Reports of Cases

JUDGMENT OF THE GENERAL COURT (Fourth Chamber, Extended Composition)

4 December 2018 *

(Civil service — Officials and members of the contractual staff — Reform of the Staff Regulations of 1 January 2014 — Article 6 of Annex X to the Staff Regulations — New provisions relating to annual leave applicable to officials posted in a third country — Objection of illegality — Purpose of annual leave)

In Case T-518/16,

Francisco Carreras Sequeros, official of the European Commission, residing in Addis Ababa (Ethiopia), and the other officials and staff members whose names are annexed to the judgment,[1] represented by S. Orlandi and T. Martin, lawyers,

applicants,

v

European Commission, represented initially by J. Currall and G. Gattinara, and subsequently by G. Gattinara and A.-C. Simon, acting as Agents,

defendant,

supported by

European Parliament, represented by J. Steele and E. Taneva, acting as Agents,

and by

Council of the European Union, represented initially by M. Bauer and M. Veiga, and subsequently by M. Bauer and R. Meyer, acting as Agents,

interveners,

ACTION under Article 270 TFEU for annulment of the decisions reducing the number of days of annual leave of the applicants as from 2014,

THE GENERAL COURT (Fourth Chamber, Extended Composition),

composed of H. Kanninen, President, J. Schwarcz, C. Iliopoulos, L. Calvo-Sotelo Ibáñez-Martín (Rapporteur) and I. Reine, Judges,

Registrar: M. Marescaux, Administrator,

* Language of the case: French.

1 The list of the other applicants is annexed only to the version sent to the parties.

having regard to the written part of the procedure and further to the hearing on 21 November 2017,

gives the following

Judgment

I. Background

1 The applicants, Mr Francisco Carreras Sequeros and the other persons whose names are annexed to this judgment, are officials or contract staff of the European Commission. They were all posted in third countries and were already posted in a third country before 1 January 2014.

2 Under the first paragraph of Article 57 of the Staff Regulations of Officials of the European Union ('the Staff Regulations'), applicable by analogy to contract staff under Articles 16 and 91 of the Conditions of Employment of Other Servants of the European Union ('the CEOS'), officials and other members of staff are 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 European Union after consulting the Staff Regulations Committee. Pursuant to that provision, the number of days of annual leave was set at 24 days of leave, to which supplementary days of leave allocated depending on age and grade are added, subject to the abovementioned limit of 30 days.

3 Annex X to the Staff Regulations nevertheless lays down special and exceptional provisions applicable to officials serving in third countries. Under Article 118 of the CEOS, some of those provisions apply by analogy to contract staff in the same situation. Such is the case with Article 6 of that annex.

4 Article 6 of Annex X to the Staff Regulations, as worded before Regulation (EU, Euratom) No 1023/2013 of the European Parliament and of the Council of 22 October 2013 amending the Staff Regulations and the CEOS (OJ 2013 L 287, p. 15) became effective, provided as follows, in respect of staff posted in third countries:

'An official shall, per calendar year, be entitled to annual leave of three and a half working days for each month of service.'

5 However, in recital 27 of Regulation No 1023/2013, the EU legislature stated:

'It is appropriate to modernise working conditions for staff employed in third countries and to render them more cost-effective whilst generating cost savings. Annual leave entitlements should be adjusted, and provision should be made for the possibility of including a wider range of parameters to fix the allowance for living conditions, without affecting the overall aim of generating cost savings. The conditions for granting the accommodation allowance should be revised to take better account of local conditions and to reduce the administrative burden.'

6 Since Article 1(70)(a) of Regulation No 1023/2013 came into effect on 1 January 2014, Article 6 of Annex X to the Staff Regulations ('the new Article 6 of Annex X to the Staff Regulations') provides as follows, further in respect of officials posted in third countries:

'An official shall, per calendar year, be entitled to annual leave of two working days for each month of service.

Notwithstanding the first paragraph of this Article, officials posted already in a third country on 1 January 2014 shall be entitled to:

– three working days from 1 January 2014 until 31 December 2014;

– two and a half working days from 1 January 2015 until 31 December 2015.'

7 The applicants' personal files were updated to take account of the second paragraph, first indent, of the new Article 6 of Annex X to the Staff Regulations and the applicants were thus allocated 36 working days of annual leave for 2014, compared with 42 the previous year.

8 The applicants submitted complaints between 17 February and 13 March 2014. Those complaints were rejected by the appointing authority or the authority empowered to conclude contracts of employment ('the competent authority'), as appropriate, by decisions of 23 May 2014, all of which were couched in the same terms.

II. Procedure and forms of order sought by the parties

9 By application lodged at the Registry of the Civil Service Tribunal of the European Union on 2 September 2014, the applicants brought the present action which was registered under number F-88/14.

10 By decision of 10 November 2014, the Civil Service Tribunal decided to stay proceedings in this case until Cases T-17/14, *U4U and Others* v *Parliament and Council*, and T-23/14, *Bos and Others* v *Parliament and Council*, had become *res judicata*.

11 By documents lodged at the Registry of the Civil Service Tribunal on 29 October 2014 and 5 February 2015, respectively, the Council of the European Union and the European Parliament sought leave to intervene in this case in support of the form of order sought by the Commission.

12 Pursuant to Article 3 of Regulation (EU, Euratom) 2016/1192 of the European Parliament and of the Council of 6 July 2016 on the transfer to the General Court of jurisdiction at first instance in disputes between the European Union and its servants (OJ 2016 L 200, p. 137), the present case was transferred to the General Court as it stood on 31 August 2016 and must henceforth be dealt with in accordance with the Rules of Procedure of the General Court. The case was accordingly registered under number T-518/16 and assigned to the Fourth Chamber.

13 The cases pending which the proceedings had been stayed gave rise to the judgment of 15 September 2016, *U4U and Others* v *Parliament and Council* (T-17/14, not published, EU:T:2016:489), and order of 11 November 2014, *Bos and Others* v *Parliament and Council* (T-23/14, not published, EU:T:2014:956). No appeal was lodged against that judgment or that order and they became *res judicata*.

14 The Council and the Parliament were granted leave to intervene in this case by decisions of the Court of 6 March 2017.

15 On a proposal from the Fourth Chamber, the Court decided, on 20 September 2017, pursuant to Article 28 of the Rules of Procedure, to refer the case to a chamber sitting in extended composition.

16 On a proposal from the Judge-Rapporteur, the Court (Fourth Chamber, Extended Composition) decided, on 18 October 2017, to open the oral part of the procedure and, by way of a measure of organisation of procedure provided for in Article 89 of the Rules of Procedure, to request the parties to answer certain written questions before the hearing. The parties complied with the Court's request within the prescribed period.

17 The parties presented oral argument and gave their replies to the questions put by the Court at the hearing on 21 November 2017.

18 The applicants claim that the Court should:

– declare the new Article 6 of Annex X to the Staff Regulations unlawful;

– annul the decisions reducing their annual leave 'as from 2014';

– order the Commission to pay the costs.

19 The Commission contends that the Court should:

– dismiss the action;

– order the applicants to pay the costs.

20 The Parliament contends that the Court should dismiss the action.

21 The Council contends that the Court should:

– declare the objection of illegality concerning the new Article 6 of Annex X to the Staff Regulations unfounded;

– dismiss the action.

III. Law

A. The first head of claim seeking that the Court declare unlawful the new Article 6 of Annex X to the Staff Regulations

22 In their first head of claim, the applicants request the Court to declare unlawful the new Article 6 of Annex X to the Staff Regulations.

23 The Commission and the Parliament argue that since a finding of unlawfulness, following consideration of an objection of illegality, can be only ancillary in nature and may not be included in the operative part of a judgment, the applicants' first head of claim is inadmissible as such.

24 It is true that it is not for the EU courts to make findings of principle in the operative part of its judgments (see, to that effect, judgment of 16 December 2004, *De Nicola* v *EIB*, T-120/01 and T-300/01, EU:T:2004:367, paragraphs 136 and 137). However, in the instant case, it is clear that the first head of claim must be understood as not being separate from the second head of claim, since, as the Commission and the Parliament themselves submit, in essence, the applicants are indirectly putting forward the unlawfulness of the new Article 6 of Annex X to the Staff Regulations in support of their claim for annulment of the decisions reducing their annual leave 'as from 2014'.

B. The second head of claim seeking annulment of the decisions reducing the length of the applicants' annual leave 'as from 2014'

1. The subject matter of the second head of claim

25 In their second head of claim, the applicants seek annulment of the decisions that reduced their annual leave entitlement 'as from 2014'.

26 In response to the measure of organisation of procedure mentioned in paragraph 16 above, the applicants nonetheless stated that the action, brought in 2014, was in fact to be construed as targeting the decisions reducing the number of days of annual leave in that year ('the contested decisions') and that it did not concern the lawfulness of the relevant decisions taken in 2015 and in 2016.

2. The effects of limiting the subject matter of the action on the objections of illegality raised by the applicants

27 Since the contested decisions determined the number of days of annual leave for 2014 alone, the issue arises of whether it is admissible for the applicants to put forward, as they did, pleas based on objections of illegality directed not only against the second paragraph, first indent, of the new Article 6 of Annex X to the Staff Regulations, concerning annual leave for 2014, but also more generally against the first subparagraph of that article determining the number of days of annual leave from 2016 onwards.

28 In response to the measure of organisation of procedure mentioned in paragraph 16 above, the applicants maintained that they had an interest in pleading the unlawfulness of the new Article 6 of Annex X to the Staff Regulations as a whole and that the transitional phase established by the second paragraph, first indent, thereof was not severable from the first subparagraph, under which officials and other members of staff serving in third countries were henceforth entitled to 24 leave days per year.

29 By contrast, the Commission and the Council argued that the objections of illegality could be directed only against the second paragraph, first indent, of the new Article 6 of Annex X to the Staff Regulations, because an objection of illegality did not constitute an autonomous right of action and therefore it could be only ancillary in scope, limited to the subject matter of the action.

30 It is settled case-law that an objection of illegality raised indirectly under Article 277 TFEU, when challenging in the main proceedings the legality of another act, is admissible only if there is a link between the contested act and the provision forming the subject matter of the objection. Since the purpose of Article 277 TFEU is not to enable a party to contest the applicability of any act of general application in support of any action whatsoever, the scope of an objection of illegality must be limited to what is necessary for the outcome of the proceedings (see judgment of 12 June 2015, *Health Food Manufacturers' Association and Others* v *Commission*, T-296/12, EU:T:2015:375, paragraph 170 and the case-law cited). It follows that the act of general application claimed to be illegal must be applicable, directly or indirectly, to the issue with which the action is concerned and there must be a direct legal connection between the contested individual decision and the act of general application in question (judgments of 15 March 2017, *Fernández González* v *Commission*, T-455/16 P, not published, EU:T:2017:169, paragraph 34, and of 22 November 2017, *von Blumenthal and Others* v *EIB*, T-558/16, not published, EU:T:2017:827, paragraph 71).

31 Nevertheless, Article 277 TFEU must be interpreted sufficiently broadly to enable effective judicial review of the legality of acts of the institutions of a general nature in favour of persons excluded from direct actions against such acts (judgments of 26 October 1993, *Reinarz* v *Commission*, T-6/92 and T-52/92, EU:T:1993:89, paragraph 56, and of 21 October 2010, *Agapiou Joséphidès* v *Commission and EACEA*, T-439/08, not published, EU:T:2010:442, paragraph 50). Thus, the scope of Article 277 TFEU

must extend to acts of the institutions which were relevant to the adoption of the decision forming the subject matter of the action for annulment (judgments of 4 March 1998, *De Abreu* v *Court of Justice*, T-146/96, EU:T:1998:50, paragraph 27, and of 2 October 2001, *Martinez and Others* v *Parliament*, T-222/99, T-327/99 and T-329/99, EU:T:2001:242, paragraph 135), in the sense that that decision must essentially be based on them (judgment of 12 June 2015, *Health Food Manufacturers' Association and Others* v *Commission*, T-296/12, EU:T:2015:375, paragraph 172), even though such acts did not formally constitute the legal basis of that decision (judgments of 2 October 2001, *Martinez and Others* v *Parliament*, T-222/99, T-327/99 and T-329/99, EU:T:2001:242, paragraph 135; of 20 November 2007, *Ianniello* v *Commission*, T-308/04, EU:T:2007:347, paragraph 33; and of 2 October 2014, *Spraylat* v *ECHA*, T-177/12, EU:T:2014:849, paragraph 25).

32 In the present case, the applicants had 42 days of annual leave in 2013 under Article 6 of Annex X to the Staff Regulations as worded prior to the entry into force of Article 1(70)(a) of Regulation No 1023/2013. In 2014, when the action was brought, that was altered to only 36 days of annual leave under the second paragraph, first indent, of the new Article 6 of Annex X to the Staff Regulations. In 2015, they were to have only 30 days of annual leave under the second paragraph, second indent, of that article. Finally, from 2016, the applicants were to be entitled, in principle, to only 24 days of leave per year, in accordance with the first paragraph of the new Article 6 of Annex X to the Staff Regulations.

33 The competent authority thus has no discretion for the purposes of determining the number of days of annual leave. Moreover, a contextual and systemic interpretation of the new Article 6 of Annex X to the Staff Regulations shows that the first indent of the second paragraph thereof, directly applicable to the contested decisions, was a transitional provision, while the first paragraph of that article forms the definitive new regime for the annual leave of officials and other members of staff posted in third countries.

34 Accordingly, the very nature of a transitional period is to organise the progressive shift from one regime to another (judgments of 6 July 2017, *Bodson and Others* v *EIB*, T-508/16, not published, EU:T:2017:469, paragraph 117, and of 12 February 2014, *Bodson and Others* v *EIB*, F-83/12, EU:F:2014:15, paragraph 139) in order to resolve difficulties inherent in putting the new regime in place or avoiding a sudden change in the old regime.

35 In view of the link between transitional provisions and definitive provisions, the former having no raison d'être without the latter, and in view of the fact that the competent authority has no discretion, it must be held here that there is a direct legal connection between the contested decisions and the first paragraph of the new Article 6 of Annex X to the Staff Regulations and that, since that first paragraph is the culmination of the second paragraph, first indent, of the new Article 6 of Annex X to the Staff Regulations, it is at least indirectly applicable to those decisions inasmuch as it was relevant for the purposes of their adoption in so far as they were essentially based on it, even though it was not their formal legal basis.

36 Thus, from the applicants' perspective, the contested decisions were the first application of the new Article 6 of Annex X to the Staff Regulations, with the result that, as of 2016, the applicants were to have only 24 days of leave.

37 The Commission nonetheless submitted at the hearing that, when the action was brought in 2014, the implementation from 2016 onwards of the first paragraph of the new Article 6 of Annex X to the Staff Regulations as regards the applicants was hypothetical.

38 It is true that the applicants' replies to the measure of organisation of procedure mentioned in paragraph 16 above show that two of the applicants are now serving in Brussels (Belgium). However, it cannot be inferred from this that the implementation of the first paragraph of Article 6 of Annex X to the Staff Regulations as regards the applicants from 2016 onwards was hypothetical in 2014. Besides

the fact that one of the interested parties has been based in Brussels only since 1 September 2017, that provision was intended to apply to the applicants, as officials or other members of staff serving in third countries within the Directorate-General for International Cooperation and Development.

39 Consequently, even if the contested decisions are formally based on the transitional provision which concerns exclusively 2014, contained in the second paragraph, first indent, of the new Article 6 of Annex X to the Staff Regulations, the applicants' challenge, by way of an objection, to the legality of the definitive annual leave regime determined under the first paragraph of that article is also admissible.

3. The pleas in law

(a) Preliminary remarks

40 In their application, the applicants asserted that the new Article 6 of Annex X to the Staff Regulations disregarded the specific nature and purpose of the right to annual leave, the general principle of equal treatment, the principle of legal certainty and Article 10 of the Staff Regulations.

41 However, in the light of the judgment of 15 September 2016, *U4U and Others* v *Parliament and Council* (T-17/14, not published, EU:T:2016:489), the applicants withdrew the plea alleging infringement of Article 10 of the Staff Regulations.

42 Furthermore, in reply to a question put by the Court, the applicants stated that the third plea alleging breach of the principle of legal certainty had to be construed as being based on an infringement of the principle of the protection of legitimate expectations.

43 Finally, the arguments in the application include considerations on the right to respect for private and family life, which should be regarded as a separate plea.

44 In short, the applicants raise four pleas alleging, respectively:

– disregard for the specific nature and purpose of the right to annual leave,

– breach of the general principle of equal treatment,

– breach of the principle of the protection of legitimate expectations,

– breach of the right to respect for private and family life.

(b) First plea in law: disregard for the nature and purpose of the right to annual leave

(1) Arguments of the parties

45 Relying on the case-law of the Court, particularly its judgment of 19 September 2013, Review *Commission* v *Strack* (C-579/12 RX-II, EU:C:2013:570), the applicants claim that the right to annual leave is a particularly important principle of European Union social law. That right is now laid down in Article 31(2) of the Charter of Fundamental Rights of the European Union ('the Charter') and is guaranteed, inter alia, by 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 (OJ 2003 L 299, p. 9). The applicants state that, according to the case law, the right to annual leave has the dual purpose of enabling workers both to rest from carrying out the work they are required to do and to enjoy a period of relaxation and leisure. The preferential annual leave rules applicable to officials and

other members of staff serving in third countries were precisely intended to offset the disadvantages associated with the living conditions in their place of posting, which continue to be regarded as special and even difficult.

46 Against that background, the applicants claim that it is apparent from the case-law and recital 4 of Directive 2003/88 that the improvement of workers' safety, hygiene and health through the right to annual leave is an objective which should not be subordinated to purely economic considerations. However, the reduction of the annual leave entitlement of officials and other members of staff serving in third countries was justified, in recital 27 of Regulation No 1023/2013, by such a reason, namely to improve the cost-effectiveness of staff and to generate cost savings. Moreover, the fact that that reduction was also justified by the interests of the service and, in particular, by the interests of small delegations, the functioning of which was allegedly impaired by numerous staff absences, is an unsubstantiated assertion which is not valid in all cases. In addition, the aim of modernising working conditions allegedly linked to changes in methods of transport and communication, to which the Commission and the Parliament refer, cannot justify the contested reduction either, since such reasoning would gradually erode the right to annual leave without regard for its purpose.

47 Furthermore, the applicants state that the fact that the number of days of annual leave provided for by the new Article 6 of Annex X to the Staff Regulations remains higher than that provided for in Article 7 of Directive 2003/88 does not mean that this new article ensures that the applicants' working conditions, health and safety are sufficiently protected. Indeed, Directive 2003/88 seeks only to ensure a minimum level of protection. Besides, Article 23 of that directive contains a non-reduction clause under which a decrease in the number of leave days cannot be justified by the mere fact that the resulting number remains higher than that provided for in Article 7.

48 In any event, the deterioration of the applicants' working conditions has a disproportionate effect on their working life and health.

49 Finally, the applicants argue that despite the broad discretion enjoyed by the legislature, it ought to have assessed the consequences of reducing the number of days of annual leave for the health and safety of officials and other members of staff serving in third countries, since practice gave rise to a presumption that work performed in third countries is more difficult than that performed at the seats of the institutions. Likewise, the legislature should have provided an adequate statement of reasons for the deterioration in the working conditions of the persons concerned. There was no such assessment or statement of reasons in this case.

50 The Commission, with whose arguments the Parliament and the Council concur, disputes the relevance of the judgment of 19 September 2013, Review *Commission* v *Strack* (C-579/12 RX-II, EU:C:2013:570), from the outset.

51 The Commission, the Parliament and the Council also submit that, in recital 14 of Directive 2003/88, the legislature envisaged that 'specific standards laid down in other Community instruments' may take precedence over the provisions of that directive. They claim that that is the case as regards the new Article 6 of Annex X to the Staff Regulations. Furthermore, the number of days of annual leave determined by that article is still higher than leave of 'at least four weeks', which Article 7 of Directive 2003/88 stipulates as the minimum period of leave. Thus, the new Article 6 of Annex X to the Staff Regulations does not adversely affect the substance of the right to annual leave.

52 In addition, the legislature did not solely pursue an economic objective when it adopted the new Article 6 of Annex X to the Staff Regulations. On the contrary, it is apparent from recital 27 of Regulation No 1023/2013 that it also pursued the objective of modernising the working conditions of staff employed in third countries, that is to say an administrative requirement seeking to adapt working conditions to changing economic and social circumstances. In that regard, the Council observes that annual leave of 42 working days was problematic for small delegations which, because of

such leave and absences for other reasons, did not always have enough staff to ensure their proper functioning. The Commission and the Parliament state that, between 2004 and 2014, the situation which had partly justified the earlier regime underwent change due to the significant growth of internet-based communications and low-cost flights.

53 Moreover, the applicants failed to demonstrate that the legislature infringed the right to annual leave, the purpose of which is to enable workers both to rest and to enjoy a period of relaxation and leisure. Previous 'practice' giving rise to an alleged presumption that work carried out in third countries is difficult could not, even if proven, bind the legislature in any way, because it enjoys a broad discretion to adapt the Staff Regulations to economic and social changes and to modify adversely and at any time the rights and obligations of officials.

54 In any event, the legislature took account of the specific constraints associated with the situation of staff working in third countries in, first, Article 7 of Annex X to the Staff Regulations, concerning the calculation of leave when a staff member takes up or ceases to perform his duties in a third country and the carrying over of annual leave not taken, and, secondly, the second paragraph of Article 7 of Annex V to the Staff Regulations on travelling time.

55 Finally, the Commission submits that the statement of reasons for acts of general application is sufficient where the legislature has explained, albeit briefly, the essence of the measures. Accordingly, it does not follow from any provision or principle that the legislature was required to take account of the effects of the reduction of annual leave on the health and safety of officials, or to assess the impact of that reduction on the general objective of improving working conditions, or to demonstrate the efficiency savings that such a reduction would bring.

(2) Findings of the Court

(i) Preliminary remarks

56 It is necessary, first of all, to consider the relevance to the present case of the judgment of 19 September 2013, Review *Commission* v *Strack* (C-579/12 RX-II, EU:C:2013:570), on which the applicants rely to a large extent.

57 As the Commission, the Parliament and the Council point out, the Court confined its ruling in that judgment to a provision that organised a mechanism for carrying over leave not taken from one year to the next, without amending existing law.

58 However, although the situation in the instant case is characterised by a legislative amendment reducing the length of annual leave, the clarification provided by that judgment concerning, in particular, the nature and purpose of such leave, the circumstances in which a directive may be relied on against an institution and the detailed rules for the application of the Charter to institutions, is relevant in this case.

59 That said, the applicants infer the very nature and purpose of the right to annual leave on which they rely from Directive 2003/88 and the case-law concerning it. It is therefore also appropriate to examine as a preliminary point the extent to which that directive may be invoked here.

(ii) Whether Directive 2003/88 may be relied on against the EU legislature

60 It should be borne in mind that, according to settled case-law, as directives are addressed to the Member States and not to the EU institutions, the provisions of Directive 2003/88 cannot be treated as imposing any obligations on the EU institutions in their relations with their staff (see, to that effect, judgment of 15 September 2016, *TAO-AFI and SFIE-PE* v *Parliament and Council*, T-456/14, EU:T:2016:493, paragraph 72 and the case-law cited).

61 However, as has already been held, the fact that a directive is not, as such, binding on the institutions does not preclude rules or principles laid down in that directive from being relied on against the institutions, where those rules or principles themselves appear to be merely the specific expression of fundamental Treaty rules and general principles directly applicable to the institutions. Likewise, a directive may be binding on an institution where the latter, within the scope of its organisational autonomy and within the limits of the Staff Regulations, has sought to carry out a specific obligation laid down by a directive or in the specific instance where an internal measure of general application itself expressly refers to measures laid down by the EU legislature pursuant to the Treaties. Lastly, the institutions must, in their conduct as employer and in accordance with their duty to cooperate in good faith, take account of legislative provisions adopted at EU level (judgment of 15 September 2016, *TAO-AFI and SFIE-PE* v *Parliament and Council*, T-456/14, EU:T:2016:493, paragraphs 73 and 74 and the case-law cited).

62 In the present case, the applicants contend in their pleadings that Article 1e(2) of the Staff Regulations is an internal measure of general application referring to Directive 2003/88.

63 It is true that the Court held in its judgment of 19 September 2013, Review *Commission* v *Strack* (C-579/12 RX-II, EU:C:2013:570, paragraph 43), that Article 1e(2) of the Staff Regulations contemplates rules such as those contained in Directive 2003/88, since both article and directive intend to lay down minimum health and safety requirements for the organisation of working time which include minimum periods of annual leave.

64 However, in its judgment of 19 September 2013, Review *Commission* v *Strack* (C-579/12 RX-II, EU:C:2013:570, paragraph 48 *et seq.*), the Court's only recourse to Directive 2003/88 was in order to interpret Article 4 of Annex V to the Staff Regulations in conjunction with Article 1e(2) thereof. On the other hand, since the annexes to the Staff Regulations have the same legal force as the Staff Regulations themselves (see, to that effect, judgment of 24 November 2010, *Commission* v *Council*, C-40/10, EU:C:2010:713, paragraph 61, and order of 13 December 2012, *Mische* v *Commission*, T-641/11 P, EU:T:2012:695, paragraph 41) and in the absence of any order of precedence between Directive 2003/88 and Regulation No 1023/2013 amending the Staff Regulations, as that regulation does not take the form of a delegated act or act giving effect to that directive (see, to that effect, judgment of 13 November 2014, *Spain* v *Commission*, T-481/11, EU:T:2014:945, paragraph 74 and the case-law cited), Article 1e(2) of the Staff Regulations and Directive 2003/88 cannot be relied on in support of an objection of illegality to declare the new Article 6 of Annex X to the Staff Regulations inapplicable.

65 The fact remains that, in their pleadings, the applicants also refer to Article 31(2) of the Charter and they expressly stated in reply to a question put by the Court at the hearing that Directive 2003/88 can be relied on against the EU legislature in so far as it gives expression to a fundamental right.

66 It should be recalled that it follows from Article 51(1) of the Charter that its provisions are addressed, in particular, to the EU institutions, which are therefore required to observe and promote the application of the principles embodied in it, including the right to annual leave guaranteed by Article 31(2) of the Charter.

67 It should also be borne in mind that the explanations of the Praesidium of the Convention relating to the Charter (OJ 2007 C 303, p. 17) must be taken into account in the interpretation of the Charter, in accordance with the third subparagraph of Article 6(1) TEU and Article 52(7) of the Charter (see, to that effect, judgment of 19 September 2013, *Review Commission v Strack*, C-579/12 RX-II, EU:C:2013:570, paragraph 27).

68 It is apparent from the explanations mentioned in paragraph 67 above that Article 31(2) of the Charter enshrines inter alia the substance of Council Directive 93/104/EC of 23 November 1993 concerning certain aspects of the organisation of working time (OJ 1993 L 307, p. 18), which was subsequently replaced and codified by Directive 2003/88 (judgment of 19 September 2013, *Review Commission v Strack*, C-579/12 RX-II, EU:C:2013:570, paragraph 39). In particular, Article 7 of Directive 2003/88 on annual leave is identical to Article 7 of Directive 93/104. Paragraph 1 thereof provides that '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'.

69 In so far as Directive 2003/88 is a concrete expression of the principle laid down in Article 31(2) of the Charter, as is apparent from the explanations of the Praesidium relating to the Charter (see paragraph 67 above), the legislature, bound as it is to comply with that article which has the same force as the Treaties, could not disregard the content of that directive.

70 Accordingly, the new Article 6 of Annex X to the Staff Regulations should be disapplied if it is shown to be incompatible with the right to annual leave, the nature and purpose of which follow from Article 31(2) of the Charter read in the light of Directive 2003/88.

71 The Court is therefore required to determine whether the first paragraph and the second paragraph, first indent, of the new Article 6 of Annex X to the Staff Regulations adversely affected the right to annual leave and, specifically, the nature and purpose of that right.

– *Whether the right to annual leave was adversely affected*

72 It should be noted at the outset that since Article 31(2) of the Charter and the explanations relating to it (see paragraph 67 above) require reference to be made to Directive 2003/88, it is not possible to disregard the content of that directive's provisions.

73 In that context, it must be pointed out that Article 14 of Directive 2003/88 provides that the directive 'shall not apply where other [Union] instruments contain more specific requirements relating to the organisation of working time for certain occupations or occupational activities'. As is apparent from recital 14 of Directive 2003/88, that provision particularly covers specific requirements relating to annual leave applicable to 'certain categories of workers'.

74 The Commission therefore suggests that the new Article 6 of Annex X to the Staff Regulations should be treated as a requirement that takes precedence over the provisions of Directive 2003/88 as regards the length of annual leave.

75 It follows, however, from Article 1(3) of Directive 2003/88 that the minimum health and safety requirements for the organisation of working time set out in that directive apply as a matter of principle to all sectors of activity, both public and private. Against that background and also in the light of recital 14 of the directive, Article 14 thereof must be interpreted as referring to provisions specific to certain categories of workers due to the particularities of their occupations or occupational activities.

76 The legislature has thus adopted provisions specific to road transport, air transport and inland waterway transport, respectively, in Directive 2002/15/EC of the European Parliament and of the Council of 11 March 2002 on the organisation of the working time of persons performing mobile road transport activities (OJ 2002 L 80, p. 35), Council Directive 2000/79/EC of 27 November 2000 concerning the European Agreement on the Organisation of Working Time of Mobile Workers in Civil Aviation concluded by the Association of European Airlines (AEA), the European Transport Workers' Federation (ETF), the European Cockpit Association (ECA), the European Regions Airline Association (ERA) and the International Air Carrier Association (IACA) (OJ 2000 L 302, p. 57), and Council Directive 2014/112/EU of 19 December 2014 implementing the European Agreement concerning certain aspects of the organisation of working time in inland waterway transport, concluded by the European Barge Union (EBU), the European Skippers Organisation (ESO) and the European Transport Workers' Federation (ETF) (OJ 2014 L 367, p. 86).

77 In the present case, it is worth noting that the new Article 6 of Annex X to the Staff Regulations is not expressed as a specific requirement relating to the organisation of working time as provided for in Article 14 of Directive 2003/88. Furthermore, the Commission adduces no evidence capable of proving that officials and other members of staff serving in third countries carry on an occupational activity requiring specific provisions such as those set out in the preceding paragraph. The fact that Article 336 TFEU gave Parliament and the Council the power to adopt the Staff Regulations and the CEOS under the ordinary legislative procedure is not sufficient to prove that specificity.

78 The Commission argues that Article 7(1) of Directive 2003/88 merely lays down an obligation to take the measures necessary to ensure that every worker is entitled to paid annual leave of at least four weeks, that is to say 20 working days, so that, by setting the number of days of annual leave at 24 days as from 2016, the new Article 6 of Annex X to the Staff Regulations observes that threshold.

79 The applicants dispute that the new Article 6 of Annex X to the Staff Regulations is consistent with the nature and purpose of annual leave inasmuch as the number of days of annual leave remains above the minimum required by Article 7 of Directive 2003/88. They thus observe that Article 23 of Directive 2003/88 contains a non-reduction clause and also state that the fundamental objective of that directive is to improve the living conditions of workers.

80 Article 23 of Directive 2003/88 provides that 'as long as the minimum requirements provided for in this Directive are complied with, implementation of this Directive shall not constitute valid grounds for reducing the general level of protection afforded to workers'. It follows that a reduction in the protection which workers are guaranteed in the sphere of the organisation of working time is not prohibited as such by Directive 2003/88 but, in order for that reduction to be caught by the prohibition laid down by Article 23 of the directive, it must, first, be connected to the 'implementation' of the directive and, second, relate to the 'general level of protection' afforded to the workers concerned (see, by analogy, judgment of 23 April 2009, *Angelidaki and Others*, C-378/07 to C-380/07, EU:C:2009:250, paragraph 126).

81 Specifically, the condition relating to the 'implementation' of Directive 2003/88 covers all national implementing measures designed to ensure the attainment of the objective pursued by the directive. On the other hand, legislation cannot be regarded as conflicting with Article 23 of Directive 2003/88 if the reduction it entails is in no way connected to the implementation of the directive, that is to say, in other words, if the reduction were justified not by the need to implement the directive but by the need to encourage another objective (see, by analogy, judgment of 23 April 2009, *Angelidaki and Others*, C-378/07 to C-380/07, EU:C:2009:250, paragraphs 131 and 133).

82 It is apparent from recital 27 of Regulation No 1023/2013 that the objective pursued by Article 1(70)(a) thereof was to generate savings and to modernise the working conditions of staff employed in third countries, and not to attain the objective pursued by Directive 2003/88.

83 Consequently, the applicants cannot rely on Article 23 of Directive 2003/88 to challenge the validity of the new Article 6 of Annex X to the Staff Regulations.

84 The fact remains that, as the applicants maintain, the entitlement of every worker, including officials and other members of staff, to annual leave must be regarded as a particularly important principle of European Union social law (judgment of 19 September 2013, Review *Commission* v *Strack*, C-579/12 RX-II, EU:C:2013:570, paragraph 26). Its purpose is to enable workers to rest and to enjoy a period of relaxation and leisure (judgment of 20 January 2009, *Schultz-Hoff and Others*, C-350/06 and C-520/06, EU:C:2009:18, paragraph 25) and thus to protect their safety and health (see, to that effect, judgment of 14 October 2010, *Union syndicale Solidaires Isère*, C-428/09, EU:C:2010:612, paragraph 37, and order of 4 March 2011, *Grigore*, C-258/10, not published, EU:C:2011:122, paragraph 40).

85 The purpose of annual leave thus falls within the objective set for the European Union by Article 151 TFEU to improve the living and working conditions of workers and, in accordance with Article 153 TFEU, to support and complement the activities of the Member States in the field of improving the working environment to protect workers' health and safety.

86 Furthermore, under Article 51(1) of the Charter, the European Union must observe the principles laid down in the Charter, one of which is the right to annual leave, and promote their application.

87 It also emerges from the explanations of the Praesidium of the Convention relating to Article 31(2) of the Charter (see paragraph 67 above) that that article is based on Directive 93/104, replaced by Directive 2003/88, and on point 8 of the Community Charter of the Fundamental Social Rights of Workers, adopted at the meeting of the European Council held at Strasbourg (France) on 9 December 1989. As appears from recital 4 of Directive 2003/88, the measures concerning the organisation of working time, in particular those concerning paid annual leave as provided for in Article 7 thereof, fundamentally aim to contribute directly to the improvement of health and safety protection for workers (see, to that effect, judgment of 19 September 2013, Review *Commission* v *Strack*, C-579/12 RX-II, EU:C:2013:570, paragraph 44). Point 8 of the Community Charter of the Fundamental Social Rights of Workers provides that 'every worker of the European Community shall have a right to a weekly rest period and to annual paid leave, the duration of which must be progressively harmonised in accordance with national practices'.

88 It follows from all of the foregoing that, by its nature, the entitlement to annual leave referred to in Article 31(2) of the Charter is intended, in principle, to promote the improvement of the living and working conditions of workers.

89 In addition, the fact that the number of days of annual leave determined by the new Article 6 of Annex X to the Staff Regulations remains higher than the minimum required by Article 7 of Directive 2003/88 is not sufficient, as the Commission claims, to conclude that this new article does not infringe the right to annual leave.

90 By contrast, although a reduction in the number of days of annual leave is not in itself sufficient to conclude that the right to annual leave guaranteed by Article 31(2) of the Charter has been adversely affected, that is not the case as regards the new Article 6 of Annex X to the Staff Regulations, which significantly reduces the length of leave of officials and other members of staff serving in third countries, decreasing it from 42 to 24 days in the space of 3 years. That reduction cannot be regarded as consistent with the principle of promoting the improvement of the living and working conditions of the persons concerned.

91 The above finding is not invalidated by the arguments of the Commission, the Parliament and the Council, inasmuch as the scale of that reduction is not mitigated by the other provisions of the Staff Regulations and the annexes thereto which form the backdrop for the new Article 6 of Annex X to the Staff Regulations.

92 Thus, Article 1(71)(b) of Regulation No 1023/2013 amended the first paragraph of Article 7 of Annex X to the Staff Regulations and aligned the regime for officials and members of staff serving in third countries with the regime for other officials and members of staff by reducing the number of leave days to which they were entitled when taking up or ceasing to perform their duties in the course of a year.

93 Furthermore, the first paragraph of Article 8 of Annex X to the Staff Regulations and Article 9(2) of that annex provide that 'by way of exception, the appointing authority may, by special reasoned decision, grant an official rest leave' of a maximum of 15 working days 'on account of particularly difficult living conditions at his place of employment'. However, when it comes to determining whether the legislature duly took account of the purpose and scope of annual leave, it must be pointed out that those provisions existed before the entry into force of the new Article 6 of Annex X to the Staff Regulations. Because they predate that article, they cannot therefore mitigate the extent of the reduction in leave implemented by the legislature. That is particularly so since Article 1(70)(c) of Regulation No 1023/2013 supplemented Article 8 of Annex X to the Staff Regulations so as to clarify that officials who take part in professional training courses and who have been granted rest leave should undertake to combine the two, even though such leave must enable the person concerned to rest, as its name suggests.

94 Moreover, the possibility for an official or other member of staff posted to a delegation to be provided with official accommodation under Article 5 of Annex X to the Staff Regulations and the provisions of that annex enabling the family of the person concerned to accompany him in the third country are irrelevant as regards the entitlement to annual leave.

95 Similarly, the allowance for living conditions, provided for in Article 10 of Annex X to the Staff Regulations, and the other provisions of that annex relating to the reimbursement of accommodation, travel and transport expenses or concerning the social security benefits of the interested parties, not only existed before the entry into force of Regulation No 1023/2013, but cannot make up for the reduction in the number of days of annual leave. A worker must normally be entitled to actual rest, with a view to ensuring effective protection of his health and safety, so that an allowance may not be paid in lieu of annual leave except where the employment relationship is terminated, as is clear from Article 7(2) of Directive 2003/88 (see, to that effect, judgment of 10 September 2009, *Vicente Pereda*, C-277/08, EU:C:2009:542, paragraph 20).

96 Lastly, it transpires from the second paragraph of Article 7 of Annex X to the Staff Regulations that an official working in a third country who has not used up his annual leave may carry over 14 working days to the following year, compared with 12 days under the first paragraph of Article 4 of Annex V to those regulations for officials working within the European Union. Furthermore, it follows from the second paragraph of Article 7 of Annex V to the Staff Regulations that travelling time, normally set at two and a half days of leave, may be extended for staff posted in a third country where justified by need. However, those measures in favour of officials and members of staff serving in third countries are inconsequential compared with the reduction in the number of days of annual leave resulting from the new Article 6 of Annex X to the Staff Regulations.

97 As the applicants submit, it must therefore be considered that the significant reduction in the number of days of annual leave implemented by the new Article 6 of Annex X to the Staff Regulations affects their entitlement to annual leave. In those circumstances, the Court must examine whether there is appropriate justification for such an adverse effect.

– Justification for adversely affecting the right to annual leave

98 It should be recalled that, under Article 52(1) of the Charter, restrictions may be imposed on fundamental rights that are not unfettered prerogatives, such as the right to property and the freedom to pursue an economic activity, provided that those restrictions in fact correspond to objectives of

public interest and do not constitute, in relation to the aim pursued, a disproportionate and intolerable interference, impairing the very substance of the rights guaranteed (judgments of 28 November 2013, *Council* v *Manufacturing Support & Procurement Kala Naft*, C-348/12 P, EU:C:2013:776, paragraph 122, and of 26 September 2014, *Arctic Paper Mochenwangen* v *Commission*, T-634/13, not published, EU:T:2014:828, paragraph 55).

99 By analogy, it must be considered that restrictions such as those in the instant case may be imposed under the same conditions on principles, such as the right to annual leave, which have previously been implemented in accordance with Article 52(5) of the Charter.

100 It is true, nevertheless, that the legislature enjoys a broad discretion to adapt the Staff Regulations and to modify at any time, even adversely, the rights and obligations of officials. However, it does not follow that the legislature is relieved of the obligation to take a decision in full knowledge of the facts and following a detailed examination, carried out carefully and impartially, of all the relevant considerations (see, to that effect, judgment of 14 November 2013, *Europol* v *Kalmár*, T-455/11 P, EU:T:2013:595, paragraph 72). Consequently, it is for the Court, in particular, to satisfy itself that the legislature verified that the conditions set out in paragraph 98 above were satisfied (see, to that effect, judgment of 9 November 2010, *Volker und Markus Schecke and Eifert*, C-92/09 and C-93/09, EU:C:2010:662, paragraphs 79 to 83).

101 In the first place, as for whether the new Article 6 of Annex X to the Staff Regulations is justified by a public interest objective, it is necessary to refer to recital 27 of Regulation No 1023/2013, according to which 'it [wa]s appropriate to modernise working conditions for staff employed in third countries and to render them more cost-effective whilst generating cost savings'.

102 However, it is clear from recital 4 of Directive 2003/88 that 'the improvement of workers' safety, hygiene and health at work is an objective which should not be subordinated to purely economic considerations'. Also, the Court held, in paragraph 55 of its judgment of 19 September 2013, Review *Commission* v *Strack* (C-579/12 RX-II, EU:C:2013:570), that considerations based on the need to protect the financial interests of the Union cannot be relied on to justify an adverse effect on the right to paid annual leave. It follows that such objectives may not justify an adverse effect on the entitlement to annual leave guaranteed by Article 31(2) of the Charter. Consequently, in the present case, the objective of enhancing the cost-effectiveness of officials and other members of staff serving in third countries, while generating cost savings, cannot constitute a legitimate objective justifying the reduction of the applicants' annual leave.

103 However, according to the wording of recital 27 of Regulation No 1023/2013, the objective pursued was also 'to modernise working conditions for staff employed in third countries'.

104 Nonetheless, the Commission, the Parliament and the Council appear to interpret that objective in different ways.

105 On the one hand, the Commission and the Parliament explain that, between 2004 and 2014, the situation which had partly justified the earlier regime underwent change due to the significant growth of internet-based communications and low-cost flights. On the other, the Council states that annual leave of 42 working days was problematic for small delegations as they did not always have enough staff to ensure they functioned properly on account of such leave and absences for other reasons.

106 What is more, the Commission and the Parliament are unable to explain how, having regard to the purpose of annual leave, the expansion of low-cost travel and the possibility of using internet-based communications more than before justified a reduction in that leave. In particular, the growth of low-cost flights provides, at most, a reason for reducing travelling times as referred to in Article 7 of Annex V to the Staff Regulations, although those times are, on the other hand, likely to be longer for staff in third countries, as the Commission itself acknowledges.

107 As for the justification provided by the Council, the applicants rightly point out that it is not valid for all delegations. The Council adduced no evidence to suggest that the situation of small delegations was so critical that the legislature was entitled to take the view that a general reduction in the number of days of annual leave was the only obvious solution. Moreover, the legislature does not seem to have verified the relevance of that justification in the light of the possibility afforded by Article 9(1) of Annex X to the Staff Regulations whereby leave may be refused for reasons relating to the requirements of the service, even though, by adopting Article 1(70)(d) of Regulation No 1023/2013, it reduced the period of leave to be taken at least once a year from 14 working days to 2 weeks.

108 In the second place, as regards the question whether the new Article 6 of Annex X to the Staff Regulations is proportionate to the aim pursued, there is nothing to indicate that, prior to its adoption, the legislature considered the consequences of reducing the number of days of annual leave for the health and safety of officials and other members of staff serving in third countries or looked at other reduction methods, even though paid annual leave contributes directly to the improvement of health and safety protection for workers (see, to that effect, judgment of 19 September 2013, Review *Commission* v *Strack*, C-579/12 RX-II, EU:C:2013:570, paragraph 44).

109 Furthermore, by formally limiting, in the first paragraph of the new Article 6 of Annex X to the Staff Regulations, the annual leave of officials and other members of staff serving in third countries to 24 working days as from 2016, the legislature does not appear to have actually taken account of the fact that, under Article 57 of the Staff Regulations, officials and other members of staff posted within the European Union are eligible for leave of up to 30 working days depending on their age and grade.

110 Similarly, it does not appear that the legislature examined whether the wording of the first paragraph of Article 8 of Annex X to the Staff Regulations, concerning rest leave, actually ensured that the health and safety of all officials and other members of staff serving in third countries and placed in a particularly difficult situation was sufficiently protected, even though, under that provision, rest leave may only be granted exceptionally and requires a special reasoned decision.

111 Finally, the Commission is wrong to argue that the legislature took into consideration the constraints associated with the situation of staff serving in third countries specifically as regards their entitlement to annual leave by referring to the first paragraph of Article 7 of Annex X to the Staff Regulations, when, as has already been explained (see paragraph 92 above), that provision, as amended by Article 1(71)(b) of Regulation No 1023/2013, actually aligns the regime applying to the interested parties with that applying to other officials and members of staff by reducing the number of leave days to which they were entitled when taking up or ceasing to perform their duties in the course of a year.

112 On the basis of the foregoing, it does not appear that the European Union legislature satisfied itself, when adopting the new Article 6 of Annex X to the Staff Regulations, that that article was actually justified by a public interest objective and that it did not constitute, having regard to the aim pursued, a disproportionate interference with the right to annual leave enjoyed by officials and other members of staff serving in third countries. Consequently, the Commission was not entitled to rely on the new Article 6 of Annex X to the Staff Regulations in order to adopt the contested decisions.

113 It follows that the first plea is well founded and that the contested decisions must be annulled, without there being any need to examine the other pleas put forward by the applicants.

IV. Costs

114 Under Article 134(1) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings.

115 Under Article 138(1) of the Rules of Procedure, the Member States and institutions which have intervened in the proceedings are to bear their own costs.

116 Since the Commission has been unsuccessful, it must be ordered to bear its own costs and to pay the costs incurred by the applicants, in accordance with the form of order sought by the applicants. In addition, as intervening institutions, the Parliament and the Council must bear their own costs.

On those grounds,

THE GENERAL COURT (Fourth Chamber, Extended Composition)

hereby:

1. Annuls the decisions reducing the number of days of annual leave for 2014 of Mr Francisco Carreras Sequeros and the other officials or members of staff of the European Commission whose names are annexed to the judgment;

2. Orders the Commission to bear its own costs and to pay those incurred by Francisco Carreras Sequeros and the other officials or members of staff of the Commission whose names are annexed to the judgment;

3. Orders the European Parliament and the Council of the European Union to bear their own costs.

Kanninen Schwarcz Iliopoulos

Calvo-Sotelo Ibáñez-Martín Reine

Delivered in open court in Luxembourg on 4 December 2018.

E. Coulon President
Registrar