Reports of Cases

JUDGMENT OF THE COURT (Sixth Chamber)

27 April 2023*

(Reference for a preliminary ruling – Social policy – Directive 2003/88/EC – Article 7(1) – Article 31(2) of the Charter of Fundamental Rights of the European Union – Right to paid annual leave – Lapse of that right – Progressive retirement scheme – Days of annual leave acquired under that scheme but as yet untaken – Incapacity for work)

In Case C-192/22,

REQUEST for a preliminary ruling under Article 267 TFEU from the Bundesarbeitsgericht (Federal Labour Court, Germany), made by decision of 12 October 2021, received at the Court on 11 March 2022, in the proceedings

FI

v

Bayerische Motoren Werke AG,

THE COURT (Sixth Chamber),

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

Advocate General: P. Pikamäe,

Registrar: A. Calot Escobar,

having regard to the written procedure,

after considering the observations submitted on behalf of:

– FI, by A. Köhl, Rechtsanwältin,

– Bayerische Motoren Werke AG, by A. Nowak, Rechtsanwalt,

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

having decided, after hearing the Advocate General, to proceed to judgment without an Opinion,

* Language of the case: German.

gives the following

Judgment

1 This 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 Article 31(2) of the Charter of Fundamental Rights of the European Union ('the Charter').

2 The request has been made in proceedings between FI and Bayerische Motoren Werke AG concerning the allowance in lieu of leave to which FI claims to be entitled.

Legal context

European Union law

3 Recitals 4 and 5 of Directive 2003/88 state:

'(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. …'

4 Article 7 of that directive, 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

5 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, entitled 'Timing, carrying-over of leave and allowance in lieu of annual leave', 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 by compelling reasons relating to the worker himself or herself. 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 dispute in the main proceedings and the questions referred for a preliminary ruling

6 FI was employed by Bayerische Motoren Werke from 1986 until 30 September 2019. FI retired on 1 October 2019.

7 In late 2012, in the context of the progressive retirement scheme, FI and Bayerische Motoren Werke agreed to change their employment relationship to a part-time employment relationship. In those circumstances, FI was to work from 1 February 2013 to 31 May 2016 and would be released from work from 1 June 2016 to 30 September 2019.

8 FI took leave from 4 to 25 May 2016 in order to use up his remaining leave for 2016. However, as he was ill during that period, he was unable to take two and two-thirds days of leave before the end of May 2016.

9 In 2019, FI brought an action before the Arbeitsgericht (Labour Court, Germany) against Bayerische Motoren Werke for compensation for the days of leave that were not taken, claiming in that connection that he had not been able to take those days of leave due to illness.

10 The Arbeitsgericht (Labour Court) dismissed the action on the ground that, as Bayerische Motoren Werke submitted, the right to leave for 2016 had lapsed on 31 March 2017 at midnight. According to that court, the fact that Bayerische Motoren Werke did not alert FI that he needed to use up his leave is irrelevant, given that it would have been impossible for FI to do so in the light of his work release from 1 June 2016 to the end of the employment relationship on 30 September 2019.

11 FI appealed, unsuccessfully, against the judgment of the Arbeitsgericht (Labour Court) before the Landesarbeitsgericht (Higher Labour Court, Germany). He then brought an appeal on a point of law before the Bundesarbeitsgericht (Federal Labour Court, Germany), the referring court.

12 That court is uncertain as to the application of a provision of national law, Paragraph 7(3) of the Federal Law on leave, in the version applicable to the dispute in the main proceedings, in this case; according to the referring court, that law provides for a worker's untaken leave to be forfeited at the end of a certain period when it becomes impossible for the worker to use up his or her leave due to work release. The referring court seeks to determine, inter alia, to what extent the employer did in fact give the worker concerned the opportunity to exercise his right to leave.

13 In those circumstances, the Bundesarbeitsgericht (Federal Labour Court) decided to stay the proceedings and to refer the following questions to the Court of Justice:

‘(1) [Does] Article 7 of Directive [2003/88] or Article 31(2) of the [Charter] preclude an interpretation of a rule of national law such as Paragraph 7(3) of the [Federal Law on leave] according to which a worker’s entitlement to paid annual leave acquired during the work phase of a progressive retirement relationship but as yet unexercised lapses in the release phase at the end of the holiday year or at a later time?

(2) Should the Court of Justice answer Question 1 in the negative: [does] Article 7 of Directive [2003/88] or Article 31(2) of the [Charter] preclude an interpretation of a rule of national law such as Paragraph 7(3) [of the Federal Law on leave] according to which the as yet unexercised entitlement to paid annual leave of a worker who, in the course of the holiday year, moves from the work phase to the release phase lapses at the end of the holiday year or at a later time if the employer – without having previously fulfilled its obligations to cooperate in the realisation of the leave entitlement – has granted the worker the entire annual leave in line with his or her application for a period immediately prior to the start of the release phase, but the leave entitlement could not be fulfilled – at least in part – because the worker became unfit for work due to illness after the leave was granted?’

Consideration of the questions referred

The first question

14 By its first question, the referring court asks, in essence, whether Article 7 of Directive 2003/88 or Article 31(2) of the Charter preclude a rule of national law according to which days of paid annual leave acquired during the work phase of a progressive retirement scheme but not taken are likely to be forfeited because they cannot be taken during the work release phase.

15 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 (judgment of 22 September 2022, *Fraport and St. Vincenz-Krankenhaus*, C-518/20 and C-727/20, EU:C:2022:707, paragraph 24 and the case-law cited).

16 The Court has held that the right of every worker to paid annual leave is, as a principle of EU social law, not only particularly important, but is also expressly laid down in Article 31(2) of the Charter (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 54 and the case-law cited).

17 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 (see, to that effect, judgment of 8 September 2020, *Commission and Council* v *Carreras Sequeros and Others*, C-119/19 P and C-126/19 P, EU:C:2020:676, paragraph 115). While the latter provision guarantees the right of every worker to an annual period of paid leave, the former provision sets out the rules for the implementation of that right, the duration of that period in particular.

18 In the second place, it should be borne in mind that the right to annual leave constitutes only one of two aspects of the right to paid annual leave as a fundamental principle of EU social law. When the employment relationship has come to an end 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 avoid that, as a result, the right in question cannot be enjoyed by the worker, even in pecuniary form (judgment of 25 November 2021, *job-medium*, C-233/20, EU:C:2021:960, paragraphs 29 and 30 and the case-law cited).

19 That fundamental right also includes the right to payment and, as a right which is consubstantial with the right to 'paid' annual leave, the right to an allowance in lieu of annual leave not taken upon termination of the employment relationship (judgment of 25 November 2021, *job-medium*, C-233/20, EU:C:2021:960, paragraph 29 and the case-law cited).

20 In that regard, it must be recalled that compliance with the Charter is required, as is apparent from Article 51(1) thereof, when Member States are implementing EU law (judgment of 13 January 2022, *Koch Personaldienstleistungen*, C-514/20, EU:C:2022:19, paragraph 26).

21 Since the national legislation at issue in the main proceedings constitutes such an implementation of Article 7 of Directive 2003/88, it is therefore in the light of Article 31(2) of the Charter that Article 7 of the directive must be interpreted in order to determine whether that provision precludes such legislation.

22 It should be borne in mind, in that regard, 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 fact, first, that the employment relationship has ended and, secondly, that the worker has not taken all the annual leave to which he or she was entitled on the date that that relationship ended (judgment of 25 November 2021, *job-medium*, C-233/20, EU:C:2021:960, paragraph 31 and the case-law cited).

23 In the third place, it should be recalled that, according to the Court's settled case-law, 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 (judgment of 22 September 2022, *Fraport and St. Vincenz-Krankenhaus*, C-518/20 and C-727/20, EU:C:2022:707, paragraph 33 and the case-law cited).

24 Thus, any derogation from the European Union system for the organisation of working time put in place by Directive 2003/88 must be interpreted in such a way that its scope is limited to what is strictly necessary in order to safeguard the interests which that derogation protects (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 74 and the case-law cited).

25 In that context, it is apparent from, inter alia, the judgment of 22 November 2011, *KHS* (C-214/10, EU:C:2011:761, paragraphs 38 and 39), that any carry-over period provided for by the law of a Member State, in addition to the fact that it must take into account the specific circumstances of a worker who is unfit for work, is also intended 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.

26 It is apparent from the case-law that incapacity for work due to illness is, as a rule, not foreseeable and beyond the worker's control (judgment of 22 September 2022, *Fraport and St. Vincenz-Krankenhaus*, C-518/20 and C-727/20, EU:C:2022:707, paragraph 30 and the case-law cited).

27 However, it is only in the event of long-term absence for health reasons that the employer should be concerned that the worker will accumulate periods of long-term absence, which could give rise to difficulties for the organisation of work.

28 In that connection, it must be borne in mind that, in the specific circumstances in which a worker is unfit for work for several consecutive holiday 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(1) of that directive must be interpreted as not precluding national provisions 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 (judgment of 29 November 2017, *King*, C-214/16, EU:C:2017:914, paragraph 55 and the case-law cited).

29 However, circumstances such as those in the main proceedings cannot justify a derogation from the principle laid down in Article 7 of Directive 2003/88 that an acquired right to paid annual leave cannot lapse on expiry of the reference period and/or a carry-over period set by national law when the worker has not been in a position to take his or her leave.

30 In that connection, first, in the present case, the period is not a long-term absence for health reasons or such absence covering several consecutive reference periods, but is very limited – two days and two-thirds of a day – in respect of which FI was not able to take leave.

31 Second, the fact that the acquired leave could not be taken does not result from a long-term absence of the worker due to illness, as in the case which gave rise to the judgment of 22 November 2011, *KHS* (C-214/10, EU:C:2011:761), but from the fact that the employer released the worker from work.

32 Third, although a worker's absence for health reasons is, admittedly, not foreseeable by the employer, the fact that such absence can, as the case may be, prevent that worker from using up his or her annual leave rights in the case of a part-time employment relationship in the context of a progressive retirement scheme is usually foreseeable. The employer is able to rule out or reduce such a risk by agreeing with the worker that he or she will take his or her leave in good time.

33 Fourth, as recalled in paragraph 18 of the present judgment and as is apparent from the Court's settled case-law, the right to annual leave constitutes only one of two aspects of the right to paid annual leave as a fundamental principle of EU social law; the other aspect is the allowance due to the worker when he or she is unable to take his or her leave on account of the fact that the employment relationship has ended. If a worker who, in a case such as that in the main proceedings, was prevented from exercising his or her right to paid annual leave before the employment relationship ended on account of unforeseeable circumstances, such as illness, were refused any right to such allowance, this would be tantamount to making nugatory the right laid down in Article 7 of Directive 2003/88, read in the light of Article 31(2) of the Charter.

34 Having regard to all the foregoing considerations, the answer to the first question is that Article 7 of Directive 2003/88, read in the light of Article 31(2) of the Charter, must be interpreted as precluding a rule of national law which provides that the right to paid annual leave acquired by a

worker, by reason of his or her work in the context of a progressive retirement scheme, is to lapse at the end of the holiday year or at a later date, where the worker has been prevented from taking that leave before the work release phase due to illness, even where it is not a long-term absence.

The second question

35 The second question has been asked in the event of a negative answer to the first question. Therefore, in view of the answer to the first question, there is no need to answer the second question.

Costs

36 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 (Sixth 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, read in the light of Article 31(2) of the Charter of Fundamental Rights of the European Union,

must be interpreted as precluding a rule of national law which provides that the right to paid annual leave acquired by a worker, by reason of his or her work in the context of a progressive retirement scheme, is to lapse at the end of the holiday year or at a later date, where the worker has been prevented from taking that leave before the work release phase due to illness, even where it is not a long-term absence.

[Signatures]