Judgment of the Court (Sixth Chamber) of 26 June 2001

The Queen v Secretary of State for Trade and Industry, ex parte Broadcasting, Entertainment, Cinematographic and Theatre Union (BECTU)

Reference for a preliminary ruling: High Court of Justice (England & Wales), Queen's Bench Division (Crown Office) - United Kingdom

Social policy - Protection of the health and safety of workers - Directive 93/104/EC - Entitlement to paid annual leave - Condition imposed by national legislation - Completion of a qualifying period of employment with the same employer

Case C-173/99

European Court reports 2001 Page I-04881

In Case C-173/99,

REFERENCE to the Court under Article 234 EC by High Court of Justice of England and Wales, Queen's Bench Division (Crown Office), for a preliminary ruling in the proceedings pending before that court between

The Queen

and

Secretary of State for Trade and Industry,

ex parte:

Broadcasting, Entertainment, Cinematographic and Theatre Union (BECTU),

on the interpretation of Article 7 of Council Directive 93/104/EC of 23 November 1993 concerning certain aspects of the organisation of working time (OJ 1993 L 307, p. 18).

THE COURT (Sixth Chamber),

composed of: C. Gulmann, President of the Chamber, V. Skouris, R. Schintgen (Rapporteur), N. Colneric and J.N. Cunha Rodrigues, Judges,

Advocate General: A. Tizzano,

Registrar: L. Hewlett, Administrator,

after considering the written observations submitted on behalf of:

- Broadcasting, Entertainment, Cinematographic and Theatre Union (BECTU), by L. Cox QC and J. Coppel, Barrister, instructed by S. Cavalier, Solicitor,

- the United Kingdom Government, by J.E. Collins, acting as Agent, assisted by E. Sharpston QC and P. Sales, Barrister,

- Commission of the European Communities, by D. Gouloussis and N. Yerrell, acting as Agents,

having regard to the Report for the Hearing,

after hearing the oral observations of Broadcasting, Entertainment, Cinematographic and Theatre Union (BECTU), of the United Kingdom Government and the Commission at the hearing on 7 December 2000,

after hearing the Opinion of the Advocate General at the sitting on 8 February 2001,

gives the following

Judgment

Grounds

1 By order of 14 April 1999, received at the Court Registry on 10 May 1999, the High Court of Justice of England and Wales, Queen's Bench Division (Crown Office), referred to the Court for a preliminary ruling under Article 234 EC two questions on the interpretation of Article 7 of Council Directive 93/104/EC of 23 November 1993 concerning certain aspects of the organisation of working time (OJ 1993 L 307, p. 18).

2 Those questions were raised in proceedings brought by Broadcasting, Entertainment, Cinematographic and Theatre Union (BECTU) against the Secretary of State for Trade and Industry (the Secretary of State) in relation to the transposition into the domestic law of the United Kingdom of Great Britain and Northern Ireland of the provision of Directive 93/104 governing paid annual leave.

Legislative background

3 Article 118a of the EC Treaty (Articles 117 to 120 of the EC Treaty have been replaced by Articles 136 EC to 143 EC) provides:

(1) Member States shall pay particular attention to encouraging improvements, especially in the working environment, as regards the health and safety of workers, and shall set as their objective the harmonisation of conditions in this area, while maintaining the improvements made.

(2) In order to help achieve the objective laid down in the first paragraph, the Council, acting in accordance with the procedure referred to in Article 189c and after consulting the Economic and Social Committee, shall adopt by means of directives, minimum requirements for gradual implementation, having regard to the conditions and technical rules obtaining in each of the Member States.

Such directives shall avoid imposing administrative, financial and legal constraints in a way which would hold back the creation and development of small and medium-sized undertakings.

(3) The provisions adopted pursuant to this article shall not prevent any Member State from maintaining or introducing more stringent measures for the protection of working conditions compatible with this Treaty.

4 It was on the basis of Article 118a of the Treaty that a number of directives were adopted, in particular Council Directive 89/391/EEC of 12 June 1989 on the introduction of measures to encourage improvements in the safety and health of workers at work (OJ 1989 L 183, p. 1) and Directive 93/104.

5 Directive 89/391 is the framework directive which lays down general principles regarding the health and safety of workers. Those principles were subsequently developed in a series of individual directives, including Directive 93/104.

6 Article 2 of Directive 89/391 defines its scope as follows:

1. This Directive shall apply to all sectors of activity, both public and private (industrial, agricultural, commercial, administrative, service, educational, cultural, leisure, etc.).

2. This Directive shall not be applicable where characteristics peculiar to certain specific public service activities, such as the armed forces or the police, or to certain specific activities in the civil protection services inevitably conflict with it.

In that event, the safety and health of workers must be ensured as far as possible in the light of the objectives of this directive.

7 Under the heading Definitions, Article 3 of Directive 89/391 provides:

For the purposes of this directive, the following terms shall have the following meanings:

(a) worker: any person employed by an employer, including trainees and apprentices but excluding domestic servants;

(b) employer: any natural or legal person who has an employment relationship with the worker and has responsibility for the undertaking and/or establishment;

....

8 Article 1 of Directive 93/104 lays down minimum safety and health requirements for the organisation of working time and provides that the directive is to apply to all sectors of activity, both public and private, within the meaning of Article 2 of Directive 89/391, with the exception of air, rail, road, sea, inland waterway and lake transport, sea fishing, other work at sea and the activities of doctors in training.

9 Section II of Directive 93/104 lays down the measures to be taken by the Member States to ensure that all workers are entitled to minimum daily and weekly rest periods and to paid annual leave; it also lays down rules on breaks and maximum weekly working time.

10 Section III of that directive lays down a number of requirements concerning the length of and conditions for night work and shift work, and the pattern of work.

11 As regards annual leave, Article 7 of Directive 93/104 provides:

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.

12 Article 15 of Directive 93/104 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.

13 Article 17 of the same directive provides for a number of derogations from the basic rules on account of the specific characteristics of certain activities and under certain conditions.

14 However, it is common ground that those derogations do not apply to the paid annual leave provided for by Article 7 of that directive and both BECTU and the Secretary of State accept that none of those derogations is applicable to the present case.

15 Article 18 of Directive 93/104, entitled Final provisions, provides, in paragraph (1)(a), that it is to be transposed into domestic law by 23 November 1996.

16 However, under Article 18(1)(b)(ii), Member States are to have the option, as regards the application of Article 7, of making use of a transitional period of not more than three years from the date referred to in (a), provided that during that transitional period:

- every worker receives three weeks' paid annual leave in accordance with the conditions for the entitlement to, and granting of, such leave laid down by national legislation and/or practice, and

- the three-week period of paid annual leave may not be replaced by an allowance in lieu, except where the employment relationship is terminated.

17 It is common ground that the United Kingdom availed itself of the option granted by Article 18(1)(b)(ii) of Directive 93/104.

The national legislation

18 In the United Kingdom Directive 93/104 was transposed into national law by the Working Time Regulations 1998 (S.I. 1998 No 1833, the Regulations). The Regulations were drawn up by the Government on 30 July 1998, laid before Parliament on the same day and entered into force on 1 October 1998.

19 Regulation 13 concerns the right to annual leave.

20 Paragraphs (1) and (2) thereof provide as follows:

(1) Subject to paragraphs (5) and (7), a worker is entitled in each leave year to a period of leave determined in accordance with paragraph (2).

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

(a) in any leave year beginning on or before 23 November 1998, three weeks;

(b) in any leave year beginning after 23 November 1998 but before 23 November 1999, three weeks and a proportion of a fourth week equivalent to the proportion of the year beginning on 23 November 1998 which has elapsed at the start of that leave year, and

(c) in any leave year beginning after 23 November 1999, four weeks.

21 Regulation 13(3) defines the starting-point of the leave year for the purposes of that regulation.

22 Where a worker's employment begins after the date on which the first leave year begins, regulation 13(5) provides that his leave entitlement is to be calculated proportionately.

23 Under regulation 13(9), leave may be taken in instalments, but it may be taken only in the leave year in respect of which it is due and it may not be replaced by a payment in lieu except where the employment is terminated.

24 Regulation 13(7) provides:

The entitlement conferred by paragraph (1) does not arise until a worker has been continuously employed for 13 weeks.

25 Regulation 13(8) specifies that a worker has been continuously employed for 13 weeks, within the meaning of paragraph (9), if his relations with his employer have been governed by a contract during the whole or part of each of those weeks.

The main proceedings and the questions referred to the Court

26 BECTU is a trade union with about 30 000 members working in the broadcasting, film, theatre, cinema and related sectors in jobs such as sound recordists, cameramen, special effects technicians, projectionists, editors, researchers, hairdressers and make-up artistes.

27 BECTU claims that most of its members are engaged on short-term contracts - frequently for less than 13 weeks with the same employer - so that many of them do not satisfy the condition laid down by regulation 13(7) for entitlement to paid annual leave. Accordingly, the persons concerned are deprived of any entitlement to paid annual leave and of any right to an allowance in lieu merely because, although they work on a regular basis, they do so for successive employers.

28 Taking the view that regulation 13(7) constituted an incorrect transposition of Article 7 of Directive 93/104, BECTU lodged an application for judicial review on 4 December 1998 seeking permission to challenge that provision of the Regulations. The High Court of Justice granted permission for judicial review on 18 January 1999.

29 In those proceedings, BECTU argued that regulation 13(7) constituted an unlawful limitation of the right to paid annual leave conferred by Article 7 of Directive 93/104 because workers who have been continuously employed for less than 13 weeks by the same employer are, by virtue of that provision, deprived of the benefit of that right, whereas Directive 93/104 confers the right to such leave on every worker.

30 Moreover, none of the derogations provided for in Article 17 of Directive 93/104 was applicable to the circumstances of the case and the minimum period of employment required by the Regulations was contrary both to the aim of protecting the health and safety of workers pursued by that directive and to the need to interpret restrictively any derogations from rights granted to workers by Community law. Furthermore, the provision at issue gave rise to a risk of abuse by unscrupulous employers.

31 Whilst conceding that Article 7(1) of Directive 93/104, in stating that every worker is to be entitled to paid annual leave in accordance with the conditions for entitlement to, and granting of, such leave laid down by national legislation and/or practice, may indeed permit the Member States to provide for a framework within which that right is to be exercised, BECTU contends that that framework cannot have the effect of entirely depriving certain classes of workers of the protection conferred by the directive.

32 In those circumstances, the High Court of Justice of England and Wales, Queen's Bench Division (Crown Office), stayed proceedings pending a preliminary ruling from the Court on the following questions:

(1) Is the expression "in accordance with the conditions for entitlement to, and granting of, such leave laid down by national legislation and/or practice" in Article 7 of Directive 93/104/EC of 23 November 1993 concerning certain aspects of the organisation of working time to be interpreted as permitting a Member State to enact national legislation under which:

(a) a worker does not begin to accrue rights to the paid annual leave specified in Article 7 (or to derive any benefits consequent thereon) until he has completed a qualifying period of employment with the same employer; but

(b) once that qualifying period has been completed, his employment during the qualifying period is taken into account for the purposes of computing his leave entitlement?

(2) If the answer to question 1 is "yes", what are the factors that the national court should take into account in order to determine whether a particular qualifying period of employment with the same employer is lawful and proportionate? In particular, is it legitimate for a Member State to take into account the cost for employers of conferring those rights on workers who are employed for less than the qualifying period?

The first question

33 By its first question the national court seeks essentially to ascertain whether Article 7(1) of Directive 93/104 allows a Member State to adopt national rules under which a worker does not begin to accrue rights to paid annual leave until he has completed a minimum period of 13 weeks' uninterrupted employment with the same employer.

34 Article 7(1) of Directive 93/104 imposes a clear and precise obligation on Member States to achieve a specific result by virtue of which they are to take the measures necessary to ensure that every worker is entitled to paid annual leave of at least four weeks.

35 However, Article 7(1) provides that workers enjoy that individual right to paid annual leave of a minimum duration, conferred by Directive 93/104, in accordance with the conditions for entitlement to, and granting of, such leave laid down by national legislation and/or practice.

36 The scope of that provision must therefore be determined having regard to its context. Accordingly, it is necessary to examine the purpose of Directive 93/104 and the system established by it, of which Article 7(1) forms part.

37 As regards, first, the purpose of Directive 93/104, it is clear both from Article 118a of the Treaty, which is its legal basis, and from the first, fourth, seventh and eighth recitals in its preamble as well as the wording of Article 1(1) itself, that its purpose is to lay down minimum requirements intended to improve the living and working conditions of workers through approximation of national provisions concerning, in particular, the duration of working time.

38 According to those same provisions, such harmonisation at Community level in relation to the organisation of working time is intended to guarantee better protection of the health and safety of workers by ensuring that they are entitled to minimum rest periods and adequate breaks.

39 In that context, the fourth recital in the preamble to the directive refers to the Community Charter of the Fundamental Social Rights of Workers adopted at the meeting of the European Council held at Strasbourg on 9 December 1989 which declared, in point 8 and the first subparagraph of point 19, that every worker in the European Community must enjoy satisfactory health and safety conditions in his working environment and that he is entitled, in particular, to paid annual leave, the duration of which must be progressively harmonised in accordance with national practices.

40 As regards, second, the system established by Directive 93/104, whilst Article 15 allows in general terms the application or introduction of national provisions more favourable to the protection of the safety and health of workers, the directive makes it clear, on the other hand, in Article 17, that only certain of its provisions, which are exhaustively listed, may be the subject of derogations introduced by the Member States or the two sides of industry. Moreover, the implementation of such derogations is subject to the condition that the general principles of protection of the health and safety of workers are complied with or that the workers concerned are afforded equivalent periods of compensatory rest or else appropriate protection.

41 Now it is clear that Article 7 is not one of the provisions from which Directive 93/104 expressly allows derogations.

42 Directive 93/104, in Article 18(1)(b)(ii), provides only that Member States are to have the option, as regards the application of Article 7, of making use of a transitional period of not more than three years from 23 November 1996, provided that during that period every worker receives three weeks' paid annual leave, which may not be replaced by an allowance in lieu, except where the employment relationship is terminated. As stated in paragraph 17 of this judgment, the United Kingdom availed itself of that option.

43 It follows that the entitlement of every worker to paid annual leave must be regarded as a particularly important principle of Community 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 by Directive 93/104.

44 It is significant in that connection that the directive also embodies the rule that a worker must normally be entitled to actual rest, with a view to ensuring effective protection of his health and safety, since it is only where the employment relationship is terminated that Article 7(2) allows an allowance to be paid in lieu of paid annual leave.

45 In addition, Directive 93/104 defines its scope broadly in that, as is clear from Article 1(3), it applies to all sectors of activity, whether private or public, within the meaning of Article 2 of Directive 89/391, with the exception of certain specific sectors which are expressly listed.

46 Furthermore, Directive 93/104 draws no distinction between workers employed under a contract of indefinite duration and those employed under a fixed-term contract. On the contrary, as regards more specifically the provisions concerning minimum rest periods contained in Section II of that directive, they refer in most cases to every worker, as indeed does Article 7(1) in relation to entitlement to paid annual leave.

47 It follows that, with regard to both the objective of Directive 93/104 and to its scheme, paid annual leave of a minimum duration of three weeks during the transitional period provided for in Article 18(1)(b)(ii) and four weeks after the expiry of that period constitutes a social right directly conferred by that directive on every worker as the minimum requirement necessary to ensure protection of his health and safety.

48 Legislation of a Member State, such as that at issue in the main proceedings, which imposes a precondition for entitlement to paid annual leave which has the effect of preventing certain workers from any such entitlement not only negates an individual right expressly granted by Directive 93/104 but is also contrary to its objective.

49 By applying such rules, workers whose employment relationship comes to an end before completion of the minimum period of 13 weeks' uninterrupted work for the same employer are deprived of any entitlement to paid annual leave and likewise receive no allowance in lieu even though they have in fact worked for a certain period and, under Directive 93/104, minimum rest periods are essential for the protection of their health and safety.

50 National rules of that kind are also manifestly incompatible with the scheme of Directive 93/104 which, in contrast to its treatment of other matters, makes no provision for any possible derogation regarding entitlement to paid annual leave and therefore, a fortiori, prevents a Member State from unilaterally restricting that entitlement which is conferred on all workers by that directive. Article 17 makes the derogations for which it provides subject to an obligation on Member States to grant compensatory rest periods or other appropriate protection. Given that no such condition is laid down in relation to the right to paid annual leave, it is all the more clear that Directive 93/104 was not intended to authorise Member States to derogate from that right.

51 Furthermore, rules of the kind at issue in the main proceedings are liable to give rise to abuse because employers might be tempted to evade the obligation to grant the paid annual leave to which every worker is entitled by more frequent resort to short-term employment relationships.

52 Consequently, Directive 93/104 must be interpreted as precluding Member States from unilaterally limiting the entitlement to paid annual leave conferred on all workers by applying a precondition for such entitlement which has the effect of preventing certain workers from benefiting from it.

53 The expression in accordance with the conditions for entitlement to, and granting of, such leave laid down by national legislation and/or practice must therefore be construed as referring only to the arrangements for paid annual leave adopted in the various Member States. As the Advocate General observed in point 34 of his Opinion, although they are free to lay down, in their domestic legislation, conditions for the exercise and implementation of the right to paid annual leave, by prescribing the specific circumstances in which workers may exercise that right, which is theirs in respect of all the periods of work completed, Member States are not entitled to make the existence of that right, which derives directly from Directive 93/104, subject to any preconditions whatsoever.

54 Contesting the interpretation of Directive 93/104 given in paragraphs 52 and 53 of this judgment, the United Kingdom Government contends, first, that it is undermined by the fact that the arrangements for paid annual leave vary considerably from one Member State to another and that certain national rules do not provide for a right to such leave from the first day of employment.

55 As to that, it must be borne in mind that Directive 93/104 merely lays down minimum requirements for harmonisation of the organisation of working time at Community level and leaves Member States to adopt the requisite arrangements for implementation and application of those requirements. Those measures may therefore display certain divergences as regards the conditions for exercising the right to paid annual leave but, as the Court has held in paragraphs 52 and 53 of this judgment, that directive does not allow Member States to exclude the very existence of a right expressly granted to all workers.

56 Moreover, even if other national rules contained a condition comparable to that appearing in the legislation at issue in the main proceedings, it need merely be pointed out that such a condition is manifestly contrary to Directive 93/104 and that, according to settled case-law, a Member State cannot justify its failure to fulfil obligations under Community law by relying on the fact that other Member States are also in breach of their obligations (see Case C-146/89 Commission v United Kingdom [1991] ECR I-3533, paragraph 47).

57 The United Kingdom Government contends, second, that the condition for entitlement to paid annual leave laid down in its regulations strikes a fair balance between the objective of Directive 93/104, which is to protect the health and safety of workers, and the need to avoid imposing excessive constraints on small and medium-sized undertakings, in accordance with the second paragraph of Article 118a(2) of the Treaty, which constitutes the legal basis of that directive. Apart from the cost of the leave itself, the administrative costs of organising

annual leave for staff engaged for short periods would be particularly high and would weigh more heavily on small and medium-sized undertakings.

58 On that point, first, the regulations at issue in the main proceedings are of general application since the rule that entitlement to paid annual leave is conditional upon completion of a minimum uninterrupted period of 13 weeks' employment with the same employer applies to all workers and does not vary according to the category of undertaking in which they are employed.

59 Second, it is clear from the fifth recital in the preamble to Directive 93/104 that the improvement of workers' safety, hygiene and health at work is an objective which should not be subordinated to purely economic considerations. However, the United Kingdom's argument is incontestably based on such a consideration.

60 Finally, as the Court held in Case C-84/94 United Kingdom v Council [1996] ECR I-5755, paragraph 44, the directive has already taken account of the effects which the organisation of working time for which it provides may have on small and medium-sized undertakings, given that one of the conditions to which measures based on Article 118a of the Treaty are subject is precisely that they must not hold back the creation and development of such undertakings. Moreover, Article 18(1)(b)(ii) of that directive allows the Member States to make use of a transitional period of three years during which workers must be entitled to receive three weeks' paid annual leave, an option which the United Kingdom has taken up.

61 Furthermore, the directive does not prevent the Member States from organising the way in which the right to paid annual leave may be exercised by regulating, for example, the manner in which workers may take the annual leave to which they are entitled during the early weeks of their employment.

62 The United Kingdom Government contends, third, that Article 7 of Directive 93/104 must be interpreted in the light of the directive as a whole. By virtue of the other provisions of that directive, the availability of daily and weekly rest periods from the start of employment retards the accumulation of work-related fatigue so that it is unnecessary to grant workers the right to paid annual leave during the early weeks of their employment in order to protect their health and safety.

63 It need merely be pointed out that that argument is based on the assumption that a worker employed under short-term contracts has been able to take an adequate period of rest before entering into a new employment relationship. However, that assumption does not necessarily hold true in the case of workers employed under a succession of short-term contracts. On the contrary, such workers often find themselves in a more precarious situation than those employed under longer-term contracts, so that it is all the more important to ensure that their health and safety are protected in a manner consonant with the purpose of Directive 93/104.

64 It follows that the answer to the first question must be that Article 7(1) of Directive 93/104 does not allow a Member State to adopt national rules under which a worker does not begin to accrue rights to paid annual leave until he has completed a minimum period of 13 weeks' uninterrupted employment with the same employer.

The second question

65 The second question is asked only in the event that Article 7(1) of Directive 93/104 allows a Member State to adopt regulations of the kind at issue in the main proceedings. Since the first question has been answered in the negative, it is unnecessary to answer the second question.

Decision on costs

Costs

66 The costs incurred by the United Kingdom Government and by the Commission, which have submitted observations to the Court, are not recoverable. Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court.

Operative part

On those grounds,

THE COURT (Sixth Chamber)

in answer to the questions referred to it by the High Court of Justice of England and Wales, Queen's Bench Division (Crown Office) by order of 14 April 1999, hereby rules:

Article 7(1) of Council Directive 93/104/EC of 23 November 1993 concerning certain aspects of the organisation of working time does not allow a Member State to adopt national rules under which a worker does not begin to accrue rights to paid annual leave until he has completed a minimum period of 13 weeks' uninterrupted employment with the same employer.