Court of Justice of the European Union
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Opinions of the Advocate General in Cases
C-619/16 Sebastian W. Kreuziger v Land Berlin and
C-684/16 Max-Planck-Gesellschaft zur Förderung der Wissenschaften eV v Tetsuji Shimizu

Press and Information

Advocate General Bot proposes that the Court of Justice should hold that the mere fact that a worker did not apply for leave cannot automatically entail the loss of the right to an allowance in lieu of untaken leave at the end of the employment relationship

However, where the employer shows that he took the necessary steps to enable workers to exercise their right to paid annual leave and, in spite of the measures taken, the worker deliberately declined to exercise that right even though he was able to do so during the employment relationship, that worker cannot claim the allowance

After the end of his traineeship for the legal professions (Rechtsreferendariat) with the *Land* of Berlin, Sebastian W. Kreuziger requested the grant of an allowance in lieu of untaken paid annual leave. He had decided not to take annual paid leave for the last five months of his traineeship. That request was refused on the ground, in particular, that the applicable German legislation [1] does not provide for such a right to an allowance. Under that legislation (as interpreted by certain national courts), the right to paid annual leave is lost at the end of the reference period when the worker did not apply to exercise that right during that period. That loss of the right to paid annual leave entails the loss of the right to an allowance in lieu of untaken paid annual leave at the end of the employment relationship. The Oberverwaltungsgericht Berlin-Brandenburg (Higher Administrative Court, Berlin-Brandenburg, Germany), to which Mr Kreuziger appealed, asks the Court of Justice whether EU law precludes such national legislation or practice.

Tetsuji Shimizu was employed by the Max-Planck-Gesellschaft zur Förderung der Wissenschaften (a non-profit-organisation governed by private law) for more than 10 years on the basis of a number of fixed-term contracts. On 23 October 2013 he learnt that his contract of employment would not be renewed. At the same time, the Max-Planck-Gesellschaft invited him to take his leave before the employment relationship terminated at the end of December 2013. Since Mr Shimizu took only two days' leave, he requested the Max-Planck-Gesellschaft to pay an allowance for the 51 days of untaken annual leave that were due to him in respect of the last two years. After the Max-Planck-Gesellschaft refused that request, Mr Shimizu brought proceedings before the German labour courts. The Bundesarbeitsgericht (Federal Labour Court, Germany) explains that, under the German legislation applicable to Mr Shimizu, [2] the worker must apply for leave, with an indication of his preferred dates, in order that his leave entitlement does not lapse without compensation at the end of the reference period. The Bundesarbeitsgericht seeks to ascertain from the Court whether EU law precludes such legislation and, if so, whether the same applies in a dispute between two private persons.

In his Opinions delivered today, Advocate General Bot recalls, first of all, that under the Working Time Directive [3] every worker is to be entitled to paid annual leave of at least four weeks. That right is intended to enable the worker to rest and to enjoy a period of relaxation and leisure. Payment of

[1] Verordnung über den Erholungsurlaub der Beamten und Richter (Regulation on the annual leave of public servants and judges) of 26 April 1988.
[2] Bundesurlaubsgesetz (Federal Law on leave) of 8 January 1963 (BGBl. 1963, p. 2), as amended on 7 May 2002 (BGBl. 2002 I, p. 1529).
[3] 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.

an allowance in lieu of that minimum period of paid annual leave is possible only when the employment relationship comes to an end.

The Advocate General also refers to the Court's case-law according to which the right to paid annual leave must be regarded as a particularly important principle of EU social law. Once acquired, that right cannot be lost at the end of the leave year and/or of a carry-over period fixed by national law, when the worker has been unable to take his leave. Thus, a worker who has not been able, for reasons beyond his control, to exercise his right to paid annual leave before termination of the employment relationship is entitled to an allowance in lieu.

The Advocate General proposes in particular that the Court should state in answer that the directive precludes national legislation or practice, such as that at issue, **in accordance with which a worker loses his right to an allowance in lieu of untaken paid annual leave at the end of the employment relationship where he did not apply for that leave while he was in active service and does not show that he was unable to take the leave for reasons beyond his control, without prior verification of whether that worker was actually given the opportunity by his employer to exercise his right to paid annual leave.**

The Advocate General also proposes that the Court should answer that, where a national court is dealing with a dispute relating to a right to an allowance in lieu of untaken paid annual leave at the end of the employment relationship, it must ascertain whether the employer shows that he took the appropriate measures to ensure that the worker concerned was able actually to exercise his right to paid annual leave during that relationship. If the employer shows that he took the necessary steps and that, in spite of the measures which he took, the worker deliberately and in an informed manner declined to exercise his right to paid annual leave even though he was able to do so, that worker cannot claim, on the basis of the directive, payment of an allowance in lieu of untaken paid annual leave at the end of the employment relationship.

In support of this approach, the Advocate General recalls that, according to the Court, the directive embodies the rule that a worker must normally be entitled to actual rest, with a view to ensuring effective protection of his health and safety.

According to the Advocate General, the employer has a special responsibility in order that the workers under his control actually exercise their right to paid annual leave. Thus, the employer must adopt specific measures of organisation appropriate for enabling the workers to exercise their right to paid annual leave. He must in particular inform the workers in good time that, if they do not actually take their leave, it might be lost at the end of the reference period or an authorised carry-over period. He must also inform them that, if they do not take leave during the course of the employment relationship although they are actually able to do so, they will not be able to claim entitlement to an allowance in lieu of untaken paid annual leave at the end of the employment relationship. However, the obligation borne by the employer does not extend to requiring the employer to force his workers to claim the rest periods due to them.

The Advocate General takes the view that it is necessary to ensure that the possibility provided for by the directive of replacing the minimum period of paid annual leave by an allowance in lieu where an employment relationship ends cannot be used by workers as a tool to build up days of paid annual leave in order to secure remuneration from them at the end of the employment relationship. The Advocate General points out in this regard that the protection of the worker's safety and health is not just in the worker's individual interest, but also in the interest of his employer and in the general interest.

As regards Mr Kreuziger's position, the Advocate General states that, if it follows from the verifications carried out by the referring court that the Land of Berlin, in its capacity as Mr Kreuziger's employer, gave him the opportunity to exercise his right to paid annual leave and that, in spite of that, he did not wish to take his leave before passing the oral test in the second State examination, that court will be able to consider that he was rightfully refused such an allowance.

So far as concerns the issue that a directive binds only the Member States which must transpose it into national law and cannot therefore, in principle, be applied directly in a dispute between individuals (such as that between Mr Shimizu and the Max-Planck-Gesellschaft), the Advocate General observes that the right to paid annual leave is also guaranteed by the Charter of Fundamental Rights of the European Union.[4]

According to the Advocate General, in so far as the Charter guarantees the worker the right to an allowance in lieu of untaken paid annual leave at the end of the employment relationship when that worker has not been in a position actually to exercise his right to paid annual leave during the relationship, the Charter may be relied on directly by the worker in the context of a dispute between him and his employer in order to preclude the application of national legislation that stands in the way of such an allowance being paid.[5]

As regards specifically the case of Mr Shimizu, the Advocate General observes that, although the final assessment of this point falls to be made by the Bundesarbeitsgericht, he doubts whether the Max-Planck-Gesellschaft took the necessary steps to put Mr Shimizu in a position to take the paid annual leave to which he was entitled. In fact, the only measure that appears in the file is the invitation made to Mr Shimizu by the Max-Planck-Gesellschaft on 23 October 2013 to take his leave, when he learnt at the same time that his contract of employment would not be renewed. Given the limited time between the date on which that measure was taken and the date of the end of Mr Shimizu's fixed-term contract, namely 31 December 2013, that measure was belated, which, according to the Advocate General, means that it cannot be regarded as an appropriate measure to enable that worker actually to exercise his right to paid annual leave.

NOTE: The Advocate General's Opinion is not binding on the Court of Justice. It is the role of the Advocates General to propose to the Court, in complete independence, a legal solution to the cases for which they are responsible. The Judges of the Court are now beginning their deliberations in these cases. Judgment will be given at a later date.

NOTE: A reference for a preliminary ruling allows the courts and tribunals of the Member States, in disputes which have been brought before them, to refer questions to the Court of Justice about the interpretation of European Union law or the validity of a European Union act. The Court of Justice does not decide the dispute itself. It is for the national court or tribunal to dispose of the case in accordance with the Court's decision, which is similarly binding on other national courts or tribunals before which a similar issue is raised.

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[4] Article 31(2) of the Charter.

[5] For more details regarding the direct effect of Article 31(2) of the Charter, see press release No 70/18 issued today on the Opinion of Mr Bot in Joined Cases C-569/16, Stadt Wuppertal v Maria Elisabeth Bauer, and C-570/16, Volker Willmeroth, as owner of TWI Technische Wartung und Instandsetzung Volker Willmeroth e. K. v Martina Broßonn.