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Provisional text

OPINION OF ADVOCATE GENERAL

TANCHEV

delivered on 8 June 2017 (1)

Case C-214/16

C. King

v

The Sash Window Workshop Ltd

Richard Dollar

(Request for a preliminary ruling from the Court of Appeal (England & Wales) (Civil Division) (United Kingdom))

(Social Policy — Article 7 of Directive 2003/88/EC and the right to paid annual leave — Article 31 of the EU Charter of Fundamental Rights in horizontal disputes between two private parties — Absence of a facility for the full duration of the employment relationship for exercise of the right to paid annual leave — Member State law requiring workers to first take leave before being able to ascertain if the leave will be paid — Article 7(2) of Directive 2003/88 and the right to an allowance in lieu of leave untaken upon termination of the employment relationship — right to an effective remedy)

I. **Introduction**

1. When a worker like Mr King has, throughout the course of a 13 year employment relationship, been afforded a facility by his employer for exercise of the right to paid annual leave only part of the way through the relationship, or perhaps not at all, (2) can the right to paid annual leave be extinguished by Member State law on the basis that Mr King did not take steps to invoke the right to paid annual leave until the employment relationship was terminated?

2. This is the question that arises in the order for reference of the Court of Appeal of England and Wales. It requires interpretation of Article 7(1) and (2) 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, (3) and particularly in the light of Article 31(2) of the EU Charter of Fundamental Rights, the text of which states, without qualification, that '[e]very worker has the right to … 'an annual period of paid leave'. The precise content of the right to paid annual leave under EU law further merits assessment, as does the extent to which there are any restrictions on its applicability in the dispute to hand, given that Mr King is relying on Directive 2003/88 against a private sector actor. (4)

3. The problem to hand is of acute social importance, given the increasing number of people across the European Union who work on flexible, casual, and intermittent bases. These forms of employment are becoming ever more prevalent because of the provision of services via digital technologies in the age of the internet. Who should bear the risk of non-compliance with the right to paid annual leave when there is no facility in the employment relationship for its exercise, the employer or the workers concerned? Is it compatible with the EU right to paid annual leave for Member State law to first oblige a worker to take leave, before being able to ascertain if the leave will be paid? And in the circumstances of the main proceedings, what limit, if any, should be placed on what a worker like Mr King might be able to recover through an allowance in lieu of paid annual leave at termination of employment under Article 7(2) of Directive 2003/88?

4. I have come to the conclusion that, in the light of the considerable normative weight of the right to paid annual leave under EU, international, (5) and Member State law, (6) requiring a worker, rather than the employer, to take steps to create an adequate facility for the exercise of paid annual leave would unlawfully make the existence of the right subject to a pre-condition, (7) and therefore falls beyond the parameters of the discretion afforded to Member States under Article 7(1) of Directive 2003/88 with respect to 'conditions for entitlement to, and granting of, such leave'.

5. Thus, pursuant to Article 7(2) of Directive 2003/88, a provision which cannot be interpreted restrictively, (8) an allowance in lieu of paid annual leave is triggered upon termination of the employment relationship, and to cover the whole of the period in which no adequate facility was afforded by the employer for the exercise of the right to paid annual leave, and ending only once that facility became available. It is only at this point that temporal and other restrictions on exercise of the right to paid annual leave that

Member States may have elected to impose can commence to apply, and even then only if such restrictions fall within the boundaries of the discretion afforded to Member States under Article 7(1) of Directive 2003/88, and are otherwise in conformity with EU law. If an adequate facility for exercise of the right to paid annual leave was never provided, then an allowance is due under Article 7(2) of Directive 2003/88 to cover the full period of employment until termination of the employment relationship.

II. **Legal framework**

A. **EU law**

6. Recital 6 of Directive 2003/88 states:

'Account should be taken of the principles of the International Labour Organisation with regard to the organisation of working time …'

7. Article 1 of Directive 2003/88 is entitled 'Purpose and scope'. Article 1(1) thereof states:

'This Directive lays down minimum safety and health requirements for the organisation of working time.'

8. Article 7 of Directive 2003/88 is entitled 'Annual leave' and states:

'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 for annual leave may not be replaced by an allowance in lieu, except where the employment relationship is terminated.'

B. **National law**

9. Directive 2003/88 is implemented in the UK by the Working Time Regulations 1998 (as amended). Regulation 13(1) reads as follows:

'(1) … a worker is entitled to four weeks annual leave in each leave year.'

10. The right to payment is conferred by regulation 16 which states as follows:

'(1) A worker is entitled to be paid in respect of any period of annual leave to which he is entitled under regulation 13, at the rate of a week's pay in respect of each week of leave.'

11. The order for reference further explains that regulation 13(9) introduces what is colloquially termed the 'lose it or use it' principle. It requires leave to be taken in the year it is due, or it will be lost. Regulation 13(9) states as follow:

'Leave to which a worker is entitled under this regulation may be taken in installments, but -

(a) it may only be taken in the leave year in respect of which it is due, and

(b) it may not be replaced by a payment in lieu except where the worker's employment is terminated.'

12. The national referring court states that there are three other UK regulations that are potentially relevant to the main proceedings. Regulation 14 provides for the exceptional circumstances in which Article 7 of Directive 2003/88 permits a payment in lieu of taking leave, namely where a contract is terminated in a leave year and the worker has not by then taken the proportionate amount of leave to which he is entitled. Regulation 14 states as follows:

'(1) This regulation applies where –

(a) a worker's employment is terminated during the course of his leave year, and

(b) on the date on which the termination takes effect ("the termination date"), the proportion he has taken of the leave to which he is entitled in the leave year under regulation 13(1) differs from the proportion of the leave year which has expired.

(2) Where the proportion of leave taken by the worker is less than the proportion of the leave year which has expired, his employer shall make him a payment in lieu of leave in accordance with paragraph (3) …'

13. Regulation 15 governs the procedure for taking leave and the dates on which leave may be taken. It states:

'(1) A worker may take leave to which he is entitled under regulation 13 … on such days as he may elect by giving notice to his employer in accordance with paragraph (3), subject to any requirement imposed on him by his employer under paragraph (2).

(2) A worker's employer may require the worker -

(a) to take leave to which the worker is entitled under regulation 13(1); or

(b) not to take such leave, on particular days, by giving notice to the worker in accordance with paragraph (3).'

14. Regulation 30 deals with enforcement and remedies. According to the order for reference, it draws a distinction between a case where the worker is denied the right to time off under regulation 13(1) on the one hand, and cases where the employer fails to pay the wages to which the worker is entitled either under regulation 16 or 14 on the other. Regulation 30 states:

'A worker may present a complaint to an employment tribunal that his employer

(a) has refused to permit him to exercise any right he has under … regulation 13(1) …

(b) has failed to pay him the whole or any part of any amount due to him under regulation 14(2) or 16(1) …

(2). An employment tribunal shall not consider a complaint under this regulation unless it is presented -

(a) before the end of the period of three months (or, in a case to which regulation 38(2) applies, six months) beginning with the date on which it is alleged that the exercise of the right should have been permitted (or in the case of a rest period or leave extending over more than one day, the date on which it should have been permitted to begin) or, as the case may be, the payment should have been made;

(b) within such further period as the tribunal considers reasonable in a case where it is satisfied that it was not reasonably practicable for the complaint to be presented before the end of that period of three or, as the case may be, six months.'

III. The facts in the main proceedings and the question referred for a preliminary ruling

15. The first defendant, the Sash Window Workshop Ltd ('SWWL'), is a company that provides and installs windows and doors. The second defendant, Richard Dollar, is the joint Managing Director of SWWL. Mr King commenced working for SWWL on 1 June 1999 as a salesman. He was paid only by way of commission, indexed to the sales that he brought in. He was not paid for any leave taken. There was no right to paid leave in his contract, which was silent on the question of paid annual leave. The contract was described in the order for reference as a 'self-employed commission only contract'.

16. However, SWWL offered Mr King an employee contract in 2008, which the representative for Mr King stated at the hearing included all the rights ordinarily enjoyed by workers, such as the right to paid annual leave. Mr King elected to remain self-employed. (9)

17. Mr King worked for SWWL continuously until he was dismissed with effect from his 65th birthday on 6 October 2012. On 20 December 2012 Mr King instituted proceedings in the United Kingdom Employment Tribunal, and a hearing took place from 20 to 22 August 2013.

18. Mr King succeeded in the Employment Tribunal with regard to a claim on the basis of discrimination on the basis of age with respect to his dismissal, and neither this aspect of his claim, nor the finding of the Employment Tribunal that Mr King was a 'worker' for the purposes of the United Kingdom Working Time Regulations, which implement Directive 2003/88, were appealed to the Employment Appeal Tribunal.

19. Mr King also succeeded in the Employment Tribunal with respect to his claim for paid holidays. He did so under three different heads:

1. 'Holiday Pay 1', for UKL 518.40 relating to paid leave accrued but untaken during Mr King's final (incomplete) leave year from 1 June to 6 October 2012.

2. 'Holiday Pay 2', for UKL 17 402.83 relating to (unpaid) holiday which Mr King actually took during his previous 13 years with SWWL; and

3. 'Holiday Pay 3', for UKL 9 336.73 relating to leave to which Mr King was entitled whilst working for SWWL but did not in fact take.

20. The SWWL appealed the Employment Tribunal's decision on Holiday Pay 3 to the Employment Appeal Tribunal (the 'EAT').

21. The EAT hearing took place on Tuesday, 4 November 2014. The EAT allowed SWWL's appeal against the Employment Tribunal's decision on Holiday Pay 3 and remitted this element of Mr King's claim to the original Employment Tribunal for rehearing.

22. Mr King appealed to the Court of Appeal against the EAT's decision on Holiday Pay 3 on 23 December 2014. The hearing of the appeal took place on 9 February 2016. There SWWL and Richard Dollar argued that Mr King was out of time to recover 'Holiday Pay 3'. In the order for reference the Court of Appeal observes that the Employment Tribunal held that all Mr King's untaken leave carried forward because SWWL were never prepared to pay for it, so that the right to pay in lieu was triggered at dismissal, and the limitation defence of SWWL and Mr Richard Dollar fell away. On this analysis, Mr King's claim fell within the limitation period because it was brought within three months of the date of termination of his employment.

23. The Court of Appeal identified three issues which required interpretation of EU law with respect to Holiday Pay 3, and which formed the subject of the order for reference. First, the Court of Appeal queried whether regulation 13 of the Working Time Regulations 1998 was consistent with Article 7 of Directive 2003/88 and the right under EU law to an effective remedy, given that, on the logic of the EAT's analysis, the worker would first have to take unpaid leave and only after having done so could he test whether he would be entitled to be paid.

24. Second, the Court of Appeal sought clarification of the circumstances in which untaken paid leave can be carried over, in a context in which Mr King seeks a termination

payment under Article 7(2) of Directive 2003/88 covering the whole of the employment relationship. Given that Mr King did not vindicate his rights before the Employment Tribunal in the course of the employment relationship, can it be said that Mr King had no opportunity to exercise the right to paid annual leave for reasons beyond his control, so that it can be carried over in conformity with the ruling of the Court in *Schultz-Hoff and Others*? (10)

25. Thirdly, the Court of Appeal had doubts, in any event, if paid leave can be carried over indefinitely.

26. In the light of the above, the Court of Appeal referred the following questions to the Court for preliminary ruling.

'(1) If there is a dispute between a worker and employer as to whether the worker is entitled to annual leave with pay pursuant to Article 7 of Directive 2003/88, is it compatible with EU law, and in particular the principle of effective remedy, if the worker has to take leave first before being able to establish whether he is entitled to be paid?

(2) If the worker does not take all or some of the annual leave to which he is entitled in the leave year when any right should be exercised, in circumstances where he would have done so but for the fact that the employer refuses to pay him for any period of leave he takes, can the worker claim that he is prevented from exercising his right to paid leave such that the right carries over until he has the opportunity to exercise it?

(3) If the right carries over, does it do so indefinitely or is there a limited period for exercising the carried-over right by analogy with the limitations imposed where the worker is unable to exercise the right to leave in the relevant leave year because of sickness?

(4) If there is no statutory or contractual provision specifying a carry-over period, is the court obliged to impose a limit to the carry-over period in order to ensure that the application of the Regulations does not distort the purpose behind Article 7?

(5) If so, is a period of 18 months following the end of the holiday year in which the leave accrued compatible with the Article 7 right?'

27. Written observations were submitted by Mr King, SWWL and Richard Dollar, the Government of the United Kingdom and the European Commission. All of them participated at the hearing which took place on 29 March 2017.

IV. **Assessment**

A. **Introductory remarks**

28. I note at the outset that, of all the many orders for reference sent to the Court on the interpretation of Article 7 of Directive 2003/88 with respect to the right to paid annual

leave, (11) this appears to be the first time in which there is no subsisting dispute between the parties as to whether or not the party enforcing the right to paid annual leave is a 'worker' for the purposes of EU and national law, and therefore entitled to paid annual leave, (12) and in which the Court is asked only to consider the consequences flowing from failure of the worker to act earlier than termination of the employment relationship to enforce the right to paid annual leave. (13) The Court is more commonly called on to rule on whether 'the conditions, for entitlement to, and granting of, such leave laid down by national legislation and/or practice', the discretion afforded to Member States under Article 7(1) of Directive 2003/88, are compatible with the EU law. (14)

29. The dominance in the case-law of disagreements concerning the conditions for the exercise of paid annual leave, rather than its existence, might well be reflective of the status and significance of the right in EU, Member State, and international law, embedded as it is in the corpus of fundamental rules of labour law to which adherence is generally rigorous. (15)

30. This is important because, as I will explain at points 71 to 75 below, I harbour doubts as to whether the case-law of the Court to date on whether a worker has actually had the opportunity to exercise the right to paid annual leave, so that Member State restrictions on its exercise are to be set aside, (16) is relevant to resolution of the dispute to hand. This is so because all of them concerned the scope of Member State discretion with respect to the *conditions* for entitlement to and granting of paid annual leave (such as expiry of a period of time for which paid leave can be carried over) (17) but none of them concerned a situation in which the essence of the right was in issue through absence of a facility in the employment relationship for exercise of the right in the first place.

31. As I will explain in the pages that follow, the better approach to the problem to hand entails consideration of the following question. Can Article 7(2) of Directive 2003/88 be relied on by Mr King upon termination of the employment relationship to secure an allowance in lieu of untaken paid leave when the employer created an adequate facility for the exercise of the right to paid annual leave only part of the way through the employment relationship, or perhaps not at all (see points 84 to 86 below).

32. Before turning to this question, it is important to be clear about precisely what the right to paid annual leave entails.

B. Sources of the right to paid annual leave

33. Every worker's right to paid annual leave is a particularly important principle of Union social law, and one which is now enshrined in Article 31(2) of the Charter. There is no provision for its derogation in Directive 2003/88, (18) and it is to be implemented by the competent national authorities within the limits set out in Directive 2003/88. (19) It is a right that has been conferred directly by European Union law on every worker, (20) and Article 7 of Directive 2003/88, which enshrines it, imposes a clear and precise obligation on Member States to achieve a specific result. (21) The right has the dual purpose of

enabling workers both to rest from carrying out the work they are required to do under their contracts of employment and to enjoy a period of relaxation and leisure. (22) As such it is a health and safety measure, as reflected in Article 31(1) of the Charter. In addition to this, the right to paid annual leave in Article 7(1) of Directive 2003/88 cannot be interpreted restrictively (23), and nor can the right to payment in lieu of leave untaken in Article 7(2) of the same directive. (24)

34. Moreover, a cardinal principal of the interpretation of Article 7(1) of Directive 2003/88 is that, while Member States are free to lay down, in their domestic legislation, conditions for the exercise and implementation of the right to paid annual leave, Member States are not entitled to make the very existence of that right subject to any pre-conditions whatsoever. (25) Directive 2003/88 does not allow the Member States to exclude the very existence of a right expressly granted to all of the EU's workers. (26)

35. What then is added by Article 31(2) of the Charter? According to the Explanations accompanying the Charter of Fundamental Rights,(27) Article 31(2) is based on the directive preceding Directive 2003/88, namely Directive 93/104, Article 2 of the European Social Charter of the Council of Europe of 1961, and point 8 of the Community Charter of the Fundamental Social Rights of Workers of 1989. The latter provides that every 'worker of the European Community shall have a right to a weekly rest period and to annual paid leave, the duration of which must be harmonised in accordance with national practices', while the former affirms that with 'a view to ensuring the effective exercise of the right to just conditions of work, the Contracting Parties undertake: … to provide for a minimum of two weeks annual holiday with pay'.

36. It is also noteworthy that Article 31(2) is a specific manifestation of respect for human dignity, which is protected more broadly in Title I of the Charter. This is so because Article 31(1) states that every 'worker has the right to working conditions which respect his or her health, safety and dignity.' (28) According to the Explanations accompanying the Charter, Article 31(1) draws on, inter alia, Article 26 of the Revised European Social Charter of the Council of Europe, which provides that '[a]ll workers have the right to dignity at work'. One commentator has argued that, given the connection between Article 31 of the Charter and Article 1 on human dignity, Article 31 is a provision 'with very significant normative weight and importance. Indeed, one may regard Article 31 as *the* most fundamental of the labour rights in the EU Charter.' (29)

37. The right to paid annual leave is also enshrined, and has been for some considerable time, in several international agreements on which the Member States of the European Union have collaborated. For example, it is protected in Article 24 of the Universal Declaration of Human Rights of 1948, which confers on everyone 'the right to rest and leisure, including reasonable limitation of working hours and periodic holidays with pay'. It is also upheld in Article 7(d) of the International Covenant on Economic, Social and Cultural Rights of 1966 as a manifestation of the right of everyone to just and favourable working conditions.

38. Within the framework of the International Labour Organisation the right to a minimum period of paid annual leave has been the subject matter of two multilateral conventions. Convention No 132, which entered into force on 30 June 1973, amended Convention No 52, which was previously in force. They place mandatory requirements on the signatory States with regard to the implementation of this fundamental social right within their domestic legal systems. (30)

39. Significantly, the right to paid annual leave is expressed repeatedly in both European and International instruments as an 'entitlement'. This is the precise wording that appears in Article 7(1) of Directive 2003/88, which, as I have already mentioned, leaves no scope whatsoever for the Member States to imperil 'the very existence' of that right. (31) It is therefore unsurprising that regulation 13(1) of the United Kingdom Working Time Regulations states unequivocally that 'a worker is entitled to four weeks annual leave in each year' and that Article 16(1), on payment for such leave, is worded in similarly imperative terms.

40. The language of entitlement also appears in the pertinent instruments of international law on which EU Member States have collaborated. Here I refer to recourse to the word 'shall' in point 8 of the Community Charter of the Fundamental Social Rights of Workers of 1989 (discussed above at point 35), while Article 7(d) of the International Covenant on Economic, Social and Cultural Rights provides that the States Parties 'recognize' and 'ensure' 'periodic holidays with pay, as well as remuneration for public holidays'. Article 3(1) of ILO Convention No 132 is framed even more imperatively, and nor does it address itself exclusively to states. It provides that every 'person to whom this Convention applies shall be entitled to an annual paid holiday of a specified minimum length.'

41. It is in the light of these sources that I have reached the conclusion that the right to paid annual leave under Article 7 of Directive 2003/88, as interpreted in the light of Article 31 of the Charter and international instruments concerning the right to paid annual leave on which the Member States have collaborated, means that employers are bound to provide adequate facilities to workers for the exercise of the right. Pursuant to well established principles of EU law, fulfillment of the results envisaged by Article 7 of Directive 2003/88, including observance by employers of provision of such facilities, are binding on all of the authorities of the Member States, including their courts. (32)

42. To this end, in accordance with the Court's case-law, the Member State courts are required to consider the whole body of rules of law and to apply methods of interpretation that are recognised by those rules in order to interpret Member State law, so far as possible, in the light of the wording and the purpose of Article 7 of Directive 2003/88 in order to achieve the result sought by that directive, which includes in my view the availability in employment relations of adequate facilities for the exercise of the right to paid annual leave, and consequently to comply with the third paragraph of Article 288 TFEU on the impact of directives in Member State law. (33)

43. The provision of an adequate facility for the exercise of the right to paid annual leave might take the form of specific contractual terms conferring the right to paid leave, or the establishment of a legally enforceable administrative procedure through which an application can be made to employers by workers for paid annual leave.

44. In the main proceedings it is for the national court to decide, in the light of all the pertinent facts, whether any facility supplied by SWWL was adequate for exercise of the right to paid annual leave (see further below points 84 to 86). However, as pointed out by the representative of Mr King at the hearing, Article 31(2) of the Charter removes any doubt on whether it is the employer or the worker who should bear the risk of non-compliance with the right to paid annual leave, at least with respect to which of them is to create the facility for its exercise.

45. Whatever the means deployed, I take the view that a *Drittwirkung* of the kind I am prescribing for Article 7(1) of Directive 2003/88, entailing as it will indirect effect of basic rights vis-a-visthird parties, (34) is consistent with the *effet utile* of Directive 2003/88 as interpreted in the Court's case-law. It would also be in keeping with the established case-law of the Court on the impact of directives in disputes of a horizontal nature between two private sector actors, and the extent to which the EU Charter of Fundamental Rights can be pertinent to the resolution of such disputes. It is to these issues that I will now turn.

C. Article 7 of Directive 2003/88: the Court's established case-law

1. *Key* rulings concerning Article 7 of Directive 2003/88 and its effet utile

46. The Court held in *Fuß* that a requirement under national law for workers to make prior application to an employer to secure compliance with Article 6(b) of Directive 2003/88 on the limit on working time, as a pre-requisite to bringing damages proceedings before a Member State court for breach of the same, would 'shift to individuals the burden of ensuring compliance with such norms' while giving the employer 'the possibility of avoiding compliance with those provisions where such an application has not been made.' (35)

47. As a consequence, it would be equally inconsistent with the *effet utile* of Article 7(1) to require workers like Mr King to make an application to a court, or any other body, to compel an employer to create an adequate facility for the exercise of the right to paid annual leave, a matter that is quantifiably different from a dispute over the conditions for the exercise of paid annual leave (see further below, points 71 to 75).

48. The Court further ruled in *Bollacke*, (36) with respect to Article 7(2) of Directive 2003/88 and the entitlement to an allowance in lieu of paid leave untaken, that death is no boundary to the obligation on employers to comply with it. In circumstances in which the beneficiary of a deceased worker sought recovery of an allowance in lieu of 140.5 days of outstanding leave, precluded under German law because termination of the

employment relationship occurred at death, the Court noted that Article 7(2) of Directive 2003/88 was not to be interpreted restrictively, (37) then held as follows;

'… since Article 7(2) of Directive 2003/88 does not impose any condition for entitlement to an allowance in lieu other than that relating to the fact that the employment relationship has ended, it must be held that receipt of such an allowance should not be make subject to the existence of a prior application for that purpose.

Indeed, ... that entitlement is conferred directly by the directive without the worker concerned having to take any steps in this regard and, secondly, that entitlement does not depend on conditions other than those which are explicitly provided in the directive, so that the fact that the worker has not previously applied for an allowance in lieu under Article 7(2) of that directive is entirely irrelevant.' (38)

49. These judgments reflect the fact that the worker is the 'weaker party in the employment relationship' and that it 'is therefore necessary to prevent the employer being in a position to impose on him a restriction on his rights'. (39)

50. Indeed, *Bollacke* (40) sets out the benchmark on what is required for compliance with the *effet utile* of Article 7(2) of Directive 2003/88. As pointed out by the representative of Mr King at the hearing, if, contrary to the Court's case-law, (41) Article 7(2) were interpreted restrictively, the risk of non-compliance would be transferred from the employer to the worker, the former being able to proceed safe in the knowledge that Article 7(2) of Directive 2003/88 cannot be called in aid by a worker to correct failure to provide an adequate facility for the exercise of the right to paid annual leave at termination of the employment relationship. Or, as the representative of the Commission submitted at the hearing, protracted error on the part of the employer could deprive workers of their rights.

2. The horizontal effect of the Charter and enforcement of directives.

51. Unlike several other provisions of the EU Charter of Fundamental Rights, (42) Article 31(2) is not stated to be subject to Union law and national laws and practices, and nor is it directed only to Member States. Rather, as already noted, it is worded more broadly, to the effect that every 'worker has the right to … an annual period of paid leave.'

52. In the light of this wording, the imperative nature of the EU right to paid annual leave, and its substantial normative value (detailed above at points 33 to 40), the right to paid annual leave under Article 31(2) of the Charter must be viewed as amounting to a 'right' under EU law and is not merely a 'principle' (43) within the meaning of Article 52(5) of the Charter. (44) Whatever consequences might follow from the distinction between 'rights' and 'principles in EU fundamental rights law', (45) as a 'right', Article 31(2) is unquestionably an aid to interpretation of Article 7(1) and (2) of Directive 2003/88, whether the entity against whom Directive 2003/88 is being enforced

is an emanation of the State (46) or a private sector actor. This in turn inevitably informs the process of interpretation of Member State law in conformity with Directive 2003/88.

53. Thus, the unequivocal wording of Article 31(2) of the Charter further militates against an interpretation of Article 7(1) of Directive 2003/88 that would oblige workers to petition a court, or any other authority, to compel employers *to create an adequate facility* for exercise of the right to paid annual leave, a matter that is distinct from the subsisting role of the courts to rule on disputes when a worker challenges the implementation discretion of Member States in Article 7(1) with respect to the *conditions* for entitlement to and granting of paid annual leave (see further below points 71 to 75), whether the defendant be an emanation of the state or a private sector actor. Indeed, the Court has specifically held that the right to paid annual leave 'may not be undermined by provisions of national law which exclude the creation … of that right'. (47)

54. At the hearing, the Agent for the Commission stated that the obligation for compliance in health and safety matters lay with employers rather than workers, and intimated that requiring a worker to bring judicial proceedings to enforce paid annual leave would be akin to requiring the worker to ask the employer to provide a protective mask when dealing with a toxic substance. I take the view that provision of an adequate facility by employers for exercise of the right to paid annual leave is indeed an element of the employment relationship that need not be subject to compulsion by a judicial authority, and that such a requirement would be inconsistent with established case law to the effect that the existence of the right to paid annual leave is not to be subject to any pre-conditions whatsoever. (48)

55. Further, a contrary interpretation would be insufficient to dissuade employers from breaching Article 7 of Directive 2003/88, (49) particularly in the light of the small sums involved when weighed against the cost of bringing legal proceedings. It has long been established in the Court's case-law on equal treatment between men and women that the remedies provided by Member State law to secure the enforcement of the pertinent directives must be sufficiently potent to secure a 'real deterrent effect' against their breach by employers, and the Court has invoked this requirement in several horizontal disputes. (50) The same must necessarily apply to Article 7 of Directive 2003/88, particularly in the light of the substantial normative weight of the right to paid annual leave as reflected in Article 31 of the Charter.

56. That said, due account must be taken of the subsisting limitation in the Court's case-law on the horizontal impact of directives in disputes of a private nature. In its recent ruling in judgment of 19 April 2016, *DI* (C-441/14, EU:C:2016:278), a case that also concerned labour rights and social law, the Court reiterated the following;

'It is true that the Court has stated that this principle of interpreting national law in conformity with EU law has certain limits. Thus, the obligation for a national court to refer to EU law when interpreting and applying the relevant rules of domestic law is limited by general principles of law and cannot serve as the basis for an interpretation of national law *contra legem* …

It should be noted in that connection that the requirement to interpret national law in conformity with EU law entails the obligation for national courts to change its established case-law, where necessary, if it is based on an interpretation of national law that is incompatible with the objectives of a directive …' (51)

57. The order for reference states that if the analysis of the Employment Tribunal is correct (pursuant to which Mr King was to be awarded 'Holiday Pay 3') then regulations 13(9) and 14 of the WTR could be read down consistently with the *Marleasing* principle on the sympathetic interpretation of Member State law with directives so as to give full effect to the ruling in *Schultz-Hoff and others*. At the hearing the representative of SWWL further stated that 'compliant' interpretation of United Kingdom law with EU law was available until the domestic court said otherwise, and that the Court of Appeal had not done so. Thus, the interpretation of Article 7(1) of Directive 2003/88 I am here advocating would not appear to give rise to a *contra legem* interpretation of national law, (52) and no question was referred to the Court on this issue. At most, on the basis of the order for reference, interpreting Article 7(1) of Directive 2003/88 as requiring employers to provide adequate facilities for exercise of the right to paid annual leave will result in this provision having an indirect effect on a horizontal dispute, which is permitted under the Court's case-law. (53) As one Advocate General has observed, in "the case of interpretation in conformity with a directive the directive itself does not impose obligations on the individual; this is done by the national law which is being applied in conformity with the directive." (54)

58. It is therefore unnecessary for me to reflect on whether the right to paid annual leave in Article 31(2) of the Charter is a general principle of law, given concrete expression in Directive 2003/88, (55) to the extent that it that joins the general principle of EU law on the prohibition of discrimination on the basis of age, (56) which is protected by Article 21 of the Charter, as one of the general principles that is directly enforceable by one private party against another, even in the event of *contra legem* impediments at the national level to this occurring. (57)

3. Protocol (No 30) on the application of the Charter of Fundamental Rights of the European Union to Poland and to the United Kingdom

59. Finally, the solution I am proposing falls within the boundaries of Protocol (No 30) on the application of the Charter of Fundamental Rights of the European Union to Poland and to the United Kingdom ('the Protocol'), on the basis of the text of the Protocol and the Court's case-law. The operative part of the Protocol states as follows:

'Article 1

1. The Charter does not extend the ability of the Court of Justice of the European Union, or any court or tribunal of Poland or of the United Kingdom, to find that the laws, regulations or administrative provisions, practices or action of Poland or of the United Kingdom are inconsistent with the fundamental rights, freedoms and principles that it reaffirms.

2. In particular, and for the avoidance of doubt, nothing in Title IV of the Charter creates justiciable rights applicable to Poland or the United Kingdom except in so far as Poland or the United Kingdom has provided for such rights in its national law.

Article 2

To the extent that a provision of the Charter refers to national laws and practices, it shall only apply to Poland or the United Kingdom to the extent that the rights or principles that it contains are recognised in the law or practices of Poland or of the United Kingdom.'

60. It is not in dispute that the right to paid annual leave is fully provided for in UK law, so that the limits set by the proviso appearing in Article 1(2) have been met. Further, the solution I am proposing entails no extension of the powers and obligations of either this Court or the UK courts, as they were at the signing of the Treaty of Lisbon in conformity with Article 1(1) of the Protocol, given that the "ability of" Member State courts to interpret national law in conformity with EU directives was established in 1990 in the *Marleasing* case. (58)

61. As to the interpretation of rights that already existed at the time of the entry into force of the Lisbon Treaty, the Court held in *N.S. and Others* that 'Article 1(1) of Protocol (No 30) explains Article 51 of the Charter with regard to the scope thereof and does not intend to exempt the Republic of Poland or the United Kingdom from the obligation to comply with the provisions of the Charter or to prevent a court of one of those Member States from ensuring compliance with those provisions'. (59)

62. Therefore, even if Article 1(2) were to preclude justiciable rights arising between private parties horizontally with respect to Title IV of the Charter (which includes Article 31), and prevent new rights deriving from any Title IV provision, (60) the solution I am proposing entails neither of these eventualities.

63. Finally, Article 2 of the Protocol is irrelevant to the main proceedings, given that it comes into play only to 'the extent that a provision of the Charter refers to national laws and practices'. As mentioned above, Article 31 of the Charter, unlike several other Charter provisions, (61) is not attenuated by reference to national laws and practices.

D. The proposed answers to the questions referred

1. *Questions 2 to 5*

64. I have identified the content of the right to paid annual leave in Article 7(1) of Directive 2003/88, as interpreted in the light of Article 31 of the Charter of Fundamental Rights of the European Union and international instruments on the right to paid annual leave on which Member States have collaborated. This review shows that the right to paid annual leave is of an imperative nature, and is not addressed exclusively to states. I have also set out parameters for reliance on Article 7(2) of Directive 2003/88 as a remedial measure in circumstances in which no adequate facility has been created by an employer

for a worker to exercise the right to paid annual leave (for all or part of the employment relationship) and addressed the legal limits on the impact of directives and the EU Charter in horizontal disputes between two private sector actors. Given that Questions 2 to 5 are directly linked to Article 7(2) of Directive 2003/88, I will answer them first before turning to Question 1. I will address question 2 separately from questions 3 to 5.

(a) Question 2

65. By its second question, the national referring court asks whether a worker like Mr King can claim that he is prevented from exercising the right to paid annual leave when he has not taken the annual leave to which he is entitled in the relevant leave year because the employer refuses to pay him for any period of leave he takes? The second question further asks whether the right carries over until the worker has the opportunity to exercise it?

66. It is important to note that the main proceedings amount to what I would refer to as a 'termination case', in which the applicant is seeking an allowance in lieu of paid annual leave untaken on the basis of Article 7(2) of Directive 2003/88 upon termination of the employment relationship. (62) This means that the important principles detailed above at point 48 above from the *Bollacke* ruling of the Court are applicable to Mr King's situation, as is the proviso to Article 7(2) of Directive 2003/88 to the effect that the 'minimum period of annual leave may not be replaced by a payment in lieu *except where the employment relationship is terminated*'(my emphasis).

67. In *Maschek* the Court considered circumstances in which Austrian law precluded payment in lieu of annual leave not taken when a public servant entered into retirement at his own request. The Court recalled its established case-law to the effect that Article 7(2) of Directive 2003/88 provides that a worker is entitled to an allowance in lieu in order to prevent the impossibility of being able to take paid annual leave, due to termination of the employment relationship, from leading to a situation in which the worker loses all enjoyment of that right, even in pecuniary form. (63) The Court then added the following:

'It should also be noted that Article 7(2) of Directive 2003/88, as interpreted by the Court, lays down no condition for entitlement to an allowance in lieu other than that relating to the fact, first, that the employment relationship has ended and, second, that the worker has not taken all annual leave to which he was entitled on the date that that relationship ended …

It follows, in accordance with Article 7(2) of Directive 2003/88, that a worker who has not been able to take all his entitlement to paid annual leave before his employment relationship has ended, is entitled to allowance in lieu of paid annual leave not taken. In that respect, the reason for which the employment relationship has ended is not relevant.' (64)

68. I therefore do not agree that the allowance in lieu is limited to the purpose of enabling the worker, even after termination of the employment relationship, to take a

period of paid rest before embarking on a new employment relationship. (65) Rather, its primary aim is to recover, through a monetary allowance, untaken paid leave subsisting at termination of the employment relationship so that the worker does not lose all enjoyment of that right. (66) This is subject only to Member State restrictions on Article 7(2) of Directive 2003/88 that are compatible with EU law, so that Member State conditions on the exercise of Article 7(2) of Directive 2003/88 do not make the very existence of the right to paid annual leave subject to any pre-condition whatsoever. (67)

69. The Court has acknowledged that there are periods beyond which annual leave ceases to have its positive effect for the worker as a rest period, so that Member States are free to impose reference and carry-over periods, on expiry of which the right to paid annual leave lapses under Article 7(1) of Directive 2003/88 ('the expiry principle'). (68) The solution I am here proposing will in no way disturb this line of the Court's case-law. (69)

70. This is so because the Court has accepted as a matter of principle, albeit subject to limits, that 'the question of carrying over leave and therefore of the specification of a period during which a worker prevented from taking his paid annual leave during the leave year can still take that leave falls within the conditions for the exercise and implementation of the right to paid annual leave and is therefore governed by national legislation and/or practice.' (70)

71. However, a wholly different factual context arises in the main proceedings.

72. All of the rulings concerning the expiry principle have fallen within Member State discretion, and typically concern the extent to which Member State law can impose limitations, such as some kind of temporal cap on the taking of leave with respect to a given leave period, or the conditions of an allowance in lieu of paid leave that has not been taken, (71)*the facility for the exercise of which has actually been made available by the employer in the first place.* These same factual circumstances have underpinned cases in which the dispute over the conditions for the payment of annual leave has arisen in employment relationships that are ongoing, (72) and thereby fall to be governed by Article 7(1) of Directive 2003/88 to the exclusion of Article 7(2). (73)

73. Therefore, if Member State law were to permit employers to withhold creation of an adequate facility for workers to exercise the right to paid annual leave, leaving it to workers to open up the availability of such a facility by institution of Court proceedings or the taking of some other form of action, it would go beyond the discretion afforded to Member States in the implementation of the right to paid annual leave, and rather amount to a pre-condition to the very existence of the right. (74)

74. Therefore, while the dispute between SWWL and Mr King has largely if not exclusively been argued on the basis of the *Schultz-Hoff* proviso, to the effect that loss of a right to paid annual leave at the end of a leave year or of a carry-over period can only occur if the worker 'has actually had the opportunity to exercise the right conferred on

him by the directive', (75) I am not persuaded that the *Schultz-Hoff* ruling is apposite to the main proceedings.

75. All this being so, I am of the view that the Court can put to one side its established precedents on Member State temporal and other restrictions on the exercise of paid annual leave, and rather approach the problem to hand by considering the following question: is there anything preventing a worker like Mr King from relying on the plain text of Article 7(2) of Directive 2003/88, as interpreted by the Court, to secure an allowance in lieu of untaken leave when no adequate facility has been made available by the employer for the exercise of the right to paid annual leave in breach of Article 7(1) of Directive 2003/88, or if such a facility was provided, only part of the way through the employment relationship? In the light of the analysis here detailed, it would seem that this question is to be answered in the negative.

76. In the alternative, I would accept arguments made by Mr King, with the support of the Commission, to the effect that Mr King has not had the opportunity to exercise paid annual leave within the meaning of the Court's case-law, but on the basis that an adequate facility for its exercise was not created by the employer until 2008 and perhaps not at all (see points 84 to 86 below). This avenue is, however, less in harmony with the established case-law, both for the reasons outlined above and due to the fact that, since the Court first ruled that workers must have had the opportunity to exercise the right conferred by the directive before the right to paid leave can be lost under Member State law, (76) this is yet to be expanded beyond cases in which a worker has been absent through illness. The Court has gone so far as to hold that when a worker 'is not subject to physical or psychological constraints caused by an illness, he is in a situation different from that resulting from an inability to work due to his state of health.' (77)

77. Nonetheless, I accept that it is possible to conclude on a plain meaning analysis that a worker has not had the opportunity to exercise the right to paid annual leave under Directive 2003/88 for periods in which no adequate facility had been made available by the employer for exercise of the right, so that Member State restrictions on its exercise that would otherwise fall within the discretion afforded to Member States under Article 7(1) of Directive 2003/88 must necessarily be disapplied.

78. Question 2 should therefore be answered to the effect that if a worker does not take all or some of the annual leave to which he is entitled in the leave year when any right should be exercised, in circumstances where he would have done so but for the fact that the employer refuses to pay him for any period of leave he takes, the worker can claim that he is prevented from exercising his right to paid leave such that the right carries over until he has had such opportunity to exercise it.

(b) *The answers to Questions 3 to 5*

79. Questions 3 to 5, which should be answered together, ask if the right to paid annul leave can be carried over indefinitely. What, if any, carry over period should be applied when there is no statutory or contractual provision specifying a carry over period, and in

its absence is the court obliged to impose one? If so, would a period of 18 months following the end of the holiday year in which the leave accrued be compatible with the right to paid annual leave in Article 7 of Directive 2003/88?

80. These queries can be answered succinctly.

81. Upon termination of the employment relationship, pursuant to Article 7(2) of Directive 2003/88 a worker is entitled to an allowance in lieu of paid annual leave that has not been taken up until the date on which the employer made available to the worker an adequate facility for the exercise of the right to paid annual leave. It is only at this point that temporal and other restrictions on exercise of the right to paid annual leave that Member States may have elected to impose can commence to apply, and even then only if such restrictions fall within the boundaries of the discretion afforded to Member States under Article 7(1) of Directive 2003/88, and are otherwise in conformity with EU law. If an adequate facility for exercise of the right to paid annual leave was never provided, then an allowance is due under Article 7(2) of Directive 2003/88 to cover the full period of employment until termination of the employment relationship.

82. The order for reference suggests a limit to the carry over period of 18 months following the end of the holiday year in which the leave accrued as a permissible limitation on the exercise of the right to paid annual leave.

83. This suggestion seems to be inspired by Article 9(1) of ILO Convention No 132 of 1970 concerning annual holidays with pay. However, this provision, like the Court's case-law on the expiry principle, is predicated on there being an adequate facility for the exercise of paid annual leave in the employment relationship in the first place. Article 9(1) of ILO Convention No 132 of 1970 is therefore irrelevant to the facts of the main proceedings.

84. The legal representative of SWWL said at the hearing that Mr King's contractual terms were silent on the question of paid annual leave. This necessarily means that no adequate facility was provided by SWWL for exercise of the right to paid annual leave. I note that SWWL acknowledged at the hearing that Mr King was a worker and was entitled throughout the course of the employment relationship to paid annual leave.

85. However, SWWL equally contends that in 2008 it offered Mr King an employment contract, and their representative stated at the hearing that it entailed a right to paid annual leave. If this amounted to provision of an adequate facility for the exercise of the right to paid annual leave, which is a question for the national referring court to decide, than an allowance in lieu of untaken paid leave would be payable pursuant to Article 7(2) of Directive 2003/88 from the commencement of Mr King's employment in June 1999 to the date in 2008 on which he was offered an employment contract featuring an adequate facility for exercise of the right to paid annual leave. It would only be then that any restrictions on exercise of the right to paid annual leave imposed under United Kingdom law, and that were compatible with Article 7(1) of Directive 2003/88 and EU law more broadly, could commence to apply.

86. On the other hand, if this offer did not contain such a facility, through, for example, provision of a sufficiently detailed contractual term on the exercise of paid annual leave, then an allowance in lieu pursuant to Article 7(2) of Directive 2003/88 would necessarily have to encapsulate the whole of the employment relationship from commencement in June 1999 to termination on 6 October 2012.

87. The answer to Questions 3 to 5 is as follows;

'Upon termination of the employment relationship, pursuant to Article 7(2) of Directive 2003/88, a worker is entitled to an allowance in lieu of paid annual leave that has not been taken up until the date on which the employer made available to the worker an adequate facility for the exercise of the right to paid annual leave. It is only at this point that temporal and other restrictions on exercise of the right to paid annual leave that Member States may have elected to impose can commence to apply, and even then only if such restrictions fall within the boundaries of the discretion afforded to Member States under Article 7(1) of Directive 2003/88, and are otherwise in conformity with EU law. If an adequate facility for exercise of the right to paid annual leave was never provided, then an allowance is due under Article 7(2) of Directive 2003/88 to cover the full period of employment until termination of the employment relationship. In the circumstances of the main proceedings, a limit to the carry over period of 18 months following the end of the holiday year in which the leave accrued is not compatible with Article 7 of Directive 2003/88.'

2. *The answer to Question 1*

88. By its first question the national referring court asks whether, in circumstances in which there is a dispute between a worker and an employer as to whether the worker is entitled to annual leave with pay pursuant to Article 7 of Directive 2003/88, would it be compatible with EU law, and in particular the principle of effective remedy, if the worker has to take leave first before being able to establish whether he is entitled to be paid?

89. Given that I have proposed that requiring workers to take any action, whether that be the institution of judicial proceedings or otherwise, to create an adequate facility for exercise of the right to paid annual leave would amount to an unlawful pre-condition to the very existence of that right, (78) it is only if the Court does not accept my answer to questions 2 to 5 that it will be necessary to answer Question 1. This is so because requiring a worker to take leave before being able to ascertain if he will be paid for it, equally amounts to requiring the worker, as opposed to the employer, to take active steps to secure the creation of the facility.

90. That said, in all events I propose a negative answer to the first question for the following reasons.

91. First, it has long since been established in the case-law of the Court that Directive 2003/88 treats entitlement to annual leave and to payment on that account as being two aspects of a single right. (79) The Court has held incompatible with

Article 7(1) of Directive 2003/88 practices that create a 'serious risk that the worker will not take his leave'. (80) These have included economic conditions for the duration of the leave which are not comparable to those relating to the exercise of the workers employment, such as payment of only a basic salary is paid during a leave period, exclusive of commission. (81) As one Advocate General has observed, 'it is necessary to ensure … that the worker does not suffer any disadvantage as a result of deciding to exercise his right to annual leave'. (82)

92. It would seem to be inarguable that a worker will be deterred from exercising his right to paid annual leave if he is first required to take it without payment at all, before then being able to establish that he is entitled to paid leave. Such a situation would be inconsistent with the *effet utile* of Article 7(1) of Directive 2003/88, and the interpretation the Court has afforded to that provision to the effect that 'for the duration of annual leave … remuneration must be maintained and that, in other words, workers must receive their normal remuneration for that period of rest'. (83) This implies an inherently contemporaneous element to the right to paid annual leave.

93. Second, obliging a worker to take unpaid leave before being able to establish whether he should be paid for it is also inconsistent with the obligation I have described, above at point 55, on Member States to supply remedies for the enforcement of Article 7 of Directive 2003/88 that provide a real deterrent affect against breach by employers. Such a requirement also renders the right to paid annual leave excessively difficult to enforce, given that there would seem to be nothing in the role of such a provision in the procedure, its conduct, or any special features, (84) to justify such an impediment to exercise of the right to paid annual leave. Nor would it seem to be necessary in the light of the protection of the rights of the defence and the protection of legal certainty. (85)

94. Thirdly, any decoupling under United Kingdom law of the right to leave from the right to be paid for it may mean that the remedy provided for under United Kingdom law may be of inordinate complexity, so as to give rise to breach of Article 47 of the Charter. (86)

95. Question 1 should therefore be answered to the effect that if there is a dispute between a worker and employer as to whether the worker is entitled to annual leave with pay pursuant to Article 7 of Directive 2003/88, it is incompatible with EU law, and in particular the principle of an effective remedy, if the worker has to take leave first before being able to establish whether he is entitled to be paid.

E. **Concluding remarks**

96. I appreciate that the answers to the questions referred I am here proposing would require employers rather than workers to take all the necessary steps to ascertain whether they are bound to create an adequate facility for the exercise of the right to paid annual leave, whether those steps be the taking of legal advice, consultation with relevant unions, or seeking counsel from Member State bodies that are responsible for the enforcement of labour law. If an employer does not take such action, it will risk having to

make a payment in lieu of unpaid leave on termination of the employment relationship. However, this would be in keeping with guaranteeing the *effet utile* of the right to paid annual leave, a fundamental right of substantial normative weight in Member State law, EU law, and international law, and would also be consistent with the practical reality, recognised in the Court's case-law, of the worker's position as the weaker party in the employment relationship. (87)

97. At the same time, enabling workers in Mr King's position to rely on Article 7(2) of Directive 2003/88 at termination of the employment relationship would in no way open up an opportunity for workers to accumulate payment in lieu of leave in breach of the objective of Article 7 of Directive 2003/88, which is to secure actual rest to ensure effective protection of their health and safety. (88) This is so because once the employer provides an adequate facility for exercise of the right to paid annual leave, the worker becomes responsible for taking it up. (89) In other words, at this point, the worker is afforded an opportunity to exercise the right to paid annual leave in the sense of the ruling in *Schultz-Hoff,* absent other circumstances recognized in the Court's case law as impeding exercise of the right, such as illness.

V. **Conclusion**

98. I therefore propose that the Court answer the questions referred by the Court of Appeal of England and Wales as follows;

(1) If there is a dispute between a worker and employer as to whether the worker is entitled to annual leave with pay pursuant to 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, it is incompatible with EU law, and in particular the principle of an effective remedy, if the worker has to take leave first before being able to establish whether he is entitled to be paid.

(2) If a worker does not take all or some of the annual leave to which he is entitled in the leave year when any right should be exercised, in circumstances where he would have done so but for the fact that the employer refuses to pay him for any period of leave he takes, the worker can claim that he is prevented from exercising his right to paid leave such that the right carries over until he has had such opportunity to exercise it.

(3) Upon termination of the employment relationship, pursuant to Article 7(2) of Directive 2003/88, a worker is entitled to an allowance in lieu of paid annual leave that has not been taken up until the date on which the employer made available to the worker an adequate facility for the exercise of the right to paid annual leave. It is only at this point that temporal and other restrictions on exercise of the right to paid annual leave that Member States may have elected to impose can commence to apply, and even then only if such restrictions fall within the boundaries of the discretion afforded to Member States under Article 7(1) of Directive 2003/88, and are otherwise in conformity with EU law. If an adequate facility for exercise of the right to paid annual leave was never provided, then an allowance is due under Article 7(2) of Directive 2003/88 to cover the full period

of employment until termination of the employment relationship. In the circumstances of the main proceedings, a limit to the carry over period of 18 months following the end of the holiday year in which the leave accrued is not compatible with Article 7 of Directive 2003/88.'

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1 Original language: English

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2 This is a question of fact for the national court to decide. See points 44 and 84 to 86 below.

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3 OJ 2003 L 299, p. 9.

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4 For key rulings in which the Court considered the impact of the Charter on the interpretation of a Directive in a dispute of a horizontal nature see judgments of 19 April 2016, *DI*, C-441/14, EU:C:2016:278, and of 15 January 2014, *Association de médiation sociale*, C-176/12, EU:C:2014:2; and in the specific context of the right to paid annual leave, judgment of 24 January 2012, *Dominguez*, C-282/10, EU:C:2012:33, in which the Court concluded at paragraph 40 that it was for the national court to determine whether the directive could be relied on through the doctrine of direct effect, against an employer that may in fact have been an emanation of the state.

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5 See further below points 35 to 40.

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6 See in this respect the analysis of Advocate General Trstenjak in her Opinion in *Dominguez*, C-282/10, EU:C:2011:559, points 106 to 113.

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7 This has been precluded since the judgment of 26 June 2001, *BECTU*, C-173/99, EU:C:2001:356. The Court in this case was interpreting the predecessor to Directive 2003/88, namely Council Directive 93/104/EC of 23 November 1993 concerning certain aspects of the organisation of working time (OJ 1993 L 307, p. 18). However the text of Article 7 in the two directives is the same.

8 Judgment of 12 June 2014, *Bollacke*, C-118/13, EU:C:2014:1755, paragraph 22 and the case-law cited.

9 Also mentioned in the written observation of SWWL and Richard Dollar.

10 Judgment of 20 January 2009, C-350/06 and C-520/06, EU:C:2009:18.

11 See notably judgments of 20 January 2009, *Schultz-Hoff and Others*, C-350/06 and C-520/06, EU:C:2009:18; of 10 September 2009, *Vicente Pereda*, C-277/08, EU:C:2009:542; of 22 Novembre 2011, *KHS*, C-214/10, EU:C:2011:761; of 24 January 2012, *Dominguez*,C-282/10, EU:C:2012:33; of 3 May 2012, *Neidel*, C-337/10, EU:C:2012:263; of 21 June 2012, *ANGED*, C-78/11, EU:C:2012:372; and of 8 November 2012, *Heimann and Toltschin*,C-229/11 and C-230/11, EU:C:2012:693; order of 21 February 2013, *Maestre García*, C-194/12, EU:C:2013:102; judgments of 15 January 2014, *Association de médiation sociale*, C-176/12, EU:C:2014:2; of 22 May 2014, *Lock*, C-539/12, EU:C:2014:351; of 12 June 2014, *Bollacke*, C-118/13, EU:C:2014:1755; of 26 March 2015, *Fenoll*, C-316/13, EU:C:2015:200; of 11 November 2015, *Greenfield*, C-219/14, EU:C:2015:745; of 12 February 2015, *Sähköalojen ammattiliitto*,C-396/13, EU:C:2015:86; of 30 June 2016, *Sobczyszyn*, C-178/15, EU:C:2016:502; and of 20 July 2016, *Maschek*, C-341/15, EU:C:2016:576.

12 Cf. judgment of 26 March 2015, *Fenoll*,C-316/13, EU:C:2015:200.

13 At the hearing the representative of SWWL confirmed that their only objection to Mr King's claim was that he acted too late to enforce his rights.

14 See cases cited footnote 11 above**.**

15 See analysis of the laws of the Member States See in the Opinion of Advocate General Trstenjak in *Dominguez*,C-282/10, EU:C:2011:559, points 106 to 113. See also

discussion at point 36 below on the link between the right to paid annual leave and human dignity. I note that a 'work smart' publication of the United Kingdom Trade Union Congress, entitled 'Know your rights:paid Holidays and Rest Breaks at Work' states in its opening paragraph that '[t]hanks to European rules, we have enjoyed guaranteed paid holidays since 1998'; a period of almost 20 years. See https://worksmart.org.uk/work-rights/hours-and-holidays/holidays.

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16 Established in judgment of 20 January 2009, *Schultz-Hoff and Others*, C-350/06 and C-520/06, EU:C:2009:18, see in particular 43.

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17 E.g. judgment of 22 November 2011, *KHS*, C-214/10, EU:C:2011:761.

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18 The Court is yet to rule on the extent to which Article 52(1) of the Charter places limitations on Article 31(1). One commentator has argued that Article 31(1) is, on its face, 'a serious candidate for a right that does not admit of limitations and derogations'. Bogg, A., 'Article 31', in Peers, S., et al. (ed), *The EU Charter of Fundamental Rights; a commentary* (2014, Hart Publishing), p. 833, at p. 863.

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19 Judgments of 24 January 2012, *Dominguez*, C-282/10, EU:C:2012:33, paragraph 16 and the case-law cited.

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20 Judgment of 22 November 2011, *KHS*, C-214/10, EU:C:2011:761, paragraph 34.

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21 See the judgment of 26 June 2001, *BECTU*, C-173/99, EU:C:2001:356, paragraph 34.

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22 Judgment of 22 November 2011, *KHS*, C-214/10, EU:C:2011:761, paragraph 31 and the case-law cited. See also judgment of 11 November 2015, *Greenfield*, C-219/14, EU:C:2015:745, paragraph 29.

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23 Judgment of 11 November 2015, *Greenfield*, C- 219/14, EU:C:2015:745, paragraph 28 and the case law cited.

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24 Judgment of 12 June 2014, *Bollacke*, C-118/13, EU:C:2014:1755, paragraph 22 and the case law cited.

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25 Judgment of 26 June 2001, *BECTU*, C-173/99 EU:C:2001:356, paragraph 53. See also judgments of 20 January 2009, *Schultz-Hoff and Others*, C-350/06 and C-520/06, EU:C:2009:18, paragraph 46, and of 24 January 2012, *Dominguez*, C-282/10 EU:C:2012:33, paragraph 18.

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26 Judgment of 24 January 2012, *Dominguez*, C-282/10 EU:C:2012:33, paragraph 19 and the case law cited.

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27 OJ 2007 C 303, p. 17.

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28 For a detailed discussion see Bogg, A., op. cit., footnote 18, at pp. 836 and 837.

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29 Emphasis in original. Bogg, A., ibid., at p. 837. See also Anderson, E. 'Human Dignity as a Concept for the Economy' in Düwell, M. et al (ed) *The Cambridge Handbook of Human Dignity; interdisciplinary perspectives* (2014, Cambridge University Press), 492 at p. 496. 'Work is a domain in which people are especially vulnerable to loss of dignity…The rights to enjoy safe and decent conditions of work… and to have limited working hours…mark their bearers as respectable human beings, not mere tools until they wear out.'

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30 See the Opinion of Advocate General Trstenjak in *Schultz-Hoff and Others*, C-350/06 and C-520/06, EU:C:2008:37, points 35 and 36

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31 Judgment of 24 January 2012, *Dominguez*, C-282/10, EU:C:2012:33, paragraph 19 and the case-law cited.

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32 Judgment of 19 April 2016, *DI*, C-441/14, EU:C:2016:278, paragraph 30 and the case-law cited.

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33 Judgment of 19 April 2016, *DI*, C-441/14, EU:C:2016:278, paragraph 31.

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34 See the Opinion of Advocate General Trstenjak in *Carp*, C-80/06, EU:C:2007:200, point 69 and references cited therein. See generally Fredman, S., *Human Rights Transformed: Positive Rights and Positive Duties* (Oxford University Press, 2008).

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35 Judgment of 25 November 2010, *Fuß*, C-429/09, EU:C:2010:717, paragraph 83.

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36 Judgment of 12 June 2014, C-118/13, EU:C:2014:1755.

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37 Ibid., paragraph 22 and the case-law cited.

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38 Judgment of 12 June 2014, *Bollacke*, C-118/13, EU:C:2014:1755, paragraphs 27 and 28.

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39 Judgment of 25 November 2010, *Fuß*,C-429/09, EU:C:2010:717, paragraph 80 and the case-law cited.

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40 Judgment of 12 June 2014, C-118/13, EU:C:2014:1755.

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41 Ibid., paragraph 22.

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42 See for example Article 16 of the Charter and the freedom to conduct a business, Article 27 and the right to workers right to information and consultation within the undertaking, Article 28 and the right to collective bargaining and action, Article 30 and protection in the event of unjustified dismissal, and Article 34 and the right to social security and assistance.

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43 On the distinction, see judgments of 15 January 2014, *Association de médiation sociale*, C-176/12, EU:C:2014:2, and of 22 May 2014, *Glatzel*, C-356/12, EU:C:2014:350.

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44 In judgment of 24 January 2012, *Dominguez*, C-282/10, EU:C:2012:33, the Court upheld Article 7 of Directive 2003/88 as an aid to interpretation of national law in disputes of a horizontal nature, subject to limits, without ruling on whether Article 32(1) of the Charter was a right or a principle. See Lenaerts, K., 'La solidarité ou le chapitre IV de la Charte des droits fondamentaux de l'Union européenne' (82) (2010), *Revue Trimestrielle des droits de l'homme*, p. 217.

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45 See e.g. Guđmundsdóttir, D., 'A renewed emphasis on the Charter's distinction between rights and principles: is a doctrine of judicial restraint more appropriate?', 52 *CMLRev* (2015), p. 685, p. 692, where it is stated that 'Charter principles cannot confer subjective rights, and therefore cannot create new rights that would otherwise not exist in national law, or, by implication be invoked in a dispute between private parties'. See further von Danwitz, T., and Paraschas, K., 'A fresh start for the Charter: Fundamental questions on the application of the European Charter of fundamental rights', 35 (2012) *Fordham International Law Journal*, 1396; Lenaerts, K., and Gutiérrez-Fons, J., 'The Place of the Charter in the EU Constitutional Edifice', in Peers et al. eds, p. 1559. See also the Opinion of Advocate General Wahl in *Photovost* , C-470/12, EU:C:2013:844 who states at point 66 of his Opinion that principles are only judicially cognizable under Article 52(5) of the Charter 'in the interpretation of Union acts and in the ruling on their legality'.

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46 See recently e.g., judgment of 7 July 2016, *Ambisig*, C-46/15, EU:C:2016:530, paragraph 22 and the case-law cited. The Court has held that if it is impossible to interpret national law compatibly with Article 7 of Directive 2003/88 in an action

between private parties, ‘the party injured as a result of domestic law not being in conformity with European Union law can nonetheless rely on the [judgment of 19 November 1991, *Francovich and Others*, C-6/90 and C-9/90, EU:C:1991:428] in order to obtain, if appropriate, compensation for the loss sustained.’ See judgment of 24 January 2012, *Dominguez*, C-282/10, EU:C:2012:33, paragraph 43.

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47 Judgment of 20 January 2009, *Schultz-Hoff and Others*, C-350/06 and C-520/06, EU:C:2009:18, paragraph 48.

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48 Judgment of 24 January 2012, *Dominguez,* C-282/10, EU:C:2012:33, paragraph 18 and the case law cited.

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49 The Court held in its judgment of 10 April 1984, *von Colson and Kamann*, C-14/83, EU:C:1984:153, at paragraph 23, that sanctions for the implementation of Council Directive 76/207/EEC of 9 February 1976 on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions (OJ 1976 L 39, p. 40) had to provide a ‘real deterrent effect’ against breach by employers. It stated, at paragraph 24, that their absence ‘would not satisfy the requirements of an effective transposition of the directive’. See more recently the Opinion of Advocate General Mengozzi in C-407/14, *Arjona Camacho*,EU:C:2015:534, point 34.

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50 See e.g. judgments of 10 April 1984, *von Colson and Kamman*, C-14/83, EU:C:1984:153; of 22 April 1997, Draehmpaehl, C-180/95, EU:C:1997:208; and of 17 December 2015, *Arjona Camacho*, C-407/14, EU:C:2015:831.

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51 Paragraphs 32 to 33.

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52 See judgment of 19 April 2016, *DI*, C-441/14, EU:C:2016:278, paragraph 32.

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53 See Opinion of Advocate General Bot in *DI*, C-441/14, EU:C:2015:776, point 41. See also the Opinion of Advocate General Kokott in *Hutchison 3 G and Others*, C-369/04, EU:C:2007:523, points 147 and 148.

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54 Opinion of Advocate General Kokott in *Hutchison 3 G and Others*, C-369/04, EU:C:2006:523, point 148.

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55 See Opinion of Advocate General Bot in *DI*, C-441/14, EU:C:2015:776, point 50.

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56 See judgment of 22 November 2005, *Mangold Helm*, C-144/04, EU:C:2005:709; judgment of 19 January 2010, *Kücükdeveci*, C-555/07, EU:C:2010:21; judgment of 19 April 2016, *DI*, C-441/14, EU:C:2016:278. See generally e.g. Mazák, J., and Moser, M., 'Adjudication by Reference to General Principles of EU Law: A Second Look at the Mangold Case-law', in Adams, M., et al., eds, *Judging Europe's Judges* (Hart Publishing, Oxford, 2013), p. 61. I note that Advocate General Mengozzi, at point 59 of his Opinion in *Fenoll* (C-316/13, EU:C:2014:1753), expressed the view that the right to paid annual leave could not 'be relied on as a general principle of Union law which, under the line of case-law established in *Mangold* and *Kükükdeveci*, could found an obligation on the national court not to apply any national provision to the contrary'. See also Advocate General Trstenjak in her Opinion in *Dominguez* (C-282/10, EU:C:2011:559), point 142

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57 See generally, Frantziou, E., 'The Horizontal Effect of the Charter of Fundamental Rights of the European Union: Rediscovering the Reasons for Horizontality', 21 (2015) *European Law Journal* 657; Seifert, A., 'L'effet horizontal des droits fondamentaux: quelques réflexions de droit européen et de droit comparé' (2012) 48 *Revue trimestrielle de droit européen* 801; Safjan, M., and Miklaszewicz, P., 'Horizontal Effect of the General Principles of EU law in the sphere of private law', (2010) 18, *European Review of Private Law* 475.

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58 Judgment of 13 November 1990, *Marleasing Comercial Internacional de Alimentación*, C-106/89, EU:C:1990:395. Here I note the observations of the House of Commons European Scrutiny Committee, 'European Union Intergovernmental Conference: Government Responses to the Committee's Thirty-Fifth Report of Session 2006-07 and the Committee's Third Report of Session 2007-08', First Special Report of Session 2007-2008, HC 179, published on 17 December 2007, paragraph 38, p. 16. 'It is clear that the Government accepts that the Charter will be legally binding, and it has

stated that the Protocol is not an opt-out. Since the Protocol is to operate subject to the UK's obligations under the Treaties, it still seems doubtful to us that the Protocol has the effect that the courts of this country will not be bound by interpretations of measures of EU law given by the ECJ and based on the Charter.'

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59 Judgment of 21 December 2011, C-411/10 and C-493/10, EU:C:2011:865, paragraph 120.

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60 See the Opinion of Advocate General Trstenjak in *N.S. and Others*, C-411/10 and C-493/10, EU:C:2011:611, point 173, citing House of Lords, European Union Committee, The Treaty of Lisbon: an impact assessment. Volume I: Report (10th Report of Session 2007-08),http://www.parliament.the-stationery-office.co.uk/pa/ld200708/ldselect/ldeucom/62/62, paragraph 5.103(b).

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61 Footnote 42 above.

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62 The distinction between Article 7(1) and (2) is sometimes muddled, but it is nonetheless important. See the Opinion of Advocate General Trstenjak in *KHS*, C-214/10, EU:C:2011:465, point 35.

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63 Judgment of 20 July 2016, *Maschek*, C-341/15, EU:C:2016:576, paragraph 26 and the case-law cited.

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64 Ibid., paragraphs 27 and 28 and the case-law cited.

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65 See the Opinion of Advocate General Trstenjak in *Stringer and Others*, C-520/06, EU:C:2008:38, point 85.

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66 Judgment of 20 July 2016, *Maschek*, C-341/15, EU:C:2016:576, paragraph 26 and the case law cited.

67 See judgment of 24 January 2012, *Dominguez*,C-282/10, EU:C:2012:33, paragraph 18 and the case-law cited.

68 Judgments of 22 November 2011, *KHS*,C-214/10, EU:C:2011:761, paragraph 33; of 3 May 2012, *Neidel*, C-337/10, 2012:263, paragraph 39; and of 30 June 2016, *Sobczyszyn*, C-178/15, EU:C:2016:502, paragraph 22.

69 E.g. Decision No 12 of 11 November 2010 of the Constitutional Court of Bulgaria.

70 Judgment of 20 January 2009, *Schultz-Hoff and Others*, C-350/06 and C-520/06, EU:C:2009:18, paragraph 34. See also paragraph 35.

71 E.g. judgments of 20 January 2009, *Schultz-Hoff and Others*, C-350/06 and C-520/06, EU:C:2009:18 (temporal limitation); of 22 November 2011, *KHS*, C-214/10, EU:C:2011:761 (temporal limitation); of 20 July 2016, *Maschek*, C-341/15, EU:C:2016:576 (condition with respect to voluntary retirement).

72 See e.g. judgment of 24 January 2012, *Dominguez*, C-282/10, EU:C:2012:33 (minimum period of service before paid leave accrues); order of 21 February 2013, *Maestre Garcia*, C-194/12, EU:C:2013:102 (human resource and organisational considerations limiting paid leave); and judgment of 30 June 2016, *Sobczyszyn*, C-178/15, EU:C:2016:502 (convalescence leave using up paid leave).

73 Order of 21 February 2013, *Maestre Garcia*, C-194/12 EU:C:2013:12, paragraph 29.

74 Point 34 above.

75 Judgment of 20 January 2009, *Schultz-Hoff and Others*, C-350/06 and C-520/06, EU:C:2009:18, paragraph 43.

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76 Ibid.

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77 Judgment of 8 November 2012, *Heimann and Toltschin*, C-229/11 and C-230/11, EU:C:2012:693, paragraph 29.

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78 Judgment of 24 January 2012, *Dominguez*, C-282/10, EU:C:2012:33, paragraphs 18 and 19 and the case-law cited.

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79 Judgments of 16 March 2006, *Robinson-Steele and Others*,C-131/04 and C-257/04, EU:C:2006:177 paragraph 58; of 22 May 2014, *Lock*, C-539/12, EU:C:2014:351, paragraph 17 and the case law cited; and of 12 February 2015, *Sähköalojen ammattiliitto*, C-396/13, EU:C:2015:86, paragraph 67.

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80 Judgment of 15 September 2011, *Williams and Others*, C-155/10, EU:C:2011:588, paragraph 21.

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81 Judgment of 22 May 2014, *Lock*, C-539/12, EU:C:2014:351, paragraph 24.

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82 Opinion of Advocate General Trstenjak in *Williams and Others*, C-155/10, EU:C:2011:403, point 51.

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83 Judgment of 11 November 2015, *Greenfield*, C-219/14, EU:C:2015:745, paragraph 50 and the case-law cited.

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84 Judgment of 20 October 2016, *Danqua*, C-429/15, EU:C:2016:789, paragraph 42 and the case-law cited.

85 Ibid. See recently judgment of 8 March 2017, *Euro Park Service*, C-14/16, EU:C:2017:177, paragraphs 36 to 39.

86 See for example the Opinion of Advocate General Jääskinen in *Târşia*, C-69/14, EU:C:2015:269, points 34 to 43. On the distinction between the right to effective judicial protection and the right to an effective remedy, see Prechal, S., 'Redefining the Relationship between "Rewe-effectiveness" and Effective Judicial Protection', 4 (2011) *Review of European Administrative Law* 31. On Article 47 generally see Prechal, S., 'The Court of Justice and Effective Judicial Protection: What Has the Charter Changed?', in Paulussen, C. (ed), *Fundamental Rights in International and European Law* (2016, Asser Press), p. 143.

87 Judgment of 25 November 2010, *Fuß*, C-429/09, EU:C:2010:717, paragraph 80. I note also that the notion of who is a 'worker' for the purposes of Article 7 of Directive 2003/88 is also highly evolved. See for example judgment of 26 March 2015, *Fenoll*, C-316/13, EU:C:2015:200.

88 E.g. judgment of 22 November 2011, *KHS*, C-214/10, EU:C:2011:761, paragraphs 29 to 34. Order of 21 February 2013, *Maestre García*, C-194/12, EU:C:2013:102, paragraph 28 and the case-law cited.

89 I note that when the Court has ruled against Member State measures that would have acted as an incentive for workers to replace the actual taking of leave with financial compensation, it has done so in a context in which it was envisaged that a facility for exercise of the right to paid annual leave would be provided by the employer. See, for example, judgment of 6 April 2006, *Federatie Nederlandse Vakbeweging*, C-124/05, EU:C:2006:244.