EELA EUROPEAN EMPLOYMENT LAWYERS ASSOCIATION

SUMMARY

# ECJ 6 November 2018, C-684/16 (Max-Planck-Geschellschaft), paid leave

***A worker does not automatically lose the right to annual leave because s/he did not apply for it. The employer must have informed the employee about the opportunity to take the leave adequately and in a timely way, and must be able to prove it. Based on the EU Charter of Fundamental Rights, this applies between individuals as well. Max-Planck-Gesellschaft zur Förderung der Wissenschaften e.V. – v – Tetsuji Shimizu, German case***

**Legal background**

Article 7(1) of (Working Time) Directive 2003/88/EC grants any worker annual paid leave of four weeks per year. Article 7(2) states that the minimum period of annual leave cannot be replaced by an allowance in lieu, except where the employment relationship is terminated. Article 31(2) of the Charter of Fundamental Rights of the EU grants workers a right to paid annual leave.

The German Federal Law on leave (*Bundesurlaubgesetz*) stipulates that in taking leave, consideration must be given to a worker's wishes, except where there are imperative operational interests or where the wishes of other workers should prevail, for social reasons. Leave must be granted and taken in the course of the current calendar year. Carrying over is permitted only on compelling operational grounds or for reasons that are personal to the employee. If the employment relationship is terminated and therefore leave can no longer be granted, an allowance must be paid in lieu.

**Facts**

Mr Shimizu was employed by Max-Planck from 1 August until 31 December 2013. As it was

clear that his employment would end, on 23 October 2013 Max-Planck requested (but did not order) Mr Shimizu to take his outstanding leave before termination. Mr Shimizu took only two days and, after termination, claimed payment for the remaining 51 outstanding days of leave. Max-Planck rejected his claim, arguing that the outstanding holidays had lapsed on 31 December. This decision was upheld in two instances in court.

When the case came before the Federal Labour Court (*Bundesarbeitsgericht*, the 'BAG'), that court noted that it was not clear whether the right to paid leave had lapsed in this situation. The employee had been in a position to use his leave but had opted not to, and there was no obligation on the employer to force its workers to take leave. As the BAG considered Max-Planck to be an individual (as opposed to a state-controlled body), it also wondered whether Article 7 of Directive 2003/88 and Article 31 of the Charter had direct effect in relations between individuals. It put the following questions to the ECJ.

**Questions**

Must Article 7 of Directive 2003/88 and Article 31(2) of the Charter be interpreted as precluding national legislation, such as that at issue in the main proceedings, under which, in the event that the worker did not ask to be able to exercise his right to paid annual leave during the reference period concerned, that worker loses, at the end of that period, the days of paid annual leave acquired under those provisions in that period, and, accordingly, his entitlement to payment of an allowance in lieu of annual leave not taken where the employment relationship is terminated?

In the event that it is impossible to interpret national legislation such as that at issue in the main proceedings in a manner consistent with Article 7 of Directive 2003/88 and Article 31(2) of the Charter, must those provisions of EU law be interpreted as meaning that, in the context of a dispute between the worker and his former employer, who is a private individual, they result in the national legislation having to be disapplied by the national court, and the worker having to be granted by the employer an allowance in lieu of the annual leave acquired under those provisions and not taken at the time that the employment relationship was terminated?

**Consideration**

**First question**

The right to paid annual leave is a particularly important principle of EU social law. It is even laid down in Article 31(2) of the Charter, thus having the same legal value as the treaties (*Sobczyszyn*, C-178/15, paragraph 20). As regards Article 7(2) of the Directive, the only conditions necessary to become entitled to an allowance in lieu are that (i) the employment relationship has ended, and (ii) the worker has not taken all annual leave to which s/he was entitled.

So far, the ECJ has held that leave does not lapse if a worker was unable to take leave owing to sickness (e.g. *Schultz-Hoff*, C-350/06) and that the allowance intended by Article 7(2) does not lapse because of the worker's death (*Bollacke*, C-118/13). The loss of the right to annual leave would be undermined if the employee had not had the opportunity to take it.

In the present case, Mr Shimizu was denied an allowance for untaken leave, as it was assumed that his rights lapsed when he did not take his leave. But the referring court wondered whether his rights in fact subsisted, even though he did not request to take the leave. The ECJ noted Article 7(1) does not imply that an employee always retains the right to annual leave, irrespective of his or her own failure to take it. The right to annual leave is meant to be exercised and, indeed, Member States may lay down conditions for the exercise and implementation of the right to paid annual leave. The Directive does not preclude conditions being imposed on the right to leave – and even the lapse of it – as long as the employee has actually been given the opportunity to take it.

The ECJ noted that the loss of Mr Shimizu's right to annual leave had resulted from the fact that he did not take it. However, automatic loss which is not subject to any verification as to whether the employee had the opportunity to take his leave, does not meet the conditions. The employee is the weaker party in the employment relationship and must therefore be protected against any dissuasion by the employer from claim his or her right to annual leave. Any practice or omission by an employer that may deter a worker from not taking leave, is incompatible with the purpose of the right to annual leave.

While Article 7 does not require employers to force workers to take leave, they must ensure that workers can take leave. If need be, workers must be encouraged to take it. They should be told accurately and in good time that they can take it and informed that their right to it will lapse if they do not. The burden of proof of having done so in any claim is on the employer.

The same conclusions can be drawn from Article 31(2) of the Charter, as this right is based on the Directive's predecessor (Directive 93/104/EC), while Article 7 has remained exactly the

same in Directive 2003/88/EC.

The ECJ stated that the referring court must ascertain whether the national provisions may be interpreted in accordance with Article 7 of the Directive and Article 31(2) of the Charter, taking into account the whole body of law.

**Second question**

Article 7 can be invoked directly on bodies subject to the authority of the state, or which have tasks to fulfil in the public interest or special powers that go beyond 'normal rules' between individuals. In this case, however, the employer was an individual. Although Articles 7(1) and (2) are unconditional and sufficiently precise to produce a direct effect (*Bauer and Willmeroth*, joined cases C-569/16 and C-570/16), the ECJ noted that these provisions cannot be invoked as between individuals.

As regards Article 31(2) of the Charter, the right to paid annual leave constitutes an essential principle of EU social law. This principle is derived from various instruments drawn up by Member States both at EU level (Community Charter of the Fundamental Social Rights of Workers) and not at EU level (European Social Charter), which is referred to in Article 151 TFEU. Moreover, recital 6 of Directive 2003/88 refers to ILO Convention no. 132. Recital 4 of Directive 93/104/EC refers to the Community Charter of the Fundamental Social Rights of Workers. The right to paid annual leave has therefore not been established by the directives themselves, but by various international instruments, and is as an essential principle of EU social law, which is in itself, mandatory.

Article 31(2) is also mandatory and unconditional; only the exact duration of the right need be filled in. article 31(2) is sufficient in itself to confer a right on workers that they may rely on in disputes between them and their employer in a field covered by EU law and therefore falling within the scope of the Charter (see, by analogy, *Egenberger*, C|414/16, par. 76). Therefore, the national courts must disapply any national legislation negating this principle.

It should be noted that, while Article 51(1) states that Charter provisions are directed to the EU (and its institutions) and the Member States (the latter only if they are implementing EU law), this does not exclude individuals being able to invoke them. This principle has also been held in respect of Article 21(1) in *Egenberger*, C-414/16), for example.

**Ruling**

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 of Article 31(2) of the Charter of Fundamental Rights of the European Union must be interpreted as precluding national legislation such as that at issue in the main proceedings, under which, in the event that the worker did not ask to exercise his right to paid annual leave during the reference period concerned, that worker loses, at the end of that period – automatically and without prior verification of whether the employer had in fact enabled him to exercise that right, in particular through the provision of sufficient information – the days of paid annual leave acquired under those provisions in respect of that period, and, accordingly, his right to an allowance in lieu of paid annual leave not taken in the event that the employment relationship is terminated. It is, in that regard, for the referring court to determine, taking into consideration the whole body of domestic law and applying the interpretative methods recognised by it, whether it can arrive at an interpretation of that right capable of ensuring the full effectiveness of EU law.
In the event that it is impossible to interpret national legislation such as that at issue in the main proceedings in a manner consistent with Article 7 of Directive 2003/88 and Article 31(2) of the Charter of Fundamental Rights, it follows from the latter provision that a national court hearing a dispute between a worker and his former employer who is a private individual must disapply the national legislation and ensure that, should the employer not be able to show that it has exercised all due diligence in enabling the worker actually to take the paid annual leave to which he is entitled under EU law, the worker cannot be deprived of his acquired rights to that paid annual leave or, correspondingly, and in the event of the termination of the employment relationship, to the allowance in lieu of leave not taken which must be paid, in that case, directly by the employer concerned.

---

**Creator**: European Court of Justice (ECJ)
**Verdict at**: 2018-11-06
**Case number**: C-684/16