ECLI:EU:C:2018:338

Provisional text

OPINION OF ADVOCATE GENERAL BOT

delivered on 29 May 2018 (1)

Case C-684/16

Max-Planck-Gesellschaft zur Förderung der Wissenschaften eV

v

Tetsuji Shimizu

(request for a preliminary ruling from the Bundesarbeitsgericht (Federal Labour Court, 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 — Charter of Fundamental Rights of the European Union — Article 31(2) — Obligation to interpret national law consistently with EU law — Possibility of relying directly on Article 31(2) of the Charter in the context of a dispute between individuals — Obligation to disapply inconsistent national legislation)

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) and of Article 31(2) of the Charter of Fundamental Rights of the European Union. (3)

2. The request has been made in proceedings between Tetsuji Shimizu and his former employer, Max-Planck-Gesellschaft zur Förderung der Wissenschaften eV (‘Max-Planck’), concerning the latter’s refusal to pay Mr Shimizu an allowance in lieu of untaken paid annual leave at the end of the employment relationship.

3. The present case, like the case of *Kreuziger* (C-619/16) in which I am also delivering an Opinion, 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 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, 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 state, next, 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.

7. Last, I shall be prompted to make clear that when, in the context of a dispute between two individuals, national legislation prevents a worker from receiving an allowance in lieu of untaken paid annual leave at the end of the employment relationship to which he is nonetheless entitled under Article 7(2) of Directive 2003/88, the national court dealing with the matter is required to ascertain whether it can interpret the applicable national law in a manner consistent with that provision and, if that does not appear to it to be the case, to ensure, within the framework of its powers, the legal protection resulting for individuals from Article 31(2) of the Charter and to give full effect to that article by disapplying, if need be, any national provision to the contrary.

I. **Legal framework**

A. **EU law**

8. 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.'

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 5(1) of Council Directive 89/391/EEC of 12 June 1989 on the introduction of measures to encourage improvements in the safety and health of workers (4) provides:

'The employer shall have a duty to ensure the safety and health of workers in every aspect related to the work.'

B. **German law**

12. Paragraph 7 of the Bundesurlaubsgesetz (Federal Law on leave) (5) of 8 January 1963, as amended on 7 May 2002, (6) provides, under the heading 'Fixing and carry-over of leave and allowance in lieu':

'1. In determining the time of leave consideration shall be given to a worker's wishes, save where consideration thereof is precluded on compelling operational grounds or by the wishes of other workers who deserve to be given priority for social reasons. Leave shall be granted when requested in connection with preventive or post-care medical treatment.

2. Leave shall be granted for consecutive days, save where compelling operational grounds or reasons personal to the employee necessitate apportionment of the leave. Where the leave cannot be granted for consecutive days for these reasons and the employee is entitled to leave of more than 12 working days, one portion of the leave shall comprise at least 12 consecutive working days.

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

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

13. The Tarifvertrag für den öffentlichen Dienst (Collective agreement for public service employees) contains Paragraph 26, entitled 'Annual leave', which provides, in subparagraph 1:

'… Annual leave must be granted in the course of the current calendar year and may also be taken in parts. …'

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

14. Mr Shimizu was employed by Max-Planck on the basis of a number of fixed-term contracts from 1 August 2001 until 31 December 2013. The employment relationship was governed by the provisions of the BUrlG and of the Collective agreement for public service employees.

15. By letter of 23 October 2013, Max-Planck requested Mr Shimizu to take his leave before the end of the employment relationship, but did not require him to take specific leave days which it fixed unilaterally. Mr Shimizu took two days' leave, on 15 November and 2 December 2013.

16. After unsuccessfully requesting Max-Planck, by letter of 23 December 2013, to pay an allowance of EUR 11 979.26 corresponding to 51 days' untaken annual leave for 2012 and 2013, Mr Shimizu brought an action seeking an order that Max-Planck pay that allowance.

17. After that action had been allowed both at first instance and on appeal, Max-Planck brought an appeal on a point of law before the Bundesarbeitsgericht (Federal Labour Court, Germany), the referring court.

18. That court explains that Mr Shimizu's entitlement to paid annual leave for 2012 and 2013 has lapsed, pursuant to the first sentence of Paragraph 7(3) of the BUrlG. He did not take that leave during the years in respect of which it was granted to him and it is not apparent that compelling operational grounds or reasons personal to the employee, within the meaning of the third sentence of Paragraph 7(3) of the BUrlG, justified that failure to take leave in this instance or that the employer in any way prevented Mr Shimizu from taking leave. Nor, according to the referring court, can Paragraph 7 of the BUrlG be interpreted as meaning that the employer is required to fix unilaterally the dates of annual leave and to require the worker to take it. Thus, because his entitlement to paid annual leave has lapsed, that entitlement can no longer be converted into an entitlement to an allowance under Paragraph 7(4) of the BUrlG.

19. The referring court considers, moreover, that the Court's case-law does not make it possible to determine clearly whether national legislation having the effects described in the preceding point of this Opinion is consistent with Article 7 of Directive 2003/88 and with Article 31(2) of the Charter, while the literature is divided in that regard.

20. Furthermore, the referring court states that Max-Planck is a non-profit-making organisation governed by private law which is, admittedly, largely financed from public funds but which, however, has no special powers by comparison with the rules applicable between individuals, so that it should be regarded as an individual under the Court's case-law. (7) However, the Court has not yet made clear, in that regard, whether Article 7 of Directive 2003/88 or Article 31(2) of the Charter has horizontal direct effect.

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

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

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

Does this apply even where the employment relationship is between two private persons?'

III. **My analysis**

22. By the first question referred by it for a preliminary ruling, the referring court asks, in essence, whether Article 7(2) of Directive 2003/88 must be interpreted as precluding national legislation 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.

23. The second question relates to whether it is possible to rely on EU law in a dispute between individuals in order to preclude the application of such legislation, if that legislation should be considered to be contrary to EU law.

24. 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'. (8)

25. 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'. (9)

26. 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 (10) or because the employer refused to remunerate his leave. (11)

27. 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'. (12)

28. 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'. (13)

29. 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*'. (14)

30. 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. (15)

31. 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.

32. 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.

33. 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.

34. 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'. (16) 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'. (17)

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

36. 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'. (18) 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'. (19) 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'. (20)

37. 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'. (21)

38. 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. (22) 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'.

39. 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.

40. 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.

41. 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'. (23) 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.

42. 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. (24) 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. (25)

43. 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.

44. 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"'. (26) 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’. (27) 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’. (28)

45. 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.

46. 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.

47. 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. (29)

48. 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.

49. 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’. (30) Furthermore, mention should again be made of the rule that the worker must normally be able to enjoy an actual period of rest.

50. 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.

51. 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’. (31) 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. (32)

52. 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. (33)

53. In the light of those factors, it is therefore necessary to put in perspective the passage in the judgment of 12 June 2014, *Bollacke*, (34) 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'. (35) 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', (36) 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'. (37) 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.

54. 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.

55. 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.

56. 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.

57. 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.

58. That provision must to my mind be interpreted as precluding national legislation 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, without prior verification of whether that worker was actually given the opportunity by his employer to exercise his right to paid annual leave.

59. 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.

60. In this instance, although the final assessment of the point falls to be made by the referring court, I doubt whether it may be considered that Max-Planck took the necessary steps to put Mr Shimizu in a position to take the paid annual leave to which he was entitled. Indeed, the only measure that appears in the file is the invitation made to Mr Shimizu by Max-Planck on 23 October 2013 to take his leave, when he learnt at the same time that his contract of employment would not be renewed. Given the limited time between the date on which that measure was taken and the date of the end of Mr Shimizu's fixed-term contract, namely 31 December 2013, that measure was belated, which in my view means that it cannot be regarded as an appropriate measure to enable that worker actually to exercise his right to paid annual leave.

61. In addition, I consider that during the period preceding the expiry of a fixed-term contract a worker is not in a position actually to enjoy his entitlement to paid annual leave. As the reality of the labour market is what it is, during that period the worker will certainly be more concerned with seeking a new post than with resting and enjoying a period of relaxation and leisure. Furthermore, during the period preceding the end of a fixed-term contract, the worker can be committed to properly completing the projects which he has carried out during the employment relationship, which is likely to encourage him not to take his leave. (38)

62. I now come to the second question referred for a preliminary ruling by the referring court, which raises the problem whether it is possible to rely on EU law in the context of a dispute been individuals. In that regard, the referring court observes that Max-Planck is a non-profit-making organisation governed by private law, which is indeed financed largely from public funds but which does not, however, have special powers by comparison with the rules applicable in relations between individuals. The dispute before it must therefore in its view be regarded as a dispute between individuals. That premiss has not been called into question in the context of the present preliminary ruling proceedings.

63. In the light of the Court's settled case-law on the lack of horizontal direct effect of directives, the referring court seeks, by this question, to ascertain, in essence, whether Article 31(2) of the Charter might be relied on in a dispute between individuals in order to preclude the application of national legislation which is shown to be inconsistent with Article 7(2) of Directive 2003/88.

64. I have examined in detail that problem, and also the scope of the obligation borne by the national courts to interpret national law consistently with EU law, in my Opinion in Joined Cases *Bauer* (C-569/16) and *Willmeroth* (C-570/16), to which I refer. In the light of the considerations

which I have set out in that Opinion, I consider that, in so far as Article 31(2) of the Charter guarantees a worker the right to an allowance in lieu of untaken paid annual leave at the end of the employment relationship when that worker has not been in a position actually to exercise his right to paid annual leave during that relationship, it may be relied on directly by that worker in the context of a dispute between him and his employer in order to preclude the application of national legislation that stands in the way of such an allowance being paid to him.

65. I therefore propose that the Court's answer to the referring court should be that where, in the context of a dispute between two individuals, national legislation prevents a worker from receiving an allowance in lieu of untaken paid annual leave at the end of the employment relationship to which he is nonetheless entitled under Article 7(2) of Directive 2003/88, the national court dealing with the matter is required to ascertain whether it can interpret the applicable national law in a manner consistent with that provision and, if that does not appear to it to be the case, to ensure, within the framework of its powers, the legal protection resulting for individuals from Article 31(2) of the Charter and to give full effect to that article by disapplying, if need be, any national provision to the contrary.

IV. **Conclusion**

66. Having regard to the foregoing considerations, I propose that the Court should answer the questions referred for a preliminary ruling by the Bundesarbeitsgericht (Federal Labour Court, 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 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, 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.

(4) Where, in the context of a dispute between two individuals, national legislation prevents a worker from receiving an allowance in lieu of untaken paid annual leave at the end of the employment relationship to which he is nonetheless entitled under Article 7(2) of Directive 2003/88, the national court dealing with the matter is required to ascertain whether it can interpret the applicable national law in a manner consistent with that provision and, if that does not appear to it to be the case, to ensure, within the framework of its powers, the legal protection resulting for

individuals from Article 31(2) of the Charter and to give full effect to that article by disapplying if need be any national provision to the contrary.

1 Original language: French.

2 OJ 2003 L 299, p. 9.

3 ‘The Charter’.

4 OJ 1989 L 183, p. 1.

5 BGBl. 1963, p. 2.

6 BGBl. 2002 I, p. 1529 (‘the BUrlG’).

7 The referring court refers, in that regard, to the judgment of 12 July 1990, *Foster and Others* (C-188/89, EU:C:1990:313).

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

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

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

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

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

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

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

15 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).

16 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’.

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

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

19 Ibid., paragraph 81.

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

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

22 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’.

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

24 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).

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

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

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

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

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

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

31 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).

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

33 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).

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

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

36 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.

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

38 As he stated at the hearing, following Max-Planck's request that he should take his leave, Mr Shimizu, having learnt at the same time that his contract would not be renewed, wished to complete his last projects, which is why he decided not to take all the paid annual leave to which he was entitled.