Reports of Cases

JUDGMENT OF THE COURT (First Chamber)

22 September 2022 *

(Reference for a preliminary ruling – Social policy – Protection of the safety and health of workers – Organisation of working time – Article 31(2) of the Charter of Fundamental Rights of the European Union – Directive 2003/88/EC – Article 7(1) – Right to paid annual leave – Total invalidity or incapacity for work due to illness occurring during a leave year – National legislation providing for the loss of entitlement to paid annual leave on expiry of a certain period – Employer's obligation to enable the worker to exercise his or her right to paid annual leave)

In Joined Cases C-518/20 and C-727/20,

REQUESTS for a preliminary ruling under Article 267 TFEU from the Bundesarbeitsgericht (Federal Labour Court, Germany), made by decisions of 7 July 2020, received at the Court on 16 October 2020, in the proceedings

XP

v

Fraport AG Frankfurt Airport Services Worldwide (C-518/20),

and

AR

v

St. Vincenz-Krankenhaus GmbH (C-727/20),

THE COURT (First Chamber),

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

Advocate General: J. Richard de la Tour,

Registrar: A. Calot Escobar,

having regard to the written procedure,

* Language of the case: German.

after considering the observations submitted on behalf of:

– XP, by J. Rehberg, Rechtsanwalt,

– AR, by U. Happe, Rechtsanwältin,

– Fraport AG Frankfurt Airport Services Worldwide, by M.A.J. Strömer, Rechtsanwältin,

– St. Vincenz-Krankenhaus GmbH, by N. Gehling,

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

after hearing the Opinion of the Advocate General at the sitting on 17 March 2022,

gives the following

Judgment

1 These requests for a preliminary ruling concern the interpretation of Article 7(1) 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 Article 31(2) of the Charter of Fundamental Rights of the European Union ('the Charter').

2 The requests have been made in proceedings between, on the one hand, XP and Fraport AG Frankfurt Airport Services Worldwide ('Fraport') (Case C-518/20) and, on the other hand, AR and St. Vincenz-Krankenhaus GmbH (Case C-727/20), concerning the entitlement to paid annual leave of XP and of AR for the leave year during which those workers were in a state of total invalidity and incapacity for work due to illness.

Legal context

European Union law

3 Article 7 of Directive 2003/88, entitled 'Annual leave', provides:

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

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

German law

4 Paragraph 7 of the Bundesurlaubsgesetz (Federal Law on leave) of 8 January 1963 (BGBl. 1963, p. 2), in the version applicable to the dispute in the main proceedings ('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.

(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 for reasons personal to the employee. If leave is carried over, it must be granted and taken during the first three months of the following calendar year. At the worker's request, however, part of the leave acquired in accordance with Paragraph 5(1)(a) shall be carried over to the following calendar year.

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

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

Case C-518/20

5 XP has been employed since 2000 by Fraport as a driver for the transport of goods. On account of a severe disability, he has, since 1 December 2014, been in receipt, on the ground of a full but non-permanent reduction of earning capacity, of a pension which was most recently extended until 31 August 2022.

6 XP brought proceedings against Fraport seeking a declaration that he was entitled to 34 days of paid annual leave from 2014. In XP's view, he was unable to take those days of leave because of his state of health, since Fraport had, moreover, failed to fulfil its obligations to cooperate in the granting and taking of leave.

7 Fraport argued that XP's entitlement to paid annual leave for 2014 lapsed on 31 March 2016, at the end of the carry-over period provided for in Paragraph 7(3) of the BUrlG. In Fraport's view, a worker who, on health grounds, has been unable to take his or her leave for a long period of time loses his or her leave entitlement 15 months after the end of the leave year, irrespective of whether the employer has fulfilled its obligations to enable that worker to take such leave.

8 Following the rejection of his claims by the courts adjudicating on the substance, XP brought an appeal on a point of law *(Revision)* before the Bundesarbeitsgericht (Federal Labour Court, Germany).

9 That court refers a question regarding the compatibility, in the light of Article 7 of Directive 2003/88, of the rule laid down in Paragraph 7 of the BUrlG that leave not taken may be regarded as lost in the event of a worker being unfit for work over a prolonged period on health grounds, even if the employer has not actually enabled the worker to exercise his or her leave entitlement during the period of work preceding his or her total invalidity.

10 The referring court recalls that, following the judgment of 6 November 2018, *Max-Planck-Gesellschaft zur Förderung der Wissenschaften* (C-684/16, EU:C:2018:874), it interpreted Paragraph 7 of the BUrlG in a manner consistent with Article 7 of Directive 2003/88 in so far as it held that the right to minimum paid annual leave is lost at the end of the leave year or the carry-over period only if the employer has previously enabled the worker to exercise his or her leave entitlement, and the worker has nevertheless voluntarily opted not to take that leave.

11 Furthermore, in accordance with the judgments of 20 January 2009, *Schultz-Hoff and Others* (C-350/06 and C-520/06, EU:C:2009:18), and of 22 November 2011, *KHS* (C-214/10, EU:C:2011:761), the referring court states that it has held that entitlement to paid annual leave is not lost by reason of Paragraph 7(3) of the BUrlG if the worker is unfit for work due to illness until the end of the leave year and/or the carry-over period. However, if that incapacity for work persists, the entitlement to that leave lapses 15 months after the end of the leave year.

12 The referring court has not yet ruled on whether the entitlement to paid annual leave of a worker in a state of total invalidity lapses 15 months after the leave year, where that incapacity persists.

13 A first possible interpretation is that a lapse of such type would, on account of its exceptional nature, be precluded where the employer has not fulfilled its obligation to enable the worker to exercise his or her leave entitlement. That obligation continues to be relevant even where the worker is unfit to work, since the duration of the illness cannot be known in advance. Any practice or omission of an employer that may potentially deter a worker from taking his or her paid annual leave is incompatible with the purpose of that right (judgment of 6 November 2018, *Max-Planck-Gesellschaft zur Förderung der Wissenschaften*, C-684/16, EU:C:2018:874, paragraph 42). If the employer had complied in good time with its obligation, the worker could have taken his or her annual leave before the total invalidity occurred.

14 A second interpretation is that if, because of total invalidity during the leave year and the carry-over period, it is objectively impossible for the employer to enable the worker to exercise his or her entitlement to paid annual leave, the view could be taken that the employer may rely on the leave entitlement lapsing, even if the employer has not fulfilled its obligation to enable the worker to exercise his or her entitlement. In such a situation, paid annual leave would fail to have any positive effect for the worker in terms of providing a rest period, thereby justifying, in situations of long-term illness, a carry-over period limited to 15 months on the expiry of which the entitlement to paid annual leave lapses (judgment of 22 November 2011, *KHS*, C-214/10, EU:C:2011:761, paragraphs 43 and 44).

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

‘(1) Do Article 7 of Directive [2003/88] and Article 31(2) of the [Charter] preclude an interpretation of a rule of national law such as Paragraph 7(3) of the [BUrlG] according to which the as yet unexercised entitlement to paid annual leave of a worker who suffers, on health grounds, a full reduction of earning capacity in the course of the leave year, but who

could still have taken – at least some of – the leave in the leave year before the onset of his [or her] reduction of earning capacity, lapses 15 months after the end of the leave year in the event of continuing uninterrupted reduction of earning capacity even if the employer has not actually enabled the worker to exercise his [or her] leave entitlement by informing him [or her] of the leave concerned and inviting him [or her] to take it?

(2) If Question 1 is answered in the affirmative: Under these conditions, is it also impossible for the entitlement to lapse at a later point in time in cases where a full reduction in earning capacity persists?'

Case C-727/20

16 AR, who is an employee of St. Vincenz-Krankenhaus, has been unfit for work since her illness during the course of 2017.

17 AR did not take all the days of paid annual leave to which she was entitled for 2017. Her employer did not invite her to take her leave and did not inform her that leave not requested may lapse once the calendar year or period for carrying over leave referred to in Paragraph 7(3) of the BUrlG expires. AR brought an action before the labour courts seeking a declaration that she has 14 days of paid leave from 2017. She maintains that, because of her continued incapacity for work, her entitlement to paid annual leave did not lapse on 31 March 2019, as her employer failed to warn her in good time of the risk that days of leave would lapse.

18 St. Vincenz-Krankenhaus argues that, in accordance with Paragraph 7(3) of the BUrlG, AR's entitlement to paid annual leave for 2017 lapsed on 31 March 2019.

19 Following the dismissal of her action, AR brought an appeal on a point of law *(Revision)* before the Bundesarbeitsgericht (Federal Labour Court).

20 The referring court adopted reasoning comparable to that set out in Case C-518/20, which is reproduced in paragraphs 9 to 14 of the present judgment, regarding the reasons which led to the referring court's questions on the interpretation of Article 7 of Directive 2003/88 and of Article 31(2) of the Charter.

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

'(1) Do Article 7 of Directive [2003/88] and Article 31(2) of the [Charter] preclude an interpretation of a rule of national law such as Paragraph 7(3) of the [BUrlG] according to which the as yet unexercised entitlement to paid annual leave of a worker who became ill to an extent that rendered him or her unfit for work in the course of the leave year, but who could still have taken – at least some of – the leave in the leave year before the onset of his or her illness, lapses 15 months after the end of the leave year in the event of a continuing uninterrupted period of incapacity for work even if the employer has not actually enabled the worker to exercise his or her leave entitlement by duly informing him or her of the leave concerned and inviting him or her to take it?

(2) If Question 1 is answered in the affirmative: Does this also preclude the lapse of entitlement at a later date under these conditions if incapacity for work continues?'

Procedure before the Court

22 By decision of the Court of 30 November 2021, Cases C-518/20 and C-727/20 were joined for the purposes of the oral part of the procedure and of the judgment, in view of the connection between them.

Consideration of the questions referred

23 By its questions in each of Cases C-518/20 and C-727/20, which it is appropriate to examine together, the referring court asks, in essence, whether Article 7 of Directive 2003/88 and Article 31(2) of the Charter must be interpreted as precluding national legislation under which entitlement to paid annual leave acquired by a worker during the leave year in the course of which total invalidity or incapacity for work due to illness occurred and which has persisted since, may lapse, either at the end of a carry-over period authorised under national law, or at a later stage, where the employer has not enabled the worker to exercise that leave entitlement in good time.

24 In the first place, it should be recalled that, as is clear from the very wording of Article 7(1) of Directive 2003/88, every worker is entitled to paid annual leave of at least four weeks. 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 (judgment of 6 November 2018, *Max-Planck-Gesellschaft zur Förderung der Wissenschaften*, C-684/16, EU:C:2018:874, paragraph 19 and the case-law cited).

25 Furthermore, it should be noted that the right to paid annual leave is, as a principle of EU social law, not only particularly important, but is also expressly enshrined in Article 31(2) of the Charter, which Article 6(1) TEU recognises as having the same legal value as the Treaties (judgment of 22 November 2011, *KHS*, C-214/10, EU:C:2011:761, paragraph 37).

26 Thus, Article 7(1) of Directive 2003/88 reflects and gives concrete expression to the fundamental right to an annual period of paid leave, enshrined in Article 31(2) of the Charter. While the latter provision guarantees the right of every worker to an annual period of paid leave, the former provision implements that principle by fixing the duration of that period (judgment of 13 January 2022, *Koch Personaldienstleistungen*, C-514/20, EU:C:2022:19, paragraph 25).

27 In the second place, it should be borne in mind that, according to the Court's settled case-law, the right to paid annual leave has the dual purpose of enabling the worker both to rest from carrying out the work he or she is required to do under his or her contract of employment and to enjoy a period of relaxation and leisure (judgments of 20 January 2009, *Schultz-Hoff and Others*, C-350/06 and C-520/06, EU:C:2009:18, paragraph 25, and of 25 June 2020, *Varhoven kasatsionen sad na Republika Bulgaria and Iccrea Banca*, C-762/18 and C-37/19, EU:C:2020:504, paragraph 57 and the case-law cited).

28 That purpose, which distinguishes paid annual leave from other types of leave having different purposes, is based on the premiss that the worker actually worked during the reference period. The objective of allowing the worker to rest presupposes that the worker has been engaged in activities which justify, for the protection of his or her safety and health, as provided for in Directive 2003/88, his or her being given a period of rest, relaxation and leisure. Accordingly,

entitlement to paid annual leave must, in principle, be determined by reference to the periods of actual work completed under the employment contract (judgment of 4 October 2018, *Dicu*, C-12/17, EU:C:2018:799, paragraph 28 and the case-law cited).

29 However, in certain situations in which the worker is incapable of carrying out his or her duties, the right to paid annual leave cannot be made subject by a Member State to a condition that the worker has actually worked. The same applies, in particular, with regard to workers who are placed on sick leave during the reference period. As is clear from the Court's case-law, with regard to entitlement to paid annual leave, workers who are absent from work on sick leave during the reference period are to be treated in the same way as those who have actually worked during that period (judgment of 9 December 2021, *Staatssecretaris van Financiën (Remuneration during paid annual leave)*, C-217/20, EU:C:2021:987, paragraphs 29 and 30 and the case-law cited).

30 The Court has found, in that regard, that incapacity for work due to illness is, as a rule, not foreseeable and beyond the worker's control. Absences on account of illness must be regarded as being absences from work for such reasons beyond the control of the employed person concerned, which must be counted as part of the period of service (see, to that effect, judgment of 9 December 2021, *Staatssecretaris van Financiën (Remuneration during paid annual leave)*, C-217/20, EU:C:2021:987, paragraph 31 and the case-law cited).

31 In that context, the Court has held that Article 7(1) of Directive 2003/88 must be interpreted as precluding national legislation or practices under which the right to paid annual leave is extinguished at the end of the leave year and/or of a carry-over period laid down by national law where the worker has been on sick leave, for the whole or part of the leave year, and therefore has not actually had the opportunity to exercise that right (judgment of 30 June 2016, *Sobczyszyn*, C-178/15, EU:C:2016:502, paragraph 24 and the case-law cited).

32 As set out in the case-law recalled above, it cannot therefore be accepted that the right of a worker to a paid minimum annual leave, guaranteed by European Union law, is reduced where the worker could not fulfil his or her obligation to work during the reference period due to an illness (see, to that effect, judgment of 9 December 2021, *Staatssecretaris van Financiën (Remuneration during paid annual leave)*, C-217/20, EU:C:2021:987, paragraph 32 and the case-law cited).

33 In the third place, it should be recalled that limitations may be imposed on the fundamental right to paid annual 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.

34 Accordingly, in the particular context where the workers concerned had been prevented from exercising their right to paid annual leave as a result of their absence from work due to sickness, the Court has held that, although a worker who is unfit for work for several consecutive holiday years would be entitled to accumulate, without any limit, all the entitlements to paid annual leave that are acquired during his or her absence from work, such unlimited accumulation of entitlements would no longer reflect the actual purpose of the right to paid annual leave (judgment of 29 November 2017, *King*, C-214/16, EU:C:2017:914, paragraphs 53 and 54 and the case-law cited).

35 The Court has already recognised the existence of 'specific circumstances' justifying, in order to avoid the negative consequences of unlimited accumulation of entitlement to paid annual leave acquired during a period of absence on account of long-term illness, a derogation from the rule

that entitlement to paid annual leave cannot lapse. Such a derogation is based on the actual purpose of the right to paid annual leave and on the need to protect the employer from the risk that a worker will accumulate periods of absence of too great a length, and from the difficulties for the organisation of work which such periods might entail (judgment of 22 November 2011, *KHS*, C-214/10, EU:C:2011:761, paragraphs 34 and 39).

36 Consequently, in the specific circumstances in which a worker is unfit for work for several consecutive leave years, the Court has held that, having regard not only to the protection of workers as pursued by Directive 2003/88, but also the protection of employers faced with the risk that a worker will accumulate periods of absence of too great a length and the difficulties in the organisation of work which such periods might entail, Article 7 of that directive must be interpreted as not precluding national provisions or practices limiting, by a carry-over period of 15 months at the end of which the right to paid annual leave is lost, the accumulation of entitlements to such leave by a worker who has been unfit for work for several consecutive holiday years (judgments of 22 November 2011, *KHS*, C-214/10, EU:C:2011:761, paragraphs 29 and 30, and of 29 November 2017, *King*, C-214/16, EU:C:2017:914, paragraph 55).

37 It is therefore necessary to examine, subject to the verifications which must be carried out by the referring court, whether circumstances such as those at issue in the disputes in the main proceedings are 'specific' for the purposes of the case-law cited in the previous paragraph, such that they justify a derogation from the right laid down in Article 7 of Directive 2003/88 and Article 31(2) of the Charter, which has been interpreted by the Court as meaning that that right 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 or her leave.

38 In the present case, it is necessary to determine whether the employers at issue in the main proceedings may claim application of the temporal limitation on the right to paid annual leave acquired by a worker during the leave year in the course of which he or she actually worked before finding him or herself in a state of total invalidity or incapacity for work, following from the case-law referred to in paragraphs 34 to 36 of the present judgment.

39 The Court has previously held that the 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 entitlement, fails to have regard to the limits, recalled in paragraph 33 of the present judgment, which are binding on the Member States when specifying the conditions for the exercise of that entitlement (see, to that effect, judgment of 6 November 2018, *Max-Planck-Gesellschaft zur Förderung der Wissenschaften*, C-684/16, EU:C:2018:874, paragraph 40).

40 It should be pointed out that it is for the employer to ensure that workers are given the opportunity to exercise their entitlement to annual leave (see, to that effect, judgments of 6 November 2018, *Kreuziger*, C-619/16, EU:C:2018:872, paragraph 51 and the case-law cited, and of 6 November 2018, *Max-Planck-Gesellschaft zur Förderung der Wissenschaften*, C-684/16, EU:C:2018:874, paragraph 44 and the case-law cited). In that regard, unlike in a situation of accumulation of entitlement to paid annual leave by a worker who was unfit for work due to sickness, an employer that does not allow a worker to exercise his or her right to paid annual leave must bear the consequences (judgment of 25 June 2020, *Varhoven kasatsionen sad na Republika Bulgaria and Iccrea Banca*, C-762/18 and C-37/19, EU:C:2020:504, paragraph 77 and the case-law cited).

41 Consequently, Member States may not derogate from the principle flowing from Article 7 of Directive 2003/88 and 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 not been able to take his or her leave (see, to that effect, judgment of 6 November 2018, *Max-Planck-Gesellschaft zur Förderung der Wissenschaften*, C-684/16, EU:C:2018:874, paragraph 54 and the case-law cited).

42 As can be deduced from point 65 of the Advocate General's Opinion, it is for the national court to ascertain whether the employer has fulfilled, in good time, its obligations to inform the worker of the leave and to invite him to take it.

43 In addition, it should be noted that, in the disputes in the main proceedings, the workers concerned do no more than claim entitlements to paid annual leave acquired in respect of the leave year during which they were partly working and in the course of which the total invalidity or incapacity for work due to illness occurred.

44 As the Advocate General observed in point 52 of his Opinion, in circumstances such as those in the main proceedings, there is no risk of adverse consequences of an unlimited accumulation of entitlement to paid annual leave. Therefore, it does not appear to be strictly necessary that the interests of the employer, such as those referred to in paragraphs 35 and 36 above, be protected and, consequently there is, a priori, no justification for derogating from the worker's entitlement to paid annual leave.

45 Accordingly, while the temporal limitation accepted by the Court in its judgment of 22 November 2011, *KHS* (C-214/10, EU:C:2011:761), undoubtedly prevents workers from claiming that they retain the entirety of their entitlement to paid annual leave acquired during their prolonged absence from work in respect of a number of consecutive leave years, such a limitation cannot apply to the entitlement to paid annual leave acquired during the leave year in the course of which a worker actually worked before finding him or herself in a state of total invalidity or incapacity for work, without examining whether the employer has, in good time, enabled the worker to exercise that entitlement, since such a situation would be tantamount to making nugatory the right laid down in Article 31(2) of the Charter and given specific expression in Article 7 of Directive 2003/88.

46 Consequently, the answer to the questions referred in each of Cases C-518/20 and C-727/20 is that Article 7 of Directive 2003/88 and Article 31(2) of the Charter must be interpreted as precluding national legislation under which the entitlement to paid annual leave, acquired by a worker during the leave year in the course of which that worker actually worked before finding him or herself in a state of total invalidity or incapacity for work due to illness which has persisted since, may lapse, either at the end of a carry-over period authorised under national law, or even at a later stage, where the employer has not, in good time, enabled the worker to exercise that entitlement.

Costs

47 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 (First Chamber) hereby rules:

Article 7 of Directive 2003/88/EC of the European Parliament and of the Council of 4 November 2003 concerning certain aspects of the organisation of working time and Article 31(2) of the Charter of Fundamental Rights of the European Union

must be interpreted as precluding national legislation under which the entitlement to paid annual leave, acquired by a worker during the leave year in the course of which that worker actually worked before finding him or herself in a state of total invalidity or incapacity for work due to illness which has persisted since, may lapse, either at the end of a carry-over period authorised under national law, or even at a later stage, where the employer has not, in good time, enabled the worker to exercise that entitlement.

[Signatures]