ECLI:EU:C:2018:874

Provisional text

JUDGMENT OF THE COURT (Grand Chamber)

6 November 2018 (*)

(Reference for a preliminary ruling — Social policy — Organisation of working time — Directive 2003/88/EC — Article 7 — Right to paid annual leave — National legislation providing for the loss of annual leave not taken and of the allowance in lieu thereof where an application for leave has not been made by the worker prior to the termination of the employment relationship — Directive 2003/88/EC — Article 7 — Obligation to interpret national law in conformity with EU law — Charter of Fundamental Rights of the European Union — Article 31(2) — Whether it may be relied upon in a dispute between individuals)

In Case C-684/16,

REQUEST for a preliminary ruling under Article 267 TFEU from the Bundesarbeitsgericht (Federal Labour Court, Germany), made by decision of 13 December 2016, received at the Court on 27 December 2016, in the proceedings

Max-Planck-Gesellschaft zur Förderung der Wissenschaften e.V.

v

Tetsuji Shimizu,

THE COURT (Grand Chamber),

composed of K. Lenaerts, President, J.-C. Bonichot, A. Prechal (Rapporteur), M. Vilaras, T. von Danwitz, F. Biltgen, K. Jürimäe, and C. Lycourgos, Presidents of Chambers, M. Ilešič, J. Malenovský, E. Levits, L. Bay Larsen and S. Rodin, Judges,

Advocate General: Y. Bot,

Registrar: K. Malacek, Administrator,

having regard to the written procedure and further to the hearing on 9 January 2018,

after considering the observations submitted on behalf of:

– Max-Planck-Gesellschaft zur Förderung der Wissenschaften e.V., by J. Röckl, Rechtsanwalt,

– Mr Shimizu, by N. Zimmermann, Rechtsanwalt,

– the German Government, by T. Henze and J. Möller, acting as Agents,

– the French Government, by D. Colas and R. Coesme, acting as Agents,

– the Hungarian Government, by E. Sebestyén and M.Z. Fehér, acting as Agents,

– the European Commission, by M. van Beek and T.S. Bohr, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 29 May 2018,

gives the following

Judgment

1 The present request for a preliminary ruling concerns the interpretation of Article 7 of Directive 2003/88/EC of the European Parliament and of the Council of 4 November 2003 concerning certain aspects of the organisation of working time (OJ 2003 L 299, p. 9) and of Article 31(2) of the Charter of Fundamental Rights of the European Union ('the Charter').

2 The request has been made in proceedings between Max-Planck-Gesellschaft zur Förderung der Wissenschaften e.V. ('Max-Planck') and Mr Tetsuji Shimizu, one of its former employees, concerning the refusal of Max-Planck to pay him an allowance in lieu of paid annual leave not taken before the termination of the employment relationship between them.

Legal context

European Union law

3 The fourth recital of Council Directive 93/104/EC of 23 November 1993 concerning certain aspects of the organisation of working time (OJ 1993 L 307, p. 18) stated:

'Whereas the Community Charter of the Fundamental Social Rights of Workers, adopted at the meeting of the European Council held at Strasbourg on 9 December 1989 by the Heads of State or of Government of 11 Member States, and in particular ... [point] 8 ... thereof, declared that:

"...

8. Every worker in the European Community shall have a right to a weekly rest period and to annual paid leave, the duration of which must be progressively harmonised in accordance with national practices.

..."'

4 As is apparent from recital 1, Directive 2003/88, which repealed Directive 93/104, codified the provisions of the latter.

5 According to recitals 4 to 6 of Directive 2003/88:

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

(5) All workers should have adequate rest periods. The concept of “rest” must be expressed in units of time, i.e. in days, hours and/or fractions thereof. [European Union] workers must be granted minimum daily, weekly and annual periods of rest and adequate breaks. ...

(6) Account should be taken of the principles of the International Labour Organisation with regard to the organisation of working time, including those relating to night work.’

6 Article 7 of Directive 2003/88, which is identical to Article 7 of Directive 93/104, is worded as follows:

‘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.’

7 Article 17 of Directive 2003/88 provides that Member States may derogate from certain provisions of that directive. However, no derogation is permitted in respect of Article 7 of the directive.

German law

8 Paragraph 7 of the Bundesurlaubsgesetz (Federal Law on leave), of 8 January 1963 (BGBl. 1963, p. 2), in its version of 7 May 2002 (BGBl. 2002 I, p. 1529) (‘the BUrlG’), provides:

‘(1) In determining the dates on which leave may be taken, consideration shall be given to a worker’s wishes, save where consideration thereof is precluded by imperative operational interests or 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.

...

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

(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.’

9 The Tarifvertrag für den öffentlichen Dienst (Collective agreement for public service employees) includes Paragraph 26, entitled ‘Annual leave’, which provides, in subparagraph 1 thereof:

‘... Annual leave must be granted in the course of the current calendar year; ...

...’

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

10 Mr Shimizu was employed by Max-Planck under several fixed-term contracts between 1 August 2001 and 31 December 2013. The employment relationship between the parties was governed by the provisions of the BUrlG and of the Collective agreement for public service employees.

11 By letter dated 23 October 2013, Max-Planck invited Mr Shimizu to take his leave before the employment relationship was terminated, but did not force him to take it on dates it had set. Mr Shimizu took two days' leave, on 15 November and 2 December 2013.

12 After having, by letter of 23 December 2013, unsuccessfully sought payment from Max-Planck of an allowance in the amount of EUR 11 979 corresponding to 51 days' paid annual leave for 2012 and 2013 which had not been taken, Mr Shimizu brought an action seeking that Max-Planck be ordered to pay that allowance.

13 That action having been upheld both at first instance and on appeal, Max-Planck appealed to the referring court, the Bundesarbeitsgericht (Federal Labour Court, Germany), on a point of law.

14 That court states that the entitlements to paid annual leave at issue in the main proceedings lapsed under Paragraph 7(3) of the BUrlG, since they were not taken during the year for which the leave had been granted. Under Paragraph 7(3) of the BUrlG, a worker's leave which has not been taken in the year in respect of which it was granted expires, in principle, at the end of that year, unless the conditions for its carry-over laid down in that provision are met. Thus, where the worker was able to take his leave in the leave year in respect of which it was granted, his right to paid annual leave lapses at the end of that year. As a result of the loss of that right, it may no longer be converted into an entitlement to an allowance under Article 7(4) of the BUrlG. It would be otherwise only if, despite the worker's timely submission of a request for leave to his employer, the latter had refused him the leave. In contrast, Article 7 of the BUrlG cannot be interpreted as meaning that the employer is required to oblige the worker to take paid annual leave.

15 The referring court takes the view that the Court's case-law does not make it possible to determine whether national legislation which has the effects described in the preceding paragraph is consistent with Article 7 of Directive 2003/88 and Article 31(2) of the Charter, the legal literature, moreover, being divided in that regard. In particular, the question arises whether the employer is obliged, under Article 7(1) of Directive 2003/88, to determine unilaterally the dates of leave or if the judgment of 12 June 2014, *Bollacke* (C-118/13, EU:C:2014:1755) must be understood as meaning that the right to paid annual leave does not lapse at the end of the reference year or carry-over period, even if the worker was in a position to exercise it.

16 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 as compared to the rules applicable between individuals, so that it should be regarded as an individual. In those circumstances, it is for the Court to clarify whether Article 7 of Directive 2003/88 or Article 31(2) of the Charter has direct effect in relations between individuals.

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

‘(1) Does Article 7(1) 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 relevant 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 relevant period?

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

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

Consideration of the questions referred

The first question

18 By its first question, the referring court asks, in essence, whether Article 7 of Directive 2003/88 and Article 31(2) of the Charter must be interpreted as precluding national legislation, such as that at issue in the main proceedings, under which, in the event that the worker did not ask to be able to exercise his right to paid annual leave during the reference period concerned, that worker loses, at the end of that period, the days of paid annual leave acquired under those provisions in that period, and, accordingly, his entitlement to payment of an allowance in lieu of annual leave not taken where the employment relationship is terminated.

19 It should be recalled as a preliminary point that, according to the settled case-law of the Court, every worker’s right to paid annual leave must be regarded as a particularly important principle of EU social law from which there may be no derogations and whose implementation by the competent national authorities must be confined within the limits expressly laid down by Directive 2003/88 (see, to that effect, judgment of 12 June 2014, *Bollacke*, C-118/13, EU:C:2014:1755, paragraph 15 and the case-law cited).

20 Moreover, the right to paid annual leave, as a principle of EU social law, is not only particularly important, but is also expressly laid down in Article 31(2) of the Charter, which Article 6(1) TEU recognises as having the same legal value as the Treaties (judgment of 30 June 2016, *Sobczyszyn*, C-178/15, EU:C:2016:502, paragraph 20 and the case-law cited).

21 As regards, first, Article 7 of Directive 2003/88, it should be noted at the outset that the case in the main proceedings relates to a refusal to pay an allowance in lieu of paid annual leave not taken on the date of the termination of the employment relationship between the parties in the main proceedings.

22 In that regard, it should be recalled that upon termination of the employment relationship, the actual taking of paid annual leave to which a worker is entitled is no longer possible. In order to prevent this impossibility from leading to a situation in which the worker loses all enjoyment of that right, even in pecuniary form, Article 7(2) of Directive 2003/88 provides that the worker is entitled to an allowance in lieu for the days of annual leave not taken (see, to that effect, judgment of 12 June 2014, *Bollacke*, C-118/13, EU:C:2014:1755, paragraph 17 and the case-law cited).

23 The Court has held that Article 7(2) of Directive 2003/88 lays down no condition for entitlement to an allowance in lieu other than that relating to the circumstance, first, that the employment relationship has ended and, second, that the worker has not taken all the annual leave

to which he was entitled on the date that that relationship ended (judgment of 20 July 2016, *Maschek*, C-341/15, EU:C:2016:576, paragraph 27 and the case-law cited).

24 In that regard, it is apparent from the case-law of the Court that that provision precludes national legislation or practices which provide that, upon termination of the employment relationship, no allowance in lieu of paid annual leave not taken is to be paid to a worker who has not been able to take all the annual leave to which he was entitled before the end of that employment relationship, in particular because he was on sick leave for all or part of the leave year and/or of a carry-over period (judgments of 20 January 2009, *Schultz-Hoff and Others*, C-350/06 and C-520/06, EU:C:2009:18, paragraph 62; of 20 July 2016, *Maschek*, C-341/15, EU:C:2016:576, paragraph 31; and of 29 November 2017, *King*, C-214/16, EU:C:2017:914, paragraph 65).

25 The Court has also held that Article 7 of Directive 2003/88 cannot be interpreted as meaning that the right to paid annual leave and therefore, to the allowance in lieu provided for in paragraph 2 of this Article, may lapse because of the worker's death. In that regard, the Court has in particular pointed out that, if the obligation to pay such an allowance were to lapse because of the termination of the employment relationship resulting from the worker's death, the consequence of that circumstance would be an unintended occurrence retroactively leading to the total loss of the entitlement to paid annual leave itself (see, to that effect, judgment of 12 June 2014, *Bollacke*, C-118/13, EU:C:2014:1755, paragraphs 25, 26 and 30).

26 The loss of a worker's acquired right to paid annual leave or of his corresponding right to payment of an allowance in lieu of leave not taken upon termination of the employment relationship, without the worker having actually had the opportunity to exercise that right to paid annual leave, would undermine the very substance of that right (see, to that effect, judgment of 19 September 2013, *Review of Commission* v *Strack*, C-579/12 RX-II, EU:C:2013:570, paragraph 32).

27 As regards the case in the main proceedings, it should be noted that, according to the explanations provided by the referring court, the refusal of Mr Shimizu's former employer to pay him an allowance in lieu of paid annual leave not taken before the employment relationship was terminated is based on a rule of national law, under which the right to such leave lapses, in principle, not as a consequence of the termination of the employment relationship as such, but as a consequence of the fact that the worker did not, during the employment relationship, apply to take that leave during the reference period to which it relates.

28 The referring court is therefore essentially asking in the present case whether, in the light of the case-law of the Court cited in paragraph 23 of the present judgment, on the date on which the employment relationship at issue in the main proceedings was terminated, Mr Shimizu was still entitled to paid annual leave capable of being converted into an allowance in lieu on account of the termination of that relationship.

29 That question thus relates, first and foremost, to the interpretation of Article 7(1) of Directive 2003/88 and seeks to ascertain whether that provision precludes (i) the maintenance of the entitlement to paid annual leave not taken at the end of a reference period from being made subject to the condition that the worker requested to exercise that right during that period, and (ii) that it be declared lost if no such request was made, without the employer being obliged to decide unilaterally and with binding effect for the worker the leave dates during that period.

30 In that regard, first, it cannot be inferred from the Court's case-law mentioned in paragraphs 22 to 25 of the present judgment that Article 7 of Directive 2003/88 should be

interpreted as meaning that, irrespective of the circumstances underlying the worker's failure to take paid annual leave, that worker should still be entitled to the right to annual leave referred to in Article 7(1), and, in the event of the termination of the employment relationship, to an allowance by way of substitution therefor, pursuant to Article 7(2).

31 Secondly, while it is, admittedly, settled case-law that, in order to ensure compliance with the fundamental workers' right to paid annual leave affirmed in EU law, Article 7 of Directive 2003/88 may not be interpreted restrictively at the expense of the rights that workers derive from it (see, to that effect, judgment of 12 June 2014, *Bollacke*, C-118/13, EU:C:2014:1755, paragraph 22 and the case-law cited), it must also be noted, however, that the holiday pay required by Article 7(1) is intended to enable the worker actually to take the leave to which he is entitled (see, to that effect, judgment of 16 March 2006, *Robinson-Steele and Others*, C-131/04 and C-257/04, EU:C:2006:177, paragraph 49).

32 According to the settled case-law of the Court, the right to annual leave laid down in Article 7 of Directive 2003/88 is intended to enable the worker to rest from carrying out the work he is required to do under his contract of employment and to enjoy a period of relaxation and leisure (judgment of 20 July 2016, *Maschek*, C-341/15, EU:C:2016:576, paragraph 34 and the case-law cited).

33 Thus, by providing that the minimum period of paid annual leave may not be replaced by an allowance in lieu, except where the employment relationship is terminated, Article 7(2) of Directive 2003/88 also aims to ensure that workers are entitled to actual rest, with a view to ensuring effective protection of their health and safety (see, to that effect, judgment of 16 March 2006, *Robinson-Steele and Others*, C-131/04 and C-257/04, EU:C:2006:177, paragraph 60 and the case-law cited).

34 Thirdly, as is apparent from the very wording of Article 7 of Directive 2003/88 and the case-law of the Court, it is for the Member States to lay down, in their domestic legislation, conditions for the exercise and implementation of the right to paid annual leave, by prescribing the specific circumstances in which workers may exercise the right (judgment of 20 January 2009, *Schultz-Hoff and Others*, C-350/06 and C-520/06, EU:C:2009:18, paragraph 28 and the case-law cited).

35 In that regard, the Court has in particular held that Article 7(1) of Directive 2003/88 does not in principle preclude national legislation which lays down conditions for the exercise of the right to paid annual leave expressly conferred by the directive, including even the loss of that right at the end of a leave year or of a carry-over period, provided, however, that the worker who has lost his right to paid annual leave has actually had the opportunity to exercise the right conferred on him by the directive (judgment of 20 January 2009, *Schultz-Hoff and Others*, C-350/06 and C-520/06, EU:C:2009:18, paragraph 43).

36 National legislation such as Paragraph 7(1) and (3) of the BUrlG, which provides that it is necessary, when determining the dates of leave, to take account of the worker's wishes in that respect, unless there are overriding reasons relating to the interests of the undertaking or the wishes of other workers who, because of social considerations, deserve priority, or that the leave should as a rule be taken during the reference year, are covered by the rules governing paid annual leave, within the meaning of Article 7(1) of Directive 2003/88 and the Court's case-law referred to in the previous paragraph.

37 Such legislation forms part of the rules and procedures of national law applicable to the scheduling of workers' leave, which seek to take into account the various interests involved (see, to

that effect, judgment of 10 September 2009, *Vicente Pereda*, C-277/08, EU:C:2009:542, paragraph 22).

38 However, and as is apparent from paragraph 35 of the present judgment, it is important to ensure that the application of those provisions of national law cannot lead to the loss of the rights to paid annual leave acquired by the worker, even though he has not actually had the opportunity to exercise those rights.

39 In the present case, it should be noted that it is apparent from the order for reference that the national provisions mentioned in paragraph 36 of the present judgment are interpreted as meaning that the fact that a worker has not requested any paid annual leave during the relevant reference period in principle results in the worker losing his entitlement to leave at the end of that period and, accordingly, his entitlement to an allowance in lieu of the leave which is not taken upon termination of the employment relationship.

40 As noted by the Advocate General in point 32 of his Opinion, such an automatic loss of the entitlement to paid annual leave, which is not subject to prior verification that the worker was in fact given the opportunity to exercise that right, fails to have regard to the limits, recalled in paragraph 35 of the present judgment, which are binding on Member States when specifying the conditions for the exercise of that right.

41 The worker must be regarded as the weaker party in the employment relationship, and it is therefore necessary to prevent the employer from being in a position to impose upon him a restriction of his rights. On account of that position of weakness, such a worker may be dissuaded from explicitly claiming his rights vis-à-vis his employer where, in particular, doing so may expose him to measures taken by the employer likely to affect the employment relationship in a manner detrimental to that worker (see, to that effect, judgment of 25 November 2010, *Fuß*, C-429/09, EU:C:2010:717, paragraphs 80 and 81 and the case-law cited).

42 In addition, incentives not to take annual leave or encouraging employees not to do so are incompatible with the objectives of the right to paid annual leave, as recalled in paragraphs 32 and 33 of the present judgment, relating in particular to the need to ensure that workers enjoy a period of actual rest, with a view to ensuring effective protection of their health and safety (see, to that effect, judgment of 6 April 2006, *Federatie Nederlandse Vakbeweging*, C-124/05, EU:C:2006:244, paragraph 32). Thus, 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 (judgment of 29 November 2017, *King*, C-214/16, EU:C:2017:914, paragraph 39 and the case-law cited).

43 In those circumstances, it is important to avoid a situation in which the burden of ensuring that the right to paid annual leave is actually exercised rests fully on the worker, while the employer may, as a result thereof, take free of the need to fulfil its own obligations by arguing that no application for paid annual leave was submitted by the worker.

44 While it should be made clear in the response, in that regard, to the first question, that compliance with the requirement, for employers, under Article 7 of Directive 2003/88 should not extend to requiring employers to force their workers to actually exercise their right to paid annual leave (see, to that effect, judgment of 7 September 2006, *Commission* v *United Kingdom*, C-484/04, EU:C:2006:526, paragraph 43), the fact remains that employers must, however, ensure that workers are in a position to exercise such a right (see, to that effect, judgment of 29 November 2017, *King*, C-214/16, EU:C:2017:914, paragraph 63).

45 To that end, as the Advocate General also observed in points 41 to 43 of his Opinion, the employer is in particular required, in view of the mandatory nature of the entitlement to paid annual leave and in order to ensure the effectiveness of Article 7 of Directive 2003/88, to ensure, specifically and transparently, that the worker is actually in a position to take the paid annual leave to which he is entitled, by encouraging him, formally if need be, to do so, while informing him, accurately and in good time so as to ensure that that leave is still capable of ensuring for the person concerned the rest and relaxation to which it is supposed to contribute, that, if he does not take it, it will be lost at the end of the reference period or authorised carry-over period.

46 In addition, the burden of proof in that respect is on the employer (see, by analogy, judgment of 16 March 2006, *Robinson-Steele and Others*, C-131/04 and C-257/04, EU:C:2006:177, paragraph 68). Should the employer not be able to show that it has exercised all due diligence in order to enable the worker actually to take the paid annual leave to which he is entitled, it must be held that the loss of the right to such leave at the end of the authorised reference or carry-over period, and, in the event of the termination of the employment relationship, the corresponding absence of a payment of an allowance in lieu of annual leave not taken constitutes a failure to have regard, respectively, to Article 7(1) and Article 7(2) of Directive 2003/88.

47 However, if the employer is able to discharge the burden of proof in that regard, as a result of which it appears that it was deliberately and in full knowledge of the ensuing consequences that the worker refrained from taking the paid annual leave to which he was entitled after having been given the opportunity to exercise his right thereto, Article 7(1) and (2) of Directive 2003/88 does not preclude the loss of that right or, in the event of the termination of the employment relationship, the corresponding absence of an allowance in lieu of the paid annual leave not taken.

48 As noted by the Advocate General in points 50 and 51 of his Opinion, any interpretation of Article 7 of Directive 2003/88 which is liable to encourage the worker to refrain deliberately from taking his paid annual leave during the applicable authorised reference or carry-over periods in order to increase his remuneration upon the termination of the employment relationship is, as is apparent from paragraph 42 of the present judgment, incompatible with the objectives pursued by the introduction of the right to paid annual leave.

49 As regards, secondly, Article 31(2) of the Charter, it should be recalled that it is settled case-law of the Court that the fundamental rights guaranteed in the legal order of the European Union are applicable in all situations governed by EU law (see, inter alia, judgment of 15 January 2014, *Association de médiation sociale*, C-176/12, EU:C:2014:2, paragraph 42 and the case-law cited).

50 Since the legislation at issue in the main proceedings is an implementation of Directive 2003/88, Article 31(2) of the Charter is intended to apply to the case in the main proceedings (see, by analogy, judgment of 15 January 2014, *Association de médiation sociale*, C-176/12, EU:C:2014:2, paragraph 43).

51 In that regard, it follows, first, from the wording of Article 31(2) of the Charter that that provision enshrines the ‘right’ of all workers to an ‘annual period of paid leave’.

52 Next, according to the explanations relating to Article 31 of the Charter, which, in accordance with the third subparagraph of Article 6(1) TEU and Article 52(7) of the Charter, must be taken into consideration for the interpretation of the Charter, Article 31(2) of the Charter is based on Directive 93/104 and Article 2 of the European Social Charter, signed in Turin on 18 October 1961 and revised in Strasbourg on 3 May 1996, and on point 8 of the Community Charter of the Fundamental Social Rights of Workers, adopted at the meeting of the European Council in Strasbourg on

9 December 1989 (judgment of 19 September 2013, *Review of Commission* v *Strack*, C-579/12 RX-II, EU:C:2013:570, paragraph 27).

53 As is apparent from the first recital of Directive 2003/88, the directive codified Directive 93/104. Article 7 of Directive 2003/88 concerning the right to paid annual leave reproduces the terms of Article 7 of Directive 93/104 exactly (judgment of 19 September 2013, *Review of Commission* v *Strack*, C-579/12 RX-II, EU:C:2013:570, paragraph 28).

54 In that context, it should, finally, be recalled that limitations may be imposed on the fundamental right to annual paid leave affirmed in Article 31(2) of the Charter only in compliance with the strict conditions laid down in Article 52(1) thereof and, in particular, the essential content of that right. Thus, Member States may not derogate from the principle flowing from Article 7 of Directive 2003/88 read in the light of Article 31(2) of the Charter, 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 (see, to that effect, judgment of 29 November 2017, *King*, C-214/16, EU:C:2017:914, paragraph 56).

55 It follows from those considerations that both Article 7 of Directive 2003/88 and, as regards situations falling within the scope of the Charter, Article 31(2) thereof, must be interpreted as meaning that they preclude national legislation pursuant to which the fact that a worker has not requested to exercise his right to paid annual leave acquired under those provisions during the reference period automatically entails, without prior verification that the worker has actually been given the opportunity to exercise that right, the consequence that the worker loses the benefit of that right and, accordingly, his entitlement toan allowance in lieu of paid annual leave not taken in the event of the termination of the employment relationship.

56 On the other hand, where the worker has refrained from taking his paid annual leave deliberately and in full knowledge of the ensuing consequences, after having been given the opportunity actually to exercise his right thereto, Article 7(1) and (2) of Directive 2003/88 and Article 31(2) of the Charter do not preclude the loss of that right or, in the event of the termination of the employment relationship, the corresponding absence of an allowance in lieu of paid annual leave not taken, without the employer being required to force that worker to actually exercise that right.

57 It is for the referring court to ascertain whether the national legislation at issue in the main proceedings may be interpreted in accordance with Article 7(1) and (2) of Directive 2003/88 and Article 31(2) of the Charter.

58 In that regard, it should be recalled that it is settled case-law of the Court that, when national courts apply domestic law, they are bound to interpret it, so far as possible, in the light of the wording and the purpose of the directive concerned in order to achieve the result sought by the directive and consequently comply with the third paragraph of Article 288 TFEU (judgment of 24 January 2012, *Dominguez*, C-282/10, EU:C:2012:33, paragraph 24 and the case-law cited).

59 The principle that national law must be interpreted in conformity with EU law requires national courts to do whatever lies within their jurisdiction, taking the whole body of domestic law into consideration and applying the interpretative methods recognised by it, with a view to ensuring that the directive in question is fully effective and to achieving an outcome consistent with the objective pursued by it (judgment of 24 January 2012, *Dominguez*, C-282/10, EU:C:2012:33, paragraph 27 and the case-law cited).

60 As has also been held by the Court, that requirement to interpret national law in conformity with EU law entails, in particular, the obligation for national courts to change established case-law, where necessary, if it is based on an interpretation of national law that is incompatible with the objectives of a directive. Consequently, a national court cannot validly claim that it is impossible for it to interpret a provision of national law in a manner that is consistent with EU law merely because that provision has consistently been interpreted in a manner that is incompatible with EU law (judgment of 17 April 2018, *Egenberger*, C-414/16, EU:C:2018:257, paragraphs 72 and 73 and the case-law cited).

61 In the light of the foregoing, the answer to the first question is that Article 7 of Directive 2003/88 and Article 31(2) of the Charter must be interpreted as precluding national legislation, such as that at issue in the main proceedings, under which, in the event that the worker did not ask to exercise his right to paid annual leave during the reference period concerned, that worker loses, at the end of that period — automatically and without prior verification of whether the employer had in fact enabled him to exercise that right, in particular through the provision of sufficient information — the days of paid annual leave acquired under those provisions in respect of that period, and, accordingly, his right to an allowance in lieu of paid annual leave not taken in the event that the employment relationship is terminated. It is, in that regard, for the referring court to determine, taking into consideration the whole body of domestic law and applying the interpretative methods recognised by it, whether it can arrive at an interpretation of that right capable of ensuring the full effectiveness of EU law.

The second question

62 By its second question, the referring court asks, in essence, whether, in the event that it is impossible to interpret national legislation such as that at issue in the main proceedings in a manner consistent with Article 7 of Directive 2003/88 and Article 31(2) of the Charter, those provisions of EU law must be interpreted as meaning that, in the context of a dispute between the worker and his former employer who is a private individual, they result in the national legislation having to be disapplied by the national court, and the worker having to be granted by the employer an allowance in lieu of the annual leave acquired under those provisions and not taken at the time that the employment relationship was terminated.

63 As regards, first, the possible direct effect that it may be appropriate to acknowledge Article 7 of Directive 2003/88 as producing, it is clear from the settled case-law of the Court that, whenever the provisions of a directive appear, so far as their subject matter is concerned, to be unconditional and sufficiently precise, they may be relied upon before the national courts by individuals against the State where the latter has failed to implement the directive in domestic law by the end of the period prescribed or where it has failed to implement the directive correctly (judgment of 24 January 2012, *Dominguez*, C-282/10, EU:C:2012:33, paragraph 33 and the case-law cited). In addition, where a person involved in legal proceedings is able to rely on a directive against a State, he may do so regardless of the capacity in which the latter is acting, whether as an employer or as a public authority. In either case, it is necessary to prevent the State from taking advantage of its own failure to comply with EU law (judgment of 24 January 2012, *Dominguez*, C-282/10, EU:C:2012:33, paragraph 38 and the case-law cited).

64 On the basis of those considerations, the Court has held that provisions of a directive that are unconditional and sufficiently precise may be relied upon by individuals, in particular against a Member State and all the organs of its administration, including decentralised authorities, but also against organisations or bodies which are subject to the authority or control of the State or which have been required by a Member State to perform a task in the public interest and, for that purpose,

possess special powers beyond those which result from the normal rules applicable to relations between individuals (judgment of 7 August 2018, *Smith*, C-122/17, EU:C:2018:631, paragraph 45 and the case-law cited).

65 In the present case, it is for the referring court, which alone has the relevant information in that regard, to carry out the necessary checks in respect thereof. That court held, as is apparent from paragraph 16 of the present judgment, that Max Planck had to be considered an individual.

66 In the light of the foregoing, it should be recalled, first, that, according to the settled case-law of the Court, a directive cannot of itself impose obligations on an individual and cannot therefore be relied upon as such against an individual. If the possibility of relying on a provision of a directive that has not been transposed, or has been incorrectly transposed, were to be extended to the sphere of relations between individuals, that would amount to recognising a power in the European Union to enact obligations for individuals with immediate effect, whereas it has competence to do so only where it is empowered to adopt regulations (judgment of 7 August 2018, *Smith*, C-122/17, EU:C:2018:631, paragraph 42 and the case-law cited).

67 Thus, even a clear, precise and unconditional provision of a directive seeking to confer rights on or impose obligations on individuals cannot of itself apply in a dispute exclusively between private persons (judgment of 7 August 2018, *Smith*, C-122/17, EU:C:2018:631, paragraph 43 and the case-law cited).

68 Accordingly, although Article 7(1) and (2) of Directive 2003/88 fulfilled the criteria of unconditionality and sufficient precision required in order to produce a direct effect (see, to that effect, judgment of today's date, *Bauer and Willmeroth*, C-569/16 and C-570/16, EU:C:2018:337, paragraphs 65 to 67), those provisions cannot be invoked in a dispute between individuals in order to ensure the full effect of the right to paid annual leave and to set aside any contrary provision of national law (judgment of 26 March 2015, *Fenoll*, C-316/13, EU:C:2015:200, paragraph 48).

69 As regards, secondly, Article 31(2) of the Charter, a provision for which it was established, in paragraphs 49 to 55 of the present judgment, that it is intended to apply to situations such as those in the main proceedings and must be interpreted as meaning that it precludes legislation such as that at issue in the main proceedings, it should be recalled at the outset that the right to paid annual leave constitutes an essential principle of EU social law.

70 That principle is itself mainly derived both from instruments drawn up by the Member States at EU level, such as the Community Charter of the Fundamental Social Rights of Workers, which is moreover mentioned in Article 151 TFEU, and from international instruments on which the Member States have cooperated or to which they are party. Among them is the European Social Charter, to which all Member States are parties in so far as they are party to it in its original version, its revised version or in both versions, also referred to in Article 151 TFEU. Mention should also be made of Convention No 132 of the International Labour Organisation of 24 June 1970 concerning Annual Holidays with Pay (revised) which, as the Court noted in paragraphs 37 and 38 of the judgment of 20 January 2009, *Schultz-Hoff and Others* (C-350/06 and C-520/06, EU:C:2009:18), forms part of the principles of that organisation which recital 6 of Directive 2003/88 states must be taken account of.

71 In that regard, the fourth recital of Directive 93/104 states, in particular, that paragraph 8 of the Community Charter of the Fundamental Social Rights of Workers provides that every worker in the Union has a right, inter alia, to paid annual leave, the duration of which must be progressively

harmonised in accordance with national practices (see, to that effect, judgment of 26 June 2001, *BECTU*, C-173/99, EU:C:2001:356, paragraph 39).

72 Article 7 of Directive 93/104 and Article 7 of Directive 2003/88 have not therefore themselves established the right to paid annual leave, which is based in particular on various international instruments (see, by analogy, judgment of 17 April 2018, *Egenberger*, C-414/16, EU:C:2018:257, paragraph 75) and is, as an essential principle of EU social law, mandatory in nature (see, to that effect, judgment of 16 March 2006, *Robinson-Steele and Others*, C-131/04 and C-257/04, EU:C:2006:177, paragraphs 48 and 68), that essential principle including the right to 'paid' annual leave as such and the right, inherent in the former, to an allowance in lieu of annual leave not taken upon termination of the employment relationship (see judgment of today's date, *Bauer and Willmeroth*, C-569/16 and C-570/16, EU:C:2018:337, paragraph 77).

73 By providing, in mandatory terms, that 'every worker' has 'the right' 'to an annual period of paid leave' — like, for example, Article 27 of the Charter which led to the judgment of 15 January 2014, *Association de médiation sociale* (C-176/12, EU:C:2014:2) — without referring in particular in that regard to the 'cases' and 'conditions provided for by Union law and national laws and practices', Article 31(2) of the Charter, reflects the essential principle of EU social law from which there may be derogations only in compliance with the strict conditions laid down in Article 52(1) of the Charter and, in particular, the fundamental right to paid annual leave.

74 The right to a period of paid annual leave, affirmed for every worker by Article 31(2) of the Charter, is thus, as regards its very existence, both mandatory and unconditional in nature, the unconditional nature not needing to be given concrete expression by the provisions of EU or national law, which are only required to specify the exact duration of annual leave and, where appropriate, certain conditions for the exercise of that right. It follows that that provision is sufficient in itself to confer on workers a right that they may actually rely on in disputes between them and their employer in a field covered by EU law and therefore falling within the scope of the Charter (see, by analogy, judgment of 17 April 2018, *Egenberger*, C-414/16, EU:C:2018:257, paragraph 76).

75 Article 31(2) of the Charter therefore entails, in particular, as regards the situations falling within the scope thereof, that the national court must disapply national legislation negating the principle, recalled in paragraph 54 of this judgment, that a worker cannot be deprived of an acquired right to paid annual leave 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, or correspondingly, of the entitlement to the allowance in lieu thereof upon termination of the employment relationship, as a right which is consubstantial with the right to 'paid' annual leave. Under that provision, nor may employers rely on that national legislation in order to avoid payment of the allowance in lieu which they are required to pay pursuant to the fundamental right guaranteed by that provision.

76 With respect to the effect of Article 31(2) of the Charter on an employer who is a private individual, it should be noted that, although Article 51(1) of the Charter states that the provisions thereof are addressed to the institutions, bodies, offices and agencies of the European Union with due regard for the principle of subsidiarity and to the Member States only when they are implementing EU law, Article 51(1) does not, however, address the question whether those individuals may, where appropriate, be directly required to comply with certain provisions of the Charter and cannot, accordingly, be interpreted as meaning that it would systematically preclude such a possibility.

77 First of all, as noted by the Advocate General in point 78 of his Opinion in Joined Cases *Bauer and Willmeroth* (C-569/16 and C-570/16, EU:C:2018:337), the fact that certain provisions of primary law are addressed principally to the Member States does not preclude their application to relations between individuals (see, to that effect, judgment of 17 April 2018, *Egenberger*, C-414/16, EU:C:2018:257, paragraph 77).

78 Next, the Court has, in particular, already held that the prohibition laid down in Article 21(1) of the Charter is sufficient in itself to confer on individuals a right which they may rely on as such in a dispute with another individual (judgment of 17 April 2018, *Egenberger*, C-414/16, EU:C:2018:257, paragraph 76), without, therefore, Article 51(1) of the Charter precluding it.

79 Finally, as regards, more specifically, Article 31(2) of the Charter, it must be noted that the right of every worker to paid annual leave entails, by its very nature, a corresponding obligation on the employer, which is to grant such periods of paid leave or an allowance in lieu of paid annual leave not taken upon termination of the employment relationship.

80 In the event that it is impossible to interpret the national legislation at issue in the main proceedings in a manner consistent with Article 31(2) of the Charter, it will therefore be for the referring court, in a situation such as that at issue in the main proceedings, to ensure within its jurisdiction the judicial protection for individuals flowing from that provision and to guarantee the full effectiveness thereof by disapplying if need be that national legislation (see, by analogy, judgment of 17 April 2018, *Egenberger*, C-414/16, EU:C:2018:257, paragraph 76).

81 In the light of all the foregoing considerations, the answer to the second question is that, in the event that it is impossible to interpret national legislation such as that at issue in the main proceedings in a manner consistent with Article 7 of Directive 2003/88 and Article 31(2) of the Charter, it follows from the latter provision that a national court hearing a dispute between a worker and his former employer who is a private individual must disapply the national legislation and ensure that, should the employer not be able to show that it has exercised all due diligence in enabling the worker actually to take the paid annual leave to which he is entitled under EU law, the worker cannot be deprived of his acquired rights to that paid annual leave or, correspondingly, and in the event of the termination of the employment relationship, to the allowance in lieu of leave not taken which must be paid, in that case, directly by the employer concerned.

Costs

82 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Grand Chamber) hereby rules:

1. **Article 7 of Directive 2003/88/EC of the European Parliament and of the Council of 4 November 2003 concerning certain aspects of the organisation of working time and of Article 31(2) of the Charter of Fundamental Rights of the European Union must be interpreted as precluding national legislation such as that at issue in the main proceedings, under which, in the event that the worker did not ask to exercise his right to paid annual leave during the reference period concerned, that worker loses, at the end of that period — automatically and without prior verification of whether the employer had in fact enabled him to exercise that right, in particular through the provision of sufficient information — the days of paid annual leave acquired under those provisions in respect of that period, and,**

accordingly, his right to an allowance in lieu of paid annual leave not taken in the event that the employment relationship is terminated. It is, in that regard, for the referring court to determine, taking into consideration the whole body of domestic law and applying the interpretative methods recognised by it, whether it can arrive at an interpretation of that right capable of ensuring the full effectiveness of EU law.

2. **In the event that it is impossible to interpret national legislation such as that at issue in the main proceedings in a manner consistent with Article 7 of Directive 2003/88 and Article 31(2) of the Charter of Fundamental Rights, it follows from the latter provision that a national court hearing a dispute between a worker and his former employer who is a private individual must disapply the national legislation and ensure that, should the employer not be able to show that it has exercised all due diligence in enabling the worker actually to take the paid annual leave to which he is entitled under EU law, the worker cannot be deprived of his acquired rights to that paid annual leave or, correspondingly, and in the event of the termination of the employment relationship, to the allowance in lieu of leave not taken which must be paid, in that case, directly by the employer concerned.**

[Signatures]

* Language of the case: German.