Reports of Cases

OPINION OF ADVOCATE GENERAL
RICHARD DE LA TOUR
delivered on 17 March 2022[1]

Joined Cases C-518/20 and C-727/20

XP
v
Fraport AG Frankfurt Airport Services Worldwide (C-518/20)
and
AR
v
St. Vincenz-Krankenhaus GmbH (C-727/20)

(Request for a preliminary ruling from the Bundesarbeitsgericht (Federal Labour Court, Germany))

(Reference for a preliminary ruling – Social policy – Protection of the health and safety of workers – Directive 2003/88 – Article 7 – Right to paid annual leave – Total invalidity or incapacity for work due to illness occurring during a leave year and which persists after that period – Lapse or retention of right to paid annual leave at the end of a leave year and/or carry-over period – Failure of the employer to fulfil its obligations to enable the worker to exercise his or her right to paid annual leave – Consequences)

I. Introduction

1. By the present requests for a preliminary ruling, the Bundesarbeitsgericht (Federal Labour Court, Germany) asks the Court to interpret 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[2] and Article 31(2) of the Charter of Fundamental Rights of the European Union.[3]

2. The requests have been made in the context of two sets of proceedings between, first, XP and Fraport AG Frankfurt Airport Services Worldwide ('Fraport') and, second, AR and St. Vincenz-Krankenhaus GmbH ('St. Vincenz-Krankenhaus'). The proceedings concern the entitlement of XP and AR to paid annual leave for the leave year during which they were in a state of total invalidity or incapacity for work due to illness.

1 Original language: French.
2 OJ 2003 L 299, p. 9.
3 'the Charter'.

3. In essence, the Court is asked to decide whether EU law precludes national legislation from which it follows that entitlement to paid annual leave acquired by a worker during the leave year in the course of which total invalidity or incapacity for work due to illness occurred and which has persisted since, may lapse at the end of the carry-over period authorised under national law, even though the employer had not enabled the worker to exercise his or her leave entitlement during the period actually worked before the total invalidity or incapacity for work occurred.

4. The Court will thus have to reconcile, in a situation where a worker is unfit for work for a number of consecutive leave years, but where he partly worked during the period in the course of which the incapacity for work occurred, and wishes to retain leave entitlements acquired for that period, the lessons which can be drawn, on the one hand, from the judgments of 20 January 2009, *Schultz-Hoff and Others*, [4] and of 22 November 2011, *KHS*; [5] and, on the other, from the judgment of 6 November 2018, *Max-Planck-Gesellschaft zur Förderung der Wissenschaften*. [6]

5. If it is apparent from a combined reading of the first two judgments that national legislation may provide for a temporal limitation on the right to paid annual leave acquired by a worker in the course of consecutive leave years during which the worker was unfit for work due to illness, can such a temporal limitation apply as a matter of course to the entitlement to paid annual leave acquired by that worker in the course of the leave year during which he worked before the incapacity for work occurred? Is it to be considered that, if his or her employer has not fulfilled its obligations to inform the worker of the leave and to invite him or her to take it before the worker's incapacity for work occurred, as highlighted by the Court, in particular, in the judgment in *Max-Planck-Gesellschaft zur Förderung der Wissenschaften*, the worker does not lose the entitlement to paid annual leave acquired for leave year in question? These are, in essence, the questions at the heart of the present cases.

6. In the discussion that follows, I will set out the reasons why I consider that Article 7 of Directive 2003/88 and Article 31(2) of the Charter ought to be interpreted as precluding national legislation under which entitlement to paid annual leave acquired by a worker during the leave year in the course of which total invalidity or incapacity for work due to illness occurred and which has persisted since, may lapse, either at the end of a carry-over period authorised under national law, or even at a later stage, where the employer had not enabled the worker to exercise his or her leave entitlement in good time before the total invalidity or incapacity for work occurred.

II. Legal framework

A. European Union law

7. Article 7 of Directive 2003/88, which is entitled 'Annual leave', provides:

'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.

[4] C-350/06 and C-520/06, 'the judgment in *Schultz-Hoff and Others*', EU:C:2009:18.

[5] C-214/10, 'the judgment in *KHS*', EU:C:2011:761.

[6] C-684/16, 'the judgment in *Max-Planck-Gesellschaft zur Förderung der Wissenschaften*', EU:C:2018:874.

2. The minimum period of paid annual leave may not be replaced by an allowance in lieu, except where the employment relationship is terminated.'

B. German law

8. Paragraph 7 of the Bundesurlaubsgesetz (Federal Law on leave),[7] of 8 January 1963, in the version of 7 May 2002 applicable to the employment relationship between the parties,[8] is entitled 'Timing, carrying-over and allowances in lieu of leave'. That paragraph provides:

'(1) In determining the dates on which leave may be taken, consideration shall be given to a worker's wishes, save where consideration thereof is precluded by imperative operational interests or the wishes of other workers who deserve to be given priority for social reasons. Leave shall be granted when requested in connection with preventive or post-care medical treatment.

(2) Leave shall be granted for consecutive days, save where compelling operational grounds or reasons personal to the employee necessitate apportionment of the leave. Where the leave cannot be granted for consecutive days and the employee is entitled to leave of more than 12 working days, one portion of the leave shall comprise at least 12 consecutive working days.

(3) Leave must be granted and taken in the course of the current calendar year. The carrying-over of leave to the next calendar year shall be permitted only if justified on compelling operational grounds or for reasons personal to the employee. If leave is carried over it must be granted and taken during the first three months of the following calendar year. At the worker's request, however, part of the leave acquired in accordance with Paragraph 5(1)(a) shall be carried over to the following calendar year.

(4) If, because of the termination of the employment relationship, leave can no longer be granted in whole or in part, an allowance shall be paid in lieu.'

III. The facts in the disputes in the main proceedings and the questions referred

A. Case C-518/20

9. XP, recognised as a severely disabled person, has been employed by Fraport since 2000 as a driver for the transport of goods. Since 1 December 2014, he has been in receipt of a pension on the ground of full reduction of earning capacity ('Rente wegen voller Erwerbsminderung'), which was most recently extended until 31 August 2022. It is apparent from the information before the Court that it is not a permanent full reduction of earning capacity – the invalidity being reassessed by the pension authority every three years – and that the employment relationship between the two parties, although suspended, has not been terminated.

10. XP asserts that Fraport continues to owe him 34 working days of leave from 2014. That entitlement has not lapsed, he submits, because Fraport has not fulfilled its obligations to cooperate in the granting and taking of leave. By contrast, Fraport takes the view that the leave which the applicant did not take in 2014 lapsed at midnight on 31 March 2016, at the end of the

7 BGBl, 1963, p. 2.

8 BGBl, 2002 I, p. 1592; 'the BUrlG'.

carry-over period. Fraport submits that, a worker who has been unable to take his or her leave for a long period of time on health grounds, as is the case for XP on account of his total invalidity, loses his or her leave entitlement 15 months after the end of the leave year, irrespective of whether the employer has fulfilled its obligations to enable that worker to take such leave.

11. The referring court notes that the dispute in the main proceedings concerns XP's 2010, 2011 and 2014 leave entitlements, but that only the 2014 leave entitlement is relevant for the purposes of the present proceedings. [9]

12. Following the rejection of his action by the courts of first and second instance, XP maintains the form of order sought in the appeal on a point of law (*Revision*).

B. Case C-727/20

13. AR, who is employed by St. Vincenz-Krankenhaus, has been permanently unfit for work since her illness during the course of 2017. [10] It is apparent from the information before the Court that AR is not in a state of total invalidity and that she lodged a complaint against a decision to reject her application for an invalidity pension.

14. AR did not take her full entitlement to statutory leave for 2017. St. Vincenz-Krankenhaus did not invite her to take her leave, nor did it inform her that leave not requested may lapse once the calendar year or period for carrying over leave expires. AR requests that the Court find that she continues to be entitled to the remaining 14 days of annual leave from 2017. She takes the view that the leave has not lapsed because her employer failed to inform her in good time of the risk that the leave would lapse. St. Vincenz-Krankenhaus argues that the 2017 leave entitlement expired at the end of 31 March 2019 at the latest.

15. The dispute between the parties therefore relates only to AR's 2017 leave entitlement.

16. Following the dismissal of her action by the lower courts, AR maintains the form of order sought in the appeal on a point of law (*Revision*).

C. The questions referred

17. The referring court states that, in accordance with the Court's case-law, it has interpreted Paragraph 7 of the BUrlG in a manner consistent with Directive 2003/88 in two respects.

18. In the first place, it applied the case-law resulting from the judgment in *Max-Planck-Gesellschaft zur Förderung der Wissenschaften* by ruling that the entitlement to the statutory minimum leave lapses, in principle, at the end of the calendar year (first sentence of Paragraph 7(3) of the BUrlG) or of a permitted carry-over period (second and fourth sentences of Paragraph 7(3) of the BUrlG) only if the employer has previously enabled the worker to exercise his or her leave entitlement and the worker has nevertheless not opted voluntarily to take that leave. According to an interpretation which is in line with the first sentence of Paragraph 7(1) of the BUrlG, it is for the employer to take the initiative for the purpose of ensuring practical effect is

[9] With regard to the 2010 and 2011 leave entitlement, the referring court states that the appeal on a point of law must be dismissed, if only because, given the failure to state reasons in accordance with legal requirements, the applicant's appeal was inadmissible on that ground and that, therefore, questions relating to EU law are not relevant to the outcome of the dispute in that regard.

[10] In its written submissions, St. Vincenz-Krankenhaus notes that AR has been permanently unfit for work since September 2017.

given to that entitlement. The temporal limitation of that entitlement laid down in Paragraph 7(3) of the BUrlG presupposes, in principle, that the employer ensures, specifically and transparently, that that worker is actually given an opportunity to take the paid annual leave to which he or she is entitled.

19. If the employer has not fulfilled its obligations to assist, the leave not expired on 31 December of the leave year is added to the leave entitlement which arises on 1 January of the following year. Like the new entitlement to leave, it is subject to the provisions of the first sentence of Paragraph 7(1) and (3) of the BUrlG. The employer can therefore avoid the unlimited accumulation of leave entitlements over several years by fulfilling a posteriori, in the course of the current leave year, its obligations to assist with regard to entitlement for previous leave years. If, in such a case, the worker does not claim his or her accumulated leave entitlement during the current leave year, when he or she has the possibility to do so, he or she loses the entitlement to that leave at the end of the calendar year or a carry-over period. The decisions of the Bundesarbeitsgericht (Federal Labour Court) concerned situations in which the workers were not in a state of total invalidity or suffering long-term illness.

20. In the second place, the referring court held, in accordance with the case-law resulting from the judgments in *Schultz-Hoff and Others* and *KHS*, that statutory leave is not lost by reason of Paragraph 7(3) of the BUrlG if the worker is unfit for work due to illness until the end of the leave year or carry-over period and is therefore unable to take the leave. In such a case, the retained leave entitlement is added to the leave entitlement arising in the following year and is thus subject to a new temporal limit pursuant to Paragraph 7(3) of the BUrlG. However, it expires 15 months after the end of the leave year in the event of continuing incapacity for work. The referring court also applied that case-law to cases where the worker received an invalidity pension.

21. The referring court has not yet ruled, following the judgment in *Max-Planck-Gesellschaft zur Förderung der Wissenschaften*, on whether and under what conditions the entitlement to paid annual leave of a worker in a state of total invalidity or suffering long-term illness lapses 15 months after the end of the leave year if incapacity for work has persisted since.

22. The referring court, like the Court of Justice, considers that leave entitlements can be extinguished in cases where the worker has been unable to take his or her leave only in exceptional cases, where the loss of such leave is justified by particular circumstances.[11] According to the case-law of that same court, the presence of such particular circumstances is, in principle, ruled out where that worker has been unable to take his or her leave because the employer failed to fulfil its obligations to inform the worker of the leave and to invite him or her to take it or because the employer has in some other way prevented the worker from taking his or her leave.

23. However, the referring court asks whether that case-law also applies to workers in a state of total invalidity or suffering long-term illness.

24. In that regard, the referring court considers that if the employer has fulfilled its obligations to assist in good time, Paragraph 7(3) of the BUrlG must be interpreted, in line with Directive 2003/88, as meaning that the entitlement to paid annual leave of a worker who falls ill to a degree that renders him or her unfit for work at the beginning or during the course of a leave year can lapse 15 months after the end of the leave year if the incapacity for work has continued since then without interruption. If that incapacity for work continues without interruption beyond

[11] It refers, in that regard, to the judgment of 25 June 2020, *Varhoven kasatsionen sad na Republika Bulgaria and Iccrea Banca* (C-762/18 and C-37/19, EU:C:2020:504, paragraph 73 et seq.).

31 March of the second year following the leave year, that would constitute particular circumstances justifying the temporal limit on the leave entitlement in order to safeguard the essential interest of the employer to avoid the unlimited accumulation of leave entitlements, despite the fact that the worker who is unfit for work has not had the possibility of exercising his or her leave entitlement.

25. However, it is necessary for the Court to clarify whether EU law also allows a leave entitlement to lapse 15 months after the end of the leave year – or a longer period where appropriate – in the event that total invalidity or incapacity for work due to illness continues, where the employer has not complied with its obligations to inform the worker of the leave and to invite him or her to take it, and the worker could have taken at least part of the leave in the leave year before that total invalidity or incapacity for work occurred.

26. The referring court thus asks whether the entitlement to paid annual leave acquired in the course of the leave year may lapse at the end of the period for carrying over leave authorised under national law where the employer has not given the worker an opportunity to exercise that leave entitlement before the incapacity for work occurred in the course of that leave year. In particular, having regard to the contributions from the judgments in *KHS* and *Max-Planck-Gesellschaft zur Förderung der Wissenschaften*, the question arises whether, given that the purpose of the right to paid annual leave is rest, the principle that the loss of entitlement to such leave is subject to the employer fulfilling its obligations to inform the worker of the leave and to invite him or her to take it applies only within certain limits.

27. The referring court notes, in that regard, that it is possible to consider that the worker could still have taken his or her paid annual leave before the total invalidity or incapacity for work occurred if the employer had complied in good time with its obligations to inform the worker of the leave and to invite him or her to take it. If the employer failed to inform the worker of the leave and to invite him or her to take it, as required in accordance with applicable law, it would have to bear the risk that the leave entitlement would not lapse in full, even if that worker's total invalidity or incapacity for work continued beyond 31 March of the second leave year following the leave year.

28. That being so, the referring court observes, relying on the case-law arising from the judgment in *KHS*, that the paid annual leave can only serve its intended purpose of rest in so far as the carry-over period is limited in time, such that national legislation may prescribe such a time limit in the event of the long-term illness of workers in order to avoid the unlimited accumulation of entitlements to such leave.

29. According to the referring court, if those principles were also applicable in relation to the leave year during which the worker's total invalidity or incapacity for work occurred, which has persisted since, the entitlement to paid annual leave for that year could expire 15 months after the end of that year even if the employer has not complied with its obligations to inform the worker of the leave and to invite him or her to take it. Leave acquired in respect of the leave year before the worker's total invalidity or incapacity for work occurred would then expire, even if the worker could still have taken that annual leave before the onset of the total invalidity or incapacity for work where the employer had fulfilled in good time its obligations to inform the worker of the leave and to invite him or her to take it.

30. The referring court also states that the Court has not yet ruled on whether Article 7 of Directive 2003/88 and Article 31(2) of the Charter set the date, during the leave year, by which the employer must, at the latest, have fulfilled its obligations to inform the worker of the leave and to invite him or her to take it so that those obligations have been fulfilled 'in good time' within the meaning of EU law.

31. In the light of the foregoing, the Bundesarbeitsgericht (Federal Labour Court) decided to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling: [12]

'(1) Do Article 7 of [Directive 2003/88/EC] and Article 31(2) of the [Charter] preclude an interpretation of a rule of national law such as Paragraph 7(3) of the [BUrlG] according to which the as yet unexercised entitlement to paid annual leave of a worker who suffers, on health grounds, a full reduction of earning capacity in the course of the leave year [or who became ill to an extent that rendered him or her unfit for work in the course of the leave year], but who could still have taken – at least some of – the leave in the leave year before the onset of his [or her] reduction of earning capacity [or before the onset of his or her illness], lapses 15 months after the end of the leave year in the event of a continuing uninterrupted reduction of earning capacity [or period of incapacity for work] even if the employer has not actually enabled the worker to exercise his [or her] leave entitlement by informing him or her of the leave concerned and inviting him [or her] to take it?

(2) If Question 1 is answered in the affirmative: Under these conditions, is it also impossible for the entitlement to lapse at a later point in time in cases where a full reduction of earning capacity persists [or if incapacity for work continues]?'

32. In Case C-518/20, written observations were submitted by XP, Fraport and the European Commission.

33. In Case C-727/20, written observations were submitted by AR, St. Vincenz-Krankenhaus and the European Commission.

IV. Analysis

34. By its questions, which, in my view, should be examined together, the referring court asks, in essence, the Court to rule whether Article 7 of Directive 2003/88 and Article 31(2) of the Charter must be interpreted as precluding national legislation under which entitlement to paid annual leave acquired by a worker during the leave year in the course of which total invalidity or incapacity for work due to illness occurred and which has persisted since, may lapse, either at the end of a carry-over period authorised under national law, or even at a later stage, where his or her employer has not enabled the worker in good time to exercise that leave entitlement before the onset of that total invalidity or incapacity for work.

35. The Court has already ruled on questions relating to the right to paid annual leave of a worker who has been unable, before the termination of the employment relationship, to exercise his or her leave entitlement for reasons beyond the worker's control, and in particular due to illness.

[12] Since the questions referred are almost identical in both cases, I will reproduce them only once, indicating in square brackets the minor differences in wording.

36. In that context, the Court took as a starting point, in its judgment in *Schultz-Hoff and Others*, that 'Directive 2003/88 does not make any distinction between workers who are absent from work on sick leave, whether short-term or long-term, during the leave year and those who have in fact worked in the course of that year'. [13] According to the Court, it follows that, 'with regard to workers on sick leave which has been duly granted, the right to paid annual leave conferred by Directive 2003/88 itself on all workers cannot be made subject by a Member State to a condition concerning the obligation actually to have worked during the leave year laid down by that State'. [14]

37. In that same judgment, the Court also held that 'Article 7(1) of Directive 2003/88 does not preclude, as a rule, national legislation which lays down conditions for the exercise of the right to paid annual leave expressly conferred by the directive, including even the loss of that right at the end of a leave year or of a carry-over period, provided, however, that the worker who has lost his [or her] right to paid annual leave has actually had the opportunity to exercise the right conferred on him [or her] by the directive'. [15]

38. National legislation, such as Paragraph 7(3) of the BUrlG, is covered by the rules governing paid annual leave, within the meaning of Article 7(1) of Directive 2003/88, as interpreted by the Court. [16] Such legislation forms part of the rules and procedures of national law applicable to the scheduling of workers' leave, which seek to take into account the various interests involved. [17]

39. According to the Court, it is necessary, however, in each situation, to 'ensure that the application of those provisions of national law cannot lead to the loss of the rights to paid annual leave acquired by the worker, even though he [or she] has not actually had the opportunity to exercise those rights'. [18] Accordingly, an 'automatic loss of the entitlement to paid annual leave, which is not subject to prior verification that the worker was in fact given the opportunity to exercise that right, fails to have regard to the limits … which are binding on Member States when specifying the conditions for the exercise of that right'. [19] 'The loss of a worker's acquired right to paid annual leave or of his [or her] corresponding right to payment of an allowance in lieu of leave not taken upon termination of the employment relationship, without the worker having actually had the opportunity to exercise that right to paid annual leave, would undermine the very substance of that right'. [20]

40. The Court has found that a worker who is on sick leave for the whole leave year and beyond that period and/or a carry-over period 'is denied any period giving the opportunity to benefit from his [or her] paid annual leave'. [21] It concluded that 'Article 7(1) of Directive 2003/88 must be interpreted as meaning that it precludes national legislation or practices which provide that the right to paid annual leave is extinguished at the end of the leave year and/or of a carry-over period laid down by national law even where the worker has been on sick leave for the whole

13 Judgment in *Schultz-Hoff and Others* (paragraph 40).

14 Judgment in *Schultz-Hoff and Others* (paragraph 41).

15 Judgment in *Schultz-Hoff and Others* (paragraph 43).

16 See judgment in *Max-Planck-Gesellschaft zur Förderung der Wissenschaften* (paragraph 36).

17 See judgment in *Max-Planck-Gesellschaft zur Förderung der Wissenschaften* (paragraph 37 and the case-law cited).

18 Judgment in *Max-Planck-Gesellschaft zur Förderung der Wissenschaften* (paragraph 38).

19 Judgment in *Max-Planck-Gesellschaft zur Förderung der Wissenschaften* (paragraph 40).

20 Judgment in *Max-Planck-Gesellschaft zur Förderung der Wissenschaften* (paragraph 26 and the case-law cited).

21 Judgment in *Schultz-Hoff and Others* (paragraph 44).

leave year and where his [or her] incapacity for work persisted until the end of his employment relationship, which was the reason why he [or she] could not exercise his [or her] right to paid annual leave'.[22]

41. Interestingly, the Court reached the same conclusion with regard to a worker who, in the same way as XP and AR in the present proceedings, worked for part of the leave year before being put on sick leave, which continued beyond the end of that year or a carry-over period.

42. According to the Court, a worker who is on long-term sick leave for all or only part of the leave year is, in both cases, in the same situation 'inasmuch as incapacity for work owing to sickness is not foreseeable'.[23] In both cases, the worker can therefore claim the entitlement to leave acquired during the leave year in question.

43. Should the incapacity for work persist in the long term, such an interpretation was, however, likely to lead automatically to the unlimited accumulation of entitlements to paid annual leave acquired during successive periods of absence from work on grounds of illness. That is why, in its judgment in *KHS*, the Court considered that the solution it had adopted in its judgment in *Schultz-Hoff and Others* should be 'qualified' in 'specific circumstances'.[24]

44. Accordingly, in the specific context of workers who have been prevented from taking their paid annual leave on account of their absence from work because of illness, the Court has held that, if a worker who is unfit for work for several consecutive years has the right to accumulate, without any limit, all the entitlements to paid annual leave that are acquired during his or her absence from work, a right to such unlimited accumulation would no longer reflect the actual purpose of the right to paid annual leave.[25]

45. Therefore, in the specific circumstances of a worker who is unfit for work for several consecutive leave years, the Court has held that, with regard not only to the aim of protecting the worker pursued by Directive 2003/88, but also that of protecting the employer from the risk that a worker will accumulate periods of absence of too great a length, and from the difficulties for the organisation of work which such periods might entail, Article 7 of that directive must be interpreted as not precluding national provisions or practices, which limit, by a carry-over period of 15 months on the expiry of which the right to paid annual leave lapses, the accumulation of entitlements to such leave of a worker who is unfit for work for several consecutive reference periods.[26]

46. It is therefore necessary to examine whether circumstances such as those at issue in the disputes in the main proceedings are 'specific', within the meaning of the case-law arising from the judgment in *KHS*, such that they justify a derogation from the principle established in

22 Judgment in *Schultz-Hoff and Others* (paragraph 49).

23 Judgment in *Schultz-Hoff and Others* (paragraph 51).

24 Judgment in *KHS* (paragraph 28).

25 See, to that effect, judgment in *KHS* (paragraphs 29 and 30). In accordance with the Court's settled case-law, the right to paid annual leave 'has the dual purpose of enabling the worker both to rest from carrying out the work he is required to do under his [or her] contract of employment and to enjoy a period of relaxation and leisure. (paragraph 31 of that judgment). The Court also considered that 'the right to paid annual leave acquired by a worker who is unfit for work for several consecutive reference periods can reflect both the aspects of its purpose … only in so far as the carry-over does not exceed a certain temporal limit. Beyond such a limit annual leave ceases to have its positive effect for the worker as a rest period and is merely a period of relaxation and leisure' (paragraph 33 of that judgment).

26 See, to that effect, judgment in *KHS* (paragraphs 38, 39 and 44).

Article 7 of Directive 2003/88 and Article 31(2) of the Charter, according to which the right to paid annual leave acquired cannot be lost at the end of the leave year and/or of a carry-over period fixed by national law, when the worker has been unable to take his [or her] leave.[27]

47. I do not think that such specific circumstances can be established in the present cases. I note that if, as was the situation in the case giving rise to the judgment in *KHS*, the question arises of a temporal limit of the entitlement to paid annual leave in the event of an extended absence of the worker due to illness or invalidity, there is a significant difference between that case and the cases under consideration.

48. Thus, in the case giving rise to the judgment in *KHS*, the Court had to decide whether the solution it had adopted in its judgment in *Schultz-Hoff and Others* meant that a worker on long-term sick leave had the right to accumulate unlimited entitlements to paid annual leave acquired during successive leave years. That question could legitimately be raised since, during his or her absence from work due to illness, the worker in question had been unable to exercise his or her right to such leave, so that, if the solution adopted in the judgment in *Schultz-Hoff and Others* had to be followed to the letter, that entitlement could not be extinguished. The Court was perfectly aware of the extremes that such a solution could entail, and so as to avoid them it recognised the possibility for Member States to prescribe a temporal limit of the entitlement to paid annual leave acquired during a period of long-term absence from work due to illness.

49. However, the situation at issue in the present cases is different, in so far as the workers concerned do not wish to retain all the entitlements to paid annual leave acquired during their long-term absence from work, but only the entitlement to paid annual leave acquired during the leave year during which they were partly working and in the course of which the state of total invalidity or incapacity for work due to illness occurred.

50. I observe that, as I stated above, the Court, in its judgment in *Schultz-Hoff and Others*, with regard to a person who worked for part of the leave year before being put on sick leave, considered that the entitlement to paid annual leave could not be extinguished.

51. Furthermore, I conclude from the judgment in *KHS* that it is only to avoid the negative consequences of an unlimited accumulation of entitlements to paid annual leave acquired during a prolonged period of absence from work due to illness that the Court has recognised that it is appropriate to derogate from the principle that such entitlements cannot be extinguished and that it has, in that context, accepted the possibility of a temporal limit with regard to those entitlements.

52. I consider that such a derogation ought to be interpreted strictly and therefore be limited to the risk which it is intended to preclude, namely the unlimited accumulation of entitlements to paid annual leave acquired during a prolonged period of absence from work on account of long-term sick leave. In other words, where there is no such risk, the principle laid down in Article 7 of Directive 2003/88 – according to which an acquired right to paid annual leave cannot be extinguished on expiry of the reference period and/or the carry-over period fixed by national law when the worker has not been in a position to take his or her leave – should prevail.[28]

[27] See judgment of 29 November 2017, *King* (C-214/16, EU:C:2017:914, paragraph 56).

[28] See, by analogy, judgment of 25 June 2020, *Varhoven kasatsionen sad na Republika Bulgaria and Iccrea Banca* (C-762/18 and C-37/19, EU:C:2020:504, paragraph 72).

53. It is important, in that regard, to emphasise the fact that, according to the Court's settled case-law, the right to paid annual leave may not be interpreted restrictively. [29] It follows that 'any derogation from the European Union system for the organisation of working time put in place by Directive 2003/88 must be interpreted in such a way that its scope is limited to what is strictly necessary in order to safeguard the interests which that derogation protects'. [30]

54. Consequently, whilst the temporal limit permitted by the Court in its judgment in *KHS* would undoubtedly preclude, in so far as it is established by national law, workers such as XP and AR from claiming all the entitlements to paid annual leave acquired during their prolonged absence from work in respect of several successive leave years, I doubt that it could be accepted that such a limitation could also apply as a matter of course to the entitlement to paid annual leave acquired for the leave year during which the total invalidity or incapacity for work occurred. The mixed nature of that period, during which the worker in question worked before finding him or herself in a state of total invalidity or incapacity for work, raises questions relating to the employer's compliance with its obligations to inform the worker of the leave and to invite him or her to take it and on the consequences to be drawn from the employer's failure to fulfil those obligations.

55. In that regard, it is apparent from the Court's case-law that employers must ensure that workers are in a position to exercise their right to paid annual leave. [31] To that end, the Court has held that 'the employer is in particular required, in view of the mandatory nature of the entitlement to paid annual leave and in order to ensure the effectiveness of Article 7 of Directive 2003/88, to ensure, specifically and transparently, that the worker is actually in a position to take the paid annual leave to which he [or she] is entitled, by encouraging him [or her], formally if need be, to do so, while informing him [or her], accurately and in good time so as to ensure that that leave is still capable of ensuring for the person concerned the rest and relaxation to which it is supposed to contribute, that, if he [or she] does not take it, it will be lost at the end of the reference period or authorised carry-over period'. [32]

56. In addition, the Court has held that 'the burden of proof in that respect is on the employer … Should the employer not be able to show that it has exercised all due diligence in order to enable the worker actually to take the paid annual leave to which he [or she] is entitled, it must be held that the loss of the right to such leave at the end of the authorised reference or carry-over period, and, in the event of the termination of the employment relationship, the corresponding absence of a payment of an allowance in lieu of annual leave not taken constitutes a failure to have regard, respectively, to Article 7(1) and Article 7(2) of Directive 2003/88'. [33]

57. It follows, in my view, from that case-law of the Court, that where a worker who is unfit for work over a prolonged period claims his or her entitlement to paid annual leave acquired in respect of the leave year during which he or she was partly working and in the course of which the total invalidity or incapacity for work due to illness occurred, the referring court must ascertain whether the employer fulfilled its obligations to inform the worker of the leave and to invite him or her to take it before the total invalidity or incapacity for work occurred.

[29] See, in particular, judgment of 25 November 2021, *job-medium* (C-233/20, EU:C:2021:960, paragraph 26 and the case-law cited).

[30] Judgment of 25 June 2020, *Varhoven kasatsionen sad na Republika Bulgaria and Iccrea Banca* (C-762/18 and C-37/19, EU:C:2020:504, paragraph 74 and the case-law cited).

[31] See, in particular, judgment of 6 November 2018, *Kreuziger* (C-619/16, EU:C:2018:872, paragraph 51 and the case-law cited), and judgment in *Max-Planck-Gesellschaft zur Förderung der Wissenschaften* (paragraph 44 and the case-law cited).

[32] Judgment of 6 November 2018, *Kreuziger* (C-619/16, EU:C:2018:872, paragraph 52), and judgment in *Max-Planck-Gesellschaft zur Förderung der Wissenschaften* (paragraph 45).

[33] Judgment of 6 November 2018, *Kreuziger* (C-619/16, EU:C:2018:872, paragraph 53), and judgment in *Max-Planck-Gesellschaft zur Förderung der Wissenschaften* (paragraph 46).

58. In such a situation, the worker concerned actually worked for part of the leave year and acquired an entitlement to paid annual leave, part of which had not yet been used when the worker's incapacity for work occurred. It cannot be ruled out that such entitlement could have been extinguished or, at the very least, used to a large extent before the worker's incapacity for work occurred if the employer had in good time enabled the worker to exercise his or her leave entitlement.

59. It could, of course, be considered that, where total invalidity or incapacity for work due to illness occurs during a leave year, the reasons for the worker failing to take paid annual leave are potentially twofold. First, the worker could not take his or her leave because he or she fell ill. Second, the worker could not take his or her leave because the employer did not enable him or her to do so.

60. That being said, in such a situation, I take the view that the employer cannot opt out of the need to fulfil its own obligations by arguing that it is only because of an unforeseeable event, such as the worker's illness, that the worker cannot use up his or her entitlement to leave. In my opinion, the idea should prevail that if the worker had been given the opportunity to take his or her leave, the worker would probably no longer have to claim entitlement to that leave several years later.

61. Accordingly, I consider, to use the words of the Court, that 'an employer that does not allow a worker to exercise his or her right to paid annual leave must bear the consequences'.[34] In my view, to accept that, on account of total invalidity or incapacity for work due to illness, the employer has been relieved of its obligation to ensure that the worker is enabled to take his or her leave up until the date as from which the worker can no longer perform his or her tasks, would create an imbalance in favour of the employer and to the detriment of the worker, who must be regarded as the weaker party in the employment relationship.[35] The employer would thus be permitted to opt out of the need to fulfil its own obligations by arguing that total invalidity or incapacity for work due to illness constitutes an unforeseeable event.[36] To use the words of the Court once more, 'if it were to be accepted, in that context, that the worker's acquired entitlement to paid annual leave could be extinguished, that would amount to validating conduct by which an employer was unjustly enriched to the detriment of the very purpose of [Directive 2003/88], which is that there should be due regard for workers' health'.[37]

62. It follows, in my opinion, that, as would apply, following the judgment in *Max-Planck-Gesellschaft zur Förderung der Wissenschaften*, with regard to a leave year during which a worker actually worked without the onset of total invalidity or incapacity for work,[38] a worker who worked for part of a leave year before the onset of total invalidity or incapacity for work does not lose, at the end of the carry-over period authorised under national law, the right to paid annual leave acquired for that leave year where his or her employer has not enabled him or her to exercise that right. Consequently, in such circumstances, I consider that the leave acquired

[34] Judgment of 25 June 2020, *Varhoven kasatsionen sad na Republika Bulgaria and Iccrea Banca* (C-762/18 and C-37/19, EU:C:2020:504, paragraph 77 and the case-law cited).

[35] See judgment in *Max-Planck-Gesellschaft zur Förderung der Wissenschaften* (paragraph 41).

[36] See, with regard to the impossibility for an employer to opt out of the need to fulfil its own obligations, judgment in *Max-Planck-Gesellschaft zur Förderung der Wissenschaften* (paragraph 43).

[37] Judgment of 29 November 2017, *King* (C-214/16, EU:C:2017:914, paragraph 64).

[38] Imagine that the disputes in the main proceedings also concerned the right to paid annual leave acquired in respect of the years prior to the leave year during which total invalidity or incapacity for work occurred and that, during those previous years, the employer did not fulfil its obligations to inform the worker of the leave and to invite him or her to take it. Following the judgment in *Max-Planck-Gesellschaft zur Förderung der Wissenschaften*, that right cannot be considered to be extinguished.

by the worker must be carried over until after his or her return to work or, in the event of the termination of the employment relationship, give rise to a financial allowance in lieu of leave not taken.

63. The fact that there is a time lag between the establishment of the entitlement to paid annual leave during the leave year in the course of which a total incapacity or invalidity for work occurred and the benefit of that right does not, in my view, preclude a strict application of the case-law resulting from the judgment in *Max-Planck-Gesellschaft zur Förderung der Wissenschaften*. Once again, the employer must bear the consequences of the finding that it has not fulfilled, in good time, its obligations to inform the worker of the leave and to invite him or her to take it. I add, in that regard, that the Court has already acknowledged that, 'while the positive effect of paid annual leave for the safety and health of the worker is deployed fully if it is taken in the year prescribed for that purpose, namely the current year, the significance of that rest period in that regard remains if it is taken during a later period'. [39]

64. While my position is therefore different from that of the Commission, which supports, in essence, a strict application of the judgment in *KHS* in circumstances such as those at issue in the disputes in the main proceedings, I nevertheless acknowledge that, as the Commission stated in its observations, it is only if the employer actually had the opportunity to enable the worker to exercise his or her leave entitlement that its obligation may be held against it. It is only in such a situation that the employer's failure to fulfil its obligations could give rise to negative legal consequences for the employer.

65. In that regard, I consider that it is for the referring court to assess, in each case, whether, depending on when total incapacity or invalidity for work occurred in the course of the leave year in question, the employer did, in fact, have the time to fulfil its obligations to inform the worker of the leave and to invite him or her to take it.

66. As part of that assessment, account must be taken of the fact that when total invalidity or incapacity for work due to illness occurs at the end of the leave year in question, as is the case in the disputes in the main proceedings, it is reasonable to assume that the employer had the time necessary to fulfil its obligations to inform the worker of the leave and to invite him or her to take it.

V. Conclusion

67. In the light of all the foregoing considerations, I propose to answer the questions referred by the Bundesarbeitsgericht (Federal Labour Court, Germany) as follows:

Article 7 of Directive 2003/88/EC of the European Parliament and of the Council of 4 November 2003 concerning certain aspects of the organisation of working time and Article 31(2) of the Charter of Fundamental Rights of the European Union must be interpreted as precluding national legislation under which entitlement to paid annual leave acquired by a worker during the leave year in the course of which total invalidity or incapacity for work due to illness occurred and which has persisted since, may lapse, either at the end of a carry-over period authorised under national law, or even at a later stage, where the employer had not enabled the worker in good time to exercise his or her leave entitlement before the total invalidity or incapacity for work occurred.

[39] Judgment of 30 June 2016, *Sobczyszyn* (C-178/15, EU:C:2016:502, paragraph 33 and the case-law cited).