

Case C-120/21

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:

26 February 2021

Referring court or tribunal:

Bundesarbeitsgericht (Germany)

Date of the decision to refer:

29 September 2020

Defendant, respondent and appellant on a point of law:

LB

Applicant, appellant and respondent in the appeal on a point of law

TO

Subject matter of the main proceedings

Leave entitlement – Expiry and limitation – Directive 2003/88/EC – Employer’s obligation to inform a worker of leave and to invite him or her to take that leave – Principle of effectiveness

Subject matter and legal basis of the request

Interpretation of EU law, Article 267 TFEU

Question referred for a preliminary ruling

Do 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 preclude the application of national legislation such as Paragraph 194(1), in conjunction with Paragraph 195, of the Bürgerliches Gesetzbuch, (German Civil Code; ‘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?

Provisions of EU law cited

Charter of Fundamental Rights of the European Union ('the Charter'), in particular Article 31(2)

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 ('Directive 2003/88/EC'), in particular Article 7

Provisions of national law cited

Mindesturlaubsgesetz für Arbeitnehmer (Federal Law on minimum leave for workers; 'the Bundesurlaubsgesetz' or 'BUrlG'), in particular Paragraphs 1, 3(1) and 7(3) and (4)

Bürgerliches Gesetzbuch (German Civil Code; 'the BGB'), in particular Paragraphs 194(1), 195, 199(1) and (4), 204(1)(1), 212(1)(1), and 214(1)

Summary of the facts and proceedings

- 1 The applicant was employed by the defendant as an assistant tax adviser and accountant between 1 November 1996 and 31 July 2017. During the calendar year, she was entitled to 24 working days of leave. In a letter dated 1 March 2012, the defendant certified to the applicant that her 'remaining holiday entitlement of 76 days from the 2011 calendar year and preceding years' would not expire on 31 March 2012, because she had been unable to take the leave due to the heavy workload at its office. During the years 2012 to 2017, the defendant granted the applicant 95 working days of leave in total. The applicant did not take all of her statutory minimum leave. The defendant did not request the applicant to take more leave, nor did it make her aware that leave not requested by the end of the calendar year or carry-over period could expire. By the action lodged on 6 February 2018, she requested payment in lieu of 101 leave days from 2017 and the preceding years. The defendant expressed the view that the applicant's leave had expired. It claimed that it was also unaware of and unable to comply with its obligations to inform a worker of his or her leave and to invite him or her to take it, because the employment contract had already been terminated by the time the case-law of the Bundesarbeitsgericht (Federal Labour Court) changed as a result of the decisions of 19 February 2019. Furthermore, it argued that it was not

obliged to make payment in lieu of leave, inasmuch as the leave entitlements for which the applicant could request payment in lieu had expired.

- 2 The Arbeitsgericht (Labour Court) ruled (by way of a final and definitive decision) that the defendant should be ordered to make payment in lieu of the remaining leave from 2017. It dismissed the action as to the remainder. On appeal by the applicant, the Landesarbeitsgericht (Higher Labour Court) ordered that the defendant pay her the gross sum of EUR 17 376.64 in lieu of 76 leave days from the years 2013 to 2016. It assumed that, in compliance with EU-law requirements, the applicant's leave could not have expired either pursuant to Paragraph 7(3) of the BUrlG or in accordance with the general civil-law provisions on limitation in Paragraph 194 et seq. of the BGB, because the defendant had prevented the applicant from taking the leave by failing to fulfil its obligations of cooperation. By the appeal on a point of law, the defendant is seeking the reinstatement of the decision of the court of first instance in so far as the Arbeitsgericht dismissed the action.

Brief summary of the grounds for the request

- 3 The success of the defendant's appeal on a point of law depends – in so far as it challenges the ruling that it must make payment in lieu of leave from the years 2013 and 2014 – on whether Article 7 of Directive 2003/88/EC and Article 31(2) of the Charter permit the lapse of entitlement to statutory minimum leave after the standard three-year limitation period (Paragraph 195 of the BGB) has expired, if the employer failed to fulfil its obligations to inform a worker of leave and to invite him or her to take that leave.
- 4 Further to the decision of the Court of Justice of 6 November 2018 (C-684/16) [*Max-Planck-Gesellschaft zur Förderung der Wissenschaften*] concerning Article 7 of Directive 2003/88/EC and Article 31(2) of the Charter, the Bundesarbeitsgericht has developed its case-law to date and acknowledged that, in principle, if Paragraph 7 of the BUrlG is interpreted in conformity with Article 7 of Directive 2003/88/EC, the entitlement to statutory minimum leave will expire at the end of the calendar year (Paragraph 7(3), sentence 1, of the BUrlG) or of a permissible carry-over period (Paragraph 7(3), sentences 2 and 4, of the BUrlG) only if the employer gave the worker the opportunity beforehand to take his or her leave entitlement and the worker nevertheless, of his or her own volition, did not take the leave.
- 5 If the employer relies on the limitation and expiry of leave entitlement, it must demonstrate that it fulfilled its obligations of cooperation and provide evidence, if required, because it derives a legal outcome in its favour from this.
- 6 In the main proceedings, it must be examined, in view of the objection of limitation raised by the defendant, whether the applicant's statutory leave entitlements and the concurrent contractual leave entitlements over and above

these, which cannot expire due to failure to cooperate on the part of the defendant under Paragraph 7(3) of the BUrlG, have lapsed.

- 7 The standard limitation period of three years (*Paragraph 195 of the BGB*) starts at the end of the year in which the claim arose (*Paragraph 199(1)(1) of the BGB*) and the obligee obtains knowledge of the circumstances giving rise to the claim and of the identity of the obligor, or would have obtained such knowledge if he or she had not shown gross negligence (*Paragraph 199(1)(2) of the BGB*).
- 8 In so far as the applicant seeks payment in lieu of leave from the years 2013 and 2014, the action would be unfounded if – in observance of Article 7 of Directive 2003/88/EC and Article 31(2) of the Charter – Paragraph 7 of the BUrlG did not preclude the limitation of leave entitlements and allowed the start of the limitation period to be postponed to the leave year in which the claim arose even in the event that the employer failed to cooperate.
- 9 Under the aforementioned conditions, it is argued, the standard limitation period of three years (Paragraph 195 of the BGB) commenced at the end of the leave year in which the claim arose and could be asserted after expiry of the waiting period by means of a direct action (*Paragraphs 1, 3, and 4 of the BUrlG*), in other words on 31 December 2013 for leave entitlements from 2013 and on 31 December 2014 for those from 2014. The limitation period for entitlements from 2013 ended at the end of 2016, and for those from 2014 at the end of 2017. At the time of filing of the direct action on 6 February 2018, according to the argument, the limitation periods had already expired.
- 10 The question of the expiry of statutory leave entitlement and of parallel contractual entitlement to leave over and above this is, following the further development in the case-law of the Bundesarbeitsgericht, decisive in this case, if the worker's leave entitlement has not expired because it is, or – as in the main proceedings – was, not time-limited under Paragraph 7(3) of the BUrlG due to non-fulfilment of the obligations of cooperation, and the employer, relying on its claim that the statutory limitation period for leave entitlement has expired, is refusing (*Paragraph 214(1) of the BGB*) to grant (*Paragraph 7(1) of the BUrlG*) or – as in the main proceedings – to make payment in lieu of the leave (*Paragraph 7(4) of the BUrlG*). This is because, in the case of failure on the part of the employer to cooperate, the enforceability of the accumulated leave entitlements from multiple years would, against the employer's wish, generally be time-limited in accordance with national law only if the general provisions of limitation in Paragraph 194 et seq. of the BGB could assert validity in addition to the provisions in Paragraph 7 of the BUrlG. Otherwise, if the employer fails to catch up on its obligations of cooperation in the current leave year or at a later date prior to the employment contract ending, the leave that continues to be carried over to subsequent leave years would continue to exist, without the employee being obliged to assert those claims within time limits in order to maintain enforceability. The same would apply in regard to his or her entitlement

to payment in lieu arising upon termination of the employment contract in accordance with Paragraph 7(4) of the BUrlG.

- 11 It is therefore necessary to clarify whether a mandatory legislative requirement resulting from the BUrlG precludes the imposition of a time limitation on leave entitlement if the employer did not actually give the worker the opportunity to take his or her leave entitlement by accordingly informing him or her and inviting him or her to take it. This is possible only in compliance with the requirements that apply to leave entitlement under EU law.
- 12 In so far as is apparent, the Court of Justice has not given any ruling to date on whether, and, if applicable, under what conditions, Article 7 of Directive 2003/88/EC and Article 31(2) of the Charter allow for the possibility of imposing a time limit on the right to paid annual leave against the employer's wish, by means of limitation periods, the suspension of which requires action on the part of the employee.
- 13 The case-law of the Court of Justice indicates that, if the limitation provisions in the German Civil Code are applied to leave entitlement, a breach of Article 31(2) of the Charter and Article 7 of Directive 2003/88/EC could be deemed to exist.
- 14 In its decision of 6 November 2018 (*C-684/16 [Max-Planck-Gesellschaft zur Förderung der Wissenschaften]*), the Court of Justice found that Article 7 of Directive 2003/88/EC and Article 31(2) of the Charter preclude national legislation pursuant to which the fact that a worker has not requested to exercise his or her right to paid annual leave acquired under those provisions during the reference period automatically entails, without prior verification as to whether the employer actually provided him or her with the opportunity to exercise that right, the consequence that the worker loses the leave days to which he or she is entitled at the end of the reference period (*paragraph 55*). It also emphasised in that decision, and in others, that any practice or omission of an employer that may potentially deter a worker from taking his or her annual leave is equally incompatible with the purpose of the right to paid annual leave (*paragraph 42; judgment of 29 November 2017, C-214/16, [King] paragraph 39*). Any national statutory or collective provision establishing, contrary to the provisions of EU law, a limit to the carry-over and the lapse of a worker's acquired entitlement to paid annual leave, would amount to validating conduct by which an employer was unjustly enriched to the detriment of the very purpose of that directive, which is that there should be due regard for the health of workers (*judgment of the Court of Justice of 29 November 2017, C-214/16 – [King] paragraph 64*).
- 15 In the present Chamber's view, the case-law of the Court of Justice to date does not clarify beyond any doubt whether it can be inferred from those findings of the Court of Justice that Article 7 of Directive 2003/88/EC and Article 31(2) of the Charter exclude the possibility of requiring that counteracting measures in the sense of Paragraph 204(1) of the BGB be taken by the worker in order to prevent

the expiry of leave entitlement for as long as the employer has not enabled him or her to take his or her leave entitlement by fulfilling its obligations of cooperation.

- 16 The Court of Justice’s case-law on time limits and limitation periods outside of the scope of Article 31(2) of the Charter and of Article 7 of Directive 2003/88/EC suggests that the expiry of leave entitlement is not excluded with respect for the function of the limitation provisions to ensure justice and legal certainty, but also indicates that EU law precludes the expiry of entitlements if the employer has failed to fulfil its obligations to inform and invite a worker to act.
- 17 According to the case-law of the Court of Justice, the principle of procedural autonomy of the Member States could favour an interpretation by which Article 7 of Directive 2003/88/EC and Article 31(2) of the Charter do not preclude the imposition of a limitation on leave entitlement and on the replacement entitlement to payment in lieu of leave in accordance with Paragraph 7(4) of the BUrlG. Accordingly, the detailed procedural rules designed to ensure protection of the rights that individuals acquire under EU law are a matter for the domestic legal order of each Member State (*see Court of Justice of the European Union, 19 June 2014 – C-501/12 to C-506/12, C-540/12 and C-541/12 – paragraph 112; 8 July 2010 – C-246/09 – [Bulicke] paragraphs 24 and 25 and the case-law cited*), in the absence of EU rules on the procedure of enforcing rights. However, the rules adopted must be no less favourable than those governing similar domestic situations (principle of equivalence) and must not render practically impossible or excessively difficult the exercise of the rights conferred by EU law (principle of effectiveness) (*on limitation periods, see judgment of the Court of Justice of the European Union, 20 December 2017, C-500/16 – [Caterpillar Financial Services] paragraph 37 et seq. and the case-law cited; on time limits, Court of Justice of the European Union, 19 June 2014 – C-501/12 to C-506/12, C-540/12 and C-541/12 – paragraph 112*).
- 18 The principle of equivalence would be ensured by the provisions of Paragraph 194 et seq. of the BGB, because, in accordance with national law, all claims are subject in principle to the standard limitation period of three years in accordance with Paragraph 195 of the BGB, irrespective of whether they are based on national law or on EU law, and regardless of whether they accrue to the worker or to the employer.
- 19 With regard to the principle of effectiveness, the Court of Justice has 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 conduct and its special features, viewed as a whole, before the various national bodies. For those purposes, account must be taken, where appropriate, of the basic principles of the domestic judicial system, such as protection of the rights of the defence, the principle of legal certainty and the proper conduct of proceedings (*Court of Justice of the European Union, 16 July 2020 – C-224/19 and C-259/19 – paragraph 85; 8 July 2010 – C-246/09 – [Bulicke] paragraph 35*).

- 20 In situations outside of the scope of Article 7 of Directive 2003/88/EC and of Article 31(2) of the Charter, the Court of Justice has regarded limitation periods of three years (*see Court of Justice, 15 April 2010 – C-542/08 – [Barth] paragraph 28; 24 March 2009 – C-445/06 – [Danske Slagterier] paragraph 48*) and of two years (*Court of Justice, 15 December 2011 – C-427/10 – [Banca Antoniana Popolare Veneta] paragraph 25*) as compatible with the principle of effectiveness, if, subject to the examination to be carried out by the referring court, they are not liable to make it in practice impossible or excessively difficult to exercise the rights conferred by EU law (*Court of Justice of the European Union, 16 July 2020 – C-224/19 and C-259/19 – paragraph 87*). In the same way, the Court of Justice has assessed the setting of reasonable limitation periods, *qua* application of the basic principle of legal certainty, as being compatible in principle with the requirement of effectiveness (*consistent case-law of the Court of Justice, see Court of Justice, 21 December 2016 – C-154/15, C-307/15 – [Gutiérrez Naranjo] paragraph 70; 8 July 2010 – C-246/09 – [Bulicke] paragraph 36 and the case-law cited; 10 July 1997 – C-261/95 – [Palmisani] paragraph 28 and the case-law cited*), in so far as the period does not start before the time at which the worker has knowledge of the facts that form the basis for his or her claim (*see Court of Justice of the European Union, 8 July 2010 – C-246/09 – [Bulicke] paragraph 41*). According to the consistent case-law of the Court of Justice, any finding of a breach of EU law by the Court is, in principle, immaterial with regard to the start of the limitation period (*Court of Justice, 14 May 2020 – C-749/18 – paragraph 67 and the case-law cited*). The principle of effectiveness does not preclude a limitation period determined under national law for claims which are founded in EU law from starting to run before the date of delivery of a judgment of the Court of Justice that has clarified the legal position on the matter (*see Court of Justice, 28 January 2015 – C-417/13 – [Starjakob] paragraphs 64 and 65 and the case-law cited*). EU law bars the party opposing the claim from relying on the expiry of a reasonable limitation period only if its conduct in relation to a time limit deprives the person in question of any opportunity to exercise his or her rights before the national courts (*see Court of Justice of the European Union, 14 May 2020 – C-749/18 – paragraph 68 and the case-law cited*).
- 21 The principles established by this case-law of the Court of Justice favour the interpretation that the application of limitation provisions to the entitlement to statutory minimum leave – and to the entitlement to payment in lieu in its place – is compatible with the principle of effectiveness.
- 22 The case-law of the Court of Justice also indicates, however, that the application of the limitation provisions to the entitlement to statutory minimum leave and the entitlement to payment in lieu in its place is not compatible with the principle of effectiveness if the employer has failed to fulfil its obligations to inform a worker of the leave and to invite him or her to take that leave.
- 23 The Court of Justice has ruled that the application of a limitation period is liable to render the exercise of rights conferred by EU law excessively difficult, and

therefore contravenes the principle of effectiveness, in conjunction with the principle of legal certainty, if it starts to run at a time when the claimant is unaware of, or does not appreciate the extent of, his or her rights under EU law because he or she did not possess the necessary information (*see in this regard, on the interpretation of Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts, Court of Justice of the European Union, 16 July 2020 – C-224/19 and C-259/19 – paragraphs 90 and 91; 13 September 2018 – C-176/17 – [Profi Credit Polska] paragraph 69*). As far as the present Chamber is concerned, this background prompts the question as to whether Article 7 of Directive 2003/88/EC and Article 31(2) of the Charter require, for the purpose of the start of the standard limitation period (*Paragraph 199(1)(2) of the BGB*), that not only is awareness of the existence and the extent of the leave entitlement to be required, but also information about a limitation period in that regard and the possible expiry of that period, which the employer is required to provide in fulfilment of its obligations to inform a worker of leave and to invite him or her to take that leave.

- 24 The present Chamber takes the view that – if the Court of Justice answers the question referred in the affirmative – the case-law of the Court of Justice to date has also not yet clarified whether Article 7 of Directive 2003/88/EC and Article 31(2) of the Charter require that leave entitlement from the leave year in question – *in casu*, the leave years 2013 and 2014 – that has not expired due to the employer neglecting to inform the worker of the leave and to invite him or her to take it be treated, in respect of the start of the potentially applicable limitation periods (*Paragraph 199(1)(1) of the BGB*), as if it had arisen in the same way as leave from the subsequent or later leave year, in addition to which it arises if Paragraph 7(3) of the BUrlG is interpreted in conformity with EU law.

In its judgment of 6 November 2018, (*C-684/16 – [Max-Planck-Gesellschaft zur Förderung der Wissenschaften]*), the Court of Justice stated that national legislation on the expiry of leave could not be applied if it were impossible to interpret it in a manner consistent with Article 7 of Directive 2003/88/EC and with Article 31(2) of the Charter. However, the national court must then also ensure that, should the employer be unable to show that it actually enabled the worker to take the paid annual leave to which he or she is entitled under EU law, the worker cannot be deprived of his or her acquired rights to that paid annual leave (*paragraph 81*).