ECLI:EU:C:2022:718

Provisional text

JUDGMENT OF THE COURT (Sixth Chamber)

22 September 2022 (*)

(Reference for a preliminary ruling – Social policy – Protection of the safety and health of workers – Organisation of working time – Article 31(2) of the Charter of Fundamental Rights of the European Union – Directive 2003/88/EC – Article 7 – Right to paid annual leave – Allowance in lieu of leave not taken after the termination of the employment relationship – Three-year limitation period – Starting point – Adequate information provided to the worker)

In Case C-120/21,

REQUEST for a preliminary ruling under Article 267 TFEU from the Bundesarbeitsgericht (Federal Labour Court, Germany), made by decision of 29 September 2020, received at the Court on 26 February 2021, in the proceedings

LB

v

TO,

THE COURT (Sixth Chamber),

composed of I. Ziemele (Rapporteur), President of the Chamber, P.G. Xuereb and A. Kumin, Judges,

Advocate General: J. Richard de la Tour,

Registrar: D. Dittert, Head of Unit,

having regard to the written procedure and further to the hearing on 24 March 2022,

after considering the observations submitted on behalf of:

– the German Government, by J. Möller and R. Kanitz, acting as Agents,

– the European Commission, by B.-R. Killmann and D. Recchia, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 5 May 2022,

gives the following

Judgment

1 This request for a preliminary ruling concerns the interpretation of Article 7 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) and of Article 31(2) of the Charter of Fundamental Rights of the European Union ('the Charter').

2 The request has been made in proceedings between TO, a worker, and LB, her employer, concerning an allowance in lieu of days of paid annual leave not taken.

Legal context

European Union law

3 Recitals 4 and 5 of Directive 2003/88 state:

'(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. …'

4 Article 7 of that directive, entitled 'Annual leave', 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 The general provisions on the limitation period regarding rights as between individuals are set out in Chapter 5 of Book 1, entitled 'General Part', of the Bürgerliches Gesetzbuch (Civil Code; 'the BGB'). Chapter 5 contains Paragraphs 194, 195 and 199 of that code. They define the subject matter, duration and starting point of the general limitation period, respectively.

6 Paragraph 194(1) of the BGB provides:

'The right to require another person to act or refrain from acting (enforceable claim) is subject to a limitation period.

…'

7 Paragraph 195 of the BGB provides:

‘The general limitation period shall be three years.

…’

8 Paragraph 199(1) of the BGB is worded as follows:

‘Unless otherwise provided for, the general limitation period shall begin to run at the end of the year in which

1. the right arose, and

2. the obligee became aware of the circumstances giving rise to the right and the identity of the obligor, or should have been aware of them in the absence of gross negligence on his or her part.’

9 Under Paragraph 204 of the BGB, the limitation period is suspended by the bringing of legal proceedings.

10 Paragraph 1, entitled ‘Leave entitlement’, of the Mindesturlaubsgesetz für Arbeitnehmer (Bundesurlaubsgesetz) (Law on minimum leave entitlement for workers (Federal Law on Leave)), in the version applicable to the dispute in the main proceedings (‘the BUrlG’), provides:

‘Every employee shall be entitled to paid recuperative leave in each calendar year.’

…’

11 Under Paragraph 7(3) and (4) of the BUrlG:

‘(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. If leave is carried over it must be authorised and taken during the first three months of the following calendar year. At the request of the employee, partial leave acquired in accordance with Paragraph 5(1)(a) shall nevertheless be carried over to the following calendar year.

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

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

12 TO was employed by LB from 1 November 1996 to 31 July 2017.

13 Following the termination of the employment relationship, TO requested that LB pay her an allowance in lieu of the 101 days of paid annual leave accumulated between 2013 and 2017 that she had not taken.

14 The action brought on 6 February 2018 by TO against LB’s refusal to pay her that allowance was upheld in part at first instance. TO was thus granted an allowance corresponding to three days of paid annual leave not taken in 2017. By contrast, that action was dismissed as regards the claims relating to the days of paid annual leave not taken from 2013 to 2016.

15 TO brought an appeal against that decision before the Landesarbeitsgericht Düsseldorf (Higher Labour Court, Düsseldorf, Germany), which held that TO was entitled to an allowance in lieu of 76 additional days of paid annual leave not taken in the period between 2013 and 2016. That court found that LB had not contributed to TO's being able to take her leave in those years in good time, with the result that her entitlement was not extinguished nor was it subject to the general limitation period laid down in Paragraph 194 et seq. of the BGB.

16 LB brought an appeal on a point of law (*Revision*) against that decision before the Bundesarbeitsgericht (Federal Labour Court, Germany). The referring court considers that TO's entitlement for the years 2013 to 2016 is not extinguished under Paragraph 7(3) of the BUrlG, since LB failed to put TO in a position actually to take her paid annual leave in good time. Therefore, pursuant to the judgment of 6 November 2018, *Max-Planck-Gesellschaft zur Förderung der Wissenschaften* (C-684/16, EU:C:2018:874), according to which an employer must encourage workers to take leave and inform them of the possible loss of that right, TO's request for an allowance in lieu should in principle be upheld.

17 However, the referring court states that LB raised a plea that TO's claims were time-barred under Paragraph 194 of the BGB. Under Paragraphs 195 and 199 of the BGB, an obligee's claims are time-barred three years after the end of the year in which his or her right arose.

18 The referring court states that, if it were to apply that general limitation rule, it would follow that a non-compliant employer, inasmuch as it has not put the worker in a position actually to take paid leave, would avoid complying with its obligations and benefit financially from that situation.

19 According to that court, it follows from the judgment of 16 July 2020, *Caixabank and Banco Bilbao Vizcaya Argentaria* (C-224/19 and C-259/19, EU:C:2020:578), that EU law does not preclude the application of limitation periods, provided that they do not make it practically impossible or excessively difficult to exercise rights conferred by EU law.

20 Since national legislation which allows for the carrying-over of entitlement to paid annual leave acquired by the worker to be time-barred or extinguished, first, validates conduct by which an employer is unjustly enriched and, second, runs counter to the objective of protecting the health of workers, the referring court has doubts as to whether the application of the limitation rule laid down in Paragraph 194 et seq. of the BGB is compatible with the right enshrined in Article 7 of Directive 2003/88 and in Article 31(2) of the Charter.

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

'Do Article 7 of [Directive 2003/88] and Article 31(2) of the [Charter] preclude the application of national legislation such as Paragraph 194(1), in conjunction with Paragraph 195, of the [BGB], under which the entitlement to paid annual leave is subject to a standard limitation period of three years, which starts to run at the end of the leave year under the conditions set out in Paragraph 199(1) of the BGB, if the employer has not actually enabled a worker to exercise his or her leave entitlement by accordingly informing him or her of the leave and inviting him or her to take that leave?'

Consideration of the question referred

22 By its question, the referring court asks, in essence, whether Article 7 of Directive 2003/88 and Article 31(2) of the Charter must be interpreted as precluding national legislation under which

the right to paid annual leave acquired by a worker in respect of a given reference period is time-barred after a period of three years which begins to run at the end of the year in which that right arose, where the employer has not actually put the worker in a position to exercise that right.

23 According to Article 7(1) of Directive 2003/88, Member States are to 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. Under Article 7(2) thereof, the minimum period of paid annual leave may not be replaced by an allowance in lieu, except where the employment relationship is terminated.

24 Consequently, as is apparent from the very wording of Article 7 of Directive 2003/88 and from the case-law of the Court, it is for the Member States 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 the right (judgment of 6 November 2018, *Kreuziger*, C-619/16, EU:C:2018:872, paragraph 41 and the case-law cited).

25 In that regard, the Court has found that Article 7(1) of Directive 2003/88 does not in principle preclude national legislation which lays down conditions for the exercise of the right to paid annual leave expressly conferred by the directive, including even the loss of that right at the end of a leave year or of a carry-over period, provided that the worker who has lost his or her right to paid annual leave has actually had the opportunity to exercise the right conferred on him or her by the directive (judgment of 6 November 2018, *Kreuziger*, C-619/16, EU:C:2018:872, paragraph 42 and the case-law cited).

26 Having regard to the context and objectives pursued by Article 7 of Directive 2003/88, it has thus been held that, where a worker was unfit for work for several consecutive reference periods, Article 7 of Directive 2003/88 did not preclude national provisions or practices limiting, by a carry-over period of 15 months on the expiry of which the right to paid annual leave lapses, the accumulation of entitlements to such leave (see, to that effect, judgment of 22 November 2011, *KHS*, C-214/10, EU:C:2011:761, paragraph 44).

27 That situation was justified on the basis of not only the protection of workers but also the protection of employers, faced with the risk that a worker will accumulate periods of absence of too great a length and with the difficulties for the organisation of work which such periods might entail (see, to that effect, judgment of 22 November 2011, *KHS*, C-214/10, EU:C:2011:761, paragraphs 38 and 39).

28 Accordingly, it is only where there are ‘specific circumstances’ that the right to paid annual leave enshrined in Article 7 of Directive 2003/88 may be limited (see, to that effect, judgment of 29 November 2017, *King*, C-214/16, EU:C:2017:914, paragraph 56 and the case-law cited).

29 In the present case, it is apparent from the request for a preliminary ruling that the limitation of the entitlement of the respondent in the appeal on a point of law (‘the respondent in the main proceedings’) to paid annual leave could be relied on against her in the main proceedings pursuant to the general limitation rule laid down in Paragraph 195 of the BGB.

30 It follows that the national legislation at issue in the main proceedings places a limitation on the exercise of the right to paid annual leave that the respondent in the main proceedings derives from Article 7 of Directive 2003/88; that limitation arises from the application of the limitation period laid down by the national legislation.

31 No provision of that directive is intended to govern the limitation period in respect of that right, however.

32 Since the referring court is asking the Court to interpret not only Article 7(1) of Directive 2003/88 but also, in conjunction with it, Article 31(2) of the Charter, it must be borne in mind, first, that Article 7 of Directive 2003/88 reflects and gives concrete expression to the fundamental right to an annual period of paid leave, enshrined in Article 31(2) of the Charter. While the latter provision guarantees the right of every worker to an annual period of paid leave, the former provision implements that principle by setting the duration of that period (judgment delivered today, *Fraport*, C-518/20 and C-727/20, paragraph 26 and the case-law cited).

33 Second, the right to paid annual leave is, as a principle of EU social law, particularly important and is also expressly enshrined in Article 31(2) of the Charter, which Article 6(1) TEU recognises as having the same legal value as the Treaties (judgment delivered today, *Fraport*, C-518/20 and C-727/20, paragraph 25 and the case-law cited).

34 As is apparent from paragraph 30 of this judgment, the general limitation period referred to in Paragraph 195 of the BGB has the effect of limiting the exercise of the right to paid annual leave that the respondent in the main proceedings derives from Article 7 of Directive 2003/88.

35 Consequently, the application of the general limitation rule to the claims of the respondent in the main proceedings also constitutes a limitation on the right conferred on her by Article 31(2) of the Charter.

36 It is common ground that limitations may be imposed on the fundamental rights enshrined in the Charter only if the strict conditions laid down in Article 52(1) thereof are complied with, that is to say, if those limitations are provided for by law, respect the essence of that right and, subject to the principle of proportionality, are necessary and genuinely meet objectives of general interest recognised by the European Union (judgment delivered today, *Fraport*, C-518/20 and C-727/20, paragraph 33).

37 In the present case, first, the limitation on the exercise of the fundamental right referred to in Article 31(2) of the Charter resulting from the application of the limitation period at issue in the main proceedings is laid down by law, more specifically in Paragraph 195 of the BGB.

38 Second, the question arises as to whether the application of that limitation rule has the effect of undermining the very substance of the right to paid annual leave.

39 In that regard, by virtue of Paragraph 195 of the BGB, it is only upon expiry of a three-year period that the time-barring of rights which the worker has acquired under his or her right to paid annual leave for a given period may be relied upon against him or her. Furthermore, under Paragraph 199 of the BGB, that limitation period does not begin to run until the end of the year in which that right arose and the worker became aware of the circumstances giving rise to it and of the identity of his or her employer, or should have been aware of them in the absence of gross negligence on his or her part.

40 It follows that the application, at the request of the employer, of the general limitation rule laid down in the national legislation, in so far as it merely makes the possibility for the worker to assert his or her right to paid annual leave subject to a three-year time limit, provided that he or she is aware of the circumstances giving rise to that right and the identity of the employer, does not undermine the very substance of that right.

41 Third, as regards the question whether the limitations to the exercise of the right to paid annual leave enshrined in Article 31(2) of the Charter which follow from the application of the limitation period laid down in Paragraph 195 of the BGB do not go beyond what is necessary to attain its objective, the German Government stated, in its written observations, that that provision of the BGB, as a general limitation regime, pursues a legitimate objective, that is to say, of ensuring legal certainty.

42 In particular, that government maintained that an employer should not be faced with a request for leave or for an allowance in lieu of paid annual leave not taken on the basis of a right acquired more than three years before that request is made. Furthermore, according to that government, that provision encourages workers to exercise their right to paid annual leave at the latest three years after that right has arisen, thereby contributing to the attainment of the objective of providing for rest underlying the provisions of Article 7(1) of Directive 2003/88.

43 As regards the case in the main proceedings, it must be borne in mind, in the first place, that, as is apparent from the request for a preliminary ruling, TO was not actually put in a position by her employer to exercise her right to paid annual leave.

44 In that regard, since the worker must be regarded as the weaker party in the employment relationship, the burden of ensuring that the right to paid annual leave is actually exercised should not rest fully on the worker, while the employer may, as a result thereof, take free of the need to fulfil its own obligations by arguing that no request for paid annual leave was submitted by the worker (see, to that effect, judgment of 6 November 2018, *Max-Planck-Gesellschaft zur Förderung der Wissenschaften*, C-684/16, EU:C:2018:874, paragraphs 41 and 43).

45 It follows that, as has been noted in paragraph 25 of this judgment, the loss of the right to paid annual leave at the end of a given leave year or carry-over period can occur only provided that the worker concerned has actually had the opportunity to exercise that right in good time.

46 In the second place, it must be pointed out, subject to verification by the referring court, that the plea that the claims are time-barred is raised not of the court's own motion but, in accordance with Paragraph 214(1) of the BGB, by the obligor in respect of the obligation on which the obligee relies.

47 In the context of the case in the main proceedings, it is therefore LB, as TO's employer, that argues that the right on which TO relies is time-barred.

48 It cannot be accepted, however, under the pretext of ensuring legal certainty, that an employer may rely on its own non-compliance, namely failing to put a worker in a position actually to exercise his or her right to paid annual leave, in order to take advantage of it in the context of that worker's action asserting the same right, by pleading that the right in question is time-barred.

49 First, in such a situation, the employer could avoid complying with its obligations to provide encouragement and information.

50 Such avoidance would appear to be all the more unacceptable since it would mean that the employer, which could then validly plead that the worker's right to annual leave is time-barred, will have refrained from putting the worker in a position actually to exercise that right for three consecutive years.

51 Second, where the worker's right to paid annual leave is time-barred, the employer benefits from that fact.

52 In those circumstances, to accept that the employer may rely on the limitation period in respect of a worker's entitlement without actually having put that worker in a position to exercise it would amount to validating conduct by which an employer was unjustly enriched, to the detriment of the very purpose of having due regard for workers' health referred to by Article 31(2) of the Charter (see, to that effect, judgment of 29 November 2017, *King*, C-214/16, EU:C:2017:914, paragraph 64).

53 While it is true that an employer has a legitimate interest in not having to handle requests for leave or for allowance in lieu of periods of paid annual leave not taken, corresponding to rights acquired more than three years before the request is made, the legitimacy of that interest disappears where the employer, by failing to put the worker in a position actually to exercise the right to paid annual leave, has put itself in a situation in which it is faced with such requests and from which it is liable to benefit to the detriment of the worker, which it is for the referring court to verify in the case in the main proceedings.

54 Such a situation is not comparable to that in which the Court has recognised that the employer has a legitimate interest in not being faced with the risk that a worker will accumulate periods of absence of too great a length and with the difficulties for the organisation of work which such periods might entail where the prolonged absence of a worker is due to his or her being unfit for work on account of illness (see, to that effect, judgment of 22 November 2011, *KHS*, C-214/10, EU:C:2011:761, paragraphs 38 and 39).

55 In circumstances such as those of the case in the main proceedings, it is for the employer to protect itself against late requests in respect of periods of paid annual leave not taken by complying with its obligations to provide the worker with information and encouragement, which will have the effect of ensuring legal certainty, without however limiting the fundamental right enshrined in Article 31(2) of the Charter.

56 In the light of those factors, it must be held that, where an employer has not actually put a worker in a position to exercise his or her right to paid annual leave acquired in respect of a given reference period, the application of the general limitation period laid down in Paragraph 195 of the BGB to the exercise of that right enshrined in Article 31(2) of the Charter goes beyond what is necessary to attain the objective of legal certainty.

57 It follows from all the foregoing considerations that the answer to the question referred is that Article 7 of Directive 2003/88 and Article 31(2) of the Charter must be interpreted as precluding national legislation under which the right to paid annual leave acquired by a worker in respect of a given reference period is time-barred after a period of three years which begins to run at the end of the year in which that right arose, where the employer has not actually put the worker in a position to exercise that right.

Costs

58 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 (Sixth Chamber) hereby rules:

Article 7 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 Article 31(2) of the Charter of Fundamental Rights of the European Union

must be interpreted as precluding national legislation under which the right to paid annual leave acquired by a worker in respect of a given reference period is time-barred after a period of three years which begins to run at the end of the year in which that right arose, where the employer has not actually put the worker in a position to exercise that right.

[Signatures]

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* Language of the case: German.