

**Case C-518/20**

**Summary of the request for a preliminary ruling pursuant to Article 98(1) of the Rules of Procedure of the Court of Justice**

**Date lodged:**

16 October 2020

**Referring court:**

Bundesarbeitsgericht (Germany)

**Date of the decision to refer:**

7 July 2020

**Appellant on a point of law:**

XP

**Respondent in the appeal on a point of law:**

Fraport AG Frankfurt Airport Services Worldwide

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**Subject matter of the main proceedings**

Compatibility with higher-ranking EU law, including the Directive concerning certain aspects of the organisation of working time, of national legislation on the loss of the leave entitlement of a worker who has suffered a full reduction of earning capacity

**Subject matter and legal basis of the request**

Interpretation of EU law, Article 267 TFEU, in particular

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) ('Directive 2003/88')

Charter of Fundamental Rights of the European Union (OJ 2012 C 326, (pp. 391 to 407) ('the Charter')

## Questions referred

1. Do Article 7 of Directive 2003/88 and Article 31(2) of the Charter preclude an interpretation of a rule of national law such as Paragraph 7(3) of the German Bundesurlaubsgesetz (Federal Law on leave; ‘the BUrIG’) according to which the as yet unexercised entitlement to paid annual leave of a worker who suffers, on health grounds, a full reduction of earning capacity in the course of the leave year, but who could still have taken – at least some of – the leave in the leave year before the onset of his reduction of earning capacity, lapses 15 months after the end of the leave year in the event of a continuing uninterrupted reduction of earning capacity even if the employer has not actually enabled the worker to exercise his leave entitlement by informing him of the leave concerned and inviting him to take it?
2. If Question 1 is answered in the affirmative: Under these conditions, is it also impossible for the entitlement to lapse at a later point in time in cases where a full reduction of earning capacity persists?

## Provisions of EU law cited

Article 7(1) of Directive 2003/88

Article 31(2) of the Charter

## Provisions of national law cited

Mindesturlaubsgesetz für Arbeitnehmer [Law on minimum leave for workers] (Bundesurlaubsgesetz [Federal Law on leave]) (‘the BUrIG’)

Sozialgesetzbuch (Social Security Code; ‘the SGB’) Sechstes Buch (Book VI) – Gesetzliche Rentenversicherung (statutory pension insurance) (‘SGB VI’)

## Facts and procedure

- 1 The parties to the main proceedings are in dispute, in so far as is relevant to the present preliminary-ruling procedure, as to whether the appellant retains leave entitlements from 2014.
- 2 The appellant is recognised as a severely disabled person. He has been employed by the respondent since 2000. The latter is a limited company, that is to say, a private employer. Since 1 December 2014, the appellant has been in receipt of a pension on the ground of full reduction of earning capacity. He has asserted, inter alia, that the employer still owes him 34 working days’ leave from 2014. Those entitlements have not lapsed, he submits, because the respondent has not fulfilled its obligations to cooperate in the granting and taking of leave.

- 3 By contrast, the respondent takes the view that the leave which the appellant did not take in 2014 expired at the end of 31 March 2016. The respondent submits that, if a worker has been unable to take his leave for a long period of time for health reasons, like the appellant in the present case, the leave expires 15 months after the end of the leave year irrespective of whether the employer has fulfilled its obligations to cooperate.
- 4 The courts of first and second instance dismissed the action and appeal. By his appeal on a point of law, the appellant continues to pursue the objective of his action.

### **Grounds for the reference**

- 5 The success of the appellant's appeal on a point of law turns on a decision of the Court of Justice of the European Union ('the Court') on the interpretation of the Treaties.
- 6 In order to rule on the dispute, in so far as it concerns the leave from 2014, it is necessary to obtain clarification from the Court of Justice as to whether EU law allows a leave entitlement to lapse 15 months after the end of the leave year if a full reduction of earning capacity persists, the employer has not fulfilled its obligations to inform the worker of the leave and to invite him to take it, and the worker could have taken at least part of the leave in the leave year before the full reduction of earning capacity occurred.
- 7 The application of Paragraph 7(3) of the BUrlG depends on the interpretation of Article 7 of Directive 2003/88 and of Article 31(2) of the Charter.

### *German law*

- 8 Under German law, the statutory minimum leave arises in respect of the calendar year as the leave year and, pursuant to the first sentence of Paragraph 7(3) of the BUrlG, it must be authorised and taken in the current calendar year. Pursuant to the second sentence of Paragraph 7(3) of the BUrlG, the carrying-over of leave to the next calendar year is permitted only if this is justified on compelling operational grounds or by compelling reasons relating to the worker himself. If leave is carried over, it must in principle be authorised and taken during the first three months of the following calendar year pursuant to the third sentence of Paragraph 7(3) of the BUrlG; otherwise, it expires pursuant to the third sentence of Paragraph 7(3) of the BUrlG.
- 9 The Bundesarbeitsgericht (Federal Labour Court) has interpreted those provisions in conformity with the Directive as follows, having due regard to the decisions of the Court of Justice (see, inter alia, judgments of 6 November 2018, *Max-Planck-Gesellschaft zur Förderung der Wissenschaften*, C-684/16, EU:C:2018:874, of 29 November 2017, *King*, C-214/16, EU:C:2017:914, of 20 January 2009, *Schultz-Hoff and Others*, C-350/06 and C-520/06, EU:C:2009:18, of

22 November 2011, *KHS*, C-214/10, EU:C:2011:761, and 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):

- 10 The entitlement to the statutory minimum leave in principle lapses at the end of the calendar year or of a permissible carry-over period only if the employer has previously enabled the worker to exercise his leave entitlement and the worker has nevertheless opted voluntarily not to take the leave.
- 11 In principle, this loss of entitlement to leave presupposes that the employer has ensured that the worker is actually in a position to take the paid annual leave to which he is entitled. To that end, the employer must invite the worker to take his leave and inform him, accurately and in good time, that the leave will expire at the end of the calendar year or carry-over period if he does not claim it. In addition, the employer may not in any other way prevent the worker from taking the leave.
- 12 If the employer has not fulfilled its obligations to cooperate, the leave which has not expired on 31 December of the leave year is added to the leave entitlement that arises on 1 January of the following year.
- 13 Statutory leave does not expire if the worker becomes unfit for work due to sickness before the end of the leave year and/or the carry-over period and is therefore unable to take the leave. In such a case, the leave entitlement maintained is added to the leave entitlement arising in the following year and is thus made subject to a new limitation in time pursuant to Paragraph 7(3) of the BUrIG. However, it expires 15 months after the end of the leave year in the event of continuing incapacity for work. This also applies in cases where the worker receives a pension on the ground of reduction of earning capacity.
- 14 The Bundesarbeitsgericht (Federal Labour Court) has not yet delivered a decision on whether and in which cases leave entitlements of workers who have a full reduction of earning capacity expire 15 months after the end of the leave year in the event of continuing incapacity for work.
- 15 Under the relevant German legislation, workers essentially have full reduction of earning capacity, inter alia, where, owing to illness or disability, they are unable to work for at least three hours a day under the normal conditions of the general labour market for an unforeseeable period of time or if, owing to the nature or severity of their disability, they are unable to work on the general labour market.

*First question referred*

- 16 According to the case-law of the Court of Justice, Article 7(1) of Directive 2003/88 must be interpreted as not precluding national provisions which limit, by a carry-over period of 15 months on the expiry of which the right to paid leave lapses, the accumulation of entitlements to such leave of a worker who is unfit for work for several consecutive reference periods.

- 17 The case-law of the Court of Justice has not to date clarified beyond doubt whether and under what conditions the entitlement to paid annual leave of a worker who suffers from a full reduction of earning capacity during the leave year may lapse 15 months after the end of the leave year in cases where the full reduction of earning capacity has continued without interruption since then, if the employer has not complied with its obligations to inform the worker of the leave and to invite him to take it.
- 18 In the judgment of 6 November 2018, *Max-Planck-Gesellschaft zur Förderung der Wissenschaften* (C-684/16, EU:C:2018:874), the Court of Justice held that any practice or omission of an employer that may potentially deter a worker from taking his annual leave is incompatible with the purpose of the right to paid annual leave. An employer who does not allow a worker to exercise his right to paid annual leave must bear the consequences.
- 19 If these principles were also applicable in relation to the leave year in which the worker's full reduction of earning capacity occurred, and has continued without interruption since then, the leave would not expire even 15 months after the end of that leave year in so far as the worker could still have taken his annual leave before the onset of his full reduction of earning capacity had the employer complied in good time with its obligations to inform him of the leave and to invite him to take it.
- 20 If the employer failed to inform the worker of the leave and to invite him to take it, as required, it would have to bear the risk that the leave entitlement would not lapse in full, even if the worker continues to suffer a full reduction of earning capacity beyond 31 March of the second leave year following the leave year. In such a case, the employer could exclude that risk in practice only if it fulfilled its obligations at the beginning of the calendar year.
- 21 Under the aforementioned conditions, it would only be if the employer had fulfilled the obligations to cooperate – in the aforementioned sense – in good time and had therefore created the conditions for limiting the leave entitlement pursuant to Paragraph 7(3) of the BUrlG that the worker would bear the risk of no longer being able to realise the leave entitlement in full due to a full reduction of earning capacity that had occurred during the leave year and might last a long time.
- 22 By contrast, in its judgment of 22 November 2011, *KHS* (C-214/10, EU:C:2011:761, paragraph 43), the Court of Justice held that Article 7(1) of Directive 2003/88 does not preclude national legislation which, in cases of long-term sickness of workers, provides for a carry-over period limited to 15 months, at the end of which the entitlement to paid annual leave expires.
- 23 If this principle were also applicable in relation to the leave year in which the worker's full reduction of earning capacity occurred, and continued without interruption since then, that leave could expire 15 months after the end of that

leave year even if the employer has not complied with its obligations to inform the worker of the leave and to invite him to take it. Entitlements from the leave year existing before the full reduction of earning capacity occurred would then expire, even if the worker could still have taken his annual leave before the beginning of his illness in cases where the employer had complied in good time with its obligations to inform him of the leave and to invite him to take it.

- 24 The Court of Justice has not to date determined whether Article 7 of Directive 2003/88 and Article 31(2) of the Charter allow a restriction of the principle that the time limit on the entitlement to leave is subject to fulfilment of the obligations to cooperate in cases where the worker was prevented from taking the leave by reason of a full reduction of earning capacity but could have realised his entitlement to leave in the course of the leave year before the onset of his full reduction of earning capacity had the employer fulfilled its obligations to inform him of the leave and to invite him to take it.
- 25 In its judgment of 6 November 2018, *Max-Planck-Gesellschaft zur Förderung der Wissenschaften* (C-684/16, EU:C:2018:874), the Court of Justice stated that national legislation on the expiry of leave could not be applied if it was impossible to interpret it in a manner consistent with Article 7 of Directive 2003/88 and Article 31(2) of the Charter. If the worker is in a dispute with a State employer, that outcome follows from Article 7 of Directive 2003/88 and Article 31(2) of the Charter. If his dispute is with an employer who is a private individual, it follows from Article 31(2) of the Charter.

*Second question referred*

- 26 If the Court of Justice were to answer the first question referred in the affirmative, the question as to whether, in the circumstances referred to in the first question, Article 7 of Directive 2003/88 and Article 31(2) of the Charter preclude an interpretation of a national provision such as Paragraph 7(3) of the BUrIG according to which the as yet unexercised entitlement to paid annual leave expires at a point in time later than 15 months after the end of the leave year if the full reduction of earning capacity continues without interruption beyond 31 March of the second year following the leave year – as in the case of the applicant – would be relevant to the decision to be given in the dispute.
- 27 This question has not yet been clarified beyond all doubt by the Court of Justice either.
- 28 According to the case-law of the Bundesarbeitsgericht (Federal Labour Court), the leave not expired on 31 December of the leave year as a result of non-fulfilment of the obligations to cooperate is added to the leave entitlement that arises on 1 January of the following year. The provisions of the first sentence of Paragraph 7(1) and Paragraph 7(3) of the BUrIG apply to that leave, as they do to the newly accrued leave entitlement.

- 29 The present Chamber takes the view - if the Court of Justice answers the first question referred in the affirmative - that the case-law of the Court of Justice has not yet clarified whether it is possible, under Article 7 of Directive 2003/88 and Article 31(2) of the Charter, for the leave entitlement from the leave year in question – *in casu*, the 2014 leave year – which, owing to the fact that the worker was not informed of the leave or invited to take it, has not expired, to share without restriction the fate of the leave entitlement that arises in the first subsequent year – *in casu*, the 2015 leave year – in the event of continuing incapacity for work. The leave from the first subsequent year would have expired after 15 months irrespective of whether the employer had fulfilled its obligations to inform the worker of the leave and to invite him to take it, because it would have been objectively impossible to enable the worker who still has a permanent full reduction of earning capacity even at the beginning of the first subsequent leave year to realise the leave entitlement by virtue of the employer’s cooperation.
- 30 If EU law allowed such a time limit on the carrying-over of the entitlement to paid annual leave, the applicant’s leave entitlement from 2014 would have expired at the latest 15 months after the end of the year following the leave year, that is to say, on 31 March 2017, due to the continuing full reduction of earning capacity.
- 31 The present Chamber takes the view that it has also not been clarified whether the employer can still fulfil its obligations to inform the worker of the leave and to invite him to take it even after the worker’s full reduction of earning capacity has occurred and thus bring about the limitation of the leave entitlement and its expiry at a point in time later than 15 months after the end of the leave year if the worker continues to have a full reduction of earning capacity during the entire period and therefore cannot realise his leave entitlement.