Reports of Cases

JUDGMENT OF THE COURT (First Chamber)

25 June 2020*

(References for a preliminary ruling – Social policy – Protection of the safety and health of workers – Directive 2003/88/EC – Article 7 – Worker unlawfully dismissed then reinstated in his or her employment by decision of a court – Exclusion of any right to paid annual leave not taken for the period between the dismissal and the reinstatement – No right to financial compensation in lieu of annual leave not taken for that period where the employment relationship subsequently ceases)

In Joined Cases C-762/18 and C-37/19,

REQUESTS for a preliminary ruling under Article 267 TFEU from the Rayonen sad Haskovo (District Court, Haskovo, Bulgaria) (C-762/18) and from the Corte suprema di cassazione (Supreme Court of Cassation, Italy) (C-37/19), by decisions of 26 November and 27 November 2018, received at the Court on 4 December 2018 and 21 January 2019 respectively, in the proceedings

QH

v

Varhoven kasatsionen sad na Republika Bulgaria,

interested party:

Prokuratura na Republika Bulgaria (C-762/18),

and

CV

v

Iccrea Banca SpA (C-37/19),

THE COURT (First Chamber),

composed of J.-C. Bonichot, President of Chamber, R. Silva de Lapuerta (Rapporteur), Vice President of the Court, L. Bay Larsen, C. Toader and N. Jääskinen, Judges,

* Languages of the cases: Bulgarian and Italian.

Advocate General: G. Hogan,

Registrar: M. Aleksejev, Head of Unit,

having regard to the written procedure and further to the hearing on 11 December 2019,

after considering the observations submitted on behalf of:

– QH, by S. Lateva and A. Slavchev, advokati,

– the Varhoven kasatsionen sad na Republika Bulgaria, by M. Hristova-Nikolova, Z. Stoykov and L. Panov, acting as Agents,

– CV, by F. Proietti, avvocato,

– Iccrea Banca SpA, by A. Maresca and F. Boccia, avvocati,

– the Bulgarian Government, by E. Petranova and L. Zaharieva, acting as Agents,

– the Italian Government, by G. Palmieri, acting as Agent, and by L. Fiandaca, avvocato dello Stato,

– the Polish Government, by B. Majczyna, D. Lutostańska and A. Siwek-Ślusarek, acting as Agents,

– the European Commission, by M. van Beek, C. Zadra and Y.G. Marinova, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 29 January 2020,

gives the following

Judgment

1 These requests for a preliminary ruling concern the interpretation 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 (i) QH and the Varhoven kasatsionen sad na Republika Bulgaria (Supreme Court of Cassation of the Republic of Bulgaria; 'the Court of Cassation') concerning the application by that court of case-law alleged to be incompatible with EU law and having the effect of depriving QH of compensation in lieu of paid annual leave not used for the period between the date of her unlawful dismissal and that of the reinstatement in her employment (Case C-762/18) and (ii) CV and Iccrea Banca SpA concerning similar facts (Case C-37/19).

Legal context

European Union law

3 Recital 5 of Directive 2003/88 states:

'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. Community workers must be granted minimum daily, weekly and annual periods of rest and adequate breaks. It is also necessary in this context to place a maximum limit on weekly working hours.'

4 Article 7 of that directive, entitled 'Annual leave', 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.'

Bulgarian law

The Labour Code

5 Under Article 155(1) of the Kodeks na truda (Labour Code), 'every worker shall be entitled to paid annual leave'.

6 In accordance with Article 224(1) of that code:

'Upon termination of the employment relationship, the worker or employee shall be entitled to financial compensation in lieu of any paid annual leave not taken …'

7 Article 225 of that code provides:

'1. In the event of unlawful dismissal, the worker or employee shall be entitled to payment of compensation by the employer in an amount equal to that of his or her gross remuneration for the period during which he or she remained unemployed on account of that dismissal, up to a maximum of six months.

2. If, during the period referred to in the preceding paragraph, the worker or employee held a less well-remunerated post, he or she shall be entitled to payment of the difference in salary. That right shall also be granted to a worker or employee who was unlawfully transferred to another less well-remunerated post.

…'

8 Article 354(1) of that code is worded as follows:

‘A period during which no employment relationship existed shall likewise be recognised as a period of service, when:

1. the worker or employee was unemployed on account of a dismissal which was pronounced unlawful by the competent authorities: from the date of dismissal to the date of reinstatement of the worker or employee in question;

…’

The Code of Civil Procedure

9 Under Article 290 of the Grazhdanski protsesualen kodeks (Code of Civil Procedure):

‘(1) The appeal in cassation shall be examined by a three-member formation [of the Court of Cassation] in open court.

(2) [The Court of Cassation] shall review the lawfulness of the judgment on appeal solely by reference to the grounds of appeal raised in the appeal in cassation.’

10 Article 291 of the Code of Civil Procedure provides:

‘Where the judgment on appeal was delivered in a context of inconsistent case-law:

1. [the Court of Cassation] shall state in a reasoned decision which of the inconsistent decisions [it] deems correct; in that case, [it] shall deliver a decision in the case on the basis of that case-law;

2. where [it] considers that, in the decisions, the case-law is incorrect, [it] shall state in a reasoned decision why that is so; in that case, [it] shall deliver a decision interpreting the law on the basis of the circumstances of the case before it;

3. where [it] considers that the inconsistent case-law is not applicable to the dispute, [it] shall state in a reasoned decision why that is so; in that case, [it] shall deliver a decision interpreting the law on the basis of the circumstances of the case before it.’

Italian law

11 The third paragraph of Article 36 of the Costituzione della Repubblica Italiana (Constitution of the Italian Republic) provides:

‘A worker shall be entitled to a weekly rest period and to paid annual leave and may not waive those rights.’

12 Article 10 of decreto legislativo n. 66 – Attuazione delle direttive 93/104/CE e 2000/34/CE concernenti taluni aspetti dell’organizzazione dell’orario di lavoro (Legislative Decree No 66 implementing Directives 93/104/EC and 2000/34/EC concerning certain aspects of the

organisation of working time), of 8 April 2003 (GURI No 87, 14 April 2003, Supplemento Ordinario No 61), in the version applicable to the facts of the main proceedings in Case C-37/19, is worded as follows:

'… the worker shall be entitled to paid annual leave of at least four weeks. Without prejudice to the provisions of the collective agreements or to the specific rules relating to the categories referred to in Article 2(2), the worker must take at least two weeks of that period, in consecutive weeks where the worker so requests, during the year in which that right was acquired, and, as regards the remaining two weeks, within 18 months following the end of the year in which that right was acquired.

That minimum period of four weeks may not be replaced by compensation in lieu of leave not taken, except where the employment relationship is terminated …'

13 Under the heading 'Leave', Article 52 of the Contratto collettivo nazionale di lavoro per le Banche di Credito Cooperativo, Casse Rurali ed Artigiane (National Collective Bargaining Agreement for cooperative, agricultural and small business banks) of 7 December 2000, in the version applicable to the facts of the main proceedings in Case C-37/19, provides:

'…

The right to leave is a right which may not be waived. Leave must be taken during the calendar year to which it relates.

Where the employment relationship is terminated, a worker who has not taken some or all of his or her leave relating to the current calendar year to which he or she is entitled … at the rate of one twelfth of the period of annual leave for each full month of service completed with effect from 1 January, shall be entitled to compensation corresponding to the remuneration for the days of leave lost.

If the worker is not in service, the period of paid leave due shall be reduced by one twelfth for every full month of absence.

…'

14 Article 53 of that collective agreement, entitled 'Special leave for abolished public holidays', provides:

'Having regard to the legal provisions on public holidays, days of leave and/or special leave to be taken during the calendar year shall be allocated, even where periods of leave are thereby extended.

…

Special leave provided for above which has not been taken during the calendar year, irrespective of the reasons, … must be settled on the basis of the most recent remuneration payable in the relevant year.'

15 It is apparent, in essence, from the request for a preliminary ruling in Case C-37/19 that, in the version in force at the time of the facts of the main proceedings, Article 18 of legge n. 300/1970 (Law No 300/1970) of 20 May 1970 (GURI No 131 of 27 May 1970), entitled 'Protection of the worker in the event of unlawful dismissal', provided that, in such a situation, the court, in the decision whereby it declares that the dismissal considered to be discriminatory is null and void, is to order the employer to reinstate the worker in his or her employment, irrespective of the formal

ground relied on and irrespective of the number of staff employed by the employer. The court is also to order the employer to pay compensation to the worker for the damage caused by the dismissal declared to be void or invalid.

The disputes in the main proceedings, the questions referred for a preliminary ruling and the procedure before the Court

Case C-762/18

16 QH, who was employed in a school, was dismissed by decision of 29 April 2004. By judgment of the Rayonen sad Plovdiv (District Court, Plovdiv, Bulgaria), which became final, that dismissal was declared unlawful and QH was reinstated on 10 November 2008.

17 By decision of 13 November 2008, QH was again dismissed. That dismissal was not the subject of an appeal.

18 On 1 July 2009, QH brought an action against the school which had employed her before the Rayonen sad Plovdiv (District Court, Plovdiv), claiming, in particular, compensation in the amount of 7 125 leva (BGN) (approximately EUR 3 641) in respect of 285 days of unused paid annual leave, or 57 days per year, for the period from 30 April 2004 to 13 November 2008, and also an amount of BGN 1 100 (approximately EUR 562) in respect of late payment of that compensation, for the period from 13 November 2008 to 1 July 2009.

19 That action was dismissed by judgment of 15 April 2010, which was upheld on appeal by judgment of 10 February 2011 of the Okrazhen sad Plovdiv (Regional Court, Plovdiv, Bulgaria).

20 QH lodged an appeal before the Court of Cassation against that judgment. By order of 25 October 2011, the Court of Cassation did not allow that appeal and upheld the merits of the judgment of 15 April 2010, delivered at first instance by the Rayonen sad Plovdiv (District Court, Plovdiv), as upheld on appeal.

21 In particular, the Court of Cassation considered that the rejection by the courts hearing the merits of the claim lodged by QH – who asserted, in essence, that a worker who has been unlawfully dismissed may claim compensation in respect of unused paid annual leave for the period between the date of dismissal and the date on which he or she was reinstated pursuant to a judgment which has become final – was consistent with its binding case-law.

22 According to that case-law, during the period between the termination of the employment relationship and the annulment of the dismissal by a final judgment and reinstatement of the worker who was unlawfully dismissed, it must be considered that the worker has not performed genuine work under the employment relationship and that no right to paid annual leave therefore arises for the worker in respect of that period and, in the event of a new dismissal, the employer does not owe the worker any compensation in lieu of any paid annual leave not taken, as referred to in Article 224(1) of the Labour Code, in respect of that period.

23 QH brought an action before the referring court, the Rayonen sad Haskovo (District Court, Haskovo, Bulgaria), seeking compensation from the Court of Cassation for the damage which she claimed to have sustained as a result of the infringement of EU law by that court in its order of 25 October 2011. In support of her action, QH maintains, in particular, that the Court of

Cassation ought to have applied Article 7 of Directive 2003/88 and recognised that she was entitled to paid annual leave in respect of the period during which she was unable to take paid annual leave as a result of her unlawful dismissal. She adds that if the Court of Cassation had any doubt as to the possibility of applying that provision, then, as a supreme court, it should have made a request to the Court of Justice of the European Union for a preliminary ruling under Article 267 TFEU, concerning the interpretation of that provision of EU law. Thus, in QH's submission, the failure by the Court of Cassation to fulfil its obligation to make a request for a preliminary ruling must be regarded as a wrongful act on its part that caused damage to QH in the amounts claimed.

24 In those circumstances, the Rayonen sad Haskovo (District Court, Haskovo) decided to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:

'(1) Must Article 7(1) of [Directive 2003/88] be interpreted as precluding national legislation and/or case-law, according to which a worker who has been unlawfully dismissed and subsequently reinstated by a court decision, is not entitled to paid annual leave for the period from the date of dismissal until the date of his or her reinstatement?

(2) In the event that the first question is answered in the affirmative, must Article 7(2) of [Directive 2003/88] be interpreted as precluding national legislation and/or case-law, according to which, in the event that the employment relationship is terminated once again, the worker in question is not entitled to financial compensation for unused paid annual leave for the period from the date of his or her previous dismissal until the date of his or her reinstatement?'

Case C-37/19

25 CV, an employee of Iccrea Banca, was dismissed by letter of 11 July 2002, following a collective redundancy procedure. However, by order of 4 September 2003, the Tribunale di Roma (District Court, Rome, Italy) ordered that she be reinstated, with effect from 6 October 2003.

26 By letters of 13 October and 15 November 2003, Iccrea Banca again terminated CV's contract of employment, with immediate effect. However, those acts of dismissal were both declared unlawful by court decisions that became final and CV was reinstated, with effect from 26 September 2008.

27 On 17 September 2010, CV's contract of employment was again terminated.

28 In the meantime, CV brought two actions before the Tribunale di Roma (District Court, Rome), which made two orders enjoining Iccrea Banca to pay, first, the sum of EUR 3 521, plus ancillary costs, in respect of the amount payable for 30.5 days of leave and 5 days of special leave acquired and not taken in respect of 5 abolished public holidays, for 2003, and, second, the sum of EUR 2 596.16, plus ancillary costs, in respect of the amount payable for 27 days of leave and 5 days of special leave acquired and not taken, in respect of abolished public holidays, for 2004.

29 Upon an objection lodged by Iccrea Banca, the Tribunale di Roma (District Court, Rome) cancelled the first order and enjoined Iccrea Banca to pay the lump sum of EUR 3 784.82, on the same basis, but confined to the period preceding the date of the second dismissal. Furthermore, the Tribunale di Roma (District Court, Rome) cancelled the second order, relating to the rights claimed in respect of 2004.

30 CV appealed against those judgments. The Corte d'appello di Roma (Court of Appeal, Rome, Italy), referring to previous decisions of the Corte suprema di cassazione (Court of Cassation, Italy), dismissed those appeals, on the ground that, during the period to which CV's claim related, she had not performed actual work, as the right to compensation in lieu of leave and special leave can be recognised only if the professional activity was carried out during the reference period.

31 CV appealed before the referring court, the Corte suprema di cassazione (Court of Cassation), against those decisions of the Corte d'appello di Roma (Court of Appeal, Rome).

32 The referring court states that the claim forming the subject matter of the proceedings before it is limited to the determination of CV's entitlement to compensation in lieu of the unused leave and special leave for the period from 15 November 2003 to 31 December 2004. In particular, that court states that, so far as that period is concerned, the question arises whether, on the basis of Article 31 of the Charter and Article 7 of Directive 2003/88, a worker who has been unlawfully dismissed and subsequently reinstated is entitled to compensation in lieu of the unused paid annual leave for the period between dismissal and reinstatement.

33 In that regard, the referring court considers, first of all, that, in the light of the case-law of the Court of Justice relating to Article 7 of Directive 2003/88, it cannot be ruled out that performance of the professional activity during the reference period is a condition *sine qua non* of the right to paid annual leave and that, in any event, the influence of external factors not attributable to the worker might be relevant for the purposes of the recognition of compensation in lieu of the unused paid annual leave.

34 Next, the referring court highlights certain relevant aspects of the Italian case-law on dismissal, reinstatement and the right to compensation in lieu of leave not taken in the event of reinstatement.

35 In particular, first, the referring court states that it is settled Italian case-law that, when the unlawfulness of the termination is established by a court, the worker is in principle entitled to be reinstated. The court decision ordering reinstatement of the worker has the effect of restoring the employment relationship, which must therefore be considered to be re-established for all legal and economic purposes solely on the basis of the decision of the court, without there being any need for the employer to appoint the worker again. Second, the finding by the court that the dismissal was unlawful and that the worker must be reinstated, in accordance with Article 18 of Law No 300/1970, constitutes the re-establishment *de jure* of the employment relationship, which must therefore be regarded as never having been terminated.

36 Last, the referring court points to its case-law according to which, in the event of dismissal that is declared unlawful, the award to the worker of the remuneration received for the period from the date of communication of the dismissal to the date of the exercise of the right to opt for compensation in lieu of reinstatement does not include compensation in lieu of leave not taken or in lieu of special leave for the monthly reduction of working hours. According to the

information provided by the referring court, that solution is justified in the light of the hybrid nature of those compensations, which are intended both to make good damage and to pay remuneration, with the consequence that they are payable only where the worker, who is in actual service, has performed his or her activity throughout the year without taking leave. A worker who has been dismissed is not in the same situation, since, during the period between termination of his or her contract of employment and the exercise of the option to take compensation, he or she is in a position of rest, albeit 'forced' rest.

37 In those circumstances, the Corte suprema di cassazione (Court of Cassation) decided to stay the proceedings and to refer the following question to the Court of Justice for a preliminary ruling:

'Must Article 7(2) of [Directive 2003/88] and Article 31(2) of the [Charter], taken separately where applicable, be interpreted as precluding provisions of national legislation or national practices pursuant to which, once the employment relationship has ended, the right to payment of an allowance for paid leave accrued but not taken (and for a legal arrangement, such as "abolished public holidays", which is comparable in nature and function to paid annual leave) does not apply in a context where the worker was unable to take the leave before the employment relationship ended because of an unlawful act (a dismissal established as unlawful by a national court by means of a final ruling ordering the retroactive restoration of the employment relationship) attributable to the employer, for the period between that unlawful act by the employer and the subsequent reinstatement only?'

38 By decision of the President of the First Chamber of 2 March 2020, Cases C-762/18 and C-37/19 were joined for the purposes of the judgment.

Consideration of the questions referred

The Court's jurisdiction in Case C-762/18

39 In the first place, the Bulgarian Government claims that the Court lacks jurisdiction to examine the questions referred in Case C-762/18, since QH's action for compensation is directly linked to her first dismissal and that dismissal took place on 29 April 2004, that is to say, before the accession of the Republic of Bulgaria to the European Union on 1 January 2007.

40 In that regard, it should be noted that, as is apparent from paragraphs 21 to 23 of the present judgment, QH's claim seeks payment of compensation for the harm resulting from the alleged infringement by the Court of Cassation of Article 7 of Directive 2003/88, in that that court is claimed to have applied national case-law relating to the legal effects of the annulment of that first dismissal and the interested party's reinstatement that is incompatible with that provision of EU law. The referring court in Case C-762/18 thus has doubts as to the compatibility of such national case-law with that provision and the questions which it raises are therefore linked to the legal consequences resulting from the annulment of QH's first dismissal and from her reinstatement.

41 As follows from Article 2 of the Act concerning the conditions of accession of the Republic of Bulgaria and Romania and the adjustments to the treaties on which the European Union is founded (OJ 2005 L 157, p. 203), the provisions of the original Treaties and the acts adopted by the institutions, in particular Directive 2003/88, are binding on the Republic of Bulgaria from the date

of its accession, with the result that they apply to the future effects of situations arising prior to its accession (see, by analogy, judgment of 14 February 2019, *Milivojević*, C-630/17, EU:C:2019:123, paragraph 42 and the case-law cited).

42 Although QH's first dismissal took place before the accession of the Republic of Bulgaria to the European Union, its annulment and QH's reinstatement, the legal consequences of which form the subject matter of the main proceedings, both took place after that date. Consequently, Article 7 of Directive 2003/88 applies *ratione temporis* to the effects of that annulment and that reinstatement, in so far as such effects were produced after 1 January 2007.

43 In the second place, in the context of Case C-762/18, both the Court of Cassation and the Bulgarian Government claim that, during the period between the date on which QH was first dismissed and the date on which she was reinstated, she did not have the status of 'worker' for the purposes of Directive 2003/88 and therefore did not come within the scope of that directive or, in general, within the scope of EU law, and that the Court thus does not have jurisdiction to rule on the questions referred in that case.

44 In that regard, it should be observed that it follows from the case-law of the Court of Justice that Directive 2003/88 is applicable only to workers and that in order to be considered a 'worker' it is necessary to be a person who for a certain period of time performs services for and under the direction of another person in return for which he or she receives remuneration (see, to that effect, judgment of 20 November 2018, *Sindicatul Familia Constanța and Others*, C-147/17, EU:C:2018:926, paragraphs 40 and 41.

45 In the present case, the questions referred in Case C-762/18 concern the right to paid annual leave in the context of the unlawful dismissal of a worker and his or her reinstatement, in accordance with national law, pursuant to a decision of a court.

46 It is apparent from the order for reference that, under Bulgarian law, the finding that a dismissal is unlawful means that the period between the date of the dismissal and the date of reinstatement of the person concerned must be regarded, retroactively, as forming part of the period during which that person was in the service of his or her employer.

47 Consequently, Directive 2003/88 applies *ratione materiae* to the dispute in the main proceedings in the present case.

48 It follows from the foregoing that the Court is called upon to interpret the provisions of EU law applicable to that dispute in the main proceedings and therefore has jurisdiction to answer the questions referred in Case C-762/18.

The admissibility of the reference for a preliminary ruling in Case C-37/19

49 Iccrea Banca and the Italian Government question the admissibility of the reference for a preliminary ruling in Case C-37/19, on the ground that the order for reference in that case lacks precision and clarity with respect to the facts and the national legislation or practices that might be contrary to EU law.

50 In that regard, it must be noted that the referring court identifies to the requisite legal standard the provisions of EU law the interpretation of which is necessary and the national case-law that might be incompatible with those provisions. Furthermore, the information provided in the request for a preliminary ruling enables the Court to understand the question submitted by the referring court and the context in which it was submitted.

51 It follows that the reference for a preliminary ruling in Case C-37/19 is admissible.

The first question in Case C-762/18

52 By its first question in Case C-762/18, the referring court asks, in essence, whether Article 7(1) of Directive 2003/88 must be interpreted as precluding national case-law by virtue of which a worker who was unlawfully dismissed then reinstated in his or her employment, in accordance with national law, following the annulment of the dismissal by a decision of a court, is not entitled to paid annual leave for the period between the date of the dismissal and that of the reinstatement in his or her employment on the ground that, during that period, the worker did not actually carry out work for the employer.

53 In that regard, in the first place, it must be borne in mind 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 29 November 2017, *King*, C-214/16, EU:C:2017:914, paragraph 32 and the case-law cited).

54 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 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 21 June 2012, *ANGED*, C-78/11, EU:C:2012:372, paragraph 17 and the case-law cited).

55 In addition, as the Court has previously held, the right to paid annual leave cannot be interpreted restrictively (judgment of 30 June 2016, *Sobczyszyn*, C-178/15, EU:C:2016:502, paragraph 21 and the case-law cited).

56 Last, it is clear from the terms of Directive 2003/88 and the Court's case-law that, although it is for the Member States to lay down the conditions for the exercise and implementation of the right to paid annual leave, they must not make the very existence of that right, which derives directly from that directive, subject to any preconditions whatsoever (judgment of 29 November 2017, *King*, C-214/16, EU:C:2017:914, paragraph 34 and the case-law cited).

57 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, as laid down in Article 7 of Directive 2003/88, 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 (judgment of 20 July 2016, *Maschek*, C-341/15, EU:C:2016:576, paragraph 34 and the case-law cited).

58 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).

59 Nonetheless, in certain specific 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 (see, to that effect, judgment of 24 January 2012, *Dominguez*, C-282/10, EU:C:2012:33, paragraph 20 and the case-law cited).

60 The same applies, in particular, with regard to workers who are absent from work 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 in fact worked during that period (judgment of 4 October 2018, *Dicu*, C-12/17, EU:C:2018:799, paragraph 29 and the case-law cited).

61 Thus, according to Article 7 of Directive 2003/88, any worker on sick leave during the reference period cannot have his or her entitlement to at least four weeks' paid annual leave affected (see, to that effect, judgment of 24 January 2012, *Dominguez*, C-282/10, EU:C:2012:33, paragraph 30).

62 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).

63 Under the case-law set out above it cannot be accepted that a worker's right to a minimum paid annual leave, guaranteed by European Union law, may be reduced where the worker could not fulfil his or her obligation to work during the reference period due to an illness (judgment of 19 September 2013, *Review Commission* v *Strack*, C-579/12 RX-II, EU:C:2013:570, paragraph 34 and the case-law cited).

64 Thus, Directive 2003/88 does not allow Member States either to exclude the existence of the right to paid annual leave or to provide for the right to paid annual leave of a worker, who was prevented from exercising that right, to be lost at the end of the reference period and/or of a carry-over period fixed by national law (judgment of 29 November 2017, *King*, C-214/16, EU:C:2017:914, paragraph 51 and the case-law cited).

65 It must therefore be ascertained whether the principles deriving from the case-law on the right to paid annual leave of a worker who, because of sickness, has been unable to exercise his or her right to such leave during the reference period and/or the carry-over period fixed by national law may be transposed, *mutatis mutandis*, to a situation, such as that at issue in the main proceedings in the present cases, in which a worker who has been unlawfully dismissed then reinstated in his or her employment, in accordance with national law, following the annulment of his or her dismissal by a decision of a court, has not, during the period between the date of the unlawful dismissal and the date of reinstatement, actually carried out work for his or her employer.

66 In that regard, it should be observed that, in order to derogate, as regards workers absent from work owing to sickness, from the principle that the rights to annual leave must be determined by reference to periods of actual work, the Court has relied on the fact that incapacity for work owing to sickness is, as a rule, not foreseeable and beyond the worker's control (see in particular, to that effect, judgment of 4 October 2018, *Dicu*, C-12/17, EU:C:2018:799, paragraph 32 and the case-law cited).

67 It must be stated that, like incapacity for work owing to sickness, the fact that a worker was deprived of the opportunity to work owing to dismissal that was subsequently held to be unlawful is, as a rule, not foreseeable and beyond the worker's control.

68 As the Advocate General observed in point 48 of his Opinion, the fact that the worker concerned has not, during the period between the date of his or her unlawful dismissal and the date of her reinstatement, in accordance with national law, following the annulment of that dismissal by a decision of a court, actually carried out work for his or her employer is the consequence of the latter's actions that led to the unlawful dismissal, without which the worker would have been in a position to work during that period and to exercise his or her right to annual leave.

69 Therefore, in a situation such as that at issue in the main proceedings in the present cases, the period between the date of the unlawful dismissal and the date of the worker's reinstatement, in accordance with national law, following the annulment of that dismissal by a decision of a court, must be treated as a period of actual work for the purpose of determining the rights to paid annual leave.

70 Accordingly, the Court's case-law relating to the right to paid annual leave of a worker who, owing to sickness, has not been in a position to exercise his or her right to such leave during the reference period and/or the carry-over period fixed by national law may be transposed, *mutatis mutandis*, to a situation, such as that at issue in the main proceedings in each of the present cases, in which a worker who has been unlawfully dismissed and subsequently reinstated, in accordance with national law, following the annulment of the dismissal by a decision of a court, has not, during the period between the date of that dismissal and the date of his or her reinstatement, actually carried out work for his or her employer.

71 In the third place, 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 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 (judgment of 29 November 2017, *King*, C-214/16, EU:C:2017:914, paragraph 55 and the case-law cited).

72 However, as the Advocate General observed in point 49 of his Opinion, circumstances such as those at issue in the present cases cannot justify a derogation from the principle laid down in Article 7 of Directive 2003/88, according to which an acquired right to paid annual leave cannot be extinguished on expiry of the reference period and/or the carry-over period fixed by national law when the worker has not been in a position to take his or her leave.

73 On the one hand, in accordance with the case-law referred to in paragraph 55 of this judgment, the right to paid annual leave cannot be interpreted restrictively.

74 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 29 November 2017, *King*, C-214/16, EU:C:2017:914, paragraph 58 and the case-law cited).

75 In circumstances such as those at issue in the main proceedings in the present cases, protection of the employer's interests does not seem to be strictly necessary and, accordingly, is not a priori such as to justify a derogation from the worker's right to paid annual leave.

76 On the other hand, as observed in paragraph 68 of the present judgment, in such circumstances too it is because of the acts of the employer itself, who unlawfully dismissed the worker concerned, that, during the period between that dismissal and the date of the worker's reinstatement, the worker was not in a position to work and, consequently, to exercise his or her right to paid annual leave.

77 It should be borne in mind that it is for employers to ensure that workers are given the opportunity to exercise the right to annual leave (see, to that effect, judgment of 6 November 2018, *Kreuziger*, C-619/16, EU:C:2018:872, paragraph 51 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 29 November 2017, *King*, C-214/16, EU:C:2017:914, paragraph 63).

78 Consequently, a worker who has been unlawfully dismissed and subsequently reinstated, in accordance with national law, following the annulment of that dismissal by a decision of a court, is entitled to rely on all the rights to paid annual leave acquired during the period between the date of the unlawful dismissal and the date of his or her reinstatement, following that annulment.

79 Last, it should be made clear, as the Advocate General observes in point 59 of his Opinion, that, where the worker concerned obtained other employment in the period between the date of the unlawful dismissal and the date of reinstatement in that first post, that worker cannot claim from his or her first employer the rights to annual leave corresponding to the period during which he or she held another post.

80 In such circumstances, it is vis-à-vis the new employer that the worker concerned must rely on his or her rights to paid annual leave during that period.

81 Having regard to the foregoing considerations, the answer to the first question in Case C-762/18 is that Article 7(1) of Directive 2003/88 must be interpreted as precluding national case-law by virtue of which a worker who was unlawfully dismissed then reinstated in his or her employment, in accordance with national law, following the annulment of the dismissal by a decision of a court, is not entitled to paid annual leave for the period between the date of the dismissal and that of the reinstatement in his or her employment on the ground that, during that period, that worker did not actually carry out work for the employer.

The second question in Case C-762/18 and the single question in Case C-37/19

82 By the second question in Case C-762/18 and by the single question in Case C-37/19, which should be examined together, the referring courts ask, in essence, whether Article 7(2) of Directive 2003/88 must be interpreted as precluding national case-law by virtue of which, in the event of termination of the employment relationship after the worker concerned has been unlawfully dismissed then reinstated in his or her employment, in accordance with national law, following the annulment of the dismissal by decision of a court, that worker is not entitled to financial compensation in lieu of paid annual leave not taken during the period between the date of the unlawful dismissal and that of his or her reinstatement in his or her employment.

83 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 an essential principle of EU social law reflected in Article 7 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) and Article 7 of Directive 2003/88, now expressly enshrined as a fundamental right in Article 31(2) of the Charter. As well as an entitlement to a payment, that fundamental right also includes, 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 6 November 2018, *Bauer and Willmeroth*, C-569/16 and C-570/16, EU:C:2018:871, paragraph 58).

84 The Court has held that Article 7(2) of Directive 2003/88 does not set out any conditions for entitlement to an allowance in lieu other than that relating to the fact, first, that the employment relationship has ended and, second, 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 6 November 2018, *Kreuziger*, C-619/16, EU:C:2018:872, paragraph 31).

85 In that regard, it is apparent from the Court's case-law that that provision must be interpreted as precluding 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 or she was on sick leave for all or part of the leave year and/or of a carry-over period (judgment of 6 November 2018, *Kreuziger*, C-619/16, EU:C:2018:872, paragraph 32 and the case-law cited).

86 As is apparent from paragraph 78 of the present judgment, a worker who was unlawfully dismissed and subsequently reinstated, in accordance with national law, following the annulment of his or her dismissal by a decision of a court, may claim all the rights to paid annual leave acquired during the period between the date of the unlawful dismissal and the date of his or her reinstatement following that annulment.

87 Consequently, where the worker, like those concerned in the present cases, after being reinstated following the annulment of his or her unlawful dismissal, is again dismissed, he or she may claim, on the basis of Article 7(2) of Directive 2003/88, compensation in lieu of the annual leave not taken at the time of that new dismissal, including leave corresponding to the period between the date of the unlawful dismissal and the date of his or her reinstatement.

88 However, as is apparent from paragraph 79 of the present judgment, where, during that period, the worker concerned held another post, he or she cannot claim from the first employer compensation corresponding to the period during which he or she held that other post.

89 Having regard to the foregoing considerations, the answer to the second question in Case C-762/18 and to the single question in Case C-37/19 is that Article 7(2) of Directive 2003/88 must be interpreted as precluding national case-law by virtue of which, in the event of termination of the employment relationship after the worker concerned has been unlawfully dismissed then reinstated in his or her employment, in accordance with national law, following the annulment of the dismissal by a decision of a court, that worker is not entitled to financial compensation in lieu of paid annual leave not taken during the period between the date of the unlawful dismissal and that of his or her reinstatement in his or her employment.

Costs

90 Since these proceedings are, for the parties to the main proceedings, a step in the actions pending before the national courts, the decision on costs is a matter for those courts. 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:

1. **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 must be interpreted as precluding national case-law by virtue of which a worker who was unlawfully dismissed then reinstated in his or her employment, in accordance with national law, following the annulment of the dismissal by a decision of a court, is not entitled to paid annual leave for the period between the date of the dismissal and that of the reinstatement in his or her employment on the ground that, during that period, that worker did not actually carry out work for the employer.**

2. **Article 7(2) of Directive 2003/88 must be interpreted as precluding national case-law by virtue of which, in the event of termination of the employment relationship after the worker concerned has been unlawfully dismissed then reinstated in his or her employment, in accordance with national law, following the annulment of the dismissal by a decision of a court, that worker is not entitled to financial compensation in lieu of paid annual leave not taken during the period between the date of the unlawful dismissal and that of his or her reinstatement in his or her employment.**

[Signatures]