



Reports of Cases

JUDGMENT OF THE EUROPEAN UNION CIVIL SERVICE TRIBUNAL (Second Chamber)

15 March 2011 *

(Civil service — Officials — Carry-over of days of annual leave — Article 4 of Annex V to the Staff Regulations — Reasons attributable to the requirements of the service — Article 73 of the Staff Regulations — Directive 2003/88/EC — Right to annual paid leave — Sick leave)

In Case F-120/07,

ACTION under Articles 236 EC and 152 EA,

Guido Strack, a former official of the European Commission, residing in Cologne (Germany),
represented by H. Tettenborn, lawyer,

applicant,

v

European Commission, represented by J. Currall and B. Eggers, acting as Agents,

defendant,

THE CIVIL SERVICE TRIBUNAL (Second Chamber),

composed of H. Tagaras, President, S. Van Raepenbusch (Rapporteur) and M.I. Rofes I Pujol, Judges,

Registrar: J. Tomac, Administrator,

having regard to the written procedure and further to the hearing on 5 May 2010,

gives the following

Judgment

- 1 By application lodged by fax at the Registry of the Tribunal on 22 October 2007 (the original of which was lodged on 30 October 2007), Mr Strack claims:
 - annulment of the decisions of the Commission of the European Communities of 30 May 2005, 25 October 2005, 15 March 2007 and 20 July 2007, in so far as they limit to 12 days the amount of annual leave carried over as days not taken in 2004 and limit accordingly the sum paid by way of compensation upon his leaving the service, and

* Language of the case: German.

- an order that the Commission pay compensation corresponding to 26.5 days of annual leave, plus default interest from 1 April 2005.

Legal context

Staff Regulations of officials of the European Union

- 2 According to the second paragraph of Article 1e of the Staff Regulations of officials of the European Union ('the Staff Regulations'):

'Officials in active employment shall be accorded working conditions complying with appropriate health and safety standards at least equivalent to the minimum requirements applicable under measures adopted in these areas pursuant to the Treaties.'

- 3 The first paragraph of Article 57 of the Staff Regulations provides:

'Officials shall be entitled to annual leave of not less than 24 working days nor more than 30 working days per calendar year, in accordance with rules to be laid down by common accord of the institutions of the [Union], after consulting the Staff Regulations Committee.'

- 4 Under Article 1 of Annex V to the Staff Regulations:

'In the year in which a staff member enters or leaves the service, he shall be entitled to two working days' leave per complete month of service, to two working days for an incomplete month consisting of more than 15 days and to one working day for an incomplete month of 15 days or less.'

- 5 Article 3 of Annex V to the Staff Regulations provides:

'If, during annual leave, an official contracts an illness which would have prevented him from attending for duty if he had not been on leave, his annual leave shall be extended by the duration of his incapacity, subject to production of a medical certificate.'

- 6 Article 4 of Annex V to the Staff Regulations, the German version of which was the subject of a corrigendum (OJ 2007 L 248, p. 26), provides:

'Where an official, for reasons other than the requirements of the service, has not used up all his annual leave before the end of the current calendar year, the amount of leave which may be carried over to the following year shall not exceed 12 days.'

Where an official at the time of leaving the service has not used up all his annual leave, he shall be paid compensation equal to one thirtieth of his monthly remuneration at the time of leaving the service for each day's leave due to him.

A sum calculated in the manner provided for in the preceding paragraph shall be deducted from payment due to an official who at the time of leaving the service has drawn annual leave in excess of his entitlement up to that date.'

- 7 A circular of Directorate-General (DG) 'Personnel and administration', published in *Administrative notices* No 66/2002 of 2 August 2002, provides:

'Where the number of days that you have not taken is greater than [12], however, leave in excess of these [12] days can be carried over only if you can show that you were unable to take them during the current calendar year because of necessities of the service.'

- 8 That circular was replaced, with effect from 1 May 2004, by Commission Decision C(2004) 1597 of 28 April 2004, establishing implementing provisions in relation to leave, which provide, inter alia:

'Carry-over of more than 12 days is authorised only if it has been established that the staff member has been unable to take them during the current calendar year for reasons attributable to the needs of the service (to be expressly substantiated) and is added to the entitlements for the following calendar year after decision by the human resources manager;

...

No carry-over in excess of 12 days is authorised if the leave days have not been taken for reasons other than the needs of the service ([for example] for health reasons: illness, accident, recovery of annual leave following an accident or illness during annual leave, maternity leave, adoption leave, parental leave, family leave, leave on personal grounds, unpaid leave, leave for military service, etc.);

...'

- 9 It also follows from conclusion No 53A/70 of the Heads of Administration of 9 January 1970 that the amount of leave carried over must be limited to 12 days, even in the case of prolonged illness.

- 10 Article 73(1) of the Staff Regulations provides:

'1 An official is insured, from the date of his entering the service, against the risk of occupational disease and of accident subject to rules drawn up by common agreement of the institutions of the [European Union] after consulting the Staff Regulations Committee. ...

Such rules shall specify which risks are not covered.'

Directive 2003/88/EC concerning certain aspects of the organisation of working time

- 11 According to recital 6 to 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):

'Account should be taken of the principles of the International Labour Organisation with regard to the organisation of working time, including those relating to night work.'

- 12 Article 1 of Directive 2003/88 provides as follows:

'Purpose and scope

1. This Directive lays down minimum safety and health requirements for the organisation of working time.

2. This Directive applies to:

(a) minimum periods of ... annual leave ...'.

13 Article 7 of that directive is worded as follows:

‘Annual leave

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’.

14 Article 7 of Directive 2003/88 is not among the provisions from which a derogation is possible under Article 17 of that directive.

Facts giving rise to the dispute

15 The applicant entered the service of the Commission on 1 September 1995. From that date until 31 March 2002 he served in the Publications Office of the European Communities (OPOCE). On 1 January 2001 he was promoted to grade A 6. From 1 April 2002 until 15 February 2003 the applicant worked in the Enterprise DG of the Commission, before being posted to Eurostat from 16 February 2003. From 1 March 2004 until he was retired on grounds of invalidity with effect from 1 April 2005 the applicant was on sick leave.

16 On 27 December 2004 the applicant requested that 38.5 days of leave not taken in 2004 be carried over to 2005, stating that he had been unable to take those days of leave, inter alia, because of his occupational disease. The request was refused on 30 May 2005 by the head of unit responsible for administrative and personnel affairs in the ‘Resources’ directorate of DG ‘Eurostat’ in so far as it related to the 26.5 days in excess of the 12 days automatically carried over (‘the decision of 30 May 2005’).

17 On 4 July 2005 the applicant lodged a complaint pursuant to Article 90(2) of the Staff Regulations against the decision of 30 May 2005, in which he requested, in the alternative, suspension of that decision pending the adoption of the decision on recognition of the occupational origin of his disease under Article 73 of the Staff Regulations.

18 That complaint was rejected by decision of the appointing authority of 25 October 2005. However, that decision stipulated that:

‘If the appointing authority should accept a subsequent request for recognition of the occupational origin of his disease, it would be open to [the applicant] to submit a new request for the balance of his leave for 2004 to be carried over. Only in those circumstances would it be necessary to address the question whether the occupational origin of a disease entails acknowledgement of the existence of reasons attributable to the requirements of the service, within the meaning of Article 4 of Annex V to the Staff Regulations, where the failure to take annual leave is explained by such a disease.’

19 By letter of 8 November 2006 the Commission informed the applicant that it recognised that his health had deteriorated since the medical examinations which he had undergone and that the costs of medical treatment directly related to that deterioration would be reimbursed in accordance with Article 73 of

the Staff Regulations until his injuries had stabilised. It also followed from the findings of the doctor appointed by the institution enclosed with that letter that a consolidation had not yet occurred and that a new assessment in that regard could be undertaken only upon expiry of a period of two years.

- 20 Following that letter, the applicant submitted on 22 November 2006 a new request for the balance of the days of leave for 2004 to be carried over; that request was refused by decision of 15 March 2007 of the head of unit responsible for working conditions and non-pecuniary rights and obligations in directorate B 'Staff Regulations: policy, management and advice' of DG 'Personnel and administration' ('the decision of 15 March 2007').
- 21 On 9 April 2007, the applicant lodged a complaint under Article 90(2) of the Staff Regulations against the latter decision. That complaint was rejected by decision of the appointing authority of 20 July 2007.

Forms of order sought by the parties and procedure

- 22 The applicant claims that the Tribunal should:
- annul the Commission's decisions of 30 May 2005, 25 October 2005, 15 March 2007 and 20 July 2007, in that they limit to 12 days the amount of leave not taken in 2004 that can be carried over and, consequently, limit the sum paid to the applicant by way of compensation upon his leaving the service;
 - 'order the Commission to pay the applicant compensation corresponding to 26.5 days of annual leave that were not taken into account and were not the subject of any compensation, in accordance with the second paragraph of Article 4 of Annex V to the Staff Regulations, plus default interest from 1 April 2005, calculated at the rate applied by the European Central Bank to its main refinancing operations, plus two percentage points';
 - order the Commission to pay the costs.
- 23 The Commission contends that the Tribunal should:
- dismiss the action;
 - order the applicant to pay the costs.
- 24 By decision of the President of the Tribunal of 16 November 2007, the present case was assigned to the First Chamber of the Tribunal.
- 25 By letter of 16 November 2007 the Registry invited the parties to an informal meeting on 4 December 2007, with a view to seeking an amicable settlement of the present dispute and also of other disputes between them pending before the Tribunal.
- 26 After the informal meeting of 4 December 2007 the parties submitted their observations on the draft agreement contained in the minutes of that meeting, but failed to agree on the terms of such an agreement.
- 27 The parties were called to a second informal meeting, the date of which was fixed at 6 March 2008, after the applicant had returned from holiday. However, the applicant declined the invitation, since he saw no point in holding a new informal meeting in the light of the position adopted by the Commission. The Commission expressed its regret that the informal meeting would be unable to take place in the applicant's absence, while expressing the hope that an agreement might be found and indicating that it was prepared to work towards drawing up an amicable settlement.

- 28 By decision of the President of the Tribunal of 8 October 2008, the present case was reassigned to the Second Chamber of the Tribunal.
- 29 By letter of 15 January 2010 the applicant requested that the present case be joined with the actions then pending, registered as Cases F-118/07, F-119/07, F-121/07, F-132/07 and F-62/09. The Tribunal rejected that request by decision of 26 January 2010 and informed the applicant accordingly by letter from the Registry of 18 March 2010.
- 30 In a letter of 30 March 2010 the applicant contested the reassignment of the present case to the Second Chamber of the Tribunal.
- 31 At the hearing on 5 May 2010 the applicant was requested to submit to the Tribunal certain documents concerning him relating to the procedure under Article 73 of the Staff Regulations to which he had referred in his oral submissions.
- 32 During the same hearing the Tribunal requested the Commission to submit written observations on the possible consequences for the present dispute of the judgment of 20 January 2009 in Joined Cases C-350/06 and C-520/06 *Schultz-Hoff* ('the judgment in *Schultz-Hoff*'), on which the applicant relied in support of his action in his oral observations.
- 33 The applicant and the Commission complied with the Tribunal's requests on 26 and 31 May 2010 respectively.

Law

The claim for annulment

The subject-matter of the action

- 34 In addition to the annulment of the decisions of 30 May 2005 and 15 March 2007, the applicant seeks annulment of the decisions of 25 October 2005 and 20 July 2007 rejecting two complaints submitted on 4 July 2005 and 9 April 2007 respectively. In that regard, it should be borne in mind that a claim for annulment formally directed against the rejection of a complaint has the effect of bringing before the Tribunal the measure against which the complaint was submitted, where that claim, as such, lacks any independent content (see, to that effect, judgment of 17 January 1989 in Case 293/97 *Vainker v Parliament*, paragraph 8; judgment of 6 April 2006 in Case T-309/03 *Camós Grau v Commission*, paragraph 43; and judgment of 9 July 2009 in Case F-85/08 *Notarnicola v Court of Auditors*, paragraph 14). It must therefore be held that the action must be regarded as being directed only against the decisions of 30 May 2005 and 15 March 2007.

Admissibility of the action in so far as it is directed against the decision of 30 May 2005

- 35 It must be held that the decision of 30 May 2005 whereby the Commission rejected the first request to carry over 26.5 days of annual leave, in excess of the 12 days automatically carried over, was not challenged, in accordance with Article 91(3) of the Staff Regulations, in proceedings commenced before the Tribunal within three months following the rejection of the complaint against the decision, which occurred on 25 October 2005.

- 36 The time-limits prescribed in Articles 90 and 91 of the Staff Regulations for submitting complaints and bringing actions are a matter of public policy and are not subject to the discretion of the parties or the Courts (judgments of 25 September 1991 in Case T-54/90 *Lacroix v Commission*, paragraph 24, and of 17 May 2006 in Case T-95/04 *Lavagnoli v Commission*, paragraph 41).
- 37 The action must therefore be dismissed as being out of time in so far as it is directed against the decision of 30 May 2005.

Substance

– Arguments of the parties

- 38 The applicant raises a single plea, alleging breach of the first and second paragraphs of Article 4 of Annex V to the Staff Regulations. The first paragraph of that article specifically authorises an official who has not used up all his annual leave for reasons attributable to the requirements of the service to carry over to the following year the leave in excess of 12 days. That interpretation is corroborated by the Commission's *Administrative Notices* No 66-2002.
- 39 In the present case, in the applicant's submission, the disease that prevented him from taking his leave is attributable to the requirements of the service in the precise sense of the first paragraph of Article 4 of Annex V to the Staff Regulations, in that, as the exercise of his functions constituted the cause of his disease, the reason that prevented him from taking his leave has an occupational origin.
- 40 The judgment of 9 June 2005 in Case T-80/04 *Castets v Commission* does not contradict that interpretation, since it concerns absence on the ground of non-occupational disease. In that case it was circumstances specific to the official personally that had prevented him from taking his annual leave.
- 41 In the applicant's submission, the first and second paragraphs of Article 4 of Annex V to the Staff Regulations provide for a system of compensation for cases in which the official has been unable to take his annual leave not for reasons personal to him or owing to *force majeure* but because of the requirements of the service. In the present case, the applicant became ill owing to circumstances specific to his service.
- 42 At the hearing the applicant relied on the judgment in *Schultz-Hoff*, which was delivered after this action had been brought, and especially paragraphs 25, 44 and 45 of that judgment, from which it follows that Article 7(1) of Directive 2003/88 precludes a worker who, owing to incapacity for work on medical grounds, was unable to take his leave, from being deprived of any right to annual paid leave.
- 43 The Commission contends that the first paragraph of Article 4 of Annex V to the statute prohibits the carrying over of more than 12 days of annual leave where an official, for reasons other than the requirements of the service, has not used up all his annual leave before the end of the current calendar year.
- 44 In the Commission's submission, it follows from the case-law (judgment of 9 July 1970 in Case 32/69 *Tortora v Commission*, paragraphs 13 and 14, and judgment in *Castets v Commission*, paragraphs 28 and 29) that a right to carry annual leave over exists only where an official has been unable to take his days of annual leave for reasons attributable to the requirements of the service and therefore where his 'professional activities' prevented him from using up all his annual leave. It follows that, where an official is entitled to sick leave, he is, by definition, excused from performing his duties and

is therefore not in service for the purposes of the first paragraph of Article 4 of Annex V to the Staff Regulations. As he is not in service, then a fortiori he cannot be regarded as being absent by reason of the requirements of the service.

- 45 The fact that an official's disease is subsequently recognised as an occupational disease does not alter the fact that that official was, within the meaning of the case-law cited above, not in service while on sick leave and was therefore not prevented from taking his annual leave by the requirements of the service.
- 46 The Commission further submits that, in any event, the rights of officials in relation to compensation following incapacity for work are exhaustively governed by Article 73 of the Staff Regulations and do not justify any additional compensation in respect of days of annual leave not taken for health reasons.
- 47 That interpretation is confirmed by *Administrative notices* No 66-2002 and the implementing provisions on sick leave.
- 48 In the alternative, the Commission argues that while the Commission's doctor considered, in the report attached to the decision of 8 November 2008, that the aggravation of the applicant's pre-existing disease occurred while he was exercising his duties, he also pointed out that that aggravation would not have come about if there had not been a pre-existing disease. The Commission adds that a definitive decision in that regard pursuant to Article 73 of the Staff Regulations has not yet been taken. In the present case, the Tribunal cannot adjudicate on the matter, since, according to consistent case-law, the Courts of the European Union are not authorised to adjudicate on the existence of a causal link between an occupational activity and material and non-material damage if that link is at the same time the subject-matter of a procedure pursuant to Article 73 of the Staff Regulations or might in principle form the subject-matter of such a procedure (see, to that effect, judgment of 2 May 2007 in Case F-23/05 *Giraudy v Commission*, paragraph 200).
- 49 Last, the Commission observes that the applicant does not assert that his disease was triggered by events of an occupational nature that took place only in 2004. On the contrary, he states that the reasons for his incapacity for work date back to 2002 and 2003. However, the requirements of the service within the meaning of Article 4 of Annex V to the Staff Regulations must have applied during the calendar year in question and must have prevented the official from taking his annual leave during that year.
- 50 In its observations of 31 May 2010 on the scope of the judgment in *Schultz-Hoff*, moreover, the Commission claims that Article 4 of Annex V to the Staff Regulations constitutes a *lex specialis* which takes precedence over Article 1e(2) of the Staff Regulations and that it cannot, in the light of Directive 2003/88, be given an interpretation that is contrary to the law. The concept of 'requirements of the service' in Article 4 of Annex V to the Staff Regulations cannot include disease.
- 51 The Commission adds that the applicant has not raised a plea of illegality against Article 4 of Annex V to the Staff Regulations in the light of Article 7 of Directive 2003/88 and that, consequently, such a plea cannot be examined by the Tribunal of its own motion.
- 52 In the alternative, the Commission observes that Article 7 of Directive 2003/88 concerns the right to annual leave, and not the rules on carrying that leave over, and does not prohibit the extinction of the right to annual leave that has not been taken during a reference period or a carry-over period. Such a restriction is intended to maintain the economic competitiveness of Europe.
- 53 In the judgment in *Schultz-Hoff* the Court of Justice held only that the fact that a worker was unable to take all his annual leave on expiry of a carry-over period, owing to the fact that he was on sick leave throughout the entire reference period and beyond the carry-over period determined by national law,

was incompatible with Directive 2003/88. That situation is not comparable to the present situation, since Article 4 of Annex V to the Staff Regulations specifically allows 12 days of annual leave, corresponding to half of the annual leave, to be carried over where the annual leave could not be taken for medical reasons.

54 The Commission adds that when the applicant left the service he received compensation corresponding to half of his annual leave for 2004 and to the relevant proportion of his annual leave for 2005. In addition, the applicant was not ill during the whole of 2004 and could therefore have taken some days of annual leave, in particular those for 2003 which had already been carried over.

– Findings of the Tribunal

55 It should be recalled, first of all, that under Article 1e(2) of the Staff Regulations '[o]fficials in active employment shall be accorded working conditions complying with appropriate health and safety standards at least equivalent to the minimum requirements applicable under measures adopted in these areas pursuant to the Treaties'.

56 Directive 2003/88, adopted on the basis of Article 137(2) EC, seeks, as stated in Article 1(1), to lay down minimum safety and health requirements for the organisation of working time.

57 Consequently, without there being any need at this stage to examine the way in which any conflict between a provision of the Staff Regulations and the minimum safety and health requirements for workers adopted at Union level ought to be resolved, it must be held that it was for the Commission, in the present case, to ensure compliance with those requirements with respect to the applicant in the application and interpretation of the rules of the Staff Regulations relating, in particular, to annual leave.

58 In those circumstances, before examining, with regard to the facts of the present case, the scope of the first paragraph of Article 4 of Annex V to the Staff Regulations, the breach of which is claimed by the applicant, it is appropriate to examine, in the light of the case-law of the Court of Justice, the content of the relevant minimum requirements of Directive 2003/88 and, in particular, Article 7 thereof.

59 In that regard, it is consistent case-law that the entitlement of every worker to paid annual leave must be regarded as a particularly important principle of Union social law from which there can be no derogations and whose implementation by the competent national authorities must be confined within the limits expressly laid down by the directive itself (see, to that effect, judgment of 26 June 2001 in Case C-173/99 *BECTU*, paragraph 43; judgment of 18 March 2004 in Case C-342/01 *Merino Gómez*, paragraph 29; judgment of 16 March 2006 in Joined Cases C-131/04 and C-257/04 *Robinson-Steele and Others*, paragraph 46; and judgment in *Schultz-Hoff*, paragraph 22). Article 31(2) of the Charter of Fundamental Rights of the European Union, moreover, guarantees all workers an annual period of paid leave.

60 More particularly, Article 7(1) of Directive 2003/88 provides that Member States are to take the measures necessary to ensure that every worker is entitled to paid annual leave of at least four weeks. It follows from that article that a worker must normally be entitled to actual rest, with a view to ensuring effective protection of his health and safety, since it is only where the employment relationship is terminated that Article 7(2) of Directive 2003/88 permits an allowance to be paid in lieu of paid annual leave (see, to that effect, judgments in *BECTU*, paragraph 44; *Merino Gómez*, paragraph 30; and *Schultz-Hoff*, paragraph 23). Furthermore, Article 7 of Directive 2003/88 is not among the provisions from which Member States may derogate pursuant to Article 17 of that directive.

- 61 It is also common ground that the purpose of the entitlement to paid annual leave is to enable the worker to rest and to enjoy a period of relaxation and leisure. That purpose differs from that of entitlement to sick leave, the latter being given to the worker so that he can recover from being ill (judgment in *Schultz-Hoff*, paragraph 25). In that regard, it should be observed that under Article 5(4) of Convention No 132 of the International Labour Organisation of 24 June 1970 concerning Annual Holidays with Pay (Revised), of which account should be taken in the interpretation of Directive 2003/88, according to recital 6 to that directive, ‘... absence from work for such reasons beyond the control of the employed person concerned as illness, ... shall be counted as part of the period of service’.
- 62 The Court of Justice concluded from the foregoing, in its judgment in *Schultz-Hoff* (paragraph 41), that, as regards workers on sick leave which has been duly granted, the right to annual paid leave conferred by Directive 2003/88 on all workers cannot be made subject by a Member State to a condition concerning the obligation actually to have worked during the reference period established by the legislation of that State. In that sense, a provision of national law setting out a carry-over period for annual leave not taken by the end of the reference period aims to give a worker who has been prevented from taking his annual leave an additional opportunity to benefit from that leave (judgment in *Schultz-Hoff*, paragraph 42).
- 63 Consequently, even if Article 7(1) of Directive 2003/88 does not preclude, in principle, national regulations providing for the loss of entitlement to annual paid leave at the end of a reference period or a carry-over period, the worker must have actually been able to exercise his right under the directive within the period in question. That is clearly not the case of a worker who, during the whole or part of the reference period and beyond the carry-over period laid down by national law, was on sick leave.
- 64 The Court of Justice thus held, in its judgment in *Schultz-Hoff* (paragraphs 45 and 50), that to accept that, in such specific circumstances of incapacity for work, the relevant provisions of national law, and in particular those laying down the carry-over period, can provide for the loss of the worker’s right to paid annual leave guaranteed by Article 7(1) of Directive 2003/88, without the worker actually having the opportunity to exercise the right conferred on him by that directive, would mean that those provisions undermined the social right directly conferred by Article 7 of the directive on every worker.
- 65 Last, where it is no longer possible to take annual paid leave, for reasons outside the worker’s control, Article 7(2) of Directive 2003/88 provides that the worker is entitled to an allowance in lieu. According to the case-law of the Court of Justice, the allowance in lieu to which the worker is entitled must be calculated so that the worker is put in a position comparable to that he would have been in had he exercised that right during his employment relationship. It follows that the worker’s normal remuneration, which is that which must be maintained during the rest period corresponding to the paid annual leave, is also decisive as regards the calculation of the allowance in lieu of annual leave not taken by the end of the employment relationship (judgment in *Schultz-Hoff*, paragraph 61).
- 66 It is appropriate, at this point, to draw in the present case lessons from Directive 2003/88, as interpreted by the Court of Justice, for the purpose of applying and interpreting the rules of the Staff Regulations relating to annual leave, and in particular the first and second paragraphs of Article 4 of Annex V to the Staff Regulations.
- 67 It is apparent from the file, and in particular from a letter of 14 April 2005 from the Commission’s medical service to the applicant, that the applicant was on sick leave continuously from 2 March 2004 until he was retired on grounds of invalidity on 1 April 2005.

- 68 It must thus be held that the applicant was unable for virtually the whole of 2004 to exercise his right to take annual paid leave. The fact that he could have used up that right in January and February 2004 can clearly not be taken into account, as otherwise the protection of the right to annual paid leave, as applied by the case-law of the Court of Justice, would be rendered wholly theoretical. In its judgment in *Schultz-Hoff* (paragraphs 50 and 51) the Court of Justice explicitly referred, moreover, to the situation of a worker who has worked during part of the reference period before going on long-term sick leave and compared that situation to the situation of a worker who was on sick leave throughout the entire reference period and beyond the carry-over period laid down by national law.
- 69 Consequently, it follows from Article 7(2) of Directive 2003/88 that the applicant, whose medically certified incapacity for work lasted until he was retired on grounds of invalidity on 1 April 2005, cannot be deprived of the possibility of receiving financial compensation for annual leave which was not taken.
- 70 The Tribunal must now consider the extent of that financial compensation and the question whether, as the Commission maintains, the very wording of the first paragraph of Article 4 of Annex V to the Staff Regulations precludes, in the present case, the payment of financial compensation for the days of annual leave not taken beyond those which the official concerned is allowed to carry over.
- 71 In the Commission's submission, only reasons attributable to the requirements of the service can justify a carry-over of more than 12 days' annual leave to the following year.
- 72 It is sufficient, in that regard, to state that Article 4 of Annex V to the Staff Regulations does not govern the question, raised in the present case, whether days of annual leave should be carried over where, during the reference period, an official was unable to take his days of annual leave for reasons outside his control, such as medical reasons.
- 73 That assertion is not contradicted by the judgment of 29 March 2007 in Case T-368/04 *Verheyden v Commission* (paragraphs 61 to 63), where the Court of First Instance held that the words 'requirements of the service' used in the first paragraph of Article 4 of Annex V cannot be interpreted as covering absence from service justified by sick leave, even in the case of prolonged illness (see also, to that effect, the judgment in *Castets v Commission*, paragraph 33). Not only does the position of the Court of First Instance not rest on any supposed equivalence of sick leave to absence in the needs of the service, but the facts in *Verheyden v Commission* do not correspond to those of the present case, where the applicant was unable to exercise his right to paid annual leave during almost the whole reference period.
- 74 It follows from Article 3 of Annex V to the Staff Regulations, moreover, which governs a different aspect of the connection between sick leave and annual leave, namely the situation in which an official contracts an illness during his annual leave, that the legislature clearly intended to distinguish sick leave and annual leave, the respective purposes of which, as explained at paragraph 61 above, are different.
- 75 In those circumstances, it must be held that the minimum health and safety requirements referred to in Article 1e of the Staff Regulations, and in particular the provisions of Article 7 of Directive 2003/88, supplement the provisions on leave in the Staff Regulations themselves.
- 76 It is true that Article 7 of Directive 2003/88 guarantees a minimum period of annual paid leave of four weeks, whereas the annual leave which officials of the Union can claim, pursuant to the first paragraph of Article 57 of the Staff Regulations, is a minimum of 24 days. In the present case, the applicant's initial request to carry over to 2005 his days of annual leave not taken in 2004 even came to 38.5 days, taking account of the carry-over of the days of annual leave not taken in 2003 (see paragraph 16 above).

- 77 The fact none the less remains that, as the Union legislature fixed the annual leave for officials at 24 days, the interpretation given by the Court of Justice in the judgment in *Schultz-Hoff* of Article 7 of Directive 2003/88 where a worker is prevented from taking his annual leave owing to long-term illness can be transposed in full to the total annual leave as fixed by the Staff Regulations, by the application of Articles 1e in conjunction with 57 of the Staff Regulations, in spite of the restrictions contained in the first paragraph of Article 4 of Annex V to the Staff Regulations, as concerns the possibility of carrying untaken annual leave over to the following year.
- 78 Last, as regards the argument which the Commission bases on the need to maintain the economic competitiveness of Europe, it is sufficient to state that that argument has not been substantiated and as such cannot succeed.
- 79 In the light of all of the foregoing, it must be held that the Commission, by refusing, in the circumstances of the present case, by application of the first paragraph of Article 4 of Annex V to the Staff Regulations, to allow the carry-over of the days of annual leave in excess of the 12 days automatically carried over, which had not been taken by the applicant owing to long-term sick leave, failed to have regard to the scope of that provision. Consequently, the decision of 15 March 2007 must be annulled.

The claim for damages

Arguments of the parties

- 80 The applicant maintains that the admissibility of his claim for damages follows, in accordance with consistent case-law, from the ancillary nature of that claim by reference to the action for annulment.
- 81 As to the substance, the applicant claims that the wrongful maladministration lies, in the present case, in the illegality vitiating the contested decisions. The damage sustained consists in the non-payment of the amount of the compensation referred to in the second paragraph of Article 4 of Annex V to the Staff Regulations with regard to the 26.5 days in issue, and also in the interest not applied since then. The causal link is the consequence of the fact that, in the absence of the contested decisions, the defendant would have made the payment due.
- 82 In the event that the Tribunal should consider that the decisions in issue are lawful, the applicant claims compensation for the damage sustained as a result of numerous other instances of wrongful maladministration by the Commission, 'inter alia the unlawful acts of the Commission's agents and the harassment suffered at OPOCE, the errors made on the occasion of the investigation carried out by the [European Antifraud Office], in particular the unlawful failure to provide information to the applicant, which has already been denounced by the [European] Ombudsman, the unlawful appraisal of the applicant and the fact that he was not promoted, the appointment to a post at [OPOCE] which adversely affected the applicant and also the defendant's unlawful acts exhaustively set out in the complaint'. The causal link between such wrongful maladministration and the applicant's disease is established in the light of the medical reports and the decisions of the defendant. The disease in question was specifically the reason why the applicant was prevented from taking his annual leave in 2004. It is therefore appropriate to repair the damage sustained, consisting in particular in a loss of amenity owing to the fact that the applicant was on sick leave instead of being able to relax during the annual leave, and also in his inability to leave the place to which he was posted. It is possible to make good the damage sustained by means of a lump sum, by reference to the second paragraph of Article 4 of Annex V to the Staff Regulations.
- 83 The applicant stipulates that this claim, submitted as a subsidiary matter, was presented at the pre-litigation stage and the requirements of Article 90 and following of the Staff Regulations were therefore satisfied.

- 84 The Commission denies that the applicant submitted a claim for compensation under Article 90(1) of the Staff Regulations for the days of leave lost as a result of the Commission's alleged improper behaviour, which, moreover, the applicant described in a summary fashion, and which is alleged to have caused his psychological condition.
- 85 The claim for compensation should in any event be rejected on the ground of *lis pendens*, as the alleged reasons for his disease are already fully covered by the action registered as Case F-118/07 *Strack v Commission*.
- 86 Last, an action for damages should also be dismissed owing to the priority of the procedure under Article 73 of the Staff Regulations.

Findings of the Tribunal

- 87 It follows from the claim for damages that the applicant seeks, primarily, the application of the second paragraph of Article 4 of Annex V to the Staff Regulations in respect of the 26.5 days of annual leave he did not take in 2004.
- 88 In that regard, it is sufficient to state that that claim coincides with the measures that will have to be taken by the Commission in order to execute the present annulment judgment.
- 89 Nor is there any need to adjudicate on the claim for compensation put forward by the applicant, as a subsidiary matter, in the event that the complaints directed against the decision of 15 March 2007 should be rejected by the Tribunal.
- 90 Consequently, the claim for damages must be rejected as devoid of purpose.

Costs

- 91 Under Article 122 of the Rules of Procedure, the provisions of Title 2, Chapter 8, of those rules, on costs, are to apply only to cases brought before the Tribunal from the date on which those Rules of Procedure entered into force, namely 1 November 2007. The relevant provisions of the Rules of Procedure of the General Court on the subject are to continue to apply *mutatis mutandis* to cases pending before the Tribunal before that date.
- 92 Article 87(2) of the Rules of Procedure of the General Court of the Union provides that the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. Since the Commission has essentially been unsuccessful, it must be ordered to pay the costs in accordance with the form of order sought by the applicant.

On those grounds,

THE CIVIL SERVICE TRIBUNAL (Second Chamber)

hereby:

- 1. Annuls the decision of the European Commission of 15 March 2007 rejecting Mr Strack's request to carry over the balance of the days of leave for 2004;**
- 2. Dismisses the action as to the remainder;**
- 3. Orders the European Commission to bear its own costs and to pay those incurred by Mr Strack.**

Tagaras

Van Raepenbusch

Rofes i Pujol

Delivered in open court in Luxembourg on 15 March 2011.

Registrar
W. Hakenberg

President
H. Tagaras