulation of paid annual leave entitlements of a worker who is unable to work for several consecutive reference periods by means of a carry-over period on the expiry of which the paid annual leave entitlement is extinguished, where that carry-over period substantially exceeds the duration of the reference period. When the*cour d'appel* (Court of Appeal) considered, however, that Article 7 of Directive 2003/88/EC of the European Parliament and of the Council concerning certain aspects of the organisation of working time of 4 November 2003 would require the maintenance of such a right to carry over and would oppose its extinction in time, including in the case of an employee who, like Ms [O], would have

been on uninterrupted leave for a period of more than two consecutive years, it infringed this provision."

Court's response

13. In view of the purpose of paid annual leave as set out in 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, where the employee has been unable to take their annual leave during the year provided for in the Labour Code or a collective agreement due to absences due to illness, an accident at work or an occupational illness, the paid leave earned must be carried over after the date of resumption of work or, in the event of termination, be compensated under Article L. 3141-26 of the Labour Code, as it then stood.

14. While national provisions or practices may limit the accumulation of paid annual leave entitlements of a worker who is incapacitated for work during several consecutive reference periods by means of a carry-over period on the expiry of which the paid annual leave entitlement is extinguished, if this carry-over period substantially exceeds the duration of the reference period, Directive 2003/88/EC does not require Member States to provide for such a limitation.

15. The *cour d'appel* (Court of Appeal), which held that paragraph XIV of the standard internal regulations could not have the effect of depriving the employee of any right to carry over, correctly applied the purpose assigned to paid leave by Directive 2003/88/EC.

16. The plea is therefore unfounded.

On the second plea of the main appeal

Statement of plea

17. The employer objects to the ruling for ordering it to pay the employee a sum of damages for discrimination related to her state of health, whereas "the scope of the quashing also extends to all the provisions of the judgment or the ruling that has been quashed that are indivisible or necessarily dependent. In the present case, the quashing, which will be pronounced, of the charge ordered [Establishment 1] to pay the employee EUR 3,302.68 as annual leave compensation, will, pursuant to Article 624 of the Civil Procedure Code, result in quashing the ruling ordering it to pay 1,000.00 euros in damages for discrimination in relation to her health, as the two sentences are linked by a necessary dependence."

Court's response

18. The dismissal of the first plea deprives the second plea, which alleges a consequential quashing, of its scope.

But on the plea of the cross-appeal

Statement of plea

19. The employee objected to the ruling for limiting the employer's award of compensation for annual leave to a certain sum, whereas "under the terms of Article 38 d), paragraph 4, of the national collective agreement for the staff of social security bodies of 8 February 1957, days of absence due to illness confirmed by a medical certificate or long-term illness are, when they involve the maintenance of salary, assimilated to working time and cannot, therefore, lead to a reduction in annual leave. It follows from paragraph XIV of the internal regulations appended to the collective agreement that the situation of an employee whose salary has been maintained during illness is not concerned by this text. In view of the purpose of paid annual leave set out in 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, when the employee is unable to take their annual leave during the year provided for by the Labour Code or a collective agreement, due to absences linked to illness, an accident at work or an occupational illness, the paid leave earned must be carried over after the date on which they resume work. In order to limit the annual leave indemnity to the sum of 3,302.68 euros, the*cour d'appel* (Court of Appeal) held that paragraph XIV of the internal regulations appended to the collective agreement was applicable in this case and, consequently, that the employee, who had not benefited from the balance of the leave due to her before her sick leave in December 2013, was entitled to claim, in addition, the leave due for the last financial year of 2015, which had expired in the context of her sick leave. The *cour d'appel* (Court of Appeal) noted that the employee had been on sick leave for illness recognised as a long-term illness from December 2013 to January 2016 and that, during this period, she had benefited from the maintenance of her salary, from which it had to be deduced, on the one hand, that the employee's situation was not concerned by paragraph XIV of the internal regulations and, on the other hand, that, pursuant to Article 38 d), paragraph 4, of the collective agreement, the employee had grounds to demand the sum of 6,841.80 euros by way of annual leave allowance for the financial years 2012-2013, 2013-2014 and 2014-2015. In so ruling, the *cour d'appel* (Court of Appeal) infringed, by misapplication, paragraph XIV of the internal regulations appended to the national collective agreement for the staff of social security bodies and, by refusal to apply, Article 38 d), paragraph 4, of the same collective agreement."

Court's response

In view of Article 38 d), paragraph 4 of the national collective agreement of the social security bodies of 8 February 1957 and paragraph XIV, subparagraph 4, of the standard internal regulations appended to this collective agreement:

20. According to the first of these texts, absences caused by compulsory attendance at professional courses, periods of compulsory reserve, days of absence due to illness certified by a doctor, authorised therapeutic spa treatment, workplace accident, maternity leave with full pay, long-term illness, exceptional short-term leave granted during the year and the leave provided for in Article 12 are, when they involve maintaining salary, assimilated to working time and cannot, therefore, lead to the reduction of annual leave.

21. According to the second of these texts, the right to annual leave is not accrued in a given year by absences due to illness or long-term illness, having caused a break in work equal to or greater than twelve consecutive months, by absences for compulsory military service, or by unpaid leave provided for in Articles 410, 44 and 46 of the collective agreement. It shall start accruing again on the date of resumption of work, the duration of the leave being established in proportion to the time actually worked which has not yet given rise to the granting of annual leave.

22. In view of the purpose of paid annual leave as set out in 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, where the employee has been unable to take their annual leave during the year provided for in the Labour Code or a collective agreement due to absences linked to illness, an accident at work or an occupational illness, the paid leave earned must be carried over after the date of resumption of work or, in the event of termination, be compensated under Article L. 3141-26 of the Labour Code, as it then stood.

23. National provisions or practices may limit the accumulation of paid annual leave entitlements of a worker who is incapacitated for work during several consecutive reference periods by means of a carry-over period on the expiry of which the paid annual leave entitlement is extinguished, where this carry-over period substantially exceeds the duration of the reference period for which it is granted. In this respect, the Court of Justice of the European Union ruled that a carry-over period of 15 months of paid annual leave entitlement is consistent with the purpose of annual leave (CJEU 22 November 2011, C-214/10, KHS AG v. Shulte), but that a carry-over period of nine months is not (CJEU, 3 May 2012, C-337/10, Neidel).

24. The purpose of paragraph XIV of the standard internal regulations appended to the collective agreement is to limit to twelve months the period during which an employee, absent for one of the reasons it provides, may acquire paid leave

rights and not to organise the loss of acquired rights which would not have been exercised at the end of a carry-over period substantially longer than the reference period.

25. In order to limit the employer's order to pay an annual leave indemnity to a certain amount, the ruling held that the provisions of paragraph XIV of the internal regulations may be interpreted as giving a right to annual leave in the context of an interruption of less than twelve consecutive months, including when the sick leave is of the same duration as the employee's leave. It adds that beyond this period, annual leave loses its positive effect for the worker, in terms of its purpose as a time of rest, and remains only as a period of relaxation and leisure. The ruling concludes that limiting paid annual leave to a twelve-month carry-over period is in line with the purpose of the European Parliament's Directive 2003/88/EC on paid annual leave.

26. In so ruling, the *cour d'appel* (Court of Appeal) infringed the above-mentioned texts.

ON THESE GROUNDS, the Court:

DISMISSES the appeal;

QUASHES AND SETS ASIDE, but only in so far as it limits the order for [Establishment 1] to pay Ms. [O] an annual leave allowance to the sum of 3,302.68 euros, the ruling of the *cour d'appel* (Court of Appeal) of Nancy of 19 December 2019, between the parties;

Returns, on this point, the case and the parties to the status existing prior to the said ruling and refers them to the *cour d'appel* (Court of Appeal) of Nancy, otherwise composed;

Orders [Establishment 1] to pay the costs;

Pursuant to Article 700 of the Civil Procedure Code, dismisses the claim made by [Establishment 1] and orders it to pay Ms [O] the sum of EUR 3,000;

States that, at the request of the Prosecutor-General of the *Cour de cassation* (Court of cassation), this ruling shall be transmitted to be transcribed in the margin or following the partially quashed ruling;

Thus carried decided by the *Cour de cassation* (Court of cassation), Social Chamber, and pronounced by the President at the public hearing of the fifteenth of September, two thousand and twenty-one.

President : Mr Cathala
Reporting Judge : Mr Flores, Judge
Advocate-General Referee : Ms Roques
Lawyer(s) : SCP Spinosi - SCP Rousseau et Tapie

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