Reports of Cases

JUDGMENT OF THE COURT (Grand Chamber)

6 November 2018 *

(Reference for a preliminary ruling — Social policy — Organisation of working time — Directive 2003/88/EC — Article 7 — Right to paid annual leave — National legislation providing for the loss of annual leave not taken and of the payment in lieu thereof, where the worker did not submit a request for leave before the termination of the employment relationship)

In Case C-619/16,

REQUEST for a preliminary ruling under Article 267 TFEU from the Oberverwaltungsgericht Berlin-Brandenburg (Higher Administrative Court, Berlin-Brandenburg, Germany), made by decision of 14 September 2016, received at the Court on 29 November 2016, in the proceedings

Sebastian W. Kreuziger

v

Land Berlin,

THE COURT (Grand Chamber),

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

Advocate General: Y. Bot,

Registrar: K. Malacek, Administrator,

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

after considering the observations submitted on behalf of:

– Mr Kreuziger, representing himself,

– Land Berlin, by B. Pickel and S. Schwerdtfeger, acting as Agents, and by L. von Laffert, Rechtsanwältin,

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

– the Italian Government, by G. Palmieri, acting as Agent, and F. Di Matteo, avvocato dello Stato,

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

* Language of the case: German.

– the Austrian Government, by G. Eberhard, acting as Agent,

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

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

gives the following

Judgment

1 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).

2 The request has been made in proceedings between Mr Sebastian W. Kreuziger and his former employer, Land Berlin (the Land of Berlin, Germany) concerning the latter's refusal to pay Mr Kreuziger an allowance in lieu of paid annual leave not taken before the employment relationship between them was terminated.

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. The concept of "rest" must be expressed in units of time, i.e. in days, hours and/or fractions thereof. [European Union] workers must be granted minimum daily, weekly and annual periods of rest and adequate breaks. ...'

4 Article 7 of Directive 2003/88, 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.'

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

German law

6 Paragraph 9 of the Verordnung über den Erholungsurlaub der Beamten und Richter (Regulation on the annual leave of officials and judges) of 26 April 1988 (GVBl. 1988, p. 846) ('the EUrlVO') states:

'1. The official shall take, so far as possible within a single period, the annual leave to which he is entitled. Upon request by the interested party, leave may be granted in separate periods. In general, however, leave should not be divided into more than two periods. Where leave is divided, it shall be granted to the official for at least two consecutive weeks.

2. Leave must generally be taken during the leave year. Leave which has not been taken within 12 months after the end of the leave year shall lapse. ...'

7 The EUrlVO does not make provision for the grant of an allowance in lieu of paid annual leave not taken upon termination of the employment relationship.

8 Paragraph 7(4) of the Bundesurlaubsgesetz (Federal Law on leave), of 8 January 1963 (BGBl. 1963, p. 2), in its version of 7 May 2002 (BGBl. 2002 I, p. 1529) ('the BUrlG'), provides:

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

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

9 From 13 May 2008 to 28 May 2010, Mr Kreuziger worked as a Rechtsreferendar (legal trainee) with the Land of Berlin, as part of a course of training governed by public law but not by the staff regulations of officials. His successful completion, on 28 May 2010, of the oral part of the second State examination marked the end of that traineeship and of that course of training with the *Land*.

10 Mr Kreuziger did not take paid annual leave between 1 January 2010 and the date on which his training ended. On 18 December 2010 he requested an allowance in lieu of the paid annual leave not taken. That request was first of all refused by decision of the President of the Kammergericht (Higher Regional Court, Germany) of 7 January 2011, then, on appeal, by decision of 4 May 2011 of the Gemeinsames Juristisches Prüfungsamt der Länder Berlin und Brandenburg (Joint Legal Review Board of the Länder of Berlin and Brandenburg, Germany), on the grounds that the EUrlVO does not provide for such a right to an allowance, that Directive 2003/88 applies only to workers, and that, in any event, the allowance in lieu provided for in Article 7(2) of that directive is based on the premiss that the person concerned was unable to take his leave for reasons not attributable to him.

11 Mr Kreuziger brought an action before the Verwaltungsgericht Berlin (Administrative Court, Berlin, Germany) against those decisions, which was dismissed by judgment of 3 May 2013. In that judgment, that court also noted that the EUrlVO does not provide for any entitlement to the payment of an allowance in lieu of paid annual leave not taken upon termination of the employment relationship. It also takes the view that, although it produces a direct effect, Article 7(2) of Directive 2003/88 does not provide the basis for such an entitlement in Mr Kreuziger's favour, since that entitlement is based on the premiss that the person concerned had not been able, for reasons beyond his control, to exercise his right to paid annual leave before the employment relationship was terminated.

12 Furthermore, having noted that Paragraph 9 of the EUrlVO places an obligation on the worker to take his paid annual leave and that that provision therefore entails for the person concerned a requirement to apply for leave, the Verwaltungsgericht Berlin (Administrative Court, Berlin) ruled that national legislation relating to the conditions for the exercise of the right to paid annual leave is compatible

with Article 7(1) of Directive 2003/88. Since Mr Kreuziger had voluntarily failed to submit such an application, even though he was aware that his employment relationship was to be terminated on 28 May 2010, his entitlement to paid annual leave expired on that date.

13 Mr Kreuziger brought proceedings on appeal against that judgment before the referring court, the Oberverwaltungsgericht Berlin-Brandenburg (Higher Administrative Court, Berlin-Brandenburg, Germany). That court notes, in turn, that the EUrlVO does not lay down any rule justifying the entitlement to payment of an allowance in lieu of paid annual leave not taken by Mr Kreuziger, as a result of which, in the absence of the transposition of Article 7(2) of Directive 2003/88 into national law, such an entitlement can only be derived in the present case from the direct effect of that provision.

14 In that regard, the referring court takes the view, first of all, that, as a legal trainee, Mr Kreuziger does fall within the scope *ratione personae* of Directive 2003/88.

15 Furthermore, Mr Kreuziger also meets the two conditions expressly set out in Article 7(2) of that directive, namely that, when he claimed an allowance in lieu, his employment relationship had been terminated, and he had not taken all the annual leave to which he was entitled at the time that the relationship was terminated.

16 Finally, however, the referring court states that it has doubts as to whether, in addition to those two express conditions, and as held by the Verwaltungsgericht Berlin (Administrative Court, Berlin), the right to an allowance in lieu of paid annual leave not taken may be precluded where the worker failed, before the employment relationship was terminated, to apply for the leave he was entitled to, although he had been in a position to do so, and whether, more generally, that right is based on the premiss that the worker had not been able, for reasons beyond his control, to exercise his right to paid annual leave before the employment relationship was terminated.

17 In those circumstances, the Oberverwaltungsgericht Berlin-Brandenburg (Higher Administrative Court, Berlin-Brandenburg) decided to stay proceedings and to refer the following questions to the Court for a preliminary ruling:

‘(1) Is Article 7(2) of Directive [2003/88] to be interpreted as precluding national legislation or practice in accordance with which the entitlement to an allowance in lieu on termination of the employment relationship is excluded where the worker did not apply for paid annual leave even though he could have [done so]?

(2) Is Article 7(2) of Directive [2003/88] to be interpreted as meaning that it precludes national legislation or practice in accordance with which the entitlement to an allowance in lieu on termination of the employment relationship presupposes that, for reasons beyond his control, the worker was unable to exercise his right to paid annual leave before the end of the employment relationship?’

Consideration of the questions referred

Preliminary observations

18 As a preliminary point, it should be noted that it is apparent from the order for reference that the national legislation applicable to the dispute in the main proceedings does not make provision for the payment to legal trainees of an allowance in lieu of paid annual leave not taken upon termination of the employment relationship. The BUrlG provision providing for such an allowance does not apply to them.

19 In view of that fact, the referring court states, moreover, that the request of the applicant in the main proceedings for the payment of such an allowance may be upheld only in so far as the person concerned is entitled to such an allowance directly on the basis of Article 7(2) of Directive 2003/88.

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

21 On the basis of those considerations, the Court has held that provisions of a directive that are unconditional and sufficiently precise may be relied upon by individuals, in particular against a Member State and all the organs of its administration, including decentralised authorities (see, to that effect, judgment of 7 August 2018, *Smith*, C-122/17, EU:C:2018:631, paragraph 45 and the case-law cited).

22 As regards Article 7(2) of Directive 2003/88, it is apparent from the case-law of the Court that that provision does not lay down any condition for entitlement to an allowance in lieu other than that relating to the circumstance, first, that the employment relationship has ended and, secondly, that the worker has not taken all the annual leave to which he was entitled on the date that that relationship ended. That right is conferred directly by the directive and does not depend on conditions other than those which are explicitly provided for therein (see, to that effect, judgments of 12 June 2014, *Bollacke*, C-118/13, EU:C:2014:1755, paragraphs 23 and 28, and of 20 July 2016, *Maschek*, C-341/15, EU:C:2016:576, paragraph 27). That provision thus fulfils the criteria of unconditionality and sufficient precision, and thus meets the conditions required for it to have direct effect.

23 It follows, in the present case, that the fact that the applicable national law does not provide for the payment of an allowance in lieu of paid annual leave not taken at the time that the employment relationship of legal trainees is terminated cannot, of itself, preclude Mr Kreuziger from obtaining, on the direct legal basis of Article 7(2) of Directive 2003/88, that allowance from his former employer, the Land Berlin, which has the status of a public authority. Provided that it is established that Mr Kreuziger meets the requirements laid down by that provision, national courts will thus be required to disapply national rules or practices which preclude the payment of such an allowance.

The first question

24 As regards the first question, it should be noted at the outset that, although the national court does not identify, in that question, the national legislation referred to in the present case, it may be inferred from the information set out in the order for reference that it is Paragraph 9 of the EUrlVO.

25 Although the referring court does not express a view on the scope of Paragraph 9 of the EUrlVO in the context of the dispute in the main proceedings, it is apparent from paragraph 12 of the present judgment, that, in the judgment which is the subject of the appeal before it, the Verwaltungsgericht Berlin (Administrative Court, Berlin) held that that national provision requires the worker to apply to take his paid annual leave. According to that court, in the event that that obligation — which in its view is consistent with Article 7(1) of Directive 2003/88 — is not fulfilled, Mr Kreuziger's right to paid annual leave lapsed on the date of the termination of the employment relationship.

26 Moreover, the national court further states, as is recalled in paragraph 16 of the present judgment, that it is referring a request for a preliminary ruling to the Court because it has doubts as to the compatibility of the interpretation of the Verwaltungsgericht Berlin (Administrative Court, Berlin) with Directive 2003/88.

27 In those circumstances, the first question should be understood as seeking to ascertain whether Article 7 of Directive 2003/88 must be interpreted as precluding national legislation such as Paragraph 9 of the EUrlVO, in so far as that legislation entails that, in the event that the worker did not ask to exercise his right to paid annual leave prior to the termination of the employment relationship, he automatically loses the days of paid annual leave to which he is entitled under EU law on the date of termination, and, accordingly, his entitlement to an allowance in lieu of paid annual leave not taken.

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

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

30 Since the case in the main proceedings relates to a refusal to pay an allowance in lieu of paid annual leave not taken on the date of termination of the employment relationship which existed between the parties in the main proceedings, it should be recalled that, when the employment relationship ends, it is no longer in fact possible for a worker to take the paid annual leave to which he is entitled. In order to prevent this impossibility leading to a situation in which the worker loses all enjoyment of that right, even in pecuniary form, Article 7(2) of Directive 2003/88 provides that the worker is entitled to an allowance in lieu for the days of annual leave not taken (see, to that effect, judgment of 12 June 2014, *Bollacke*, C-118/13, EU:C:2014:1755, paragraph 17 and the case-law cited).

31 As set out in paragraph 22 of the present judgment, the Court has noted 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, secondly, that the worker has not taken all annual leave to which he was entitled on the date that that relationship ended.

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

33 The Court has also held that Article 7 of Directive 2003/88 cannot be interpreted as meaning that the right to paid annual leave and therefore, to the allowance in lieu provided for in paragraph 2 of this Article, may lapse because of the worker's death. In that regard, the Court has in particular pointed out that, if the obligation to pay such an allowance were to lapse because of the termination of the employment relationship resulting from the worker's death, the consequence of that circumstance

would be an unintended occurrence retroactively leading to the total loss of the entitlement to paid annual leave itself, as set out in Article 7 (see, to that effect, judgment of 12 June 2014, *Bollacke*, C-118/13, EU:C:2014:1755, paragraphs 25, 26 and 30).

34 As regards the case in the main proceedings, it should be noted that, according to the information in the order for reference and as has been stated in paragraphs 25 to 27 of the present judgment, the refusal of Mr Kreuziger's former employer to pay him an allowance in lieu of paid annual leave not taken before the employment relationship was terminated is based, inter alia, on national legislation, in this case Paragraph 9 of the EUrlVO, pursuant to which the right to that leave lapsed not as a consequence of the termination of the employment relationship as such, but as a result of the fact that Mr Kreuziger did not apply to take it in the course of the employment relationship.

35 The referring court is therefore essentially asking whether, in the light of the case-law of the Court cited in paragraph 31 of the present judgment, on the date on which the employment relationship at issue in the main proceedings was terminated, Mr Kreuziger was still entitled to paid annual leave capable of being converted into an allowance in lieu on account of the termination of that relationship.

36 That question thus relates, first and foremost, to the interpretation of Article 7(1) of Directive 2003/88 and is intended to ascertain whether that provision precludes the right which it guarantees, in the event that annual leave is not taken, from lapsing automatically on the ground that the worker did not exercise that right during the course of the employment relationship.

37 In that regard, first, it cannot be inferred from the Court's case-law mentioned in paragraphs 30 to 33 of the present judgment that Article 7 of Directive 2003/88 should be interpreted as meaning that, irrespective of the circumstances underlying the worker's failure to take paid annual leave, that worker should still be entitled to the right to annual leave referred to in Article 7(1), and, in the event of the termination of the employment relationship, to an allowance by way of substitution therefor, pursuant to Article 7(2).

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

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

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

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

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

43 National legislation such as Paragraph 9 of the EUrlVO falls within the scope of the procedures for exercising paid annual leave, within the meaning of Article 7(1) of Directive 2003/88 and the case-law of the Court referred to in the previous paragraph.

44 Such legislation forms part of the rules and procedures of national law applicable to the scheduling of workers' leave, which seek to take into account the various interests involved (see, to that effect, judgment of 10 September 2009, *Vicente Pereda*, C-277/08, EU:C:2009:542, paragraph 22).

45 However, as is apparent from paragraph 42 of the present judgment, it is important to ensure that the application of those provisions of national law cannot lead to the loss of the rights to paid annual leave acquired by the worker, even though he has not actually had the opportunity to exercise those rights.

46 In the present case, it should be noted that it is apparent from the order for reference that Paragraph 9 of the EUrlVO appears to be interpreted by the Verwaltungsgericht Berlin (Administrative Court, Berlin) as meaning that the fact that a worker did not request to take the paid annual leave to which he was entitled before the termination of the employment relationship automatically entails the consequence that, when the relationship is terminated, the worker loses his entitlement to that leave and, accordingly, the right to an allowance in lieu of leave not taken.

47 As noted by the Advocate General in point 34 of his Opinion, such an automatic loss of the entitlement to paid annual leave, which is not subject to prior verification that the worker was in fact given the opportunity to exercise that right, fails to have regard to the limits, recalled in paragraph 42 of the present judgment, which are binding on Member States when specifying the conditions for the exercise of that right.

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

49 In addition, incentives not to take leave or to encourage employees not to do so are incompatible with the objectives of the right to paid annual leave, as recalled in paragraphs 39 and 40 of the present judgment, relating in particular to the need to ensure that workers enjoy a period of actual rest, with a view to ensuring effective protection of their health and safety (see, to that effect, judgment of 6 April 2006, *Federatie Nederlandse Vakbeweging*, C-124/05, EU:C:2006:244, paragraph 32). Thus, any

practice or omission of an employer that may potentially deter a worker from taking his annual leave is equally incompatible with the purpose of the right to paid annual leave (judgment of 29 November 2017, *King*, C-214/16, EU:C:2017:914, paragraph 39 and the case-law cited).

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

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

52 To that end, as the Advocate General also observed in points 43 to 45 of his Opinion, the employer is in particular required, in view of the mandatory nature of the entitlement to paid annual leave and in order to 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, or upon termination of the employment relationship where the termination occurs during such a period.

53 In addition, the burden of proof in that respect is on the employer (see, by analogy, judgment of 16 March 2006, *Robinson-Steele and Others*, C-131/04 and C-257/04, EU:C:2006:177, paragraph 68 and the case-law cited). 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, 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.

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

55 As noted by the Advocate General in points 52 and 53 of his Opinion, any interpretation of Article 7 of Directive 2003/88 which is liable to encourage the worker to refrain deliberately from taking his paid annual leave during the applicable reference or authorised carry-over periods in order to increase his remuneration upon termination of the employment relationship is, as is apparent from paragraph 49 of the present judgment, incompatible with the objectives pursued by the introduction of the right to paid annual leave.

56 In the light of the foregoing considerations, the answer to the first question is that Article 7 of Directive 2003/88 must be interpreted as precluding national legislation, such as that at issue in the main proceedings, in so far as it entails that, in the event that the worker did not ask to exercise his right to paid annual leave prior to the termination of the employment relationship, that worker loses — automatically and without prior verification of whether the employer had in fact enabled him,

in particular through the provision of sufficient information, to exercise his right to leave prior to the termination of that relationship — the days of paid annual leave to which he was entitled under EU law on the date of the termination of that relationship, and, accordingly, his right to an allowance in lieu of paid annual leave not taken.

The second question

57 Given the answer to the first question, there is no need to reply to the second question.

Costs

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

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

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 must be interpreted as precluding national legislation such as that at issue in the main proceedings, in so far as it entails that, in the event that the worker did not ask to exercise his right to paid annual leave prior to the termination of the employment relationship, that worker loses — automatically and without prior verification of whether the employer had in fact enabled him, in particular through the provision of sufficient information, to exercise his right to leave prior to the termination of that relationship — the days of paid annual leave to which he was entitled under EU law on the date of the termination of that relationship, and, accordingly, his right to an allowance in lieu of paid annual leave not taken.

[Signatures]