

Case No: 67372
Event No: 692380
Decision No: 51/14/COL

EFTA SURVEILLANCE
AUTHORITY

REASONED OPINION

delivered in accordance with Article 31 of the Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice concerning Norway's failure to fulfil its obligations arising from Article 7 of the Act referred to at point 32h of Annex XVIII to the EEA Agreement (*Directive 2003/88/EC of the European Parliament and of the Council of 4 November 2003 concerning certain aspects of the organization of working time*), as adapted to the Agreement by Protocol 1 thereto

1 Introduction

1. Article 7 of the Act referred to at point 32h of Annex XVIII to the EEA Agreement (*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*), as adapted to the EEA Agreement by Protocol 1 thereto, (“the Working Time Directive” or “the Directive”) provides workers with a right to a paid annual leave of at least four weeks which may not be replaced by an allowance in lieu, except where the employment relationship is terminated.
2. By letter dated 23 November 2009 (Event No 537938), the EFTA Surveillance Authority (“the Authority”) requested information from the Norwegian Government concerning the manner in which the right to compensatory annual leave was handled in the event the worker fell sick before the start of or during his/her scheduled annual leave. Furthermore, the Authority requested information on whether national law provided workers with the right to have their untaken annual leave days transferred into the next annual leave year.
3. By letter of 20 January 2010 (ref. 200905917, Event No 543564), the Norwegian Government provided the Authority with information on how this issue was regulated in the Act of 29 April 1988 No 21 relating to Holidays, as amended, (“the Annual Holidays Act” or “the Act”).
4. The case was discussed at the package meeting held in Oslo on 11 November 2010.¹ Further information was provided by the Norwegian Government by emails dated 30 November 2010 (Event No 579363) and 10 December 2010 (Event No 580500).
5. Having examined the information provided for by the Norwegian Government, on 29 June 2011, the Authority issued a letter of formal notice to Norway (Event No 569056) in which it concluded that by maintaining in force Section 9(1) third paragraph and Section 11(2) second paragraph, of the Annual Holidays Act, Norway had failed to fulfil its obligations arising from Article 7 of the Working Time Directive.
6. After an extension of the deadline, the reply to the letter of formal notice was submitted by the Norwegian Government by letter of 23 September 2011 (ref. 11/3509-, Event No 609813). In its reply the Norwegian Government explained that it followed from Section 9(1) third paragraph of the Annual Holidays Act that an employee who due to illness had not been able to take the whole of the annual leave, might demand 12 working days transferred to the following holiday year. The provision following from Section 7(3) third paragraph of the Annual Holidays Act is being interpreted also to include cases of illness, which implies that employees are entitled to transfer all unused holidays due to illness to the next annual year. Nevertheless, seeing that both the wording of this provision on its own and its reading in conjunction with Section 9(1) third paragraph might give another impression and could lead to misunderstandings the Norwegian Government committed to clarify these provisions.
7. The Norwegian Government furthermore explained that it saw that the possibility to get holiday pay in lieu due to illness, following from Section 11(2) second paragraph of the Annual Holidays Act might be in breach of Article 7(2) of the Working Time Directive

¹ See the follow-up letter to the package meeting (Event No 578290 in Case No 68544).

which stated that paid annual leave only could be replaced by a payment in lieu in the event of termination of employment. Therefore, the Norwegian Government committed to take the necessary steps to bring the abovementioned Sections of the Annual Holidays Act in accordance with Article 7 of the Working Time Directive.

8. The information provided for in the letter of 23 September 2011 was further confirmed by Norway at the package meetings held on 10 and 11 November 2011² and on 25 and 26 October 2012³.
9. A request for an update about the legislative process was sent to Norway on 5 July 2013 (Event No 675402), to which Norway replied on 24 July 2013 (ref. 11/3509-, Event No 679262) to the effect that amendments to the relevant national rules were expected to enter into force on 1 January 2014.
10. The case was discussed at the package meeting in Norway on 21 and 22 November 2013. The representatives of the Norwegian Government informed the Authority's representatives that the necessary amendments of the Annual Holidays Act had not yet been adopted and were expected to enter into force by July 2014.⁴

2 Relevant national law

11. The Annual Holidays Act guarantees persons who are employed the right to holidays and a holiday allowance (see Section 1). According to Section 5 of the Act, the employer shall ensure the worker 25 days of annual leave each year which shall be taken before the end of the holiday year (see Section 4).
12. Section 7(3) of the Act reads:⁵

"A written agreement may be entered into concerning the taking of advance holidays of up to 12 days, and the transfer of up to 12 days to the next annual leave year. Advance holidays and transfer of annual leave days exceeding this limit may not be agreed upon.

Annual leave which in violation of this Act is not taken before the end of the annual leave year shall be transferred to the next annual leave year. If the non taking of leave is due to matters referred to in Section 9(1) and (2), the provision in Section 11(2), second paragraph, applies. If the non taking of annual leave is due to the employer's fault, the worker can, in addition to the transfer, claim compensation under Section 14."

13. Section 9(1) reads:

"A worker who becomes completely incapacitated for work before his holiday may request to have the holiday postponed until later in the leave year. The request must be supported by a medical certificate and be submitted at the latest on the last working day the worker would have worked before the holiday.

² See the follow-up letter to the package meeting (Event No 616046 in Case No 70022).

³ See the follow-up letter to the package meeting (Event No 652036 in Case No 72128).

⁴ See the follow-up letter to the package meeting (Event No 691859 in Case No 74044).

⁵ The Authority's unofficial translation.

[...]

If for reasons of incapacity for work, the total annual leave cannot be taken by the end of the holiday year, the worker may request to have up to 12 days transferred into the next annual leave year. A request for such a transfer must be made before the end of the annual leave year."

14. Section 11(2) reads:

"If annual leave is transferred into the next annual leave year, the holiday pay for the transferred leave days shall be paid when the leave is taken (see paragraph 1).

Holiday pay for annual leave which due to situations mentioned in Section 9(1) and (2) is neither taken during the annual leave year nor transferred into the next annual leave year, shall be paid out on the first regular pay day following the end of the annual leave year."

3 Relevant EEA law

15. Article 1(1) of the Working Time Directive lays down minimum requirements for the organisation of working time. Chapter 2 of the Directive sets out the measures to be taken by the EEA States to ensure that every worker is entitled to minimum periods of daily and weekly rest, and paid annual leave. It also lays down rules on breaks and maximum weekly working time.

16. With regard to annual leave, Article 7 of the Directive 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."

17. Article 17 of the Directive allows EEA States to derogate from certain provisions of the Directive. However, no derogation is allowed in respect of Article 7.

4 The Authority's Assessment

18. A reading of the Annual Holidays Act, together with the information provided by the Norwegian Government, indicates that a transfer of untaken annual leave between annual leave years may fall into the following three categories.

19. First, a mutually agreed transfer of up to 12 leave days (see Section 7(3) first paragraph). Second, mandatory transfer of all the leave days which in violation of the Act have not been taken before the end of the leave year (see Section 7(3) second paragraph). Third, transfer of up to 12 leave days in the event the worker has not, due to incapacity for work, taken all of his/her annual leave by the end of the year (see Section 9(1) third paragraph).

20. In the view of the Authority, the provision falling under the third category raises certain questions with regard to Article 7 of the Working Time Directive.
21. Pursuant to Section 9(1) first paragraph of the Annual Holidays Act, a worker who has not been able to take his/her annual leave due to sickness before the start of his/her scheduled annual leave is guaranteed, on proof of illness by a medical certificate, a right to compensatory annual leave at another time within the same annual leave year. However, pursuant to Section 9(1) third paragraph a worker who has not been able to take his/her leave later in the same leave year due to long-term sickness, only has a right under Norwegian law to transfer 12 of his/her unused annual leave days into the subsequent year.
22. Furthermore, Section 11(2) second paragraph of the Act provides that annual leave which, due to incapacity for work (see Section 9(1)) is neither taken during the annual leave year nor transferred into the next year shall be paid out, *i. e.* the accrued holiday pay, on the first day following the end of the annual leave year. It follows from Section 11(2) second paragraph that in such circumstances the corresponding annual leave days will be lost.
23. The Authority takes the view that these two provisions in the Annual Holidays Act do not comply with Article 7(1) and (2) of the Working Time Directive, respectively.

Article 7(1) of the Working Time Directive

24. It is established case law of the Court of Justice of the European Union (“the Court of Justice”) that in order to protect the right of workers to four weeks’ annual leave as prescribed by Article 7(1) of the Working Time Directive the EEA States must lay down rules which guarantee workers who have not been able to take their annual leave due to sickness or other legitimate reasons a right to compensatory annual leave days. This obligation also extends to the laying down of provisions which enable workers, in such circumstances, to transfer their untaken leave days between annual years.⁶
25. In Joined Cases *Schultz-Hoff and others*,⁷ the Court of Justice held, *inter alia*, that Article 7(1) of the Working Time Directive must be interpreted as precluding national legislation which provides that the right to paid annual leave is extinguished at the end of the leave year even where a worker has been sick for the whole year and could not exercise his/her right to paid annual leave.⁸
26. The Authority notes that Section 9(1) of the Annual Holidays Act permits only the carrying over of 12 days of untaken annual leave on request of the worker to the following leave year. However, a worker may, due to long-term sickness, have more than 12 days of annual leave left by the end of the annual leave year. In such a case, the worker would lose part of the four weeks of minimum annual leave granted by Article 7(1) of the Directive.
27. In an email dated 10 December 2010, the Norwegian Government stated that a worker who for some reason, including incapacity for work, had annual leave left at the end of the leave year (exceeding the 12 days mentioned above) would automatically have that leave

⁶ See also Case C-173/199 *Bectu* [2001] ECR I-4881, paragraph 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.”

⁷ Joined Cases C-350/06 and C-520/06 *Schultz-Hoff and others* [2009] ECR I-179.

⁸ Joined Cases C-350/06 and C-520/06 *Schultz-Hoff and others*, cited above, paragraphs 43 and 45.

transferred to the next annual leave year. According to the Norwegian Government, this follows from Section 7(3) second paragraph of the Annual Holidays Act.

28. The Authority finds it difficult to reconcile the above statement by the Norwegian Government with the wording of Section 7(3) second paragraph of the Annual Holidays Act.
29. Indeed, the first sentence of Section 7(3) second paragraph appears to lay down the principle that annual leave not taken during the annual leave year, in violation of the Act, shall be transferred to the next year. However, this provision would not apply when the reason for the non-taking of the annual leave is long-term sickness.
30. Based on the above, the Authority takes the view that by setting a limit on the number of annual leave days which may be transferred Section 9(1) third paragraph of the Annual Holidays Act is in breach of Article 7(1) of the Working Time Directive.

Article 7(2) of the Working Time Directive

31. As stated above, Section 11(2) second paragraph of the Act provides that annual leave which, due to incapacity for work (see Section 9(1)) is neither taken during the annual leave year nor transferred into the next year will give rise to a financial compensation. In those circumstances the worker shall receive his/her accrued holiday pay on the first day following the end of the annual leave year.
32. By itself, this provision is in breach of Article 7(2) of the Working Time Directive which states that the four weeks' paid annual leave may not be replaced by a payment in lieu, except after termination of employment.
33. This was further confirmed by the Court of Justice in Case C-124/05 *Vakbeweging*,⁹ where it held that national practice allowing for the payment of financial compensation to an employee, who had not, in one year, taken his/her minimum annual leave, was contrary to Article 7(2) of the Working Time Directive. According to this provision, the four weeks' paid annual leave may not be replaced by a payment in lieu, except after termination of employment. The Court of Justice stated that the positive effect which that leave had for the safety and health of the worker was deployed fully if it was taken in the year prescribed for that purpose, namely the current year. However, the significance of that rest period in that regard remains if it is taken during a later period.¹⁰
34. The possibility of financial compensation in respect of the minimum period of annual leave carried over would create an incentive, incompatible with the objectives of the Directive, not to take leave or to encourage employees not to do so.¹¹
35. Consequently, Article 7(2) of the Directive precludes the replacement, by an allowance in lieu, of the minimum period of paid annual leave, in the case where it is carried over to a subsequent year.¹²

⁹ Case C-124/05 *Vakbeweging* [2006] ECR I-3423.

¹⁰ Case C-124/05 *Vakbeweging*, cited above, paragraph 30. See also Case C-277/08 *Pereda* [2009] ECR I-8405, paragraph 24.

¹¹ Case C-124/05 *Vakbeweging*, cited above, paragraph 31.

¹² Case C-124/05 *Vakbeweging*, cited above, paragraphs 28-33.

36. Based on the above, the Authority must conclude that Section 11(2) second paragraph of the Annual Holidays Act is in breach of Article 7(2) of the Working Time Directive.

FOR THESE REASONS,

THE EFTA SURVEILLANCE AUTHORITY,

pursuant to the first paragraph of Article 31 of the Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice, and after having given Norway the opportunity of submitting its observations,

HEREBY DELIVERS THE FOLLOWING REASONED OPINION

that by maintaining in force a rule whereby a worker who has not been able to take his/her leave later in the same leave year due to long-term sickness, only has a right to transfer 12 of his/her unused annual leave days into the subsequent year, and whereby annual leave which, due to incapacity for work is neither taken during the annual leave year nor transferred into the next year, is replaced by payment in lieu, such as the rule provided for in Section 9(1) third paragraph and Section 11(2) second paragraph of the Annual Holidays Act, Norway has failed to fulfil its obligations arising from Article 7 of the Act referred to at point 32h of Annex XVIII to the EEA Agreement (*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*), as adapted to the EEA Agreement by Protocol 1 thereto.

Pursuant to the second paragraph of Article 31 of the Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice, the EFTA Surveillance Authority requires Norway to take the measures necessary to comply with this reasoned opinion within *two months* following notification thereof.

Done at Brussels, 12 February 2014

For the EFTA Surveillance Authority


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