ORDER OF THE COURT (Ninth Chamber)

13 June 2013 (*)

(Social policy – Directive 2003/88/EC – Entitlement to paid annual leave – Framework agreement on part-time work – Full-time worker having been unable to exercise her entitlement to paid annual leave during the reference period – Move of that worker to a scheme of part-time work – National provision or practice providing for a reduction in the number of days of paid leave previously accumulated thereby to be in proportion to the number of days of part-time work per week)

In Case C-415/12,

REQUEST for a preliminary ruling under Article 267 TFEU from the Arbeitsgericht Nienburg (Germany), made by decision of 4 September 2012, received at the Court on 13 September 2012, in the proceedings

Bianca Brandes

v

Land Niedersachsen,

THE COURT (Ninth Chamber),

composed of J. Malenovský, President of the Chamber, M. Safjan and A. Prechal (Rapporteur), Judges,

Advocate General: E. Sharpston,

Registrar: A. Calot Escobar,

having decided, after hearing the Advocate General, to give a decision by reasoned order, pursuant to Article 99 of the Rules of Procedure of the Court of Justice,

makes the following

Order

1 This request for a preliminary ruling concerns the interpretation of Clause 4 of the Framework Agreement on part-time work concluded on 6 June 1997 ('the Framework Agreement on part-time work'), which is annexed to Council Directive 97/81/EC of 15 December 1997 concerning the framework agreement on part-time work concluded by UNICE, CEEP and the ETUC (OJ 1998 L 14, p. 9), as amended by Council Directive 98/23/EC of 7 April 1998 (OJ 1998 L 131, p. 10), and any other provision of European Union law which may be deemed relevant in the light of the dispute in the main proceedings.

2 The request has been made in proceedings between Ms Brandes and Land Niedersachsen concerning the entitlement to paid annual leave relating to 2010 and 2011 which she was unable to exercise during those years, which constitute the reference periods.

Legal context

European Union law

3 Clause 4(1) and (2) of the Framework Agreement on part-time work, entitled 'Principle of non-discrimination', provides:

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

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

4 Article 7, entitled 'Annual leave' of Directive 2003/88/EC of the European Parliament and of the Council of 4 November 2003 concerning certain aspects of the organisation of working time (OJ 2003 L 299, p. 9) 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.'

German law

5 Paragraph 3(1) of the Federal law on leave (Bundesurlaubsgesetz) of 8 January 1963 (BGBl. 1963, p. 2) provides that '[l]eave shall amount to a minimum of 24 working days each year.'

6 In accordance with Paragraph 11(1) of that Federal law:

'Holiday pay shall be calculated in accordance with the average pay that the employee received in the last 13 weeks prior to the start of the leave, not including additional pay for overtime. …'

7 Paragraph 26(1) of the Collective agreement for public service employees of the German *Länder* (Tarifvertrag für den öffentlichen Dienst der Länder) of 12 October 2006, as amended by the Amendment to the collective agreement No 4 of 2 January 2012, reads as follows:

'Each calendar year, employees are entitled to paid leave (Paragraph 21). When the amount of work per week is distributed over five days of the calendar week, the entitlement to leave for each calendar year shall be 26 working days until 30 years of age, 29 working days until 40 years of age and 30 working days after 40 years of age.

"Working days" means all the calendar days during which, in accordance with an undertaking's rostering system or practices, employees must or ought to have worked … When the amount of work is distributed other than over five days, the entitlement to leave shall increase or decrease correspondingly. When a calculation of paid leave results in a fraction which corresponds to at least a half day of leave, it shall be rounded up to a full day of leave. Fractions of less than a half day of leave shall not be taken into account. …'.

8 German law does not expressly govern the question of the effect that a change to working time may have on leave not taken.

9 Paragraph 4(1) of the Law on Part-Time Working and Fixed-term contracts of 21 December 2000 provides:

'A part-time worker shall not be treated in a less favourable manner on account of working part-time than a comparable full-time worker, unless there are objective reasons justifying different treatment. The part-time worker shall be remunerated or receive *pro rata* benefits, the scope of which shall at least correspond to the amount of his work as compared with that of a comparable full-time worker.'

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

10 Ms Brandes was employed full-time by the Land Niedersachsen under an employment contract of unlimited duration entered into in 2009.

11 In 2010, Ms Brandes was prohibited from working on account of her pregnancy until she gave birth, which occurred on 22 December 2010. At the end of her maternity leave on 17 February 2011, she took parental leave which finished on 21 December 2011.

12 From 22 December 2011, in accordance with an agreement entered into between Ms Brandes and the Land Niedersachsen, she worked part-time on the basis of three working days per week.

13 It is not in dispute that, having regard to the prohibition on working relating to her pregnancy, followed by maternity leave then parental leave taken by Ms Brandes, in 2010 and 2011 respectively, she was unable to take 22 days and 7 days of paid annual leave calculated on the basis of her full-time work.

14 In the dispute in the main proceedings which was brought before the Arbeitsgericht Nienburg, Ms Brandes claims recognition of her entitlement to take the abovementioned 29 days of paid annual leave, which had been accumulated while she was working full-time.

15 In support of its decision to refuse to approve the application, the Land Niedersachsen refers to a decision of the Bundesarbeitsgericht of 28 April 1998, according to which, in the case of a change of a worker's working time, the entitlement to leave already accumulated by the worker must be adjusted proportionally to the relationship between the new and the old number of days worked. According to that *Land*, it follows that Ms Brandes is entitled to remaining leave of 17 days, namely 29 days divided by 5 days, multiplied by 3 days, that is a total of 17.4 days, rounded down to 17 days.

16 The Land Niedersachsen contends in particular that such a calculation of days of leave *pro rata* to the days worked has a neutral effect on the amount of leave to which Ms Brandes is entitled, in so far as, expressed in the number of weeks of leave, that amount remains unchanged as a result of that calculation. It is necessary to take account of the fact that, under her new scheme of part-time work, she requires fewer days of leave in order to have a free week. On the other hand, if the number of days of leave was not calculated in a proportional manner to the days worked, that would lead to Ms Brandes being able to take advantage of weeks of leave to which she would have been entitled had she continued to work full-time, which would create an unjustified benefit for her compared with a worker employed full-time.

17 According to the Land Niedersachsen, the dispute before the referring court can be distinguished, in that respect, from the case giving rise to the judgment in Case C-486/08 *Zentralbetriebsrat der Landeskrankenhäuser Tirols* [2010] ECR I-3527, in so far as the latter case concerned a rule on leave which expressed that leave in hours. In the present dispute, however, due to the use of a reference period expressed in weeks, although the worker will not suffer any disadvantage as regards the extent of the leave to which she is entitled, that would not have been the case in the context of that case since, in respect of leave expressed in hours, any change to the working time would have a direct effect on the amount of leave.

18 The Arbeitsgericht Nienburg states that, for its part, it is convinced that it can be inferred clearly from *Zentralbetriebsrat der Landeskrankenhäuser Tirols* that to set the entitlement to annual leave already accumulated by a worker employed full-time on a proportional basis, as the Land Niedersachsen seeks to do, infringes European Union law. The Arbeitsgericht Nienburg considers, in particular, that to set the entitlement in this way discriminates between full-time and part-time workers in a manner which is prohibited by Clause 4 of the Framework agreement on part-time work.

19 As for the Land Niedersachsen's argument set out at paragraph 16 of this order, the Arbeitsgericht Nienburg considers that it stems from confusion between the amount of 'leave' and the amount of 'absence from the undertaking'. The Arbeitsgericht Nienburg also states that there are two reasons why the reduction in the entitlement to paid leave already accumulated during the preceding period is, when it is examined correctly, unacceptable, namely the amount of leave and the entitlement to holiday pay.

20 In the light, in particular, of the case-law of the Bundesarbeitsgericht referred to at paragraph 15 of this order, the Arbeitsgericht Nienburg, however, considers that it is necessary to obtain clarification on those questions from the Court.

21 In those circumstances the Arbeitsgericht Nienburg decided to stay the proceedings before it and to refer the following question to the Court for a preliminary ruling:

'Is the relevant European Union law, in particular Clause 4(1) and (2) of the Framework Agreement on part-time work …, to be interpreted as precluding national statutory or collective provisions or practices under which, in the event of a change in a worker's employment associated with a change in the number of days worked per week, the scale of the entitlement to leave which the worker was unable to exercise during the reference period must be adjusted in such a way that, although the amount of leave entitlement, expressed in weeks, remains the same, the leave entitlement, expressed in days, is converted to the new scale of employment?

The question referred for a preliminary ruling

22 Under Article 99 of the Rules of Procedure, where a question referred to the Court for a preliminary ruling is identical to a question on which the Court has already ruled, where the reply to such a question may be clearly deduced from existing case-law or where the answer to the question referred for a preliminary ruling admits of no reasonable doubt, the Court may at any time, on a proposal from the Judge-Rapporteur and after hearing the Advocate General, decide to rule by reasoned order.

23 That procedural provision may be applied in the present case.

24 By its question, the referring court asks, in essence, whether the relevant European Union law, in particular Clause 4 of the Framework agreement on part-time work, must be interpreted as meaning that it precludes national provisions or a national practice, such as those at issue in the main proceedings, under which the number of days of paid annual leave which a full-time worker was unable to exercise during the reference period is, due to the fact that that worker moved to a scheme of part-time work, subject to a reduction which is proportional to the difference between the number of days of work per week carried out by that worker before and after such a move to part-time work.

25 Although the referring court has, in formal terms, referred in particular in its question to Clause 4 of the Framework agreement on part-time work, the Court is not thereby precluded from providing that court with all the elements for the interpretation of European Union law which may be of assistance in adjudicating on the case pending before it, whether or not that court has specifically referred to them in its question (see, to that effect, *Zentralbetriebsrat der Landeskrankenhäuser Tirols*, paragraph 49 and the case-law cited). Moreover, it must be noted that in its question the referring court has itself referred to relevant European Union law as a whole.

26 It must be noted from the outset that, included amongst the provisions of European Union law relevant for the purposes of replying to the question posed by the referring court, as pointed out by Ms Brandes, the German Government and the European Commission, is Article 7 of Directive 2003/88 on the entitlement to paid annual leave.

27 In accordance with the settled case-law of the Court, to which, moreover, the referring court has itself referred, that right of every worker to paid annual leave must be regarded as a particularly important principle of European Union social law (see, inter alia, *Zentralbetriebsrat der Landeskrankenhäuser Tirols*, paragraph 28 and the case-law cited).

28 In addition, the Court has repeatedly stated that the entitlement of every worker to paid annual leave is, as a principle of European Union social law, expressly laid down in Article 31(2) of the Charter of Fundamental Rights of the European Union, which Article 6(1) TEU recognises as having the same legal value as the Treaties (see, inter alia, Joined Cases C-229/11 and C-230/11 *Heimann and Toltschin* [2012] ECR I-0000, paragraph 22 and the case-law cited).

29 In addition, it is apparent from that case-law that the right to paid annual leave may not be interpreted restrictively (see, inter alia, *Zentralbetriebsrat der Landeskrankenhäuser Tirols*, paragraph 29, and *Heimann and Toltschin*, paragraph 23 and the case-law cited).

30 As the referring court, Ms Brandes and the Commission note, the Court has, in that context, already held at paragraph 32 of *Zentralbetriebsrat der Landeskrankenhäuser Tirols*, that the taking of annual leave in a period after the reference period has no connection to the hours worked by the worker during that later period and that consequently, a change, and in particular a reduction, of working hours when moving from full-time to part-time employment cannot reduce the right to annual leave that the worker has accumulated during the reference period of full-time employment.

31 As regards Clause 4 of the Framework agreement on part-time work, it is sufficient in the present case to bear in mind that at paragraph 33 of *Zentralbetriebsrat der Landeskrankenhäuser Tirols*, the Court also noted, as regards the principle of *pro rata temporis*, set out at Clause 4(2), that it is indeed appropriate to apply that principle to the grant of annual leave for a period of employment on a part-time basis. For such a period, the reduction of annual leave by comparison to that granted for a period of full-time employment

is justified on objective grounds. However, that principle cannot be applied *ex post* to a right to annual leave accumulated during a period of full-time work.

32 The Court concluded from the foregoing that it cannot be inferred from the relevant provisions of Directive 2003/88 or from Clause 4(2) of the Framework agreement on part-time work that national legislation may provide, among the conditions for the exercise of the right to paid annual leave, for the partial loss of the right to leave accumulated over a reference period, whilst reiterating, in that regard, that this conclusion must be reached only when the worker has not actually had the opportunity to exercise that right (see *Zentralbetriebsrat der Landeskrankenhäuser Tirols*, paragraph 34).

33 Ruling on the question referred to it for a preliminary ruling in the case which gave rise to that judgment, the Court held that relevant European Union law, and in particular Clause 4(2) of the Framework agreement on part-time work, must be interpreted as precluding a national provision, under which, in the event of a change in the working hours of a worker, the amount of leave not yet taken is adjusted in such a way that a worker who reduces his working hours from full-time to part-time suffers a reduction in the right to paid annual leave which he has accumulated but not been able to exercise while working full-time, or he can only take that leave with a reduced level of holiday pay (*Zentralbetriebsrat der Landeskrankenhäuser Tirols*, paragraph 35).

34 As the referring court itself has pointed out and as Ms Brandes and the Commission have also argued, the considerations set out at paragraphs 27 to 33 of this order clearly imply that a similar response be given to the question referred in the context of this request for a preliminary ruling.

35 It is not in dispute in the present case that Ms Brandes has a deferred entitlement to paid annual leave which she was unable to exercise during the reference periods concerned during which she worked full-time due to a period when she was prohibited from working associated with her pregnancy and the maternity period after that, itself followed by parental leave. As far as the referring court and the parties to the main proceedings are concerned, it is not in dispute that, had Ms Brandes remained a full-time worker at the expiry of her parental leave, the paid annual leave covered by such deferment to which she would have been entitled would have been 29 days.

36 In those circumstances, as is apparent inter alia from *Zentralbetriebsrat der Landeskrankenhäuser Tirols*, the relevant paragraphs of which are cited at paragraphs 30 to 33 of this order, the reduction in Ms Brandes' working time having resulted from that reduction from full-time work to part-time work cannot be accompanied by a partial *ex post* loss of the entitlement to paid annual leave previously accumulated, of the kind which results from the national rule at issue in the main proceedings, in the absence, in particular, of any objective reason such as to justify such a loss.

37 As for the argument put forward by the Land Niedersachsen according to which the entitlement to paid annual leave previously accumulated by Ms Brandes would not suffer any reduction since, expressed in terms of weeks of leave, it would remain identical before and after her move to part-time work, it is clear that that argument cannot be accepted, as both the referring court and the Commission have observed.

38 Indeed, the fact that a part-time worker who normally works three full days per week is, during a particular week, absent from work, does not in any way imply, contrary to what the Land Niedersachsen contends, that the worker would thus obtain the equivalent of five days of leave which, having been accumulated when he worked full-time, must clearly be

understood as five complete days during which the worker is relieved of being under the obligation to work, in the absence of such leave.

39 In having one 'week' of leave recognised, in the context of his now part-time work, represented by three full days of work per week, it is clear that the worker is being released from his obligation to work to the extent only of three full days.

40 The equivalent argument of the German Government, which moreover it had already put forward in the case giving rise to the judgment in *Zentralbetriebsrat der Landeskrankenhäuser Tirols,* according to which the national rule at issue in the main proceedings does not infringe European Union law, on the ground that a worker who is no longer required to work every day of the week must be released from his obligations during a reduced number of days in order to be able to benefit from a period of rest which is as long as previously, must also be rejected.

41 Such an argument fails to distinguish the period of rest represented by the taking of period of actual leave and normal professional inactivity within a period during which the worker is not deemed to work due to the employment relationship binding him with his employer.

42 Having regard to all the foregoing considerations, the answer to the question referred is that the relevant European Union law, in particular Article 7(1) of Directive 2003/88 and Clause 4(2) of the Framework agreement on part-time work, must be interpreted as meaning that they preclude national provisions or a national practice, such as those at issue in the main proceedings, under which the number of days of paid annual leave which a full-time worker was unable to exercise during the reference period is, due to the fact that that worker moved to a scheme of part-time work, subject to a reduction which is proportional to the difference between the number of days of work per week carried out by that worker before and after such a move to part-time work.

Costs

43 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. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

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

The relevant European Union law, in particular, Article 7(1) of Directive 2003/88/EC of the European Parliament and of the Council of 4 November 2003 concerning certain aspects of the organisation of working time and Clause 4(2) of the Framework Agreement on part-time work concluded on 6 June 1997, which is annexed to Council Directive 97/81/EC of 15 December 1997 concerning the framework agreement on part-time work concluded by UNICE, CEEP and the ETUC, as amended by Council Directive 98/23/EC of 7 April 1998 must be interpreted as meaning that they preclude national provisions or a national practice, such as those at issue in the main proceedings, under which the number of days of paid annual leave which a full-time worker was unable to exercise during the reference period is, due to the fact that that worker moved to a scheme of part-time work, subject to a reduction which is proportional to the difference between the number of days of work per week carried out by that worker before and after such a move to part-time work.

[Signatures]

* Language of the case: German.