



## **Advanced Training in EU Law for Court Coordinators**

### PRELIMINARY RULING PROCEDURE

Trier, 19 May 2021

***Workshop Moderator: Valeria Piccone, Judge, Supreme Court of Italy***

#### **1. Topics for discussion**

Description of the factual and legal context

Identify EU law and EU case law

How to present the legal arguments in support of the reference

(Re)formulating the questions of the referring judge

#### **2. Case studies**

(See next pages)

**I. Request for a preliminary ruling from the Bundesarbeitsgericht – Federal Labour Court (Germany) lodged on 27 December 2016 — Max-Planck-Gesellschaft zur Förderung der Wissenschaften eV v Tetsuji Shimizu**

**(Case C-684/16)**

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

Mr Shimizu was employed by Max-Planck under several fixed-term contracts between 1 August 2001 and 31 December 2013. Max-Planck invited Mr Shimizu to take his leave before the employment relationship was terminated, but did not force him to take it on dates it had set. Mr Shimizu took two days' leave, on 15 November and 2 December 2013.<sup>12</sup> After having, by letter of 23 December 2013, unsuccessfully sought payment from Max-Planck of an allowance in the amount of EUR 11 979 corresponding to 51 days' paid annual leave for 2012 and 2013 which had not been taken, Mr Shimizu brought an action seeking that Max-Planck be ordered to pay that allowance.

That action having been upheld both at first instance and on appeal, Max-Planck appealed to the referring court, the Bundesarbeitsgericht (Federal Labour Court, Germany), on a point of law.

That court states that the entitlements to paid annual leave at issue in the main proceedings lapsed under Paragraph 7(3) of the Bundesurlaubsgesetz (Federal Law on leave) since they were not taken during the year for which the leave had been granted. Under Paragraph 7(3) of the BUrlG, a worker's leave which has not been taken in the year in respect of which it was granted expires, in principle, at the end of that year, unless the conditions for its carry-over laid down in that provision are met. Thus, where the worker was able to take his leave in the leave year in respect of which it was granted, his right to paid annual leave lapses at the end of that year. As a result of the loss of that right, it may no longer be converted into an entitlement to an allowance under Article 7(4) of the Federal Law on leave.

In those circumstances, the Bundesarbeitsgericht (Federal Labour Court) decided to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:

1) First of all if the Article 7(1) of Directive [2003/88] or Article 31(2) of the [Charter] preclude national legislation, such as Paragraph 7 of the [Federal law on leave], under which, as one of the methods of exercising the right to annual leave, an employee must apply for such leave with an indication of his preferred dates so that the leave entitlement does not lapse at the end of the relevant period without compensation and under which an employer is not required, unilaterally and with binding effect for the employee, to specify when that leave be taken by the employee within the relevant period.

(2) If the first question referred is answered in the affirmative:

If this apply even where the employment relationship is between two private persons.

## **Legal context**

### **European Union law**

According to recitals 4 to 6 of Directive 2003/88:

‘(4) The improvement of workers’ safety, hygiene and health at work is an objective which should not be subordinated to purely economic considerations.

(5) All workers should have adequate rest periods. The concept of “rest” must be expressed in units of time, i.e. in days, hours and/or fractions thereof. [European Union] workers must be granted minimum daily, weekly and annual periods of rest and adequate breaks. ...

(6) Account should be taken of the principles of the International Labour Organisation with regard to the organisation of working time, including those relating to night work.’

Article 7 of Directive 2003/88, which is identical to Article 7 of Directive 93/104, is worded as follows:

‘1. Member States shall take the measures necessary to ensure that every worker is entitled to paid annual leave of at least four weeks in accordance with the conditions for entitlement to, and granting of, such leave laid down by national legislation and/or practice.

### **German law**

Paragraph 7 of the Bundesurlaubsgesetz (Federal Law on leave), of 8 January 1963 provides:

‘(1) In determining the dates on which leave may be taken, consideration shall be given to a worker’s wishes, save where consideration thereof is precluded by imperative operational interests or the wishes of other workers who deserve to be given priority for social reasons. Leave shall be granted when requested in connection with preventive or post-care medical treatment.

**(3) Leave must be granted and taken in the course of the current calendar year. The carrying-over of leave to the next calendar year shall be permitted only if justified on compelling operational grounds or for reasons personal to the employee. ...**

(4) If, because of the termination of the employment relationship, leave can no longer be granted in whole or in part, an allowance shall be paid in lieu.'

## **Discussion**

**Is the preliminary ruling admissible?**

**If yes/no, why?**

**Would you want to reformulate the question? If yes, how?**

**How would you answer the questions, with special regard to the application of the Charter between two private persons?**

## **II. Request for a preliminary ruling from the Tribunal of Naples (Italy) lodged on 20 April 2019 – YT and Others**

### **Case C 282/19**

#### **The dispute in the main proceedings**

YT and Others, the applicants, are Catholic religious education teachers recruited by the defendant Ministry on the basis of fixed-term employment contracts. In particular, the employment relationship between the applicants and the defendant is based on annual appointments, which are automatically reconfirmed, in accordance with Article 40(5) of the CCNL of 29 November 2007. The applicants have certificates attesting to their suitability issued by the diocesan ordinary, which have not been revoked.

The applicants were recruited on the basis of regional ranking lists established for each diocese, and appointed by the education authority on the basis of a proposal from the diocesan ordinary. All of the fixed-term contracts in question have a total duration of more than 36 months, in some cases exceeding 20 years.

On 31 July 2015, the applicants brought an action before the District Court, Naples (Employment Division III), claiming that their fixed-term employment contracts should be converted into contracts of indefinite duration and, in the alternative, compensation for damage. The Federazione GILDA-UNAMS (GILDA-UNAMS Federation), the trade union that was a signatory to the CCNL of 29 November 2007, also made an appearance in the proceedings.

The defendant Ministry objected to the action on the grounds that it was inadmissible and without foundation.

### **The questions referred for a preliminary ruling**

The referring court has doubts as to the compatibility of the Italian legislation implementing directive 1999/70 with Clause 5 of the framework agreement laid down in that directive, and with Article 21 of the Charter and Directive 2000/78/EC, as regards the different treatment accorded to Catholic religious education teachers compared to that accorded to other teachers.

By the first question referred, the referring court is asking whether the different treatment accorded to Catholic religious education teachers constitutes discrimination on grounds of religion, within the meaning of Article 21 of the Charter and Directive 2000/78/EC, or whether the fact that the certificate attesting to their suitability issued to Catholic religious education teachers can be revoked constitutes an appropriate justification for such different treatment.

By the second question referred, the referring court is asking which instruments it has available to eliminate the effects of such discrimination and whether it should find that an employment relationship of indefinite duration exists with the defendant administration, bearing in mind that all teachers other than Catholic religious education teachers have been granted tenure, that is to say, they have been given permanent employment by the administration and consequently now have contracts of indefinite duration, under the special recruitment plan introduced by Law No 107 of 13 July 2015.

The third question referred asks whether Clause 5 of the framework agreement precludes the absence — for the school sector, and in particular for Catholic religious education teachers — of measures intended to prevent the misuse of successive fixed-term employment contracts and whether the requirement for approval by the diocesan ordinary may constitute an objective reason within the meaning of Clause 5(1)(a) of the framework agreement.

Lastly, by the fourth question referred, the referring court asks whether, if the Court were to establish that a breach of Clause 5 of the framework agreement had occurred, it is possible, on the basis of Article 21 of the Charter, Clause 4 of the framework agreement and Article 1 of Directive 2000/78, to disapply the national provisions that preclude the automatic conversion of a fixed-term contract into a contract of indefinite duration if the employment relationship exceeds a certain period of time.

## **Legal context**

### **European Union Law**

Council Directive 1999/70/EC of 28 June 1999 concerning the framework agreement on fixed-term work concluded by ETUC, UNICE and CEEP (OJ 1999 L 175, p. 43) ('Directive 1999/70'), in particular Clauses 4 and 5 of the framework agreement laid down in that directive;

Article 21 of the Charter of Fundamental Rights of the European Union (the 'Charter');

Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation (OJ 2000 L 303, p. 16) ('Directive 2000/78'), and in particular Article 1 and Article 2(2)(a) of that directive.

### **National Law**

Legislative Decree No 368 of 6 September 2001 implementing Council Directive 1999/70/EC concerning the framework agreement on fixed-term work concluded by ETUC, UNICE and CEEP;

Legislative Decree No 81 of 15 June 2015 laying down provisions governing employment contracts) ('Legislative Decree No 81/15');

Legislative Decree No 165 of 30 March 2001 laying down general rules concerning the organisation of employment in public administrations;

National Collective Employment Agreement for Schools (CCNL) of 27 November 2007: Under Article 40 of the CCNL 'Catholic religious education teachers shall be recruited on the basis of the provisions laid down in Article 309 of Legislative Decree No 297/1994 by means of annual employment contracts that shall be deemed to be confirmed where the conditions and requirements laid down by the applicable legal provisions continue to be met;

Law No 186 of 18 July 2003 laying down provisions governing the legal status of Catholic religious education teachers in establishments and schools of all types and levels

## **Discussion**

**Is the preliminary ruling admissible?**

**If yes/no, why?**

**Would you want to reformulate the question? If yes, how?**

**How would you answer the questions, with special regard to the application of the art. 21 of the Charter?**

**III. Hypothetical preliminary ruling.**

**The dispute in the main proceedings**

Mr. Who is the owner of a company that produces dairy products and imports milk and milk derivatives from various European countries.

An Italian law prescribes the obligation to tracing the production chain and indicating this tracing on the label.

1. Mr. Who underwent an inspection by agents of the Finance Police, of the State which have ascertained the violation of the obligation imposed by the Italian law of indicate the production chain on the label.
2. Mr Who, consequently, received a report confirming the violation and applying an administrative fine of one million euros, corresponding to 10% of its annual turnover.
3. Mr. Who appealed to the Administrative Court indicating that:
  - a. The obligation to indicate the production chain on the label of dairy products, imposed by Italian law, is contrary to the directive concerning dairy products circulation; this obligation constitutes a measure having direct effect;
  - b. In any case, the directive provides for the obligation for the state to allow circulation of dairy products that comply with the requirements of the directive itself. This obligation has direct effects.
  - c. The judge would then have to set aside the Italian law or raise a question of constitutional legitimacy before the Constitutional Court.
6. The Italian State constitutes itself and objects that:
  - a. The directive allows States to impose more stringent requirements to protect the individuals health;
  - b. The directive has no direct effect, as it allows States to adopt more stringent measures, for the protection of health;
  - c. Should the directive be interpreted as meaning that it precludes Italian

law on the label of dairy products, it would be invalid as the competence of the Union in terms of health is complementary to the policies of the States members.

d. The State therefore asks the judge to refer the matter to the Court of Justice in order to assess the invalidity of the directive.

### **Legal context**

2. The European Union directive, based on art. 168 TFEU, which also refers to art. 9 TFEU, contains the following provisions:

- Art. 5. Dairy products produced in the Member States must comply with the technical specifications for each category indicated below:

ii. Technical specifications concerning milk storage requirements:

iii. Technical specifications concerning analytical laboratories: ...

iv. Technical specifications concerning production plants: ...

v. Technical specifications concerning production processes: ...

vi. Technical specifications concerning conservation techniques: ...

- Art. 6. Member States may also impose measures relating to specifications more rigorous techniques to protect health.

- Art. 7. **Dairy products that comply with the requirements of this directive will be able to circulate freely in the internal market.**

### **Article 9 TFEU**

In defining and implementing its policies and activities, the Union shall take into account requirements linked to the promotion of a high level of employment, the guarantee of adequate social protection, the fight against social exclusion, and a high level of education, training and protection of human health.

### **Article 168 of the TFEU**

1. A high level of human health protection shall be ensured in the definition and implementation of all Union policies and activities.

Union action, which shall complement national policies, shall be directed towards improving public health, preventing physical and mental illness and diseases, and obviating sources of danger to physical and mental health. Such action shall cover the fight against the major health scourges, by promoting research into their causes, their transmission and their prevention, as well as health information and education, and monitoring, early warning of and combating serious cross-border threats to health.

The Union shall complement the Member States' action in reducing drugs-related health damage, including information and prevention.

**2.** The Union shall encourage cooperation between the Member States in the areas referred to in this Article and, if necessary, lend support to their action. It shall particularly encourage cooperation between the Member States to improve the complementarity of their health services in cross-border areas.

Member States shall, in liaison with the Commission, coordinate among themselves their policies and programmes in the areas referred to in paragraph 1. The Commission may, in close contact with the Member States, take any useful initiative to promote such coordination, in particular initiatives aiming at the establishment of guidelines and indicators, the organisation of exchange of best practice, and the preparation of the necessary elements for periodic monitoring and evaluation. The European Parliament shall be kept fully informed.

**3.** The Union and the Member States shall foster cooperation with third countries and the competent international organisations in the sphere of public health.

**4.** By way of derogation from Article 2(5) and Article 6(a) and in accordance with Article 4(2)(k) the European Parliament and the Council, acting in accordance with the ordinary legislative procedure and after consulting the Economic and Social Committee and the Committee of the Regions, shall contribute to the achievement of the objectives referred to in this Article through adopting in order to meet common safety concerns:

(a) measures setting high standards of quality and safety of organs and substances of human origin, blood and blood derivatives; these measures shall not prevent any Member State from maintaining or introducing more stringent protective measures;

(b) measures in the veterinary and phytosanitary fields which have as their direct objective the protection of public health;

(c) measures setting high standards of quality and safety for medicinal products and devices for medical use.

**5.** The European Parliament and the Council, acting in accordance with the ordinary legislative procedure and after consulting the Economic and Social Committee and the Committee of the Regions, may also adopt incentive measures designed to protect and improve human health and in particular to combat the major cross-border health scourges, measures concerning monitoring, early warning of and combating serious cross-border threats to health, and measures

which have as their direct objective the protection of public health regarding tobacco and the abuse of alcohol, excluding any harmonisation of the laws and regulations of the Member States.

**6.** The Council, on a proposal from the Commission, may also adopt recommendations for the purposes set out in this Article.

**7.** Union action shall respect the responsibilities of the Member States for the definition of their health policy and for the organisation and delivery of health services and medical care. The responsibilities of the Member States shall include the management of health services and medical care and the allocation of the resources assigned to them. The measures referred to in paragraph 4(a) shall not affect national provisions on the donation or medical use of organs and blood.

### **Discussion**

- I. Is the law on the label of dairy products contrary to the directive?**
- II. Does the Directive constitute a measure having direct effect?**
- III. Can the national judge set aside the law?**
- IV. The national Court has a power or an obligation to make a preliminary reference to the Court of Justice? And if so, asking what question?**