Provisional text

JUDGMENT OF THE COURT (Fourth Chamber)

13 December 2018 (*)

(Reference for a preliminary ruling — Social policy — Organisation of working time — Directive 2003/88/EC — Right to paid annual leave — Article 7(1) — Legislation of a Member State under which collective agreements may provide for account to be taken of periods of short-time working when calculating remuneration to be paid in respect of annual leave — Temporal effects of judgments ruling on interpretation)

In Case C−385/17,

REQUEST for a preliminary ruling under Article 267 TFEU from the Arbeitsgericht Verden (Labour Court, Verden, Germany), made by decision of 19 June 2017, received at the Court on 26 June 2017, in the proceedings

Torsten Hein

v

Albert Holzkamm GmbH & Co. KG,

THE COURT (Fourth Chamber),

composed of T. von Danwitz, President of the Seventh Chamber, acting as President of the Fourth Chamber, K. Jürimäe, C. Lycourgos (Rapporteur), E. Juhász and C. Vajda, Judges,

Advocate General: M. Bobek,

Registrar: R. Șereș, Administrator,

having regard to the written procedure and further to the hearing on 14 June 2018,

after considering the observations submitted on behalf of:

– Mr Hein, by S. Eidinger, Rechtsanwältin,

– Albert Holzkamm GmbH & Co. KG, by C. Brehm and I. Witten, Rechtsanwältinnen,

– the German Government, by T. Henze and J. Möller, acting as Agents,

– the Italian Government, by G. Palmieri, acting as Agent, and by L. Fiandaca, avvocato dello Stato,

– the European Commission, by T.S. Bohr and M. van Beek, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 5 September 2018,

gives the following

Judgment

1 This request for a preliminary ruling concerns the interpretation of 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 (OJ 2003 L 299, p. 9) and of Article 31 of the Charter of Fundamental Rights of the European Union ('the Charter').

2 The request has been made in proceedings between Mr Torsten Hein and Albert Holzkamm GmbH & Co. KG ('Holzkamm') concerning the calculation of remuneration for annual leave, namely the payment to which Mr Hein is entitled in respect of his paid annual leave.

Legal context

EU law

3 Article 31 of 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.'

4 Article 1 of Directive 2003/88, entitled 'Purpose and scope', provides:

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

2. This Directive applies to:

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

...'

5 Article 2(1) of that directive defines 'working time' as 'any period during which the worker is working, at the employer's disposal and carrying out his activity or duties, in accordance with national laws and/or practice'. Article 2(2) of the directive defines 'rest period' as 'any period which is not working time'.

6 Article 7 of Directive 2003/88, 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.

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

7 Article 15 of that directive reads as follows:

'This Directive shall not affect Member States' right to apply or introduce laws, regulations or administrative provisions more favourable to the protection of the safety and health of workers or to facilitate or permit the application of collective agreements or agreements concluded between the two sides of industry which are more favourable to the protection of the safety and health of workers.'

German law

Federal Law on leave

8 Paragraph 3(1) of the Mindesturlaubsgesetz für Arbeitnehmer (Law on minimum leave entitlement for workers) of 8 January 1963 (BGBl. I, 1963, p. 2), in the version applicable at the material time ('the Federal Law on leave'), states:

'Annual leave shall amount to at least 24 working days each year.'

9 Paragraph 11 of the Federal Law on leave, entitled 'Payment for annual leave', provides in paragraph 1:

'Payment for annual leave shall be calculated on the basis of the average earnings that the worker received in the last 13 weeks prior to the start of the leave, not including earnings additionally received for overtime. ... Reductions in earnings occurring in the period of calculation as a result of short-time work, loss of working hours or non-culpable absence from work shall not affect the calculation of the payment for annual leave. ...'

10 Paragraph 13 of the law provides:

'1. Collective agreements may derogate from the above provisions, with the exception of Paragraphs 1, 2 and 3(1). ...

2. In the construction industry or other economic sectors in which, as a consequence of frequent changes of location of the work to be performed by firms, employment relationships shorter than one year in duration are normal to a considerable degree, a collective agreement may derogate from the above provisions to a greater extent than is provided for in the first sentence of Paragraph 13(1), provided this is necessary in order to safeguard unbroken annual leave for all workers. ...

...'

The Federal collective agreement for the construction industry

11 Paragraph 8 of the Bundesrahmentarifvertrag für das Baugewerbe (Federal collective framework agreement for the construction industry) of 4 July 2002, in the version applicable at the material time ('the BRTV-Bau'), stipulates:

'1. Entitlement to annual leave and duration of leave

1.1 A worker shall be entitled to 30 working days' paid holiday in each calendar year (leave year).

...

1.3 Saturdays shall not be regarded as working days.

1.4 The duration of leave shall be determined by the number of days of employment completed in firms in the construction industry.

...

2. Calculation of the duration of leave

...

2.2 A worker shall acquire an entitlement to one day of leave after every 12 — in the case of severely disabled persons after every 10.3 — days of employment.

2.3 Days of employment shall include all calendar days on which an employment relationship exists in firms in the construction industry during the leave year. They shall exclude days on which the worker is

absent from work without authorisation and days of unpaid leave where the latter's duration is longer than 14 days.

...

4. Remuneration for annual leave

4.1 For annual leave pursuant to point 1, a worker shall receive remuneration for annual leave.

The remuneration for annual leave shall amount to 14.25% of the gross wage or 16.63% for severely disabled persons within the meaning of the statutory provisions. The remuneration for annual leave shall consist of the statutory payment for annual leave of 11.4% of the gross wage — 13.3% for severely disabled persons — and additional holiday pay. Additional holiday pay shall amount to 25% of the statutory payment for annual leave. It may be credited against additional holiday pay granted by the company.

...

4.2 "Gross wage" means:

(a) the gross pay on which the calculation of income tax is based and which is entered in the income tax statement, including remuneration in kind not taxed at a flat rate pursuant to Paragraph 40 of the Einkommensteuergesetz (Law on income tax),

...

The gross wage shall not include the collectively agreed 13th month pay or company payments having the same character (for example Christmas bonus and annual bonus), allowances in lieu of leave pursuant to point 6 or settlements paid in respect of the termination of the employment relationship.

...

4.3 The remuneration for annual leave in respect of partially claimed annual leave shall be calculated by dividing the remuneration for annual leave determined pursuant to point 4.1 by the total number of days of leave determined pursuant to point 2 and multiplying it by the number of days of leave claimed.

...

4.5 At the end of the leave year, residual entitlements to remuneration for annual leave shall be carried over to the following calendar year.

5. Minimum remuneration for annual leave

5.1 For each hour lost by reason of non-culpable incapacity for work as a result of sickness, for which there was no wage entitlement, the remuneration for annual leave determined pursuant to point 4.1 shall be increased by 14.25% of the gross wage last notified pursuant to point 1 of the first sentence of Paragraph 6(1) of the [Tarifvertrag über das Sozialkassenverfahren im Baugewerbe (Collective agreement on social fund procedures in the construction industry; 'the VTV')].

5.2 For each hour lost in the period from 1 December to 31 March for which the worker receives seasonal short-time working allowance, the remuneration for annual leave determined pursuant to point 4.1 shall be increased, after the end of that period, by 14.25% of the gross wage last notified pursuant to point 1 of the first sentence of Paragraph 6(1) of the VTV. The first 90 hours lost in receipt of seasonal short-time working allowance shall be disregarded.

...'

The dispute in the main proceedings and the questions referred for a preliminary ruling

12 Mr Hein is employed by Holzkamm as a concrete worker. Their employment relationship is governed by the provisions of the BRTV-Bau. In 2015, Mr Hein was on short-time work for a total of 26 weeks. In 2015 and 2016 he took 30 days of leave which he had accrued in 2015.

13 As is clear from the request for a preliminary ruling, Paragraph 11(1) of the Federal Law on leave provides that the statutory payment for annual leave is to be calculated on the basis of the average earnings received by the worker during the reference period (also 'the period of calculation'), namely the last 13 weeks prior to the start of the leave. According to that provision, reductions in earnings occurring in the reference period as a result of short-time work, loss of working hours or non-culpable absence from work are not to affect the calculation of the statutory payment for annual leave.

14 Paragraph 13(1) and (2) of the Federal Law on leave allows derogation from the provisions of that law by collective agreement. The employers and workers in the construction industry have exercised that option and have laid down in the BRTV-Bau special rules governing, inter alia, accrual of entitlement to annual leave and the remuneration received during that leave ('remuneration for annual leave').

15 Remuneration for annual leave is calculated on the basis of the gross wages received during the reference period, which are calculated on an annual basis. Although, under point 4.1 of Paragraph 8 of the BRTV-Bau, remuneration for annual leave is 25% higher than the statutory payment for annual leave provided for in Paragraph 11(1) of the Federal Law on leave, and is, thus, for persons without a disability, 14.25% of the gross annual wages, the calculation of remuneration for annual leave on the basis of gross wages received during the reference period leads to a reduction of that remuneration when the worker had periods of short-time working during the reference period, since the reduced wages received as a result of those periods of short-time working are taken into account for the calculation of that remuneration.

16 Having regard to Mr Hein's periods of short-time working during 2015, Holzkamm calculated the amount of his remuneration for annual leave on the basis of a gross hourly wage that was lower than his normal hourly wage. However, Mr Hein believes that periods of short-time work during the reference period cannot have the effect of reducing his entitlement to remuneration for annual leave and he claims, in that regard, a total amount of EUR 2 260.27.

17 According to the referring court, the Court's answer to the questions referred is necessary since if EU law precludes the domestic legal regime, under which reductions in earnings resulting from short-time working during the reference period are taken into account when calculating remuneration for annual leave, Holzkamm would have based its calculation of Mr Hein's entitlement to remuneration for annual leave on too low an hourly rate. It states that the claim made by Mr Hein concerns, at least in part, the remuneration for annual leave due on account of the minimum four weeks of annual leave provided for in Article 7 of Directive 2003/88.

18 According to the referring court, it follows from the case-law of the Court that workers must receive their normal remuneration for the duration of annual leave within the meaning of Directive 2003/88. Normal remuneration must be determined on the basis of an average calculated over a reference period considered to be representative and in the light of the principle that the right to annual leave and to a payment for that leave are two aspects of a single right.

19 The referring court considers that the issue in the present case — namely, whether national legislation under which collective agreements may provide for account to be taken of any losses of earnings that occur in the reference period as a result of short-time work, leading to a reduction of remuneration for annual leave, is in conformity with EU law — has not been decided in the case-law of the Court.

20 In those circumstances, the Arbeitsgericht Verden (Labour Court, Verden, Germany) decided to stay the proceedings and refer the following questions to the Court for a preliminary ruling:

‘(1) Are Article 31 of the [Charter] and Article 7(1) of [Directive 2003/88] to be interpreted as precluding national legislation under which it may be provided in collective agreements that reductions in earnings occurring in the period of calculation as a result of short-time work affect the calculation of the payment for annual leave with the result that the worker receives a lower remuneration for annual leave for the duration of the period of annual leave of at least four weeks, or receives a lower allowance in lieu of leave after the employment relationship has ended, than he would receive if the calculation of the remuneration for annual leave were based on the average earnings which the worker would have received in the period of calculation without such reductions in earnings? If so, what is the maximum percentage, with reference to the worker’s full average earnings, that a collectively agreed reduction, permitted by national legislation, of the remuneration for annual leave may have as a result of short-time work in the period of calculation in order for the interpretation of that national legislation to be regarded as in conformity with EU law?

(2) If Question 1 is answered in the affirmative: Do the general principle of legal certainty laid down by EU law and the principle of non-retroactivity require that the possibility of relying on the interpretation which the Court places, in the preliminary ruling to be given in the present case, on Article 31 of the [Charter] and on Article 7(1) of [Directive 2003/88] be limited in time, with effect for all parties, because the highest national courts have previously ruled that the relevant national legislation and collectively agreed rules are not amenable to an interpretation in conformity with EU law? If the Court answers this question in the negative: Is it compatible with EU law if, on the basis of national law, the national courts grant protection of legitimate expectations to employers who have relied on the continued application of the case-law developed by the highest national courts, or is the grant of protection of legitimate expectations reserved for the Court of Justice of the European Union?’

Consideration of the questions referred

The first question

21 By its first question the referring court asks, in essence, whether Article 7(1) of Directive 2003/88 and Article 31(2) of the Charter must be interpreted as precluding national legislation, such as that at issue in the main proceedings, which, for the purpose of calculating remuneration for annual leave, allows collective agreements to provide for account to be taken of reductions in earnings resulting from the fact that during the reference period there were days when no work was actually performed owing to short-time working, with the consequence that the worker receives, for the duration of the minimum period of annual leave to which he is entitled under Article 7(1) of the directive, remuneration for annual leave that is lower than the remuneration which he would have received had it been calculated on the basis of his average pay during the reference period without taking into account those reductions in earnings. If the answer to that question is in the affirmative, that court is uncertain, in the context of the interpretation of the national legislation in accordance with EU law which it could have to carry out, as to the level to which remuneration for annual leave may be reduced without infringing EU law.

22 By way of preliminary matters, it should be noted, first, that, as is apparent from the very wording of Article 7(1) of Directive 2003/88 — a provision from which the directive allows no derogation — 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 (judgment of 20 July 2016, *Maschek*, C−341/15, EU:C:2016:576, paragraph 25 and the case-law cited).

23 That right, which is enjoyed by all workers, is expressly set out in Article 31(2) of the Charter, which Article 6(1) TEU recognises as having the same legal value as the Treaties (judgments of 8 November 2012, *Heimann and Toltschin*, C−229/11 and C−230/11, EU:C:2012:693, paragraph 22; of 29 November 2017, *King*, C−214/16, EU:C:2017:914, paragraph 33; and of 4 October 2018, *Dicu*, C−12/17, EU:C:2018:799, paragraph 25).

24 Second, it must be noted that Directive 2003/88 treats entitlement to annual leave and to a payment on that account as being two aspects of a single right (judgments of 20 January 2009, *Schultz-Hoff and Others*, C−350/06 and C−520/06, EU:C:2009:18, paragraph 60, and of 15 September 2011, *Williams and Others*, C−155/10, EU:C:2011:588, paragraph 26).

25 Therefore, in order to provide a useful answer to the first part of the first question, it is necessary to examine, in the first place, the duration of the minimum period of annual leave which is conferred by EU law in circumstances such as those of the main proceedings and, in the second place, the remuneration to which that worker is entitled during that leave.

26 As regards, in the first place, the duration of the minimum period of annual leave, it must be recalled that the purpose of the right to paid annual leave, conferred on every worker by Article 7 of Directive 2003/88, is to enable the worker both to rest from carrying out the work he is required to do under his contract of employment and to enjoy a period of relaxation and leisure (see, inter alia, judgments of 20 January 2009, *Schultz-Hoff and Others*, C−350/06 and C−520/06, EU:C:2009:18, paragraph 25, and of 4 October 2018, *Dicu*, C−12/17, EU:C:2018:799, paragraph 27).

27 That purpose, which distinguishes paid annual leave from other types of leave having different purposes, is based on the premiss that the worker actually worked during the reference period. 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 calculated by reference to the periods of actual work completed under the employment contract (judgment of 4 October 2018, *Dicu*, C−12/17, EU:C:2018:799, paragraph 28).

28 In the present case, it is clear from the documents before the Court and the observations made at the hearing that, in a situation such as that of Mr Hein in the main proceedings, during periods of short-time working the employment relationship between the employer and worker continues but the worker does not perform actual work for his employer.

29 It follows from the case-law cited in paragraph 27 above that a worker in such a position may acquire entitlement to paid annual leave pursuant to Article 7(1) of Directive 2003/88 only for the periods during which he performed actual work, and thus no entitlement to leave is acquired under that provision in respect of periods of short-time working during which such work has not been performed. Thus, in the present case, since, in 2015, Mr Hein did not perform actual work for 26 weeks, it is apparent that, in principle, only two weeks of leave are governed by Article 7(1), but the exact duration of that period of leave is a matter for the referring court to determine.

30 However, as appears expressly from the wording of Article 1(1) and (2)(a) and of Article 7(1) and Article 15 of Directive 2003/88, that directive merely lays down minimum safety and health requirements for the organisation of working time and it does not affect the Member States' right to apply national provisions more favourable to the protection of workers.

31 As a result, that directive does not preclude national legislation or a collective agreement from giving workers the right to more paid annual leave than that guaranteed by the directive, irrespective of their working time having being reduced on account of short-time working (see, to that effect, judgment of 24 January 2012, *Dominguez*, C−282/10, EU:C:2012:33, paragraphs 47 and 48).

32 Regarding, in the second place, the remuneration that must be paid to a worker in respect of the minimum period of annual leave guaranteed by EU law, the Court has already stated that the term '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 (judgments of 16 March 2006, *Robinson-Steele and Others*,

C−131/04 and C−257/04, EU:C:2006:177, paragraph 50, and of 15 September 2011, *Williams and Others*, C−155/10, EU:C:2011:588, paragraph 19).

33 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 (judgments of 16 March 2006, *Robinson-Steele and Others*, C−131/04 and C−257/04, EU:C:2006:177, paragraph 58, and of 15 September 2011, *Williams and Others*, C−155/10, EU:C:2011:588, paragraph 20).

34 Although the structure of the ordinary remuneration of a worker is determined, as such, by the provisions and practices governed by the law of the Member States, that structure cannot affect the worker's right to enjoy, during his period of rest and relaxation, economic conditions which are comparable to those relating to the exercise of his employment (judgment of 15 September 2011, *Williams and Others*, C−155/10, EU:C:2011:588, paragraph 23).

35 In the present case, it is clear from points 4.1, 4.2 and 5.2 of Paragraph 8 of the BRTV-Bau that that collective agreement takes into account, if only partially, periods of short-time working for the purpose of calculating remuneration paid in respect of annual leave. In the case of Mr Hein, the referring court notes that this results in a significant reduction in such remuneration compared to what he would have received if those periods had not been taken into account. Indeed, in 2015, which, according to the referring court, is the reference period during which Mr Hein acquired his entitlement to the annual leave at issue in the main proceedings, Mr Hein was on short-time working for 26 weeks, which is half of the reference period.

36 As a result of such rules, periods of short-time working during which the worker has not performed actual work are taken into account for the purpose of calculating the remuneration due, inter alia, for the days of annual leave resulting from Article 7(1) of Directive 2003/88.

37 It follows that a worker in a position such as that of Mr Hein will receive, for his days of annual leave, remuneration which does not correspond to the normal remuneration he receives during periods of actual work — contrary to the requirements, noted in paragraphs 33 and 34 above, under which the worker must enjoy, during the periods of rest and relaxation which he is guaranteed by Article 7(1) of Directive 2003/88, economic conditions which are comparable to those relating to the exercise of his employment.

38 In that regard, Holzkamm and the German Government state, in essence, that the objective pursued by the BRTV-Bau is to allow undertakings in the construction industry more flexibility so that they can avoid dismissing their workers for economic reasons during periods of low demand by the use of short-time working. Such a benefit for workers would risk being jeopardised if undertakings had to pay the full amount of remuneration for annual leave that the workers would be entitled to if they had worked throughout the year. According to Holzkamm, dismissal would have much more pronounced negative consequences for the workers concerned than the consequences liable to result from a reduction in remuneration for annual leave.

39 Furthermore, Holzkamm states that the rules provided for by the BRTV-Bau are necessary in order to ensure that all workers have unbroken paid annual leave, even if their employment relationships are short in length, thereby guaranteeing that days of leave not already taken are transferred and granted to the worker even under a new employment relationship. In addition, Holzkamm claims that the number of days of paid annual leave to which workers are entitled is not reduced if short-time working has been previously decided upon. As a result, Holzkamm maintains that the legislation at issue in the main proceedings does not lead to a reduction of the total remuneration for annual leave received by the workers each year to an amount less than the minimum required by Article 7(1) of Directive 2003/88, since the workers benefit from a greater number of leave days.

40 Lastly, remuneration paid for overtime worked by the workers is fully taken into account when calculating remuneration for annual leave.

41 In that regard, it must be noted, first, that Article 7(1) of Directive 2003/88 does not require the normal remuneration referred to in the case-law cited in paragraphs 32 to 34 above to be granted for the entire duration of the annual leave to which the worker is entitled under national law. Pursuant to Article 7(1), the employer is required to grant such remuneration only for the minimum period of annual leave provided for in that provision, such leave being acquired by the worker, as is noted in paragraph 29 above, only for periods of actual work.

42 Next, although, as is clear from paragraphs 30 and 31 above, Directive 2003/88 does not preclude employers and workers from adopting, by collective agreement pursuant to national legislation, rules aiming to contribute generally to an improvement of workers' working conditions, the detailed implementing rules must, however, respect the limits flowing from that directive (see, to that effect, judgment of 16 March 2006, *Robinson-Steele and Others*, C−131/04 and C−257/04, EU:C:2006:177, paragraph 57).

43 In that regard, an increase in the entitlement to paid annual leave beyond the minimum required by Article 7(1) of Directive 2003/88 or the possibility of obtaining entitlement to unbroken paid annual leave are measures favourable to workers which go beyond the minimum requirements laid down in that provision and, as a result, are not governed by it. Those measures cannot serve to compensate for the negative effect that a reduction in the remuneration due for annual leave has on the worker without undermining the right to paid annual leave under that provision, an integral part of which is the right for the worker to enjoy, during his period of rest and relaxation, economic conditions which are comparable to those relating to the exercise of his employment.

44 It should be borne in mind, in that regard, that the purpose of normal remuneration being received during the period of paid annual leave is to allow the worker actually to take the days of leave to which he is entitled (see, to that effect, judgments of 16 March 2006, *Robinson-Steele and Others*, C−131/04 and C−257/04, EU:C:2006:177, paragraph 49, and of 22 May 2014, *Lock*, C−539/12, EU:C:2014:351, paragraph 20). When the remuneration paid on account of the entitlement to paid annual leave provided for by Article 7(1) of Directive 2003/88 is, as in the situation at issue in the main proceedings, less than the normal remuneration that the worker receives during periods actually worked, the worker might well be encouraged not to take his paid annual leave, at least during periods of actual work, as it would lead to a reduction in his remuneration during those periods.

45 It should be added, in that regard, that although point 1.1 of Paragraph 8 of the BRTV-Bau sets the amount of annual leave at 30 days, irrespective of periods of short-time working during which actual work has not been performed by the worker, it is clear from point 4.3 of Paragraph 8 of that agreement that, in the event that leave is taken in part, the remuneration for annual leave is reduced proportionately. Accordingly, the BRTV-Bau has the effect that a worker who does not take all the leave to which he is entitled under that agreement, but only the leave to which he is entitled under Article 7 of Directive 2003/88, in the light of the periods of short-time working, receives remuneration for annual leave that is less than the amount to which he is entitled under Article 7.

46 Lastly, as for the rule that overtime worked by the worker is to be taken into account for the purpose of calculating the remuneration due in respect of paid annual leave entitlement, it should be noted that, given its exceptional and unforeseeable nature, remuneration received for overtime does not, in principle, form part of the normal remuneration that the worker may claim in respect of the paid annual leave provided for in Article 7(1) of Directive 2003/88.

47 However, when the obligations arising from the employment contract require the worker to work overtime on a broadly regular and predictable basis, and the corresponding pay constitutes a significant element of the total remuneration that the worker receives for his professional activity, the pay received for that overtime work should be included in the normal remuneration due under the right to paid annual leave provided for by Article 7(1) of Directive 2003/88, in order that the worker may enjoy, during that leave, economic conditions which are comparable to those that he enjoys when working. It is for the referring court to verify whether that is the case in the main proceedings.

48 Regarding the role of the national court when called on to give judgment in proceedings between individuals in which it is apparent that the national legislation at issue is contrary to EU law, it should again be borne in mind that it is for that court to provide the legal protection which individuals derive from the provisions of EU law and to ensure that those provisions are fully effective (judgments of 19 January 2010, *Kücükdeveci*, C−555/07, EU:C:2010:21, paragraph 45, and of 19 April 2016, *DI*, C−441/14, EU:C:2016:278, paragraph 29).

49 In that regard, the Member States' obligation arising from a directive to achieve the result envisaged by that directive and their duty to take all appropriate measures, whether general or particular, to ensure the fulfilment of that obligation are binding on all the authorities of the Member States, including, for matters within their jurisdiction, the courts (judgment of 19 April 2016, *DI*, C−441/14, EU:C:2016:278, paragraph 30 and the case-law cited).

50 It follows that, in applying national law, national courts called upon to interpret that law are required to consider the whole body of rules of national law and to apply methods of interpretation that are recognised by those rules in order to interpret it, so far as possible, in the light of the wording and the purpose of the directive concerned in order to achieve the result sought by the directive and, consequently, to comply with the third paragraph of Article 288 TFEU (judgment of 19 April 2016, *DI*, C−441/14, EU:C:2016:278, paragraph 31 and the case-law cited).

51 Although the obligation on the national courts to refer to EU law when they interpret and apply the relevant rules of national law is limited by general principles of law, and although that obligation cannot serve as the basis for an interpretation of national law *contra legem*, the requirement to interpret national law in conformity with EU law does, however, entail the obligation for national courts to change established case-law, where necessary, if it is based on an interpretation of national law that is incompatible with the objectives of a directive (see, to that effect, judgment of 19 April 2016, *DI*, C−441/14, EU:C:2016:278, paragraphs 32 and 33 and the case-law cited).

52 In a dispute such as that in the main proceedings, which is between private persons, namely Mr Hein and Holzkamm, the referring court is required to interpret its national legislation in a way that is in accordance with Article 7(1) of Directive 2003/88. Such an interpretation should result in the remuneration for annual leave paid to workers in respect of the minimum annual leave provided for by that provision not being lower than the average normal remuneration received by those workers during periods of actual work. By contrast, the provision does not require national legislation to be interpreted as giving entitlement to a collectively agreed additional payment on top of that average normal remuneration, or the right that pay received for overtime work be taken into account, unless the conditions set out in paragraph 47 above are satisfied.

53 In the light of the foregoing, the answer to the first part of the first question is that Article 7(1) of Directive 2003/88 and Article 31(2) of the Charter must be interpreted as precluding national legislation, such as that at issue in the main proceedings, which, for the purpose of calculating remuneration for annual leave, allows collective agreements to provide for account to be taken of reductions in earnings resulting from the fact that during the reference period there were days when no work was actually performed owing to short-time working, with the consequence that the worker receives, for the duration of the minimum period of annual leave to which he is entitled under Article 7(1) of the directive, remuneration for annual leave that is lower than the normal remuneration which he receives during periods of work. It is for the referring court to interpret the national legislation, so far as possible, in the light of the wording and the purpose of Directive 2003/88, in such a way that the remuneration for annual leave paid to workers in respect of the minimum annual leave provided for in Article 7(1) is not less than the average of the normal remuneration received by those workers during periods of actual work.

54 In view of the answer to the first part of the first question, it is unnecessary to answer the second part of that question.

The second question

55 By its second question, the referring court asks, in essence, whether it is possible to limit the temporal effects of the present judgment in the event that the Court rules that Article 7(1) of Directive 2003/88 and Article 31 of the Charter must be interpreted as precluding national legislation such as that at issue in the main proceedings. In the event that such a limitation is refused, the referring court asks the Court, in essence, whether EU law must be interpreted as precluding national courts from protecting, on the basis of national law, the legitimate expectation of employers that the case-law of the highest national courts, which confirmed the lawfulness of the provisions concerning paid annual leave in the BRTV-Bau, will continue to apply.

56 It should be recalled that, according to settled case-law of the Court, the interpretation which, in the exercise of the jurisdiction conferred on it by Article 267 TFEU, the Court gives to a rule of EU law clarifies and defines the meaning and scope of that rule as it must be or ought to have been understood and applied from the time of its entry into force. It follows that the rule as thus interpreted may, and must, be applied by the courts even to legal relationships which arose and were established before the judgment ruling on the request for interpretation, provided that in other respects the conditions for bringing a dispute relating to the application of that rule before the courts having jurisdiction are satisfied (judgments of 6 March 2007, *Meilicke and Others*, C−292/04, EU:C:2007:132, paragraph 34, and of 22 September 2016, *Microsoft Mobile Sales International and Others*, C−110/15, EU:C:2016:717, paragraph 59).

57 It is only quite exceptionally that the Court may, in application of the general principle of legal certainty inherent in the EU legal order, be moved to restrict, for any person concerned, the opportunity of relying on a provision which it has interpreted with a view to calling into question legal relationships established in good faith. Two essential criteria must be fulfilled before such a limitation can be imposed, namely that those concerned should have acted in good faith and that there should be a risk of serious difficulties (judgment of 22 September 2016, *Microsoft Mobile Sales International and Others*, C−110/15, EU:C:2016:717, paragraph 60 and the case-law cited).

58 More specifically, the Court has taken that step only in quite specific circumstances, notably where there was a risk of serious economic repercussions owing in particular to the large number of legal relationships entered into in good faith on the basis of rules considered to be validly in force and where it was apparent that individuals and national authorities had been led to adopt practices which did not comply with EU law by reason of objective, significant uncertainty regarding the implications of EU provisions, to which the conduct of other Member States or the European Commission may even have contributed (judgments of 15 March 2005, *Bidar*, C−209/03, EU:C:2005:169, paragraph 69; of 13 April 2010, *Bressol and Others*, C−73/08, EU:C:2010:181, paragraph 93; and of 22 September 2016, *Microsoft Mobile Sales International and Others*, C−110/15, EU:C:2016:717, paragraph 61).

59 In the present case, there is nothing in the file to suggest that the condition as to serious economic repercussions is satisfied.

60 It follows from those considerations that it is not appropriate to limit the temporal effects of the present judgment.

61 As to whether EU law allows national courts to protect, on the basis of national law, the legitimate expectation of employers that the case-law of the highest national courts confirming the lawfulness of the provisions on paid annual leave in the BRTV-Bau will continue to apply, it must be noted that the application of the principle of the protection of legitimate expectations as contemplated by the referring court would, in practice, have the effect of limiting the temporal effects of the Court's interpretation of the provisions of EU law since, by those means, that interpretation would not be applicable in the main proceedings (see, to that effect, judgment of 19 April 2016, *DI*, C−441/14, EU:C:2016:278, paragraph 39).

62 Save in exceptional circumstances, which, as is clear from the assessment in paragraph 59 above, have not been established, EU law as thus interpreted must be applied by the courts even to legal relationships which arose and were established before the judgment ruling on the request for interpretation, provided

that in other respects, as was noted in paragraph 56 above, the conditions for bringing a dispute relating to the application of that law before the courts having jurisdiction are satisfied (see, to that effect, judgment of 19 April 2016, *DI*, C−441/14, EU:C:2016:278, paragraph 40 and the case-law cited).

63 It follows from the above considerations that the answer to the second question is that it is not appropriate to limit the temporal effects of the present judgment and that EU law must be interpreted as precluding national courts from protecting, on the basis of national law, the legitimate expectation of employers that the case-law of the highest national courts, which confirmed the lawfulness of the provisions concerning paid annual leave in the BRTV-Bau, will continue to apply.

Costs

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

On those grounds, the Court (Fourth 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 and Article 31(2) of the Charter of Fundamental Rights of the European Union must be interpreted as precluding national legislation, such as that at issue in the main proceedings, which, for the purpose of calculating remuneration for annual leave, allows collective agreements to provide for account to be taken of reductions in earnings resulting from the fact that during the reference period there were days when no work was actually performed owing to short-time working, with the consequence that the worker receives, for the duration of the minimum period of annual leave to which he is entitled under Article 7(1) of the directive, remuneration for annual leave that is lower than the normal remuneration which he receives during periods of work. It is for the referring court to interpret the national legislation, so far as possible, in the light of the wording and the purpose of Directive 2003/88, in such a way that the remuneration for annual leave paid to workers in respect of the minimum annual leave provided for in Article 7(1) is not less than the average of the normal remuneration received by those workers during periods of actual work.**

2. **It is not appropriate to limit the temporal effects of the present judgment and EU law must be interpreted as precluding national courts from protecting, on the basis of national law, the legitimate expectation of employers that the case-law of the highest national courts, which confirmed the lawfulness of the provisions concerning paid annual leave in the Bundesrahmentarifvertrag für das Baugewerbe (Federal collective framework agreement for the construction industry), will continue to apply.**

[Signatures]

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* Language of the case: German.