Reports of Cases

OPINION OF ADVOCATE GENERAL
RICHARD DE LA TOUR
delivered on 5 May 2022 [1]

Case C-120/21

LB
v
TO

(Request for a preliminary ruling
from the Bundesarbeitsgericht (Federal Labour Court, Germany))

(Reference for a preliminary ruling – Social policy – Right to paid annual leave – Allowance in lieu of paid annual leave not taken upon termination of the employment relationship – Three-year limitation period – Starting point – Obligations to provide encouragement and information to workers as regards taking their leave)

I. Introduction

1. By the present request for a preliminary ruling, the Bundesarbeitsgericht (Federal Labour Court, Germany) asks the Court to interpret 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 [2] and Article 31(2) of the Charter of Fundamental Rights of the European Union. [3]

2. The request has been made in proceedings between TO and LB for the purpose of obtaining an allowance in lieu of paid annual leave. LB submits that the right to paid annual leave claimed by TO was time-barred.

3. By its question, the referring court seeks to ascertain whether the application of national rules on limitation periods to the right to paid annual leave is consistent with EU law where the employer has failed to fulfil the obligations to provide encouragement and information to workers as regards taking their leave, as laid down by the Court in its judgments of 6 November 2018, *Kreuziger* [4] and *Max-Planck-Gesellschaft zur Förderung der Wissenschaften*. [5]

1 Original language: French.

2 OJ 2003 L 299, p. 9.

3 'the Charter'.

4 C-619/16 EU:C:2018:872; 'the judgment in *Kreuziger*'.

5 C-684/16, EU:C:2018:874; 'the judgment in *Max-Planck-Gesellschaft zur Förderung der Wissenschaften*'.

4. In those judgments, the Court held that an employer must encourage a worker to exercise his or her right to paid annual leave and inform that worker of the possible loss of that right. If that employer does not comply with its obligations in that regard, that right cannot be extinguished at the end of a reference period or a carry-over period provided for by national law.

5. The Court will be required, in the present case, to decide whether what it has held in relation to the loss of the right to paid annual leave also applies as regards the application to that right of a general limitation period. More specifically, can such a period begin to run and expire irrespective of whether the employer has in fact given the worker the opportunity to exercise that right?

6. I shall set out below the reasons why I consider that Article 7 of Directive 2003/88 and Article 31(2) of the Charter must be interpreted as precluding national legislation under which the right to paid annual leave acquired in respect of a given reference period and, accordingly, the right to an allowance in lieu of paid annual leave not taken upon termination of the employment relationship are subject to a three-year limitation period which begins to run at the end of that reference period, where the employer has not complied with its obligations to provide encouragement and information to a worker as regards taking that leave.

II. Legal framework

A. European Union law

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

B. German law

8. Paragraph 7 of the Bundesurlaubsgesetz (Federal Law on leave),[6] of 8 January 1963, in the version of 7 May 2002 applicable to the employment relationship between the parties,[7] is entitled 'Date, carrying-over and allowance in lieu of leave'. That paragraph provides:

'…

(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 authorised and taken during the first three months of the following calendar year. At the request of the

6 BGBl. 1963, p. 2.

7 BGBl. 2002 I, p. 1592; 'the BUrlG'.

employee, partial leave acquired in accordance with Paragraph 5(1)(a) shall nevertheless 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 in lieu shall be payable.'

9. The Bürgerliches Gesetzbuch (Civil Code; 'the BGB'), which is applicable to the employment relationship between the parties to the main proceedings, provides in Paragraph 194 thereof, entitled 'Subject matter of the limitation period', as follows:

'(1) The right to require another person to act or refrain from acting (enforceable claim) is subject to a limitation period.

…'

10. Under Paragraph 195 of the BGB, entitled 'General limitation period':

'The general limitation period shall be three years.'

11. Paragraph 199 of the BGB, entitled 'Starting point for the general limitation period and maximum limitation periods', reads as follows:

'(1) Unless otherwise provided for, the general limitation period shall begin to run at the end of the year in which

1. the right arose, and

2. the obligee became aware of the circumstances giving rise to the right and the identity of the obligor, or would have been aware of them in the absence of gross negligence on his or her part.

…

(4) Rights other than those referred to in points 2 to 3a shall be time-barred 10 years after the date on which they arose, irrespective of whether the person concerned was aware of those rights or unaware of them as a result of gross negligence.

…'

12. Under Paragraph 204 of the BGB, entitled 'Suspension of the limitation period by the bringing of an action':

'(1) The limitation period shall be suspended by

1. the bringing of an action for enforcement or recognition of the right …

…'

III. The facts in the main proceedings and the question referred for a preliminary ruling

13. TO was employed by LB to provide tax and accounting services from 1 November 1996 to 31 July 2017. She was entitled to 24 days of leave per calendar year. By letter of 1 March 2012, LB certified to TO that her remaining leave entitlement of 76 days for the 2011 calendar year and preceding years would not expire on 31 March 2012 because she had been unable to take that leave due to the heavy workload of its law firm. From 2012 to 2017, LB granted TO 95 days of leave in total. TO did not take all of her statutory minimum leave. LB did not request TO to take more leave, nor did LB make her aware that the unclaimed leave could expire at the end of the calendar year or carry-over period.

14. By an action brought on 6 February 2018 before the Arbeitsgericht (Labour Court, Germany), TO requested an allowance in lieu of the 101 days of paid annual leave for 2017 and the preceding years which she had not taken before the end of her employment relationship. LB took the view that the leave in question had expired. It argued in that regard that it could not have been aware of or complied with its obligations to provide information and encouragement, since the case-law of the Bundesarbeitsgericht (Federal Labour Court) had changed only after termination of the employment relationship, by decisions of 19 February 2019. Moreover, it was not obliged to pay an allowance in lieu of leave not taken on the ground that the leave entitlements for which TO could request payment of an allowance in lieu had expired.

15. The Arbeitsgericht (Labour Court) ordered LB to pay an allowance in lieu of the remaining leave for 2017. It dismissed the action as to the remainder.

16. Following an appeal brought by TO, the Landesarbeitsgericht (Higher Labour Court, Germany) ordered LB to pay TO an allowance in lieu of 76 days of leave not taken for the years 2013 to 2016, amounting to EUR 17 376.64 gross. It held that, in the light of the requirements of EU law, TO's leave entitlement could not have expired under Paragraph 7(3) of the BUrlG or been time-barred under the general provisions relating to limitation periods based on Paragraph 194 et seq. of the BGB, because LB had not given TO the opportunity to take her leave.

17. LB brought an appeal on a point of law before the referring court.

18. That court states, on the basis of the case-law deriving from the judgments in *Kreuziger* and in *Max-Planck-Gesellschaft zur Förderung der Wissenschaften*, that TO's entitlement to paid annual leave for the years 2013 to 2016 has not expired under Paragraph 7(3) of the BUrlG because LB failed to encourage her to take her leave and failed to inform her, accurately and in good time, that, if she did not take it, that leave would be lost at the end of the calendar year or the carry-over period.

19. Like the Court of Justice, the referring court starts from the premiss that the loss of entitlement to paid annual leave in cases where a worker has not been able to take his or her leave can be permitted only in exceptional cases, if there are special circumstances justifying the loss of that leave. The referring court found that LB could have given TO the opportunity to take her leave for the years 2013 to 2016 by fulfilling its obligations to provide encouragement and information.

20. In so far as LB raised a plea that the claims were time-barred, based on Paragraphs 194 and 195 of the BGB, from which it follows that an obligee's claims are time-barred three years after the end of the year in which his or her right arose, the referring court must examine whether the entitlement to paid annual leave, which could not be extinguished under Paragraph 7(3) of the BUrlG, is time-barred.

21. The referring court states that TO's request would not be justified, in so far as it concerns an allowance in lieu of leave not taken for the years 2013 and 2014, if Paragraph 7 of the BUrlG, interpreted in the light of EU law, did not preclude a limitation period in respect of the right to leave for those years and allowed the starting point for the limitation period to be based on the leave year in which the right arose, even in the event of a lack of cooperation on the part of the employer.

22. The referring court is thus seeking to ascertain how the general provisions relating to limitation periods in Paragraph 194 et seq. of the BGB relate to Paragraph 7 of the BUrlG, having regard to the case-law deriving from the judgments in *Kreuziger* and in *Max-Planck-Gesellschaft zur Förderung der Wissenschaften*. In the light of that case-law, the application of national rules on limitation periods to the right to leave in a situation such as that at issue in the main proceedings could lead to an infringement of Article 7 of Directive 2003/88 and Article 31(2) of the Charter.

23. In particular, it is necessary to determine whether it must be inferred from that case-law that those provisions preclude requiring a worker to bring an action pursuant to Paragraph 204(1) of the BGB in order to suspend the limitation period in respect of his or her right to leave, in a situation where his or her employer has not given that worker the opportunity to exercise that right.

24. The referring court has doubts as to the correct interpretation of EU law, since the Court has already accepted, in accordance with the principle of procedural autonomy of the Member States, the application of limitation periods, provided that the principles of equivalence and effectiveness are respected.

25. However, in so far as concerns the principle of effectiveness, the information which may be gleaned from the case-law of the Court requires further clarification as regards its application to the exercise of the right to paid annual leave. In particular, the issue of the starting point for the limitation period is central to the questions raised by the referring court.

26. According to the first view, the application of national rules on limitation periods to the exercise of that right could be regarded as compatible with the principle of effectiveness. By providing for a three-year limitation period, the national legislature struck an appropriate balance between the interests of the employer as the obligor burdened by the right to paid annual leave and the interests of the worker as the obligee entitled to that right. Pointing out that, in accordance with Paragraph 195 and Paragraph 199(1)(1) and (2) of the BGB, that period begins to run only from the time when the claim is known or can be identified, the referring court notes that a worker – who is generally aware of the right to leave stemming from his or her contract of employment, from the law or from collective agreements – is, for a sufficiently long period, in a position to rely on that entitlement in judicial proceedings, thereby suspending the limitation period.

27. However, according to the second view, the Court's case-law also contains information indicating that the application of national rules on limitation periods to the right to paid annual leave is incompatible with the principle of effectiveness where the employer has failed to comply with its obligations to provide encouragement and information.

28. Indeed, the Court has already held, in another context, that the application of a limitation period may make it excessively difficult to exercise rights under EU law and, consequently, run counter to the principle of effectiveness read in conjunction with the principle of legal certainty, if that period begins to run on a date at which the applicant could not know or appreciate the extent of his or her rights under EU law because he or she did not have the necessary information. [8]

29. Accordingly, for the referring court, the question which arises in that context is whether Article 7 of Directive 2003/88 and Article 31(2) of the Charter require the starting point for the limitation period to be made subject not only to knowledge of the acquisition and extent of the right to paid annual leave, but also to the requirement that the employer has provided information on the temporal limitation and possible loss of that right in fulfilment of its obligations to provide encouragement and information.

30. In the light of the foregoing, the Bundesarbeitsgericht (Federal Labour Court) decided to stay the proceedings and to refer the following question to the Court for a preliminary ruling:

'Do Article 7 of [Directive 2003/88] and Article 31(2) of the [Charter] preclude the application of national legislation such as Paragraph 194(1), in conjunction with Paragraph 195, of the [BGB], under which the entitlement to paid annual leave is subject to a standard limitation period of three years, which starts to run at the end of the leave year under the conditions set out in Paragraph 199(1) of the BGB, if the employer has not actually enabled a worker to exercise his or her leave entitlement by accordingly informing him or her of the leave and inviting him or her to take that leave?'

31. Written observations were lodged by the German Government and the European Commission. A hearing was held on 24 March 2022.

IV. Analysis

32. By its question, the referring court is essentially asking the Court to rule on whether Article 7 of Directive 2003/88 and Article 31(2) of the Charter must be interpreted as precluding national legislation under which the right to paid annual leave acquired in respect of a given reference period and, accordingly, the right to an allowance in lieu of paid annual leave not taken upon termination of the employment relationship are subject to a three-year limitation period which begins to run at the end of that reference period, where the employer has not complied with its obligations to provide encouragement and information to a worker as regards taking that leave.

[8] The referring court refers in that regard to judgments relating to the interpretation of Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts (OJ 1993 L 95, p. 29). It cites the judgments of 13 September 2018, *Profi Credit Polska* (C-176/17, EU:C:2018:711, paragraph 69), and of 16 July 2020, *Caixabank and Banco Bilbao Vizcaya Argentaria* (C-224/19 and C-259/19, EU:C:2020:578, paragraph 90 et seq.).

33. In order to answer that question, it should be pointed out that, as is apparent from the very wording of Article 7 of Directive 2003/88 and the case-law of the Court, it is for the Member States to lay down, in their domestic legislation, conditions for the exercise and implementation of the right to paid annual leave, by prescribing the specific circumstances in which workers may exercise that right. [9]

34. In that regard, the Court has held that 'Article 7(1) of Directive 2003/88 does not preclude, as a rule, national legislation which lays down conditions for the exercise of the right to paid annual leave expressly conferred by the directive, including even the loss of that right at the end of a leave year or of a carry-over period, provided, however, that the worker who has lost his right to paid annual leave has actually had the opportunity to exercise the right conferred on him by the directive'. [10]

35. The Court has already had occasion to rule that national legislation such as Paragraph 7(3) of the BUrlG is covered by the rules governing paid annual leave, within the meaning of Article 7(1) of Directive 2003/88, as interpreted by the Court. [11] Such legislation forms part of the rules and procedures of national law applicable to the scheduling of workers' leave, which seek to take into account the various interests involved. [12]

36. According to the Court, it is nevertheless necessary, in each situation, to 'ensure that the application of those provisions of national law cannot lead to the loss of the rights to paid annual leave acquired by the worker, even though he has not actually had the opportunity to exercise those rights'. [13] Accordingly, an 'automatic loss of the entitlement to paid annual leave, which is not subject to prior verification that the worker was in fact given the opportunity to exercise that right, fails to have regard to the limits … which are binding on Member States when specifying the conditions for the exercise of that right'. [14] 'The loss of a worker's acquired right to paid annual leave or of his corresponding right to payment of an allowance in lieu of leave not taken upon termination of the employment relationship, without the worker having actually had the opportunity to exercise that right to paid annual leave, would undermine the very substance of that right'. [15]

37. It follows from that case-law of the Court that, as regards the right to paid annual leave, the principle is that that right 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. [16]

9 See, in particular, judgment of 20 January 2009, *Schultz-Hoff and Others* (C-350/06 and C-520/06, EU:C:2009:18, paragraph 28), and judgment in *Max-Planck-Gesellschaft zur Förderung der Wissenschaften* (paragraph 34).

10 See, in particular, judgment of 20 January 2009, *Schultz-Hoff and Others* (C-350/06 and C-520/06, EU:C:2009:18, paragraph 43), and judgment in *Max-Planck-Gesellschaft zur Förderung der Wissenschaften* (paragraph 35).

11 See judgment in *Max-Planck-Gesellschaft zur Förderung der Wissenschaften* (paragraph 36).

12 See judgment in *Max-Planck-Gesellschaft zur Förderung der Wissenschaften* (paragraph 37 and the case-law cited).

13 Judgment in *Max-Planck-Gesellschaft zur Förderung der Wissenschaften* (paragraph 38).

14 Judgment in *Max-Planck-Gesellschaft zur Förderung der Wissenschaften* (paragraph 40).

15 See judgment in *Max-Planck-Gesellschaft zur Förderung der Wissenschaften* (paragraph 26 and the case-law cited).

16 See, inter alia, judgment of 25 June 2020, *Varhoven kasatsionen sad na Republika Bulgaria and Iccrea Banca SpA* (C-762/18 and C-37/19, EU:C:2020:504, paragraph 72).

38. In so far as they apply to the right to paid annual leave, the limitation rules contained in Paragraph 194 et seq. of the BGB are covered, like Paragraph 7(3) of the BUrlG, by the arrangements governing the exercise of that right. Such rules must therefore also comply with the limits imposed on Member States in order to ensure that the very substance of that right is not undermined.

39. This is another way of expressing, in the specific area of the right to paid annual leave, the general rule that the Member States enjoy procedural autonomy which is framed by EU law. Accordingly, it clearly follows from the Court's settled case-law that, in the absence of specific EU rules governing the matter, the rules implementing that right are a matter for the domestic legal order of the Member States in accordance with the principle of the procedural autonomy of the Member States. However, those rules must not be less favourable than those governing similar domestic actions (principle of equivalence); nor may they be framed in such a way as to make it in practice impossible or excessively difficult to exercise the rights conferred by EU law (principle of effectiveness). [17]

40. In the present case, only the principle of effectiveness is at issue. [18] As regards that principle, it should be noted that the Court has consistently held that every case in which the question arises as to whether a national procedural provision makes the application of EU law impossible or excessively difficult must be analysed by reference to the role of that provision in the procedure, its progress and its special features, viewed as a whole, before the various national bodies. In that context, it is necessary to take into consideration, where relevant, the principles which lie at the basis of the national legal system, such as the protection of the rights of the defence, the principle of legal certainty and the proper conduct of the proceedings. [19]

41. In addition, the Court has stated that the obligation on the Member States to ensure the effectiveness of the rights that individuals derive from EU law implies a requirement for effective judicial protection, also guaranteed by Article 47 of the Charter, which applies, inter alia, to the definition of detailed procedural rules relating to actions based on such rights. [20]

42. As regards the analysis of the characteristics of the limitation period, the Court has stated that that analysis must cover the duration of the limitation period and the detailed rules for its application, including the mechanism adopted to start the period running. [21]

43. It is on the basis of that analytical approach that it is necessary to examine whether, and to what extent, the application of the limitation period at issue in the main proceedings to the right to paid annual leave is compatible with EU law.

44. In the first place, as regards the duration of the limitation period, the Court has already held that reasonable time limits for bringing proceedings, laid down in the interests of legal certainty, are not liable to make it in practice impossible or excessively difficult to exercise the rights

17 See, in particular, judgments of 10 June 2021, *BNP Paribas Personal Finance* (C-776/19 to C-782/19, EU:C:2021:470; 'the judgment in *BNP Paribas Personal Finance*'; paragraph 27 and the case-law cited), and of 10 February 2022, *Bezirkshauptmannschaft Hartberg-Fürstenfeld (Limitation period)* (C-219/20, EU:C:2022:89, paragraph 41 and the case-law cited).

18 As regards the principle of equivalence, it is clear from the order for reference that Paragraph 194 et seq. of the BGB, which are relied on to plead that the right to paid annual leave is time-barred in the main proceedings, are applicable to any civil law claim whether based on national law or EU law.

19 See, in particular, judgment in *BNP Paribas Personal Finance* (paragraph 28 and the case-law cited).

20 See, in particular, judgment in *BNP Paribas Personal Finance* (paragraph 29 and the case-law cited).

21 See, in particular, judgment in *BNP Paribas Personal Finance* (paragraph 30 and the case-law cited).

conferred by the EU legal order if such time limits are sufficient in practical terms to enable an individual to prepare and bring an effective action.[22] In the interests of legal certainty it is compatible with EU law to lay down reasonable time limits for bringing proceedings.[23]

45. In the present case, Paragraph 195 of the BGB, which is relied on by LB in the main proceedings to oppose TO's claims, lays down a limitation period of three years. The Court has already held that such a period, provided that it is established and known in advance, appears to be reasonable and consistent with the principle of effectiveness.[24]

46. In the second place, as regards the starting point for the limitation period at issue in the main proceedings, it is important to ascertain whether it is likely to prevent a worker from relying, during that period, on the rights conferred on him or her by Directive 2003/88.

47. I would recall that, according to Paragraph 199(1) of the BGB, the general limitation period begins to run at the end of the year in which the right arose and in which the obligee became aware of the circumstances giving rise to that right and the identity of the obligor, or would have been aware of them in the absence of gross negligence on his or her part. That provision implies that the three-year limitation period begins to run, as a rule, at the end of the leave year in which the worker acquired his or her rights to paid annual leave. Thus determined, the starting point for that limitation period is based on the premiss that that worker is generally aware of the right to leave stemming from his or her contract of employment, from the law or from collective agreements, and is, for a sufficiently long period, in a position to rely on that entitlement in judicial proceedings, thereby suspending the limitation period.

48. However, like the Commission, I consider that a limitation period such as that at issue in the main proceedings cannot be triggered solely on the basis of a worker's theoretical and presumed knowledge of the existence of his or her right to paid annual leave. Such a view is, in my view, incompatible with the principle of effectiveness, in so far as it entails a significant risk that the worker will not be given the opportunity to exercise his or her right to paid annual leave within the period laid down in Paragraph 195 of the BGB. Indeed, the effective exercise of that right by the worker presupposes that the employer has previously provided him or her with adequate and complete information on the extent of his or her leave. Such information is all the more necessary when leave entitlements are carried over several times.

49. Accordingly, it is not the limitation period laid down by German law or its duration which is problematic as such in the light of the principle of effectiveness, but the point at which that period starts to run, which must, in my view, be the end of the year in which the employer fulfilled its obligation to provide information, since it is on that date that the worker must be regarded as having 'knowledge' of his or her entitlement to paid annual leave within the meaning of Paragraph 199(1) of the BGB. It must be inferred from this that, until the employer has discharged its obligation to provide information, the limitation period at issue in the main proceedings cannot begin to run. Understood in that way, German law could, in my view, be interpreted in a manner consistent with EU law.

22 See, in particular, judgment in *BNP Paribas Personal Finance* (paragraph 31 and the case-law cited).

23 See, in particular, judgment in *BNP Paribas Personal Finance* (paragraph 32 and the case-law cited).

24 See, in particular, judgment of 15 April 2010, *Barth* (C-542/08, EU:C:2010:193, paragraphs 28 and 29), and judgment of 9 July 2020, *Raiffeisen Bank and BRD Groupe Société Générale* (C-698/18 and C-699/18, EU:C:2020:537, paragraph 64).

50. In that regard, it follows from the case-law of the Court that it is for employers to ensure that workers are given the opportunity to exercise their right to paid annual leave.[25] To that end, the Court has ruled that 'the employer is in particular required, in view of the mandatory nature of the entitlement to paid annual leave and in order to guarantee the effectiveness of Article 7 of Directive 2003/88, to ensure, specifically and transparently, that the worker is actually given the opportunity to take the paid annual leave to which he is entitled, by encouraging him, formally if need be, to do so, while informing him, accurately and in good time so as to ensure that that leave is still capable of procuring for the person concerned the rest and relaxation to which it is supposed to contribute, that, if he does not take it, it will be lost at the end of the reference period or authorised carry-over period'.[26]

51. In addition, the Court held that 'the burden of proof in that respect is on the employer … Should the employer not be able to show that it has exercised all due diligence in order to enable the worker actually to take the paid annual leave to which he is entitled, it must be held that the loss of the right to such leave at the end of the authorised reference or carry-over period, and, in the event of the termination of the employment relationship, the corresponding absence of a payment of an allowance in lieu of annual leave not taken constitutes a failure to have regard, respectively, to Article 7(1) and Article 7(2) of Directive 2003/88'.[27]

52. According to the German Government, there are fundamental differences between the concepts of loss and limitation, however. A limitation period is not provided for only in the interests of the obligor, but is a requirement of the rule of law in that it contributes to the maintenance of order and legal certainty. A limitation period can achieve those objectives only if the possibility of asserting rights is subject to a time limit. If, on the other hand, a limitation period is regarded as inapplicable in certain circumstances, entitlements to paid annual leave arising in the course of an employment relationship could be freely and indefinitely accrued, which would run counter to the purpose of that leave, which is that rest should be provided. The German Government therefore takes the view that the application of national rules on limitation periods to the right to paid annual leave is consistent with EU law, including where the employer has not discharged its obligations to provide encouragement and information.

53. I consider, contrary to the German Government, that, in so far as the expiry of a limitation period such as that at issue in the main proceedings is liable to lead to the loss by the worker of his or her right to paid annual leave, it is necessary by analogy to apply to such a period the finding of the Court in its judgment in *Max-Planck-Gesellschaft zur Förderung der Wissenschaften* regarding a national rule, namely Paragraph 7(3) of the BUrlG, which resulted in the loss of a worker's acquired right to paid annual leave or of his corresponding right to payment of an allowance in lieu of leave not taken upon termination of the employment relationship. It follows that the application of a limitation period such as that at issue in the main proceedings must be subject to prior verification that the employer has in fact given the worker the opportunity to exercise his or her right to paid annual leave. Moreover, as the Court has held in relation to consumers, a limitation period may be compatible with the principle of effectiveness only if the consumer has had the opportunity to become aware of his or her rights before that period begins to run or expires.[28]

[25] See, in particular, judgment in *Kreuziger* (paragraph 51 and the case-law cited), and judgment in *Max-Planck-Gesellschaft zur Förderung der Wissenschaften* (paragraph 44 and the case-law cited).

[26] Judgment in *Kreuziger* (paragraph 52), and judgment in *Max-Planck-Gesellschaft zur Förderung der Wissenschaften* (paragraph 45).

[27] Judgment in *Kreuziger* (paragraph 53), and judgment in *Max-Planck-Gesellschaft zur Förderung der Wissenschaften* (paragraph 46).

[28] See, in particular, judgment in *BNP Paribas Personal Finance* (paragraph 46 and the case-law cited).

54. I would point out, in that regard, that the employer's obligations to provide encouragement and information are justified by the fact that the worker must be regarded as the weaker party in the employment relationship and that he or she may therefore be dissuaded from explicitly claiming his or her rights vis-à-vis his or her employer.[29] According to the Court, 'it is important to avoid a situation in which the burden of ensuring that the right to paid annual leave is actually exercised rests fully on the worker, while the employer may, as a result thereof, take free of the need to fulfil its own obligations by arguing that no application for paid annual leave was submitted by the worker'.[30]

55. The logic of that reasoning is the view that loss of the right to paid annual leave acquired by a worker cannot result from a finding that the worker has not taken action as regards taking his or her leave, without prior verification that that worker has in fact been given the opportunity by his or her employer to exercise that right. Such loss, which is not subject to prior verification that the employer has discharged its obligations to provide encouragement and information as regards taking leave, constitutes, including in the case of national rules on limitation periods, a failure to have regard to the limits which are binding on Member States when specifying the conditions for the exercise of that right.[31]

56. Following that same logic, I consider that, under Article 7 of Directive 2003/88 and Article 31(2) of the Charter, a worker's retention of his or her acquired right to paid annual leave cannot be made dependent on whether he or she has brought an action having the effect, in accordance with Paragraph 204 of the BGB, of suspending the limitation period.

57. In short, the principles laid down by the Court in its judgments in *Kreuziger* and in *Max-Planck-Gesellschaft zur Förderung der Wissenschaften* concerning the loss of the right to paid annual leave are, in my view, applicable as regards the limitation period in respect of that right. Accordingly, in order to ensure a worker is entitled to actual rest, with a view to ensuring effective protection of his or her health and safety,[32] it is necessary to ensure that any implementation of a national rule entailing loss of the right to paid annual leave, including in relation to the limitation period for such a right, is subject to prior verification that the worker was in fact given the opportunity to exercise that right.

58. Any other interpretation would have the consequence of allowing a Member State to reintroduce, this time by means of the general provisions relating to limitation periods, the possibility of imposing a temporal limitation on a worker's right to paid annual leave when he or she has not been given the opportunity to exercise that right, which would, in my view, run counter to what the Court held in the judgments in *Kreuziger* and in *Max-Planck-Gesellschaft zur Förderung der Wissenschaften*.

29 See judgment in *Kreuziger* (paragraph 48), and judgment in *Max-Planck-Gesellschaft zur Förderung der Wissenschaften* (paragraph 41).

30 Judgment in *Kreuziger* (paragraph 50), and judgment in *Max-Planck-Gesellschaft zur Förderung der Wissenschaften* (paragraph 43).

31 See judgment in *Kreuziger* (paragraph 47), and judgment in *Max-Planck-Gesellschaft zur Förderung der Wissenschaften* (paragraph 40).

32 See, inter alia, judgment of 13 January 2022, *Koch Personaldienstleistungen* (C-514/20, EU:C:2022:19, paragraph 31 and the case-law cited).

59. I would add that the approach I advocate is consistent with the Court's settled case-law, according to which the right to paid annual leave may not be interpreted restrictively. [33] It follows that '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'. [34]

60. In the present case, the interests of an employer that has not discharged its obligations to provide encouragement and information as regards taking leave do not seem to me to be worthy of protection to the detriment of the worker's interests. That employer should not be able to avoid compliance with its own obligations and benefit from its own failure by arguing that a national limitation rule pursues an objective of legal certainty.

61. According to the Court, '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'. [35] Moreover, as the Court has already held, 'if it were to be accepted, in that context, that the worker's acquired entitlement to paid annual leave could be extinguished, that would amount to validating conduct by which an employer was unjustly enriched to the detriment of the very purpose of [Directive 2003/88], which is that there should be due regard for workers' health'. [36]

62. It follows from the foregoing considerations that, in my view, unless the employer can show that it exercised all due diligence to ensure that the worker was in fact given the opportunity to exercise his or her right to paid annual leave, that worker cannot be deprived of that acquired right, either through its loss or as a result of a limitation period.

V. Conclusion

63. In the light of all the foregoing considerations, I propose that the question referred by the Bundesarbeitsgericht (Federal Labour Court, Germany) be answered as follows:

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 right to paid annual leave acquired in respect of a given reference period and, accordingly, the right to an allowance in lieu of paid annual leave not taken upon termination of the employment relationship are subject to a three-year limitation period which begins to run at the end of that reference period, where the employer has not complied with its obligations to provide encouragement and information to a worker as regards taking that leave.

[33] See, inter alia, judgment of 25 November 2021, *job-medium* (C-233/20, EU:C:2021:960, paragraph 26 and the case-law cited).

[34] Judgment of 25 June 2020, *Varhoven kasatsionen sad na Republika Bulgaria and Iccrea Banca SpA* (C-762/18 and C-37/19, EU:C:2020:504, paragraph 74 and the case-law cited).

[35] Judgment of 25 June 2020, *Varhoven kasatsionen sad na Republika Bulgaria and Iccrea Banca SpA* (C-762/18 and C-37/19, EU:C:2020:504, paragraph 77 and the case-law cited).

[36] Judgment of 29 November 2017, *King* (C-214/16, EU:C:2017:914, paragraph 64).