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Provisional text

OPINION OF ADVOCATE GENERAL BOT

delivered on 29 May 2018 (1)

Case C-619/16

Sebastian W. Kreuziger

v

Land Berlin

(Request for a preliminary ruling from the Oberverwaltungsgericht Berlin-Brandenburg (Higher Administrative Court, Berlin-Brandenburg, Germany))

(Reference for a preliminary ruling — Social policy — Organisation of working time — Right to paid annual leave — Directive 2003/88/EC — Article 7(2) — Allowance in lieu of untaken paid annual leave at the end of the employment relationship — Loss of the right to that allowance where the worker does not seek to take his paid annual leave and does not show that he was unable to take that leave for reasons beyond his control)

1. This request for a preliminary ruling concerns the interpretation of Article 7(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. (2)

2. The request has been made in proceedings between Sebastian W. Kreuziger and his former employer, Land Berlin (the *Land* of Berlin, Germany) concerning the latter's refusal to pay Mr Kreuziger an allowance in lieu of paid annual leave not taken before the end of the employment relationship.

3. The present case provides the Court with the opportunity to clarify the circumstances in which a worker whose employment relationship ceases may claim payment of such an allowance on the basis of Article 7(2) of Directive 2003/88.

4. In this Opinion I shall explain why I consider that Article 7(2) of that directive must be interpreted as conferring entitlement to an allowance in lieu of untaken paid annual leave at the end of the employment relationship where a worker has been unable to take all the paid annual leave to which he was entitled during that relationship.

5. I shall also explain why in my view that provision must be interpreted as precluding national legislation or practice in accordance with which a worker loses his right to an allowance in lieu of untaken paid annual leave at the end of the employment relationship where that worker did not apply for that leave while he was in active service and does not show that he was unable to take it for reasons beyond his control, without prior verification of whether that worker was actually given the opportunity by his employer to exercise his right to paid annual leave.

6. I shall make clear, last, that where a national court is dealing with a dispute relating to a worker's right to an allowance in lieu of untaken paid annual leave at the end of the employment relationship, it must ascertain whether the employer shows that he took the appropriate measures to ensure that the worker was able actually to exercise his right to paid annual leave during that relationship. If the employer shows that he took the necessary steps and that, in spite of the measures which he took, the worker declined deliberately and in an informed manner to exercise his right to paid annual leave even though he was able to do so during the employment relationship, that worker cannot claim, on the basis of Article 7(2) of Directive 2003/88, payment of an allowance in lieu of untaken paid annual leave at the end of the employment relationship.

I. **Legal framework**

A. **EU law**

7. In the words of recital 4 of Directive 2003/88:

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

8. The first subparagraph of Article 1(3) of Directive 2003/88 states:

'This Directive shall apply to all sectors of activity, both public and private, within the meaning of Article 2 of Directive 89/391/EEC, [(3)] without prejudice to Article 14, 17, 18 and 19 of this Directive.'

9. Article 7 of that directive provides:

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

2. The minimum period of paid annual leave may not be replaced by an allowance in lieu, except where the employment relationship is terminated.'

10. Article 17 of that directive provides that Member States may derogate from certain of its provisions. However, no derogation is permitted in respect of Article 7 of the directive.

11. Article 2 of Directive 89/391 states:

‘1. This Directive shall apply to all sectors of activity, both public and private (industrial, agricultural, commercial, administrative, service, educational, cultural, leisure, etc.).

2. This Directive shall not be applicable where characteristics peculiar to certain specific public service activities, such as the armed forces or the police, or to certain specific activities in the civil protection services inevitably conflict with it.

…’

B. German law

12. As provided in Paragraph 9 of the Verordnung über den Erholungsurlaub der Beamten und Richter (Regulation on the annual leave of officials and judges, ‘the EUrlVO’) (4) of 26 April 1988:

‘1. The official shall take, so far as possible on a single occasion, the annual leave to which he is entitled. Upon request, leave shall be granted in separate periods. In general, however, division of the leave into more than two periods should be avoided. Where leave is divided, it shall be granted to the official for at least two consecutive weeks.

2. Leave must generally be taken during the leave year. Leave which has not been taken within 12 months after the end of the leave year shall lapse. …’

13. The EUrlVO contains no provision for the grant of an allowance in lieu of untaken paid annual leave at the end of the employment relationship.

II. The facts of the main proceedings and the questions referred for a preliminary ruling

14. From 13 May 2008 to 28 May 2010, Mr Kreuziger pursued, as a *Rechtsreferendar* (in-service legal trainee), his course of preparation for the legal professions with the *Land* of Berlin, in the context of training governed by public law, but without having the status of an official. His success, on 28 May 2010, in the oral test in the second State examination marked the end of that training and that course of preparation with the *Land*.

15. Mr Kreuziger decided not to take annual paid leave between 1 January 2010 and the date of the end of his training. On 18 December 2010 he requested the grant of an allowance in lieu of untaken paid annual leave. That request was first of all refused by decision of the President of the Kammergericht (Higher Regional Court, Berlin, Germany) of 7 January 2011, then, on appeal, by decision of 4 May 2011 of the Gemeinsame Juristische Prüfungsamt der Länder Berlin und Brandenburg (Joint Legal Review Authority of the *Länder* of Berlin and Brandenburg, Germany), on the grounds that the EUrlVO does not provide for such a right to an allowance and that Directive 2003/88 applies only to workers and Article 7 of that directive presupposes, in any event, that the person concerned was unable to take his leave for reasons not attributable to him.

16. Mr Kreuziger brought an action before the Verwaltungsgericht Berlin (Administrative Court, Berlin, Germany) against those decisions, which was dismissed by judgment of 3 May 2013. In that judgment, the Verwaltungsgericht Berlin (Administrative Court, Berlin) observed that the EUrlVO

does not provide for a right to an allowance in lieu of untaken paid annual leave and that under Paragraph 9 of the EUrlVO the worker is required to take his leave and to apply for leave. As Mr Kreuziger had voluntarily failed to submit such an application, while being aware that his employment relationship would come to an end on 28 May 2010, his entitlement to paid annual leave would expire on that date.

17. As regards Article 7(2) of Directive 2003/88, the court considered that it, too, did not constitute the basis for a right to an allowance in lieu of paid annual leave in Mr Kreuziger's case, since it follows from the Court of Justice's case-law that the right to paid leave guaranteed by Article 7(1) of that directive may be lost, under national law, if the worker was able to take leave but did not do so, in which case the secondary right to an allowance cannot exist either.

18. Mr Kreuziger lodged an appeal against that judgment with the Oberverwaltungsgericht Berlin-Brandenburg (Higher Administrative Court, Berlin-Brandenburg, Germany), the referring court, which in turn observes that the EUrlVO contains no rule that would form the basis of a right to a financial allowance for Mr Kreuziger, with the consequence that, as Article 7(2) of Directive 2003/88 has not been transposed into national law, any such right can arise only from the direct effect of that provision.

19. In that regard, the referring court considers, first of all, that Mr Kreuziger does indeed fall within the scope *ratione personae* of that directive. As officials fall within the scope of that directive, the position cannot be different, according to the referring court, for trainees undergoing a course of training governed by public law, having regard, in particular, to the first subparagraph of Article 1(3) of Directive 2003/88, which states that that directive is to apply to private and public sectors of activity within the meaning of Article 2 of Directive 88/391 and therefore, in particular, to the 'educational' activities referred to in the latter provision.

20. Next, Mr Kreuziger satisfies both conditions expressly laid down in Article 7(2) of Directive 2003/88, since he did not apply for the paid annual leave to which he was entitled and his employment relationship has come to an end.

21. Last, the referring court states, however, that it has doubts as to whether, in addition to those two express conditions, the right to an allowance in lieu of untaken paid annual leave may be precluded where the worker did not apply to take leave before the end of the employment relationship, although he was able to do so, and whether such a right presupposes, more generally, that the worker was not in a position, for reasons beyond his control, to exercise his right to paid annual leave before the end of the employment relationship.

22. In those circumstances, the Oberverwaltungsgericht Berlin-Brandenburg (Higher Administrative Court, Berlin-Brandenburg) decided to stay proceedings and to refer the following questions to the Court for a preliminary ruling:

'(1) Is Article 7(2) of Directive [2003/88] to be interpreted as precluding national legislation or practice in accordance with which the entitlement to an allowance in lieu on termination of the employment relationship is excluded where the worker did not apply for paid annual leave even though he could have?

2) Is Article 7(2) of Directive [2003/88] to be interpreted as precluding national legislation or practice in accordance with which the entitlement to an allowance in lieu on termination of the employment relationship presupposes that, for reasons beyond his control, the worker was unable to exercise his right to paid annual leave before the end of the employment relationship?'

III. **My analysis**

23. By the two questions referred by it for a preliminary ruling, which in my view should be examined together, the referring court asks, in essence, whether Article 7(2) of Directive 2003/88 must be interpreted as precluding national legislation or practice in accordance with which a worker loses his entitlement to an allowance in lieu of untaken paid annual leave at the end of the employment relationship where that worker did not apply for leave when he was in active service and does not show that he was unable to take that leave for reasons beyond his control.

24. By way of preliminary point, I observe that, although a number of interested parties, including the *Land* of Berlin, submitted observations in respect of the nature of the relationship between that *Land* and Mr Kreuziger in his capacity as *Rechtsreferendar* (legal trainee) and, in particular, on whether that relationship fell within the scope of Directive 2003/88, it should be noted that the referring court considered that Mr Kreuziger did indeed come within the scope of that directive and therefore did not submit any question in that respect. On that point, therefore, I shall merely note that the first subparagraph of Article 1(3) of Directive 2003/88 provides that that directive is to apply to all sectors of activity, both public and private, and in particular to 'educational' activities. It follows from the Court's case-law that Directive 2003/88 must be given a broad scope. (5) I refer, moreover, to the definition of 'worker', within the meaning of Article 7 of Directive 2003/88 and of Article 31(2) of the Charter of Fundamental Rights of the European Union, (6) which the Court has applied in its case-law. (7) Like the European Commission, I am inclined to take the view that preparation for the legal professions is an educational activity which in addition, in the present case, has the general characteristics of an employment relationship. The right to paid annual leave granted to each trainee in the context of the national scheme applicable to officials and judges must therefore, in my view, be exercised in accordance with Article 7 of that directive and Article 31(2) of the Charter.

25. I would point out, moreover, that in the absence in the applicable German law of any provision for an allowance in lieu of untaken paid annual leave at the end of the employment relationship, a right to such an allowance arises directly under Article 7(2) of Directive 2003/88. (8)

26. In order to answer the referring court's questions, it is necessary to bear in mind that, as is apparent from the actual wording of Article 7(1) of Directive 2003/88, a provision from which that directive permits no derogation, every worker is to be entitled to paid annual leave of at least four weeks. As the Court has repeatedly held, 'that right to paid annual leave must be regarded as a particularly important principle of EU social law, the implementation of which by the competent national authorities must be confined within the limits expressly laid down by Directive 2003/88 itself'. (9)

27. Furthermore, it is clear from the terms of Directive 2003/88 and from the Court's case-law that, 'although it is for the Member States to lay down the conditions for the exercise and implementation of the right to paid annual leave, they must not make the very existence of that right, which derives directly from that directive, subject to any preconditions whatsoever'. (10)

28. The Court has already found it necessary on a number of occasions to adjudicate on questions relating to the right to paid annual leave of a worker who was unable, before the end of his employment relationship, to exercise his right to leave for reasons beyond his control, whether because of sickness (11) or because the employer refused to remunerate his leave. (12)

29. In that context, the Court has established the rule that 'Directive 2003/88 does not allow Member States either to exclude the existence of the right to paid annual leave or to provide for the

right to paid annual leave of a worker, who was prevented from exercising that right, to be lost at the end of the reference period and/or of a carry-over period fixed by national law'. (13)

30. Furthermore, it follows from the Court's case-law that 'a worker who has not been able, for reasons beyond his control, to exercise his right to paid annual leave before termination of the employment relationship is entitled to an allowance in lieu under Article 7(2) of Directive 2003/88. The amount of that payment must be calculated so that the worker is put in a position comparable to that he would have been in had he exercised that right during his employment relationship'. (14)

31. According to the Court, the rule laid down in Article 7 of Directive 2003/88 and in Article 31(2) of the Charter is therefore that 'the right to paid annual leave acquired cannot be lost at the end of the leave year and/or of a carry-over period fixed by national law, *when the worker has been unable to take his leave*'. (15)

32. The idea underlying that rule is that, although the Member States may lay down conditions for the exercise of the right to paid annual leave, including even the loss of that right at the end of a reference period or of a carry-over period, that is subject to the condition that a worker who has lost his right to paid annual leave must have actually had the opportunity to exercise the right conferred on him by that directive. (16)

33. It appears to follow from the national legislation at issue, as interpreted by certain national courts, that the right to paid annual leave must be considered to be lost at the end of the reference period when the worker did not request to exercise that right during that period. That loss of the right to paid annual leave not applied for by the worker entails the loss of the right to an allowance in lieu of untaken paid annual leave at the end of the employment relationship.

34. Such national legislation, as thus interpreted, seems to me to be contrary to Article 7 of Directive 2003/88 in so far as it automatically follows from the worker's failure to apply for leave during the reference period that his leave is lost at the end of that period, without prior verification of whether that worker was actually in a position to exercise his right to paid annual leave, in accordance with the requirements established in the Court's case-law.

35. Having regard to the purpose which Directive 2003/88 ascribes to the right to paid annual leave, namely to ensure that the worker has a period of actual rest, with the aim of effectively protecting his safety and health, it is for the employer to take the appropriate measures to ensure that the worker actually has the opportunity to exercise his right to paid annual leave and, in the event of a dispute, to prove that he took such measures.

36. I recall, in that regard, that Directive 2003/88 'embodies the rule that a worker must normally be entitled to actual rest, with a view to ensuring effective protection of his health and safety'. (17) The purpose of the right to paid annual leave is to 'enable the worker to rest and to enjoy a period of relaxation and leisure'. (18)

37. The employer has a special responsibility in order that the workers under his control actually exercise their right to paid annual leave.

38. As the Court has already held, 'the worker must be regarded as the weaker party in the employment relationship, and it is therefore necessary to prevent the employer being in a position to impose on him a restriction of his rights'. (19) Indeed, according to the Court, 'on account of that position of weakness, such a worker may be dissuaded from explicitly claiming his rights vis-à-vis his employer where doing so may expose him to measures taken by the employer which are likely

to affect the employment relationship in a manner detrimental to that worker'. (20) Accordingly, 'any practice or omission of an employer that may potentially deter a worker from taking his annual leave is equally incompatible with the purpose of the right to paid annual leave'. (21)

39. In the light of that imbalance inherent in the employment relationship, it is incumbent on the employer to adopt the appropriate measures to enable the workers to exercise their right to paid annual leave. The Court seems to me, moreover, to have emphasised that the employer is under an obligation as to the actual taking of leave by workers, stating that 'an employer that does not allow a worker to exercise his right to paid annual leave must bear the consequences'. (22)

40. The existence of such an obligation is borne out by Directive 89/391, which continues to apply, as stated in recital 3 and Article 1(4) of Directive 2003/88. (23) Article 5(1) of Directive 89/391 provides that 'the employer shall have a duty to ensure the safety and health of workers in every aspect related to the work'. In addition, Article 6(1) of that directive provides that 'within the context of his responsibilities, the employer shall take the measures necessary for the safety and health protection of workers'.

41. It is therefore necessary to take the obligation that Directive 89/391 imposes on employers into account when interpreting Article 7 of Directive 2003/88.

42. I observe, moreover, that the Federal Republic of Germany acknowledged at the hearing that, in application of the principle that an employer owes a duty of care to his employees, the employer is generally obliged to ensure the welfare of his workers and that that duty of care also encompasses the need to put the worker in a position to exercise his rights.

43. That obligation must be reflected, as regards the organisation of working time, in the adoption by the employer of specific measures of organisation appropriate for enabling the workers to exercise their right to paid annual leave and also in the provision of specific information to the workers in good time that, if they do not actually take their leave, it might be lost at the end of the reference period or an authorised carry-over period. The employer must also inform the workers that, if they do not take leave during the course of the employment relationship although they are actually able to do so, they will not be able to claim entitlement to an allowance in lieu of untaken paid annual leave at the end of the employment relationship. However, the obligation borne by the employer does not extend to 'requiring the employer to force his workers to claim the rest periods due to them'. (24) Subject to that reservation, the obligation placed on the employer must to my mind be reflected in a system of rules of evidence under which, in the event of dispute, it is for the employer to show that he took the appropriate measures to ensure that a worker was able actually to exercise that right.

44. In view of the obligation borne by the employer to actually give his workers the opportunity to exercise their right to paid annual leave, national legislation or practice which has the effect of attributing solely to workers the responsibility for exercising that right, without prior verification of whether that employer met his obligation, is contrary to Article 7 of Directive 2003/88. In fact, to accept that national legislation or practice might provide for the loss of the worker's right to paid annual leave, without the worker actually having the opportunity to exercise that right, would undermine the substance of the social right directly conferred by Article 7 of Directive 2003/88 on every worker. (25) It follows from the foregoing that the fact that a worker did not request to exercise his right to paid annual leave during the reference period cannot in itself entail the loss of that right at the end of that period and, correspondingly, the loss of the right to an allowance in lieu of untaken paid annual leave at the end of the employment relationship. According to the Court's

case-law, moreover, whether or not a worker made requests for paid annual leave seems to be irrelevant. (26)

45. It is therefore incumbent on the referring court to ascertain, having regard to the purpose which Directive 2003/88 ascribes to the right to paid annual leave, whether the employer shows that he took the appropriate measures to ensure that the worker was actually able to exercise his right to paid annual leave, by taking the requisite steps for that purpose. Provided that the employer demonstrates that he took the necessary steps and that, in spite of the measures which he took, the worker deliberately declined to exercise his right to paid annual leave although he had the opportunity to do so during the employment relationship, that worker cannot claim, on the basis of Article 7(2) of Directive 2003/88, payment of an allowance in lieu of untaken paid annual leave at the end of the employment relationship. In fact, the worker has then been given the opportunity to exercise his right. He waived that right in an informed manner, knowing the legal effects that he might encounter at the end of the employment relationship.

46. It is true that certain considerations formulated by the Court may give the impression that it interprets Article 7(2) of Directive 2003/88 as directly and automatically conferring on workers an allowance in lieu of untaken paid annual leave in the event of the termination of the employment relationship. As regards the conditions for the existence of such an allowance, the Court has thus pointed out that 'when the employment relationship has terminated, and, therefore, it is in fact no longer possible to take paid annual leave, Article 7(2) of Directive 2003/88 provides that the worker is entitled to an allowance in lieu in order to prevent all enjoyment by the worker of that right to paid annual leave, even in pecuniary form, being lost because of that "impossibility"'. (27) The Court has also held that, 'in order to ensure respect for that fundamental workers' right affirmed in EU law, [it] may not make a restrictive interpretation of Article 7(2) of Directive 2003/88 at the expense of the rights that workers derive from it'. (28) Furthermore, the Court has held 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, secondly, that the worker has not taken all annual leave to which he was entitled on the date that that relationship ended'. (29)

47. Nonetheless, it should be emphasised that those considerations are closely linked to the factual contexts in which they were expressed, namely situations in which a worker had been prevented from exercising his right to paid annual leave on the ground of sickness or his death.

48. Furthermore, and in any event, Article 7(2) of Directive 2003/88 cannot be interpreted as meaning that a worker who has decided voluntarily and in an informed manner not to take his paid annual leave can claim to be entitled to payment of an allowance in lieu of untaken paid annual leave at the end of the employment relationship when his employer proves that he actually gave that worker the opportunity to take his leave during the employment relationship.

49. Indeed, an interpretation of Article 7(2) of Directive 2003/88 that favoured automatic payment to the worker of an allowance in lieu of untaken paid annual leave at the end of the employment relationship, without any examination of the respective conduct of the employer and the worker, would run counter to both the wording of that provision and the purpose of the right to paid annual leave, as emphasised and then reiterated by the Court in its consistent case-law. Article 7 of Directive 2003/88 must be interpreted in the light of its wording and of the objective pursued by it. (30)

50. As regards, first, the wording of Article 7(2) of Directive 2003/88, it follows from that provision that payment of an allowance in lieu of the minimum period of paid annual leave is

possible only at the end of the employment relationship. The actual taking of leave is therefore the rule and the allowance in lieu is the exception to that rule. In addition, even where an employment relationship comes to an end, the wording of that provision does not express the idea of automatic entitlement to that allowance when the relationship ends, but only the idea of a possibility.

51. As regards, second, the purpose of the right to paid annual leave, that purpose, it will be recalled, is to 'enable the worker to rest and to enjoy a period of relaxation and leisure'. (31) Furthermore, mention should again be made of the rule that the worker must normally be able to enjoy an actual period of rest.

52. To interpret Article 7(2) of Directive 2003/88 as directly and automatically conferring on the worker an allowance in lieu of untaken paid annual leave at the end of the employment relationship would undermine that purpose and the requirement that the worker have an actual period of rest, which mean that enjoyment of the right to paid annual leave must in principle be exercised in kind.

53. Indeed, such an interpretation might encourage workers who are aware, for example because they are undergoing training or employed under a fixed-term contract, that their employment relationship might cease in the near future not to take leave in order to increase their remuneration by receiving, at the end of that relationship, an allowance in lieu of untaken paid annual leave. The Court has already held that care must be taken not to arrive at an interpretation of Article 7 of Directive 2003/88 that 'would create an incentive, incompatible with the objectives of [that] directive, not to take leave or to encourage employees not to do so'. (32) It is therefore necessary, in order to comply with the purpose of the right to paid annual leave, to ensure that Article 7(2) of Directive 2003/88 cannot be used as a tool for workers to build up days of paid annual leave in order to secure remuneration from them at the end of the employment relationship. (33)

54. I would add that the protection of the worker's safety and health is not just in the worker's individual interest, but also in the interest of his employer and in the general interest. (34)

55. In the light of those factors, it is therefore necessary to put in perspective the passage in the judgment of 12 June 2014, *Bollacke*, (35) in which the Court stated 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, secondly, that the worker has not taken all annual leave to which he was entitled on the date that that relationship ended'. (36) In order to comply with the twofold purpose of the right to paid annual leave, namely to allow the worker to rest and also to enjoy a period of relaxation and leisure, and also with the rule that the worker must normally be able to enjoy an actual period of rest, the second condition laid down in Article 7(2) of Directive 2003/88, namely that 'the worker *has not taken* all annual leave to which he was entitled on the date that [his employment relationship] ended', (37) must necessarily be understood as meaning that the worker '*has not been able* to take all his … paid annual leave before his employment relationship has ended'. (38) Only if the first condition, namely the termination of the employment relationship, and the second condition, as thus understood, are satisfied is the worker whose employment relationship has ended entitled, on the basis of Article 7(2) of Directive 2003/88, to an allowance in lieu of untaken paid annual leave.

56. As thus interpreted, Article 7(2) of Directive 2003/88 therefore enables a fair balance to be struck between the necessary financial compensation for a right to paid annual leave that could not be actually enjoyed during the employment relationship and respect for the purpose of that right, which, in principle, requires that leave actually be taken.

57. In short, I propose that the Court should reject the argument that payment of the allowance in lieu of untaken paid annual leave at the end of the employment relationship would depend on the twofold condition that the worker has personally claimed the benefit of the leave at issue from his employer and that that worker shows that he was unable to exercise his right to paid annual leave for reasons not attributable to him.

58. I suggest that the Court should follow a different logic, based on the rule that the actual taking of leave must be given priority and on the role which the employer must play in that respect. From that viewpoint, workers alone cannot bear the responsibility for ensuring that they actually take their leave, failing which they lose the benefit of that leave. Such a solution fails to have regard to the reality of employment relationships, which is reflected in an imbalance between employer and worker, who may be encouraged, in various ways, to work more, especially where he hopes that his contract will be renewed. In order to meet that risk and also the propensity for workers to convert their days of leave into additional salary, it is necessary to impose on the employer the obligation to take the appropriate measures to enable the worker actually to use his right to paid annual leave. If the employer shows that he gave the worker the opportunity to exercise that right, the worker cannot then claim, on the basis of Article 7(2) of Directive 2003/88, payment of an allowance in lieu of untaken paid annual leave at the end of the employment relationship.

59. Consequently, I propose that the Court's answer to the referring court should be that Article 7(2) of Directive 2003/88 must be interpreted as conferring entitlement to an allowance in lieu of untaken paid annual leave at the end of the employment relationship when a worker was not able to take all the paid annual leave to which he was entitled during that relationship.

60. That provision must to my mind be interpreted as precluding national legislation or practice in accordance with which a worker loses his right to an allowance in lieu of untaken paid annual leave at the end of the employment relationship where the worker did not apply for that leave while he was in active service and does not show that he was unable to take it for reasons beyond his control, without prior verification of whether that worker was actually given the opportunity by his employer to exercise his right to paid annual leave.

61. Where a national court is dealing with a dispute relating to a worker's right to an allowance in lieu of untaken paid annual leave at the end of the employment relationship, it must ascertain whether the employer shows that he took the appropriate measures to ensure that the worker was able actually to exercise his right to paid annual leave during that relationship. If the employer shows that he took the necessary steps and that, in spite of the measures which he took, the worker declined deliberately and in an informed manner to exercise his right to paid annual leave although he was able to do so during the employment relationship, that worker cannot claim, on the basis of Article 7(2) of Directive 2003/88, payment of an allowance in lieu of untaken paid annual leave at the end of the employment relationship.

62. In this instance, if it follows from the verification by the referring court that the *Land* of Berlin, in its capacity as Mr Kreuziger's employer, gave him the opportunity to exercise his right to paid annual leave and that, in spite of that, Mr Kreuziger did not wish to take his leave before passing the oral test in the second State examination, that court will be able to consider that he was rightfully refused such an allowance.

IV. **Conclusion**

63. Having regard to the foregoing considerations, I propose that the Court should answer the questions referred for a preliminary ruling by the Oberverwaltungsgericht Berlin-Brandenburg (Higher Administrative Court, Berlin-Brandenburg, Germany) as follows:

(1) Article 7(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 must be interpreted as conferring entitlement to an allowance in lieu of untaken paid annual leave at the end of the employment relationship when a worker was not able to take all the paid annual leave to which he was entitled during that relationship.

(2) Article 7(2) of Directive 2003/88 must be interpreted as precluding national legislation or practice in accordance with which a worker loses his right to an allowance in lieu of untaken paid annual leave at the end of the employment relationship where the worker did not apply for that leave while he was in active service and does not show that he was unable to take it for reasons beyond his control, without prior verification of whether that worker was actually given the opportunity by his employer to exercise his right to paid annual leave.

(3) Where a national court is dealing with a dispute relating to a worker's right to an allowance in lieu of untaken paid annual leave at the end of the employment relationship, it must ascertain whether the employer shows that he took the appropriate measures to ensure that the worker was able actually to exercise his right to paid annual leave during that relationship. If the employer shows that he took the necessary steps and that, in spite of the measures which he took, the worker declined deliberately and in an informed manner to exercise his right to paid annual leave although he was able to do so during the employment relationship, that worker cannot claim, on the basis of Article 7(2) of Directive 2003/88, payment of an allowance in lieu of untaken paid annual leave at the end of the employment relationship.

1 Original language: French.

2 OJ 2003 L 299, p. 9.

3 Council Directive of 12 June 1989 on the introduction of measures to encourage improvements in the safety and health of workers at work (OJ 1989 L 183, p. 1).

4 GVBl. 1988, p. 846.

5 See, by analogy, concerning Directive 89/391, judgment of 26 March 2015, *Fenoll* (C-316/13, EU:C:2015:200, paragraph 20).

6 ‘The Charter’.

7 See, in particular, judgment of 26 March 2015, *Fenoll* (C-316/13, EU:C:2015:200, paragraphs 24 to 27).

8 As regards the direct effect of Article 7 of Directive 2003/88, I refer to my Opinion in Joined Cases *Bauer* (C-569/16) and *Willmeroth* (C-570/16) (points 45 and 46). In view of the vertical nature of the dispute between Mr Kreuziger and the *Land* of Berlin, there is no doubt that that article may be relied on directly before the referring court in order to preclude the application of any national provision or practice that would constitute an obstacle to payment to him of an allowance in lieu of untaken paid annual leave at the end of the employment relationship, on the assumption, of course, that the conditions placed on such payment are satisfied.

9 See, in particular, judgment of 29 November 2017, *King* (C-214/16, EU:C:2017:914, paragraph 32 and the case-law cited).

10 See, in particular, judgment of 29 November 2017, *King* (C-214/16, EU:C:2017:914, paragraph 34 and the case-law cited).

11 See, in particular, judgment of 20 January 2009, *Schultz-Hoff and Others* (C-350/06 and C-520/06, EU:C:2009:18).

12 See judgment of 29 November 2017, *King* (C-214/16, EU:C:2017:914).

13 See, in particular, judgment of 29 November 2017, *King* (C-214/16, EU:C:2017:914, paragraph 51 and the case-law cited).

14 See, in particular, judgment of 29 November 2017, *King* (C-214/16, EU:C:2017:914, paragraph 52 and the case-law cited).

15 See judgment of 29 November 2017, *King* (C-214/16, EU:C:2017:914, paragraph 56), emphasis added.

16 See, in particular, to that effect, judgments of 20 January 2009, *Schultz-Hoff and Others* (C-350/06 and C-520/06, EU:C:2009:18, paragraph 43); of 22 November 2011, *KHS* (C-214/10, EU:C:2011:761, paragraph 26); and of 19 September 2013, Review *Commission* v *Strack* (C-579/12 RX-II, EU:C:2013:570, paragraph 30).

17 Judgment of 26 June 2001, *BECTU* (C-173/99, EU:C:2001:356, paragraph 44). In other words, as Advocate General Mengozzi observed in point 17 of his Opinion in *Ministerul Justiţiei and Others* (C-12/17, EU:C:2018:195), 'a period of actual work must give rise to a right to a period of actual rest'.

18 See, in particular, judgment of 29 November 2017, *King* (C-214/16, EU:C:2017:914, paragraph 37 and the case-law cited).

19 See, in particular, judgment of 25 November 2010, *Fuß* (C-429/09, EU:C:2010:717, paragraph 80 and the case-law cited).

20 Ibid., paragraph 81.

21 Judgment of 29 November 2017, *King* (C-214/16, EU:C:2017:914, paragraph 39 and the case-law cited).

22 Judgment of 29 November 2017, *King* (C-214/16, EU:C:2017:914, paragraph 63).

23 On the link between Directive 2003/88 and the improvement of the safety and health of workers, see, in particular, judgment of 19 September 2013, Review *Commission* v *Strack* (C-579/12 RX-II, EU:C:2013:570, paragraph 44 and the case-law cited). In line with the objective pursued by Directive 89/391, Directive 2003/88 lays down, as indicated in Article 1(1), 'minimum safety and health requirements for the organisation of working time'.

24 See judgment of 7 September 2006, *Commission* v *United Kingdom* (C-484/04, EU:C:2006:526, paragraph 43).

25 See, in particular, judgment of 19 September 2013, Review *Commission* v *Strack* (C-579/12 RX-II, EU:C:2013:570, paragraph 32 and the case-law cited).

26 See, in that regard, judgment of 29 November 2017, *King* (C-214/16, EU:C:2017:914, paragraph 62 and the case-law cited).

27 See, in particular, judgment of 12 June 2014, *Bollacke* (C-118/13, EU:C:2014:1755, paragraph 17 and the case-law cited).

28 See, in particular, judgment of 12 June 2014, *Bollacke* (C-118/13, EU:C:2014:1755, paragraph 22 and the case-law cited).

29 See, in particular, judgment of 12 June 2014, *Bollacke* (C-118/13, EU:C:2014:1755, paragraph 23).

30 See, in particular, judgment of 22 May 2014, *Lock* (C-539/12, EU:C:2014:351, paragraph 15).

31 See, in particular, judgment of 29 November 2017, *King* (C-214/16, EU:C:2017:914, paragraph 37 and the case-law cited).

32 See judgment of 6 April 2006, *Federatie Nederlandse Vakbeweging* (C-124/05, EU:C:2006:244, paragraph 32). See also, for reasoning based on the rule that the worker must normally be able to benefit from actual rest, judgment of 16 March 2006, *Robinson-Steele and Others* (C-131/04 and C-257/04, EU:C:2006:177).

33 See, along the same lines, Opinion of Advocate General Tanchev in *King* (C-214/16, EU:C:2017:439, point 97).

34 See also, on that idea, Opinion of Advocate General Stix-Hackl in Joined Cases *Robinson-Steele and Others* (C-131/04 and C-257/04, EU:C:2005:650, point 79).

35 C-118/13, EU:C:2014:1755.

36 See judgment of 12 June 2014, *Bollacke* (C-118/13, EU:C:2014:1755, paragraph 23).

37 See, in particular, judgment of 20 July 2016, *Maschek* (C-341/15, EU:C:2016:576, paragraph 27 and the case-law cited), emphasis added.

38 See, in that regard, judgment of 20 July 2016, *Maschek* (C-341/15, EU:C:2016:576, paragraph 28), emphasis added.