Reports of Cases

OPINION OF ADVOCATE GENERAL
HOGAN
delivered on 29 January 2020[1]

Case C-762/18

QH
v
Varhoven kasatsionen sad na Republika Bulgaria,
joined party:
Prokuratura na Republika Bulgaria

(Request for a preliminary ruling from the Rayonen sad Haskovo (Haskovo District Court, Bulgaria))

Case C-37/19

CV
v
Iccrea Banca SpA Istituto Centrale del Credito Cooperativo

(Request for a preliminary ruling from the Corte suprema di cassazione (Supreme Court of Cassation, Italy))

(References for a preliminary ruling — Social policy — Directive 2003/88/EC — Article 7 — Article 31 of the Charter of Fundamental Rights of the European Union — Protection of the safety and health of workers — Worker unlawfully dismissed from his or her duties and reinstated by a court decision — Exclusion of the right to paid annual leave not taken for the period from the dismissal until reinstatement — Absence of the right to financial compensation for annual leave not taken for the same period in the event of a subsequent termination of the employment relationship)

I. Introduction

1. Is there an entitlement on the part of a worker to paid annual leave in respect of the period from the date of dismissal to the date of reinstatement where it is established that such a worker has been unlawfully dismissed from that employment? That is, in essence, the question which is common to these two references for a preliminary ruling and which concern the interpretation of 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]

1 Original language: English.

2 OJ 2003 L 299, p. 9.

2. The references were made in two sets of proceedings, the first between QH and the Varhoven kasatsionen sad na Republika Bulgaria (Supreme Court of Cassation, Bulgaria) ('the VKS'), and the second between CV and her former employer, Iccrea Banca SpA Istituto Centrale del Credito Cooperativo ('Iccrea Banca'). Even though these references for a preliminary ruling have not been joined for the written and oral parts of the procedure, the questions that arise in those proceedings are similar. It is, accordingly, convenient that one single Opinion be delivered in respect of both these cases.

II. Legal context

A. EU law

1. The Charter of Fundamental Rights of the European Union

3. Article 31 of the Charter of Fundamental Rights of the European Union ('the Charter'), entitled 'Fair and just working conditions', provides:

'1. Every worker has the right to working conditions which respect his or her health, safety and dignity.

2. Every worker has the right to limitation of maximum working hours, to daily and weekly rest periods and to an annual period of paid leave.'

2. Directive 2003/88

4. Article 7 of Directive 2003/88, entitled 'Annual leave', states as follows:

'1. Member States shall take the measures necessary to ensure that every worker is entitled to paid annual leave of at least four weeks in accordance with the conditions for entitlement to, and granting of, such leave laid down by national legislation and/or practice.

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

B. Bulgarian law

5. According to Article 224(1) of the Kodeks na truda (Labour Code), 'upon termination of the employment relationship, the worker shall be entitled to financial compensation for any unused paid annual leave …, provided that the right to leave has not lapsed'.

6. Article 354(1) of the Labour Code provides that 'a period during which no employment relationship existed shall likewise be recognised as a period of service … [when] the worker or employee was unemployed on account of a dismissal which was pronounced unlawful by the competent authorities: from the date of dismissal until the date of reinstatement of the worker in question'.

C. Italian law

7. According to Article 10 of Decreto legislativo 8 aprile 2003, n. 66, Attuazione delle direttive 93/104/CE e 2000/34/CE concernenti taluni aspetti dell'organizzazione dell'orario di lavoro (Legislative Decree No 66 of 8 April 2003 implementing Directives 93/104/EC[3] and 2000/34/EC[4] concerning certain aspects of the organisation of working time), of 8 April 2003 (GURI n°87, of 14 April 2003)the period of paid annual leave may not be replaced by an allowance in lieu of leave not taken, except where the employment relationship is terminated.

8. Article 52 of the Contratto collettivo nazionale di lavoro (CCNL) del 7.12.2000 per le Banche di Credito Cooperativo, Casse Rurali ed Artigiane (National Collective Bargaining Agreement of 7 December 2000 for cooperative, agricultural and small business banks), applicable *ratione temporis*, states that 'the right to leave cannot be waived. … If the employment relationship ends, a worker who has not taken some or all of his [accrued] leave entitlement for the current calendar year … shall be entitled to an allowance corresponding to the remuneration for the days of annual leave not used. If the worker is not in service, the period of paid leave due shall be reduced by one twelfth for every full month of absence …'.

9. Pursuant to Article 53 of the same agreement, the leave and/or holiday days for 'abolished public holidays' granted which are not used during the calendar year are to be settled on the basis of the most recent remuneration payable in the relevant year.

III. The main proceedings and the questions referred for a preliminary ruling

A. Case C-762/18

10. From 1 September 1985, QH, was employed as a music teacher in a primary school. On 29 April 2004 the school principal decided to terminate that employment relationship. QH appealed against that decision and by a final judgment of the Rayonen sad Plovdiv (District Court of Plovdiv, Bulgaria) her dismissal was deemed unlawful and she was reinstated as an employee.

11. By a decision of 13 November 2008, the school principal once again terminated QH's employment relationship, but this time, however, she did not appeal against her dismissal.

12. On 1 July 2009, QH brought an action before the Rayonen Sad Plovdiv (District Court of Plovdiv) against the school, seeking payment of the amount of 7 125 Bulgarian lev (BGN) (approximately EUR 3 641) representing compensation for unused paid annual leave for 285 days, that is to say 57 days per year for the period from 30 April 2004 to 30 November 2008. Furthermore, she claimed the amount of BGN 1 100 (approximately EUR 562) as compensation for late payment in respect of the first amount for the period from 30 November 2008 to 1 July 2009. By judgment of 15 April 2010 the Rayonen sad Plovdiv (District Court of Plovdiv) dismissed those claims.

13. QH lodged an appeal before the Okruzhen Sad Plovdiv (Plovdiv Regional Court, Bulgaria), which, by judgment of 10 February 2011, upheld the first-instance ruling in so far as it rejected the claims for compensation. QH brought an appeal on a point of law before the VKS against the judgment of the Okruzhen Sad Plovdiv (Plovdiv Regional Court). However, by decision of 25 October 2011, the VKS refused to admit the appeal.

3 Council Directive of 23 November 1993 concerning certain aspects of the organisation of working time (OJ 1993 L 307, p. 18).

4 Directive of the European Parliament and of the Council of 22 June 2000 amending Council Directive 93/104 (OJ 2000 L 195, p. 41).

14. As regards to the substantive issue raised by the applicant in the main proceedings, namely whether an unlawfully dismissed worker is entitled to compensation for unused paid annual leave on the basis of Article 224(1) of the Labour Code for the period from the date of termination of the employment relationship until the date of reinstatement on the basis of a judgment that has become final, the VKS stated that the answer given by the Okruzhen Sad Plovdiv (Plovdiv Regional Court) was in line with the binding case-law of the VKS. According to that case-law, in the period from the time of the date of termination of the employment relationship until the cancellation of the dismissal on the basis of a definitive judgment and the reinstatement of the unlawfully dismissed worker in his or her previous role, that worker did not actually carry out work under the employment relationship. Consequently, for that period of time, that worker was not entitled to paid annual leave on the basis of Article 224(1) of the Labour Code.

15. QH subsequently brought an action before the referring court, the Rayonen Sad Haskovo (Haskovo District Court, Bulgaria) against the VKS concerning the payment of compensation for the material loss sustained by the applicant due to an infringement of EU law committed by the VKS in its order of 25 October 2011. In addition to a breach of Article 267 TFEU, QH considers that the VKS should have applied Article 7 of Directive 2003/88 and granted her the right to paid annual leave for the period during which she was unable to benefit from it as a result of her unlawful dismissal.

16. In those circumstances, doubting whether the VKS's case-law is compatible with Article 7 of Directive 2003/88, the Rayonen Sad Haskovo (Haskovo District Court) by decision of 26 November 2018, received at the Court on 4 December 2018, stayed the proceedings and referred the following questions to the Court for a preliminary ruling:

'(1) Must Article 7(1) of Directive [2003/88] be interpreted as precluding national legislation and/or case-law, according to which a worker who has been unlawfully dismissed and subsequently reinstated by a court decision, is not entitled to paid annual leave for the period from the date of dismissal until the date of his reinstatement?

(2) In the event that the first question is answered in the affirmative, must Article 7(2) of Directive [2003/88] be interpreted as precluding national legislation and/or case-law, according to which in the event that the employment relationship is terminated once again the worker in question is not entitled to financial compensation for unused paid annual leave for the period from the date of his previous dismissal until the date of his reinstatement?'

B. Case C-37/19

17. CV, an employee of Iccrea Banca, was dismissed on 11 July 2002 as the result of a collective redundancy procedure. Following an appeal brought by CV, the Tribunale di Roma (District Court, Rome, Italy) ordered that she be reinstated and she resumed her employment on 6 October 2003.

18. By letters of 13 October and 15 November 2003, Iccrea Banca dismissed CV again, with immediate effect and exempting her from the requirement to serve a notice period. Those dismissals were subsequently declared unlawful by judgments that have become final and CV was once again reinstated in her position. CV was finally dismissed on 17 September 2010.

19. In the meantime, CV brought an action before Italian courts in order to receive an allowance from Iccrea Banca to cover the paid annual leave and leave for 'abolished public holidays' accrued but not taken in 2003 and 2004 respectively.

20. Regarding the issue raised by CV, the Corte d'appello di Roma (Court of Appeal, Rome, Italy) declared that no allowance was payable in lieu of leave accrued and not taken in the period between the dismissal and reinstatement because the allowance is necessarily linked to 'missed rest', which was not applicable because CV had not worked during the period involved.

21. CV lodged an appeal in cassation against that judgment before the Corte suprema di cassazione (Supreme Court of Cassation, Italy). After recalling the case-law of the Court on Article 7 of Directive 2003/88, that court highlighted some relevant aspects of its own national case-law on dismissal, reinstatement and right of allowance in lieu.

22. In those circumstances, doubting whether that national case-law is compatible with Article 31 of the Charter and Article 7 of Directive 2003/88, the Corte suprema di cassazione (Supreme Court of Cassation) decided, by decision of 27 November 2018, received at the Court on 21 January 2019, to stay the proceedings and to refer the following question for a preliminary ruling:

'Must Article 7(2) of Directive [2003/88] and Article 31(2) of the [Charter], taken separately where applicable, be interpreted as precluding provisions of national legislation or national practices pursuant to which, once the employment relationship has ended, the right to payment of an allowance for paid leave accrued but not taken (and for a legal arrangement, such as "abolished public holidays", which is comparable in nature and function to paid annual leave) does not apply in a context where the worker was unable to take the leave before the employment relationship ended because of an unlawful act (a dismissal established as unlawful by a national court by means of a final ruling ordering the retroactive restoration of the employment relationship) attributable to the employer, for the period between that unlawful act by the employer and the subsequent reinstatement only?'

IV. The procedures before the Court

23. In Case C-762/18, written observations were submitted by QH, the VKS, the Bulgarian, Italian and Polish Governments and by the European Commission. In Case C-37/19, written observations were submitted by CV, Iccrea Banca, the Italian and Polish Governments and by the Commission.

24. Save for the VKS and Iccrea Banca, all of these parties presented oral argument before the Court at the hearing on 11 December 2019.

V. Analysis

A. The jurisdiction of the Court and the admissibility of the questions

1. The jurisdiction of the Court in Case C-762/18

25. Firstly, the Bulgarian Government submits that the Court does not have jurisdiction to examine the questions asked by the Rayonen Sad Haskovo (Haskovo District Court) in so far as the first dismissal of the applicant occurred on 29 April 2004, namely before the accession of the Republic of Bulgaria to the European Union on 1 January 2007. The Court would not have jurisdiction to reply to a question on the interpretation of EU law referred by a Member State court where the factual circumstances to which EU law applies occurred before the accession of that Member State to the European Union.

26. In that regard, it must be noted that, as follows from Article 2 of the Act concerning the conditions of accession of the Republic of Bulgaria and Romania and the adjustments to the Treaties on which the European Union is founded,[5] the provisions of the original Treaties and the acts adopted by the institutions before accession — such as Directive 2003/88 — are binding on Bulgaria from the date of its accession, with the result that they apply to the future effects of situations arising prior to its accession.[6]

27. In the present case, it is true that the first dismissal at issue took place prior to Bulgaria's accession. It is not contested, however, that the annulment of that dismissal and the reinstatement occurred after this accession. Contrary to the Bulgarian Government's submission, I am of the opinion that the questions referred are related to the legal implications of the illegality of the dismissal and the consecutive reinstatement rather than to the dismissal itself. As such, those elements and their legal effects are sufficiently autonomous and relate clearly to post-January 2007 events such as would justify the Court assuming jurisdiction in the present case.[7]

28. It follows from the foregoing that the arguments put forward by the Bulgarian Government contesting the jurisdiction of the Court to hear the questions of the referring court must be rejected. In my view, Directive 2003/88 is applicable *ratione temporis* as regards legal effects which occur after 1 January 2007.

29. Secondly, both the VKS and the Bulgarian Government argue that, during the period between the date of the applicant's first dismissal and the date of her reinstatement, the applicant was not a 'worker' within the meaning of Directive 2003/88 and therefore did not fall within the scope of that directive or, in general, within the scope of Union law, so that the Court would not have jurisdiction to rule on preliminary questions.

30. This argument must also be rejected. Indeed, the questions referred for a preliminary ruling concern precisely the right to paid annual leave in connection with the unlawful dismissal of a worker and his or her reintegration into his or her employment following a court decision. In other words, the referring court seeks to ascertain whether or not the period between the unlawful dismissal of a worker and his or her reintegration into his or her previous employment should be treated as a period of actual work for the purpose of determining the reinstated worker's entitlement to paid annual leave. Since the right to paid annual leave is provided for by Directive 2003/88, it falls within the interpretative competence of the Court.

2. The admissibility of the question referred in Case C-37/19

31. In its written submissions, the Italian Government contended that the question referred by the Corte suprema di cassazione (Supreme Court of Cassation) should be declared inadmissible because of the deficient factual context and the lack of references to specific relevant national legislation or practices.

32. It must be borne in mind at the outset that, although it is not for the Court, under Article 267 TFEU, to rule upon the compatibility of a provision of domestic law with Union law or interpret domestic legislation or regulations, it may nevertheless provide the national court with an interpretation of Union law on all such points as may enable that court to determine the issue of compatibility for the purposes of the case before it.[8]

5 OJ 2005 L 157, p. 203.

6 See, by analogy, judgment of 14 February 2019, *Milivojević* (C-630/17, EU:C:2019:123, paragraph 42).

7 See, *a contrario*, order of 11 May 2011, *Semerdzhiev* (C-32/10, not published, EU:C:2011:288, paragraphs 27 and 29).

8 See, to that effect, judgments of 9 September 2003, *Jaeger* (C-151/02, EU:C:2003:437, paragraph 43), and of 18 September 2019, *VIPA* (C-222/18, EU:C:2019:751, paragraph 28).

33. In that respect, it suffices to note that, while it is true that the explanation relating to all the pleas in law relied on in support of the appeal pending before the referring court may be confusing, the Corte suprema di Cassazione (Supreme Court of Cassation) nevertheless clearly identifies the plea relating to the question referred and the circumstances in which the question arises. In addition, the referring court precisely identifies the Union acts whose interpretation is necessary, as well as the national case-law which may be contrary to these acts.

34. It is therefore clear from those elements of the request for a preliminary ruling that the answer to the question asked is useful to the resolution of the dispute before the referring court and is, consequently, admissible.

B. First question in Case C-762/18

35. By its first question, the referring court asks whether Article 7(1) of Directive 2003/88 must be interpreted as precluding national legislation and/or case-law, according to which a worker who has been unlawfully dismissed and subsequently reinstated by a court decision, is not entitled to paid annual leave for the period from the date of dismissal until the date of reinstatement.

36. The framework within which the interpretation of Article 7(1) of Directive 2003/88 must be carried out is now well established.

37. First, as is apparent from the wording of Article 7(1) of Directive 2003/88 itself, every worker is entitled to paid annual leave of at least four weeks, a right which, according to the Court's established case-law, must be regarded as a particularly important principle of EU social law.[9] Moreover, that right, which is enjoyed by all workers, as an essential principle of EU social law reflected in Article 7 of Directive 93/104 and Article 7 of Directive 2003/88, is now expressly enshrined as a fundamental right in Article 31(2) of the Charter.[10] It follows, therefore, that the right to paid annual leave should not be given a restrictive interpretation.[11]

38. Secondly, it is appropriate to recall the purpose of the right to paid annual leave, conferred on every worker by Article 7(1) of Directive 2003/88, which is to enable the worker both to rest from carrying out the work he or she is required to do under the contract of employment and to enjoy a period of relaxation and leisure.[12] That purpose, which distinguishes paid annual leave from other types of leave having different purposes, is, however, based on the premiss that the worker actually worked during the reference period.[13]

9 See, to that effect, judgments of 26 June 2001, *BECTU* (C-173/99, EU:C:2001:356, paragraph 43); of 20 January 2009, *Schultz-Hoff and Others* (C-350/06 and C-520/06, EU:C:2009:18, paragraph 54); and of 4 October 2018, *Dicu* (C-12/17, EU:C:2018:799, paragraph 24).

10 See, to that effect, judgment of 6 November 2018, *Bauer and Willmeroth* (C-569/16 and C-570/16, EU:C:2018:871, paragraph 58). See also, for another qualification of the right to paid annual leave as a fundamental right of the worker, judgments of 12 June 2014, *Bollacke* (C-118/13, EU:C:2014:1755, paragraph 22), and of 6 November 2018, *Max-Planck-Gesellschaft zur Förderung der Wissenschaften* (C-684/16, EU:C:2018:874, paragraph 31).

11 See, to that effect, judgments of 8 November 2012, *Heimann and Toltschin* (C-229/11 and C-230/11, EU:C:2012:693, paragraph 23), and of 29 November 2017, *King* (C-214/16, EU:C:2017:914, paragraph 58).

12 See, to that effect, judgments of 20 January 2009, *Schultz-Hoff and Others* (C-350/06 and C-520/06, EU:C:2009:18, paragraph 25); of 4 October 2018, *Dicu* (C-12/17, EU:C:2018:799, paragraph 27); and of 6 November 2018, *Bauer and Willmeroth* (C-569/16 and C-570/16, EU:C:2018:871, paragraph 41).

13 See, to that effect, judgment of 4 October 2018, *Dicu* (C-12/17, EU:C:2018:799, paragraph 28).

39. Indeed, as the Court explained in its judgment of 4 October 2018, *Dicu* (C-12/17, EU:C:2018:799), 'the objective of allowing the worker to rest presupposes that the worker has been engaged in activities which justify, for the protection of his safety and health, as provided for in Directive 2003/88, his being given a period of rest, relaxation and leisure. Accordingly, entitlement to paid annual leave must, in principle, be determined by reference to the periods of actual work completed under the employment contract'. [14]

40. Thirdly, it is nevertheless clear that, to adopt the words of Advocate General Mengozzi, in certain specific situations, the Court 'ha[s] broken the link that had been assumed to be intrinsic between the provision of actual work, on the one hand, and the right to paid annual leave, on the other'. [15]

41. This link has been broken because the Court has recognised that there are certain circumstances essentially beyond the control of the worker where the right to paid annual leave cannot be made subject to a condition that the worker has actually worked by a Member State. Examples to date include sickness [16] and maternity leave. [17] By contrast, that case-law does not apply to the situation of a worker who took parental leave during a reference period [18] or to a worker whose obligation to work has been suspended (as well as that of the employer to pay his or her salary) by the application of the principle of 'zero hours short-time working' ('*Kurzarbeit Null*'). [19]

42. In this context, in order to answer the first question asked by the Rayonen Sad Haskovo (Haskovo District Court), it is therefore necessary to determine whether the situation of a worker who has been unable to work because of an unlawful dismissal and subsequently reinstated in his or her post by a court decision is '*fundamentally different*' [20] from that of a worker who is unable to work as a result of an illness or due to maternity leave.

43. Taking into account the criteria required to fulfil the conditions of the exception of having actually worked during a reference period in order to benefit from paid annual leave, I do not believe that the situation at issue in the present proceedings is fundamentally different from sick leave or maternity leave.

44. One may indeed infer from the case-law already set out in this Opinion that the criteria governing this exception are essentially, first, that the absence from work is not foreseeable [21] and, secondly, beyond the worker's control. [22] In other words, what these situations have in common is that they correspond to physical or psychological states that are *endured*. [23]

14 Paragraph 28 of this judgment.

15 Opinion of Advocate General Mengozzi in *Dicu* (C-12/17, EU:C:2018:195, point 21).

16 See, to that effect, judgments of 20 January 2009, *Schultz-Hoff and Others* (C-350/06 and C-520/06, EU:C:2009:18, paragraph 41); of 24 January 2012, *Dominguez* (C-282/10, EU:C:2012:33, paragraph 20); and of 4 October 2018, *Dicu* (C-12/17, EU:C:2018:799, paragraph 29).

17 See, to that effect, judgment of 18 March 2004, *Merino Gómez* (C-342/01, EU:C:2004:160, paragraphs 33 and 41).

18 See, to that effect, judgment of 4 October 2018, *Dicu* (C-12/17, EU:C:2018:799, paragraph 31).

19 See, to that effect, judgment of 8 November 2012, *Heimann and Toltschin* (C-229/11 and C-230/11, EU:C:2012:693, paragraph 26).

20 These words are those used by the Court in its judgment of 8 November 2012, *Heimann and Toltschin* (C-229/11 and C-230/11, EU:C:2012:693, paragraph 27).

21 See, to that effect, judgments of 20 January 2009, *Schultz-Hoff and Others* (C-350/06 and C-520/06, EU:C:2009:18, paragraph 51), and of 4 October 2018, *Dicu* (C-12/17, EU:C:2018:799, paragraph 32). See also, *a contrario*, judgment of 8 November 2012, *Heimann and Toltschin* (C-229/11 and C-230/11, EU:C:2012:693, paragraph 29).

22 See, to that effect, judgments of 29 November 2017, *King* (C-214/16, EU:C:2017:914, paragraph 49), and of 4 October 2018, *Dicu* (C-12/17, EU:C:2018:799, paragraph 32).

23 See, to that effect, Gardin, A., 'Acquisition de droits à congés payés par un salarié en congé parental : l'assimilation à du temps de travail effectif ne s'impose pas. Note sous CJUE 4 octobre 2018', *Revue de jurisprudence sociale*, 2/19, p. 83.

45. The latter criterion is also expressly used in Article 5(4) of Convention No 132 of the International Labour Organisation of 24 June 1970 concerning Annual Holidays with Pay, as revised, for absences which must be 'counted as part of the period of service'. However, as indicated in recital 6 of Directive 2003/88 and as already pointed out by the Court on several occasions, the principles of this Convention must be taken into account when interpreting that directive. [24]

46. In addition, situations in which the exception is recognised are also characterised by certain physical or psychological constraints suffered by the worker [25] or the need to protect a specific biological condition. [26]

47. All those criteria seem to me to be met in a situation where the worker is unlawfully dismissed but is later reinstated by a judicial decision. Indeed, a worker in such a position will have been unable to perform his or her duties for a reason that was unforeseeable and beyond his or her control.

48. More fundamentally, it does not seem just that the worker who was denied the opportunity to work during the period of dismissal by reason of what, by definition, were the wrongful acts of the employer, should suffer as a result. In others words, since but for the wrongful acts of the employer resulting in the dismissal of the worker, that worker would have worked during the period in question, his or her entitlement to paid annual leave should not be compromised as a result. In that context, it is worth recalling that the employer must ensure that the workers are given the opportunity to exercise the right to paid annual leave. [27]

49. I would also add that, in those circumstances, the derogation for employers, who have to face the risk that a worker may accumulate periods of absence of too great a length and the difficulties in the organisation of work which these periods may cause, is not applicable. [28]

50. First, this derogation can only be applied in 'specific circumstances'. [29] Second, an employer who does not allow a worker to exercise his or her right to paid annual leave must bear the consequences, it being understood that any possible error made by the employer in this regard is irrelevant. [30] However, it must be noted that this is also the case for a worker who is unlawfully dismissed. Indeed, in a way, that worker was not allowed, due to an error on the part of the employer, to exercise in due time the right to paid annual leave.

51. In those circumstances, I cannot therefore admit to being in the 'specific circumstances' expressly mentioned by the Court in its previous case-law. Otherwise, the risk that the employer who has unlawfully dismissed a worker will be exempt from its obligations cannot be excluded. However, such a situation must be avoided. [31]

24 See, to that effect, judgments of 20 January 2009, *Schultz-Hoff and Others* (C-350/06 and C-520/06, EU:C:2009:18, paragraphs 37 and 38); of 4 October 2018, *Dicu* (C-12/17, EU:C:2018:799, paragraph 32); and of 6 November 2018, *Bauer and Willmeroth* (C-569/16 and C-570/16, EU:C:2018:871, paragraph 81).

25 See, to that effect, judgment of 4 October 2018, *Dicu* (C-12/17, EU:C:2018:799, paragraph 33 and the case-law cited).

26 See, to that effect, judgment of 4 October 2018, *Dicu* (C-12/17, EU:C:2018:799, paragraph 34 and the case-law cited).

27 See, to that effect, judgment of 6 November 2018, *Kreuziger* (C-619/16, EU:C:2018:872, paragraph 51).

28 On this derogation, see judgments of 22 November 2011, *KHS* (C-214/10, EU:C:2011:761), and of 29 November 2017, *King* (C-214/16, EU:C:2017:914).

29 See, to that effect, judgment of 29 November 2017, *King* (C-214/16, EU:C:2017:914, paragraphs 55 and 56).

30 See, to that effect, judgment of 29 November 2017, *King* (C-214/16, EU:C:2017:914, paragraphs 61 and 63).

31 See, to that effect, judgment of 6 November 2018, *Max-Planck-Gesellschaft zur Förderung der Wissenschaften* (C-684/16, EU:C:2018:874, paragraph 43).

52. This interpretation of the derogation is also in line with the principle already recalled that the fundamental right to paid annual leave cannot be interpreted restrictively. 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.

53. In the light of the foregoing considerations, I therefore conclude that, where national legislation provides that a worker unlawfully dismissed must be reinstated in his or her work, Article 7(1) of Directive 2003/88 and Article 31(2) of the Charter preclude national legislation or case-law or practices, according to which that worker is not entitled to paid annual leave for the period from the date of dismissal until the date of reinstatement.

C. Second question in Case C-762/18 and the question in Case C-37/19

54. By the second question in Case C-762/18 and the question in Case C-37/19, the referring courts ask, in substance, whether Article 7(2) of Directive 2003/88 and Article 31(2) of the Charter must be interpreted as precluding national legislation or case-law or national practices, according to which, once the employment relationship has ended, the right to the payment of an allowance for paid leave accrued but not taken does not apply in a context where the worker was unable to take the leave before the employment relationship ended because of a dismissal established as unlawful by a national court ordering the retroactive restoration of the employment relationship for the period between that unlawful act by the employer and the subsequent reinstatement only.

55. It is settled case-law that the right to annual leave constitutes only one of two aspects of the right to paid annual leave as a fundamental right of EU law, that right also including the entitlement to payment. [32]

56. First, it follows that, with regard to a worker who has not been able, for reasons beyond his or her control, to exercise the right to paid annual leave before termination of the employment relationship, the allowance in lieu of which he or she was entitled must be calculated so that the worker is put in a position comparable to that he or she would have been in had he or she exercised that right during the employment relationship. [33] As the Court has already ruled, this right to an allowance in lieu of annual leave which has not been taken upon termination of the employment relationship is a right which is inherent to the right to 'paid' annual leave. [34]

57. Second, it is also clear that Article 7(2) of Directive 2003/88 lays down no condition for entitlement to an allowance in lieu other than that relating to the fact, first, that the employment relationship has ended and, secondly, that the worker has not taken all the annual leave to which he or she was entitled on the date that that relationship ended. [35] Moreover, the reason for which the employment relationship is terminated is not relevant as regards the entitlement to an allowance in lieu provided for in Article 7(2) of Directive 2003/88. [36]

32 See, to that effect, judgments of 20 January 2009, *Schultz-Hoff and Others* (C-350/06 and C-520/06, EU:C:2009:18, paragraph 60); of 12 June 2014, *Bollacke* (C-118/13, EU:C:2014:1755, paragraph 20); of 29 November 2017, *King* (C-214/16, EU:C:2017:914, paragraph 35); and of 6 November 2018, *Bauer and Willmeroth* (C-569/16 and C-570/16, EU:C:2018:871, paragraphs 39 and 58).

33 See, to that effect, judgments of 20 January 2009, *Schultz-Hoff and Others* (C-350/06 and C-520/06, EU:C:2009:18, paragraph 61), and of 29 November 2017, *King* (C-214/16, EU:C:2017:914, paragraph 52).

34 Judgments of 6 November 2018, *Bauer and Willmeroth* (C-569/16 and C-570/16, EU:C:2018:871, paragraphs 58 and 83), and *Max-Planck-Gesellschaft zur Förderung der Wissenschaften* (C-684/16, EU:C:2018:874, paragraphs 72 and 75).

35 See, to that effect, judgments of 12 June 2014, *Bollacke* (C-118/13, EU:C:2014:1755, paragraph 23), and of 6 November 2018, *Bauer and Willmeroth* (C-569/16 and C-570/16, EU:C:2018:871, paragraph 44).

36 See, to that effect, judgments of 20 July 2016, *Maschek* (C-341/15, EU:C:2016:576, paragraph 28), and of 6 November 2018, *Bauer and Willmeroth* (C-569/16 and C-570/16, EU:C:2018:871, paragraph 45).

58. As I have already made clear, the answer to the first question should be that a worker unlawfully dismissed and subsequently reinstated must be entitled to paid annual leave for the period from the date of dismissal until the date of reinstatement. It follows, therefore, that the answer to the second question is necessarily, that Article 7(2) of Directive 2003/88 and Article 31(2) of the Charter must be interpreted in turn as precluding national legislation or case-law or national practices, according to which, once the employment relationship has ended, the right to payment of an allowance for paid leave earned but not taken is denied in a context where the worker was unable to take the leave before the employment relationship ended because of a dismissal established as unlawful by a national court ordering the retroactive restoration of the employment relationship for the period between that unlawful act committed by the employer and the subsequent reinstatement only.

59. If, however, the worker obtained other employment in the period between the unlawful dismissal and the reinstatement in that first post, that worker cannot claim from the first employer the allowance in lieu corresponding to the period of work performed in the new post. In these specific circumstances, obtaining full payment of the allowance in lieu from the first employer would result in an accumulation of paid annual leave entitlements that no longer reflects the actual purpose of the right to paid annual leave.

60. It would also go further than the principle established by the Court in cases such as *Dicu*,[37] namely that the worker's right to paid annual leave should not be compromised by reason of events essentially beyond his or her control. Just as the worker should not suffer in this respect by reason of the wrongful act of the employer in bringing about the dismissal, the worker should not be rewarded either by securing an allowance in respect of paid annual leave greater than that to which he or she would have been entitled had the dismissal not occurred in the first place.

61. One might add that, in these specific circumstances, the worker has had the opportunity to rest from carrying out the work required under the new employment contract or has, eventually, the right to receive from the new employer the allowance in lieu for the period of work done under this contract.

VI. Conclusion

62. Accordingly, in the light of the foregoing considerations, I propose that the Court should answer to the questions referred by the Rayonen Sad Haskovo (Haskovo District Court, Bulgaria) and the Corte suprema di cassazione (Supreme Court of Cassation, Italy) as follows:

(1) Where national legislation provides that a worker unlawfully dismissed must be reinstated in his or her work, Article 7(1) 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 or case-law or practices according to which that worker is not entitled to paid annual leave for the period from the date of dismissal until the date of reinstatement.

(2) Article 7(2) of Directive 2003/88 and Article 31(2) of the Charter must be interpreted as precluding national legislation or case-law or national practices, according to which, once the employment relationship has ended, the right to payment of an allowance for paid leave earned but not taken is denied in a context where the worker was unable to take the leave before the employment relationship ended because of a dismissal established as unlawful by a national court

37 Judgment of 4 October 2018, *Dicu* (C-12/17, EU:C:2018:799).

ordering the retroactive restoration of the employment relationship for the period between that unlawful act committed by the employer and the subsequent reinstatement only, except for any period during which that worker was employed by a different employer.