

JUDGMENT OF THE COURT (Grand Chamber)

20 January 2009*

In Joined Cases C-350/06 and C-520/06,

REFERENCES for a preliminary ruling under Article 234 EC from the Landesarbeitsgericht Düsseldorf (Germany) (C-350/06) and the House of Lords (United Kingdom) (C-520/06), made by decisions of 2 August and 13 December 2006, received at the Court on 21 August and 20 December 2006 respectively, in the proceedings

Gerhard Schultz-Hoff (C-350/06)

v

Deutsche Rentenversicherung Bund,

and

Mrs C. Stringer and Others (C-520/06)

* Languages of the case: German and English.

V

Her Majesty's Revenue and Customs,

THE COURT (Grand Chamber),

composed of V. Skouris, President, P. Jann, C.W.A. Timmermans, A. Rosas, K. Lenaerts and A. Ó Caoimh, Presidents of Chambers, K. Schiemann, J. Makarczyk, P. Küris, E. Juhász, G. Arestis, E. Levits (Rapporteur) and L. Bay Larsen, Judges,

Advocate General: V. Trstenjak,
Registrar: J. Swedenborg, Administrator,

having regard to the written procedure and further to the hearing on 20 November 2007,

after considering the observations submitted on behalf of:

— Deutsche Rentenversicherung Bund, by J. Littig, Rechtsanwalt,

- Mrs Stringer and Others, by C. Jeans QC and M. Ford, Barrister, instructed by V. Phillips, Solicitor,

- the German Government, by M. Lumma and C. Blaschke, acting as Agents,

- the United Kingdom Government, by Z. Bryanston-Cross, acting as Agent, and T. Ward, Barrister,

- the Belgian Government, by L. Van den Broeck, acting as Agent,

- the Czech Government, by T. Boček, acting as Agent,

- the Italian Government, by I.M. Braguglia, acting as Agent, and W. Ferrante, avvocato dello Stato,

- the Netherlands Government, by C. Wissels, acting as Agent,

- the Polish Government, by E. Ośniecka-Tamecka, acting as Agent,

— the Slovene Government, by M. Remic, acting as Agent,

— the Commission of the European Communities, by M. van Beek, acting as Agent,

after hearing the Opinion of the Advocate General at the sitting on 24 January 2008,

gives the following

Judgment

- ¹ These references for a preliminary ruling 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 (OJ 2003 L 299, p. 9).
- ² The references were made in two sets of proceedings, the first between Mr Schultz-Hoff and his former employer, Deutsche Rentenversicherung Bund ('DRB'), and the second between a number of employees, some of whom have been dismissed, and their employer or former employer, Her Majesty's Revenue and Customs, regarding the questions whether a worker who is absent on sick leave is entitled to take paid annual leave during that period of sick leave and whether, and if so to what extent, a worker absent on sick leave for the whole or part of the leave year and/or of a carry-over period

is entitled to an allowance in lieu of paid annual leave not taken by the time the employment relationship is terminated.

Legal framework

3 Article 1 of Directive 2003/88 provides as follows:

‘Purpose and scope

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

2. The Directive applies to:

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

...’

4 Article 7 of the directive reads as follows:

'Annual leave

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

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

5 Article 17 of Directive 2003/88 allows Member States to derogate from certain provisions of the directive. No derogation is allowed with regard to Article 7 of the directive.

The main proceedings and the questions referred for a preliminary ruling

Case C-520/06

6 The appellants in the main proceedings can be divided into two categories.

- 7 The first category concerns a worker who was absent from work for several months on indefinite sick leave. In the course of that sick leave, she informed her employer that she wished to take, during the two months following her request, a number of days of paid annual leave.
- 8 The workers falling into the second category were, before their dismissal, on long-term sick leave. Since they had not taken their paid annual leave during the leave year, the only period during which paid annual leave can be taken under United Kingdom law, they claimed payment in lieu.
- 9 The workers in those two categories were successful before the Employment Tribunal. The Employment Appeal Tribunal dismissed the employer's appeals but gave permission to appeal to the Court of Appeal (England and Wales) (Civil Division), which allowed the appeals.
- 10 The appellants in the main proceedings appealed to the House of Lords, which decided to stay the proceedings and to refer the following questions to the Court for a preliminary ruling:
- '1. Does Article 7(1) of Directive 2003/88 ... mean that a worker on indefinite sick leave is entitled (i) to designate a future period as paid annual leave and (ii) to take paid annual leave, in either case during a period that would otherwise be sick leave?

2. If a Member State exercises its discretion to replace the minimum period of paid annual leave with an allowance in lieu on termination of employment under Article 7(2) of Directive 2003/88 ..., in circumstances in which a worker has been absent on sick leave for all or part of the leave year in which the employment relationship is terminated, does Article 7(2) [of that directive] impose any requirements or lay down any criteria as to whether the allowance is to be paid or how it is to be calculated?

Case C-350/06

- 11 Mr Schultz-Hoff, the appellant in the main proceedings, had been employed by DRB since 1 April 1971. As of 1995, Mr Schultz-Hoff, who is recognised as having a serious disability, experienced alternate periods of fitness for work and incapacity for work due to illness. In 2004, he was physically fit to work until the beginning of September. Thereafter, he was on continuous sick leave until 30 September 2005, the date on which his employment relationship terminated.

- 12 By letter of 13 May 2005, Mr Schultz-Hoff requested DRB to authorise him to take, from 1 June 2005, paid annual leave in respect of the calendar year 2004, the leave year. On 25 May 2005, the request was refused on the ground that the competent medical service had first to establish whether he was fit to work. In September 2005, DRB found that Mr Schultz-Hoff was incapacitated for work and, in its capacity as pensions authority, granted him a permanent pension backdated to 1 March 2005.

- 13 Mr Schultz-Hoff brought an action before the Arbeitsgericht (Labour Court) Düsseldorf seeking payment of allowances in respect of paid annual leave not taken in the calendar years 2004 and 2005, the leave years.
- 14 DRB maintains that Mr Schultz-Hoff's incapacity for work continues to the present day, and therefore beyond the carry-over period under Paragraph 7(3) of the Federal law on leave (Bundesurlaubsgesetz) of 8 January 1963, in the version applicable to the main proceedings, granted to a worker who has not been able to take his annual leave during the leave year on imperative operational grounds or for reasons connected to the worker himself. As a result, according to German law, the right to paid annual leave has been extinguished and Mr Schultz-Hoff is not entitled to any allowance in lieu of paid annual leave not taken.
- 15 The Arbeitsgericht Düsseldorf dismissed Mr Schultz-Hoff's action and he appealed to the Landesarbeitsgericht (Higher Labour Court) Düsseldorf.
- 16 The national court indicates that according to the relevant provisions of national law, as interpreted by the Bundesarbeitsgericht (Federal Labour Court), a worker's entitlement to an allowance in lieu of paid annual leave not taken is extinguished at the end of the calendar year concerned and at the latest at the end of a carry-over period which, except in the case of a derogation in favour of the worker laid down in a collective agreement, is of three months' duration. If the worker has been incapacitated for work until the end of the carry-over period, compensation by means of an allowance in lieu of the paid annual leave not taken is not permitted on termination of the employment relationship.
- 17 The Landesarbeitsgericht Düsseldorf, doubting whether that case-law of the Bundesarbeitsgericht is compatible with Article 7 of Directive 2003/88, decided to stay the proceedings and to refer the following questions to the Court for a preliminary ruling:

- ‘1. Is Article 7(1) of Directive 2003/88 ... to be understood as meaning that workers must in any event receive minimum annual paid leave of four weeks [and that] in particular leave not taken by a worker because of illness during the leave year must be authorised at a later date, or can national legal provisions and/or national practice stipulate that an entitlement to paid annual leave is extinguished if workers become incapacitated for work during the leave year before leave is authorised and do not recover their capacity for work before the end of the leave year or the carry-over period laid down by statute, collective agreement or individual agreement?

2. Is Article 7(2) of Directive 2003/88 ... to be understood as meaning that at the end of the employment relationship workers have, in any event, a claim to financial compensation in respect of leave accrued, but not taken (an allowance in lieu of leave), or can national legislation and/or national practice stipulate that workers will not receive an allowance in lieu of leave if, up to the end of the leave year or the relevant carry-over period, they are incapacitated for work and/or if after the ending of the employment relationship they draw a disability or invalidity pension?

3. In the event that the Court of Justice answers Questions 1 and 2 in the affirmative:

Is Article 7 of Directive 2003/88 ... to be understood as meaning that the entitlement to annual leave or an allowance in lieu requires the worker actually to have worked during the leave year, or does the entitlement arise also in the case of excusable absence (by reason of illness) or inexcusable absence in the same leave year?’

- 18 Given the connection between the two cases in the main proceedings, confirmed at the hearing, they should be joined for the purposes of the judgment.

Questions referred for a preliminary ruling

- 19 As a preliminary point, it should be noted that the sick leave at issue in the cases in the main proceedings did not exceed the duration of the leave years applicable, in relation to paid annual leave, under the national law in each of those cases.

The right to take paid annual leave during a period of sick leave

- 20 By the first question referred in Case C-520/06, the national court asks, essentially, whether Article 7(1) of Directive 2003/88 must be interpreted as precluding national legislation or practices which provide that a worker on sick leave is not entitled to take paid annual leave during that sick leave.

- 21 All the governments and the Commission of the European Communities in their observations consider that that question should be answered in the negative.

- 22 According to settled case-law, the entitlement of every worker to paid annual leave must be regarded as a particularly important principle of Community social law from which there can be no derogations and whose implementation by the competent national authorities must be confined within the limits expressly laid down by Council Directive 93/104/EC of 23 November 1993 concerning certain aspects of the organisation of working time (OJ 1993 L 307, p. 18) itself (see Case C-173/99 *BECTU* [2001] ECR I-4881, paragraph 43; Case C-342/01 *Merino Gómez* [2004] ECR I-2605, paragraph 29; and Joined Cases C-131/04 and C-257/04 *Robinson-Steele and Others* [2006] ECR I-2531, paragraph 48).
- 23 A worker must normally be entitled to actual rest, with a view to ensuring effective protection of his health and safety, since it is only where the employment relationship is terminated that Article 7(2) of Directive 2003/88 permits an allowance to be paid in lieu of paid annual leave (see, to that effect, *BECTU*, paragraph 44, and *Merino Gómez*, paragraph 30).
- 24 Article 7 of Directive 2003/88 is not, furthermore, one of the provisions from which the directive expressly allows derogation.
- 25 It is common ground that the purpose of the entitlement to paid annual leave is to enable the worker to rest and to enjoy a period of relaxation and leisure. The purpose of the entitlement to sick leave is different. It is given to the worker so that he can recover from being ill.
- 26 The Court has already held that a period of leave guaranteed by Community law cannot affect the right to take another period of leave guaranteed by that law (see *Merino Gómez*, paragraphs 32 and 33; Case C-519/03 *Commission v Luxembourg* [2005] ECR I-3067, paragraph 33; and Case C-116/06 *Kiiski* [2007] ECR I-7643, paragraph 56). In the case, in particular, of *Merino Gómez*, the Court held that Article 7(1) of Directive 93/104 must be interpreted as meaning that, where the dates of a worker's maternity leave coincide with those of the general annual leave fixed, by a collective

agreement, for the entire workforce, the requirements of that directive relating to paid annual leave cannot be regarded as met.

27 However, by contrast with the rights to maternity leave or parental leave at issue in the case-law cited in the previous paragraph, the right to sick leave and the conditions for exercise of that right are not, as Community law now stands, governed by that law. In addition, the interpretation of Article 7(1) of Directive 93/104 in *Merino Gómez* was necessary, in the light of the other Community directives at issue in that case, in order to guarantee observance of the rights connected with the employment contract of a worker in the event of maternity leave.

28 With regard to the right to paid annual leave, as is clear from the terms of Directive 2003/88 and the case-law of the Court, it is for the Member States to lay down, in their domestic legislation, conditions for the exercise and implementation of that right, by prescribing the specific circumstances in which workers may exercise the right, without making the very existence of that right, which derives directly from Directive 93/104, subject to any preconditions whatsoever (see, to that effect, *BECTU*, paragraph 53).

29 It follows, in those circumstances, on the one hand, that Article 7(1) of Directive 2003/88 does not, as a rule, preclude national legislation or practices according to which a worker on sick leave is not entitled to take paid annual leave during that sick leave, provided however that the worker in question has the opportunity to exercise the right conferred by that directive during another period.

30 According to the case-law of the Court, 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 (Case C-124/05 *Federatie Nederlandse Vakbeweging* [2006] ECR I-3423, paragraph 30).

31 On the other hand, nor does Directive 2003/88 preclude national legislation or practices which allow a worker on sick leave to take paid annual leave during that sick leave.

32 In the light of the foregoing, the answer to the first question referred in Case C-520/06 is that Article 7(1) of Directive 2003/88 must be interpreted as not precluding national legislation or practices according to which a worker on sick leave is not entitled to take paid annual leave during that sick leave.

The right to paid annual leave in the event of sick leave which lasts for the whole or part of the leave year, where the incapacity for work persists beyond the end of that year and/or of a carry-over period laid down by national law

33 By the first question and, in the alternative, by the third question to the extent that it relates to the right to leave and not to the allowance in lieu of paid annual leave not taken, referred in Case C-350/06, the national court asks, essentially, whether Article 7(1) of Directive 2003/88 must be interpreted as precluding national legislation or practices according to which the entitlement 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 or part of the leave year and where his incapacity to work persisted until the end of his employment relationship.

34 As pointed out *inter alia* by the German Government at the hearing, with reference to paragraph 53 of *BECTU*, it is clear from Article 7(1) of Directive 2003/88 that the conditions for application of the right to paid annual leave in the various Member States are governed by national legislation and/or practice. The German Government thus concludes that the question of carrying over leave and therefore of the specification of a period during which a worker prevented from taking his paid annual leave during the leave year can still take that leave falls within the conditions for the exercise and implementation of the right to paid annual leave and is therefore governed by national legislation and/or practice.

35 While that conclusion can be accepted as a matter of principle, it is nevertheless subject to certain limits.

36 Accordingly the limits to that principle in the specific circumstances of Case C-350/06 must be examined.

— Sick leave lasting for the whole leave year and persisting beyond the end of that year and/or of a carry-over period

37 As a preliminary point, it should be noted that, according to recital 6 in the preamble, Directive 2003/88 has taken account of the principles of the International Labour Organisation with regard to the organisation of working time.

38 In that regard, under Article 5(4) of Convention No 132 of the International Labour Organisation of 24 June 1970 concerning Annual Holidays with Pay (Revised), ‘...

absence from work for such reasons beyond the control of the employed person concerned as illness, ... shall be counted as part of the period of service’.

39 With regard, first, to the provisions concerning minimum rest periods in Chapter 2 of Directive 2003/88, they refer in most cases to ‘every worker’, as indeed does Article 7(1) of the directive in relation to entitlement to paid annual leave (*BECTU*, paragraph 46).

40 In addition, concerning that entitlement, 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.

41 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 (*BECTU*, paragraphs 52 and 53) 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.

42 A provision of national law setting out a carry-over period for annual leave not taken by the end of the leave year aims, as a rule, to give a worker who has been prevented from taking his annual leave an additional opportunity to benefit from that leave. The laying down of such a period forms part of the conditions for the exercise and implementation of the right to paid annual leave and therefore falls, as a rule, within the competence of the Member States.

43 It follows 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 right to paid annual leave has actually had the opportunity to exercise the right conferred on him by the directive.

44 It must therefore be held that a worker, who, like the appellant in the main proceedings in Case C-350/06 in relation to the year 2005, is on sick leave for the whole leave year and beyond the carry-over period laid down by national law, is denied any period giving the opportunity to benefit from his paid annual leave.

45 To accept that, in the specific circumstances of incapacity for work described in the previous paragraph, the relevant provisions of national law, and in particular those laying down the carry-over period, can provide for the loss of the worker's right to paid annual leave guaranteed by Article 7(1) of Directive 2003/88, without the worker actually having the opportunity to exercise the right conferred on him by that directive, would mean that those provisions undermined the social right directly conferred by Article 7 of the directive on every worker.

46 Thus, although the Court has accepted that Member States are free to lay down, in their domestic legislation, conditions for the exercise and implementation of the right to paid annual leave, it has nevertheless made clear that Member States are not entitled to make the very existence of that right, which derives directly from Directive 93/104, subject to any preconditions whatsoever (see, to that effect, *BECTU*, paragraph 53).

47 According to the same case-law, the Court has stated that the requisite arrangements for implementation and application of the requirements of Directive 93/104 may display certain divergences as regards the conditions for exercising the right to paid

annual leave, but that that directive does not allow Member States to exclude the very existence of a right expressly granted to all workers (*BECTU*, paragraph 55).

48 It follows that if, under the case-law cited in the previous paragraphs, the right to paid annual leave guaranteed to the worker by Article 7(1) of Directive 2003/88 may not be undermined by provisions of national law which exclude the creation or existence of that right, a different result cannot be allowed in relation to provisions of national law which provide for the loss of that right, in the case of a worker on sick leave for the whole leave year and/or beyond a carry-over period, such as Mr Schultz-Hoff, who has not been able to exercise his right to paid annual leave. As in the circumstances in *BECTU*, where the Court held that the Member States could not exclude the existence of the right to paid annual leave, in a situation such as that of Mr Schultz-Hoff the Member States may not provide for the loss of that right.

49 It follows from the above 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 leave year and where his incapacity for work persisted until the end of his employment relationship, which was the reason why he could not exercise his right to paid annual leave.

— Sick leave for part of the leave year, persisting until the end of that year and/or of a carry-over period

50 In the light of the reasoning set out in paragraphs 37 to 49 above, the conclusion to be drawn in relation to the right to paid annual leave of a worker who has worked, like

Mr Schultz-Hoff in respect of 2004, for part of the leave year before being put on sick leave, must be the same as that drawn in paragraph 49 above.

- 51 Every worker denied the benefit of a period of paid annual leave on account of long-term sick leave is in the same situation as that described in paragraph 44 above, inasmuch as incapacity for work owing to sickness is not foreseeable.
- 52 In the light of all of the foregoing, the answer to the first and third questions, in so far as the latter relates to the right to leave and not to the allowance in lieu of paid annual leave not taken, referred in Case C-350/06, is that Article 7(1) of Directive 2003/88 must be interpreted as precluding 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 or part of the leave year and where his incapacity to work has persisted until the end of his employment relationship, which was the reason why he could not exercise his right to paid annual leave.

The right to an allowance in lieu, on termination of the employment relationship, in respect of paid annual leave not taken in the leave year and/or in a carry-over period on account of incapacity for work for the whole or part of the leave year and/or of the carry-over period

- 53 By the second question and, in the alternative, by the third question to the extent that it relates to the allowance in lieu of paid annual leave not taken, referred in Case C-350/06, and by the second question referred in Case C-520/06, the national courts ask, essentially, whether Article 7(2) of Directive 2003/88 must be interpreted as

precluding national legislation or practices which provide that, on termination of the employment relationship, no allowance in lieu of paid annual leave not taken is to be paid where the worker has been on sick leave for the whole or part of the leave year and/or of a carry-over period. If that question is answered in the affirmative, the national court in Case C-520/06 would like to know the criteria for the calculation of the allowance in lieu.

54 In that regard, it should be pointed out first that, as is clear from the very wording of Article 7(1) of Directive 2003/88, a provision from which that directive allows no derogation, every worker is entitled to paid annual leave of at least four weeks. That right to paid annual leave, which, according to the case-law referred to in paragraph 22 above, must be regarded as a particularly important principle of Community social law, is therefore granted to every worker, whatever his state of health.

55 Second, as is clear from paragraph 52 above, the right to paid annual leave is not extinguished at the end of the leave year and/or of a carry-over period laid down by national law where the worker was on sick leave for the whole or part of the leave year and has not actually had the opportunity to exercise the right conferred on him by Directive 2003/88.

56 On termination of the employment relationship, it is in fact no longer possible to take paid annual leave. In order to avoid that, as a result, the right in question cannot be enjoyed by the worker, even in pecuniary form, Article 7(2) of Directive 2003/88 provides that the worker is entitled to an allowance in lieu.

- 57 No provision in Directive 2003/88 expressly lays down the way in which the allowance in lieu of the minimum period or periods of paid annual leave must be calculated where the employment relationship is terminated.
- 58 However, according to the case-law of the Court, the expression ‘paid annual leave’ in Article 7(1) of Directive 2003/88 means that, for the duration of annual leave within the meaning of that directive, remuneration must be maintained and that, in other words, workers must receive their normal remuneration for that period of rest (see *Robinson-Steele and Others*, paragraph 50).
- 59 When determining the allowance in lieu payable to the worker under Article 7(2) of Directive 2003/88, the Member States must ensure that the conditions for application laid down by national law take account of the limits which derive from the directive itself.
- 60 According to the case-law of the Court, Directive 2003/88 treats entitlement to annual leave and to a payment on that account as being two aspects of a single right. The purpose of the requirement of payment for that leave is to put the worker, during such leave, in a position which is, as regards remuneration, comparable to periods of work (see *Robinson-Steele and Others*, paragraph 58).
- 61 It follows that, with regard to a worker who has not been able, for reasons beyond his control, to exercise his right to paid annual leave before termination of the employment relationship, the allowance in lieu to which he is entitled must be calculated so that the worker is put in a position comparable to that he would have been in had he exercised that right during his employment relationship. It follows that the worker’s normal remuneration, which is that which must be maintained during the rest period corresponding to the paid annual leave, is also decisive as regards the calculation of the allowance in lieu of annual leave not taken by the end of the employment relationship.

⁶² In the light of all of the foregoing, the answer to the second and third questions, in so far as the latter relates to the allowance in lieu of paid annual leave not taken, referred in Case C-350/06, and to the second question referred in Case C-520/06, is that Article 7(2) of Directive 2003/88 must be interpreted as precluding national legislation or practices which provide that, on termination of the employment relationship, no allowance in lieu of paid annual leave not taken is to be paid to a worker who has been on sick leave for the whole or part of the leave year and/or of a carry-over period, which was the reason why he could not exercise his right to paid annual leave. For the calculation of the allowance in lieu, the worker's normal remuneration, which is that which must be maintained during the rest period corresponding to the paid annual leave, is also decisive.

Costs

⁶³ Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national courts, the decision on costs is a matter for those courts. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Grand Chamber) hereby rules:

- 1. 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 must be interpreted as not precluding national legislation or practices according to which a worker on sick leave is not entitled to take paid annual leave during that sick leave.

- 2. Article 7(1) of Directive 2003/88 must be interpreted as precluding 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 or part of the leave year and where his incapacity to work has persisted until the end of his employment relationship, which was the reason why he could not exercise his right to paid annual leave.**

- 3. Article 7(2) of Directive 2003/88 must be interpreted as precluding national legislation or practices which provide that, on termination of the employment relationship, no allowance in lieu of paid annual leave not taken is to be paid to a worker who has been on sick leave for the whole or part of the leave year and/or of a carry-over period, which was the reason why he could not exercise his right to paid annual leave. For the calculation of the allowance in lieu, the worker's normal remuneration, which is that which must be maintained during the rest period corresponding to the paid annual leave, is also decisive.**

[Signatures]