Reports of Cases

OPINION OF ADVOCATE GENERAL
ĆAPETA
delivered on 8 June 2023 [1]

Case C-218/22

BU
v
Comune di Copertino

(Request for a preliminary ruling from the Tribunale di Lecce (District Court, Lecce, Italy))

(Reference for a preliminary ruling – Social policy – Organisation of working time – Directive 2003/88/EC – Article 7 – Right to an allowance in lieu of paid annual leave not taken before the end of the employment relationship – Risk of 'monetisation' – National regulation refusing allowance in lieu in order to control public expenditure – Burden of proof of the inability to take leave during the course of employment)

I. Introduction

1. Do workers have the right to monetise their unused paid annual leave? In other words, can they decide not to use their right to respite from work and instead take the monetary equivalent at the end of their employment relationship? Does EU law preclude Member States from introducing measures which aim to prevent such a choice?

2. Such are the questions that arise from the case pending before the Tribunale di Lecce (District Court, Lecce, Italy), the referring court in the present case. That court seeks, in essence, to establish the extent to which the Working Time Directive [2] prevents the 'monetisation' of paid annual leave, that is to say, the conversion of unused right(s) to paid annual leave into a sum of money.

3. The matter results from a dispute between BU, who was employed as a civil servant, and his employer, the Comune di Copertino (Municipality of Copertino, Italy). [3] BU is seeking recognition of the right to an allowance in lieu of paid annual leave which he had not taken during the course of employment.

[1] Original language: English.

[2] Directive 2003/88/EC of the European Parliament and of the Council of 4 November 2003 concerning certain aspects of the organisation of working time (OJ 2003 L 299, p. 9, 'the Working Time Directive').

[3] It should be recalled that, in accordance with Article 1(3) of the Working Time Directive, the directive applies to all sectors of activity, 'both private and public', so that that directive undisputedly applies to an employer such as, in the main proceedings, a municipality.

II. The background of the dispute in the main proceedings, the questions referred and the procedure before the Court

4. BU, the applicant in the main proceedings, held the position of 'Istruttore Direttivo Tecnico' (Technical Manager for Public Works) as a civil servant from February 1992 to October 2016 in the Municipality of Copertino.

5. By letter of 24 March 2016 sent to the Municipality of Copertino, BU voluntarily resigned in order to take early retirement,[4] and his service therefore ended on 1 October 2016.

6. In the context of the main proceedings, BU claims that, during the period 2013-2016, his untaken paid annual leave amounted to 79 days. He therefore seeks financial compensation for those days, as he considers that he was not able to take advantage of that annual leave while he was in service.[5]

7. The Municipality of Copertino replies that BU was aware of his obligation to take the remaining days of leave, and that he could not monetise them.[6] For that, it relies on the rule laid down in Article 5(8) of Italian Decree-Law No 95,[7] which provides that employees in the public sector must take annual leave in accordance with the rules of the administration in which they are employed and that they do not *under any circumstances* have the right to payment in lieu of unused annual leave. That provision applies equally if the employment relationship is terminated due to reasons relating to change of workplace, resignation, termination or retirement.

8. The referring court explains that the law at issue was part of the package adopted in the aftermath of the 2008 global financial crisis, with a view to having a better control on the budget and financial savings in the public sector. Such a purpose is further confirmed by the heading of the relevant provision, namely Article 5 of Decree-Law No 95, entitled 'Reduction of expenditure by public service administrations'.

9. The referring court further explains that the Corte costituzionale (Constitutional Court, Italy), in its judgment No 95/2016,[8] dismissed claims challenging the constitutionality of Article 5(8) of Decree-Law No 95 as unfounded. The Corte costituzionale (Constitutional Court) offered its own interpretation of the provision in question and considered that, given such an interpretation, it does not contravene either the Italian Constitution or the applicable EU law. That court considered that the prevention of uncontrolled monetisation of leave had other objectives in

[4] It follows from the reference for a preliminary ruling that BU had already sent the request for retirement in 2015. However, the Italian social security body (INPS) informed him at the time that his application for an early retirement pension on 1 July 2015 'could not be successful as the conditions for retirement were not met'. BU therefore remained in service until he could benefit from ordinary retirement.

[5] It is important to point out that, in its observations before the Court, the Municipality of Copertino disputes the number of days relied on by the applicant in the main proceedings. That is, however, a matter for the national court to resolve.

[6] The Municipality of Copertino indicates in its observations before the Court that BU asked, on 17 May 2016, to take 93 days of paid annual leave that he was eligible for during the period 2013-2016, and that he was in fact on paid leave from 23 May 2016 to 30 September 2016. The municipality therefore contends that it does not understand the basis on which BU claims entitlement to compensation for 79 days of unused annual leave. With regard to that matter, and following the judgment of 14 May 2019, *CCOO* (C-55/18, EU:C:2019:402), it may be argued that the municipality should have a record, for each of its workers, of the balance of paid annual leave so as to ascertain the accuracy of any claims such as the one in the main proceedings.

[7] Article 5(8) of decreto-legge 6 luglio 2012, n. 95, Disposizioni urgenti per la revisione della spesa pubblica con invarianza dei servizi ai cittadini nonché misure di rafforzamento patrimoniale delle imprese del settore bancario (Decree-Law No 95 of 6 July 2012 on urgent provisions for the revision of public expenditure with no change in services to citizens and measures to strengthen the capital base of companies in the banking sector, converted, with amendments, by Article 1(1) of legge 7 agosto 2012, n. 135 (Law No 135 of 7 August 2012)).

[8] IT:COST:2016:95.

addition to curbing public spending. Those objectives include the reaffirmation of the importance of actually taking annual leave and encouraging rational planning of paid annual leave. In that light, the rule at issue was interpreted as prohibiting payment in lieu in cases in which it was possible to plan the use of leave in good time, covering different situations, including resignation.

10. That interpretation is, in the opinion of the Corte costituzionale (Constitutional Court), also in line with the judgments of the Corte suprema di cassazione (Supreme Court of Cassation, Italy) and the Consiglio di Stato (Council of State, Italy), which recognise the right of workers to receive an allowance in lieu of leave not taken for reasons not attributable to them.

11. Given that the case-law referred to by the Corte costituzionale (Constitutional Court) is relevant to understanding the context of the reference, I shall provide a brief presentation of it here.

12. The Corte suprema di cassazione (Supreme Court of Cassation) initially considered that monetisation was conditional on the worker proving that he or she had not been able to enjoy his or her right to paid annual leave because of 'exceptional and justified needs of service or *force majeure*'.[9] Subsequently, it ruled that the worker is entitled to an allowance in lieu unless the employer is able to prove that it had provided the worker with the possibility to effectively exercise his or her right to leave before the termination of the employment relationship and that it had adequately informed the worker of such a consequence, with express notice of that possible loss.[10] More specifically, in the case of a resignation at the end of a maternity leave, that court acknowledged the right to an allowance, since, although the relationship was effectively concluded on the basis of a voluntary decision by the worker, that worker would not have been able, in any way, to take paid annual leave during the period of compulsory suspension of the contract of employment.[11]

13. The judgments of the Consiglio di Stato (Council of State) concerning Article 5(8) of Decree-Law No 95 insisted that medical reasons, such as those following from incapacity to work, do not alter the right to an allowance for unused paid annual leave.[12]

14. The referring court explains that the interpretation given to the relevant provision of Decree-Law No 95 allows the monetisation in lieu of annual leave only if that leave was not actually taken for reasons beyond the worker's control (such as illness). However, it affirms that a worker can be deprived of compensation in lieu in a situation where termination of work was predictable, including a situation where a worker resigns.

15. The referring court considers that even when so interpreted, there is still a potential conflict between Article 5(8) of Decree-Law No 95 and the Working Time Directive, as interpreted by the Court of Justice. To that end, it refers in that respect to *job-medium*.[13]

[9] Corte suprema di cassazione, Sezione lavoro (Supreme Court of Cassation, Labour Division), Order of 30 July 2018, n. 20091.

[10] Corte suprema di cassazione, Sezione lavoro (Supreme Court of Cassation, Labour Division), Order of 2 July 2020, n. 13613; Corte suprema di cassazione, Sezione lavoro (Supreme Court of Cassation, Labour Division), Order of 5 May 2022, n. 14268.

[11] Corte suprema di cassazione, Sezione lavoro (Supreme Court of Cassation, Labour Division), Order of 15 June 2022, n. 19330.

[12] Consiglio di Stato, Sezione VI (Council of State, Sixth Section), 8 October 2010, IT:CDS:2010:7360SENT. See, also, a similar reasoning but with a slightly different outcome, Consiglio di Stato, Sezione IV (Council of State, Fourth Section), 12 October 2020, IT:CDS:2020:6047SENT.

[13] Judgment of 25 November 2021, *job-medium* (C-233/20, EU:C:2021:960, '*job-medium*', in particular paragraph 31). For further discussion, see point 25 et seq. of the present Opinion.

16. Harbouring doubts as to whether Italian law is compatible with the Working Time Directive, the Tribunale di Lecce (District Court, Lecce) decided to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:

'(1) Should Article 7 of [the Working Time Directive] and Article 31(2) of the Charter of Fundamental Rights of the European Union [("the Charter")] be interpreted as precluding national legislation, such as that at issue in the main proceedings …, which, for reasons of public expenditure containment and organisational requirements of the public sector as employer, does not permit the monetisation of leave in the event that a [worker] in the public service resigns?

(2) Further, if the answer to the question above is in the affirmative, must Article 7 of [the Working Time Directive] and Article 31(2) of the [Charter] be interpreted as requiring the worker in the public service to demonstrate that it was impossible for him/her to take the leave concerned in the course of the employment relationship?'

17. Written observations were submitted to the Court by BU, the Municipality of Copertino, the Italian Government and the European Commission. No hearing was held.

III. Analysis

18. The reference for a preliminary ruling follows from the Italian law and pertinent case-law interpreting it, including that of the Corte costituzionale (Constitutional Court). The referring court does not seem to agree with the finding of the Corte costituzionale (Constitutional Court) that the Italian law at issue is in conformity with the Working Time Directive.

19. None of the previous litigations in Italy concerning the law at issue have led to references for a preliminary ruling. It is, therefore, the first time that the Court is invited to explain whether Member States can choose to prevent monetisation of the right to paid annual leave in the way Italy has done in the public sector.

20. One preliminary clarification is due before I further engage in my analysis. In line with the division of competences between the Court of Justice and the national courts in the preliminary ruling procedure, the Court cannot interpret national law; it must take account of the factual and legislative context as described in the order for reference. [14]

21. Therefore, taking into account what was explained in the order for reference, I shall proceed on the basis of the following understanding of the Italian law. With the aim of preventing monetisation of the right to paid annual leave in the public sector, but also with the aim of encouraging workers to actually take such leave, the Italian law prohibited the conversion of unused entitlements to paid annual leave into a sum of money. As interpreted in the case-law, including by the Corte costituzionale (Constitutional Court), that law does not seem to prohibit monetisation in all circumstances, but only when workers had the possibility to plan to make use of their paid annual leave.

[14] See, for example, judgments of 23 April 2009, *Angelidaki and Others* (C-378/07 to C-380/07, EU:C:2009:250, paragraph 48 and the case-law cited), and of 26 October 2017, *Argenta Spaarbank* (C-39/16, EU:C:2017:813, paragraph 38).

22. The two questions of the referring court ask, in essence, whether Article 7 of the Working Time Directive prohibits such a national law and, if not, whether it is up to the worker or to the employer to prove that the worker had a real possibility to take paid annual leave. I shall deal with those questions in turn.

A. The first question

23. By its first question, the referring court essentially seeks to establish whether Article 7 of the Working Time Directive precludes national law which does not permit the monetisation of unused paid annual leave at the end of the employment relationship.

24. I shall deal with that question in the following way. First, I shall assess the conditions under which the Working Time Directive provides for the right to monetise unused annual leave. Next, I shall demonstrate that that directive gives preference to the actual use of paid annual leave, that being consistent with the benefits that it brings to the health of workers. Finally, I shall assess whether national law such as the one at issue in the main proceedings can be adopted in order to encourage workers to actually take paid annual leave.

1. When is there a right to an allowance in lieu?

25. The referring court refers to *job-medium* to explain its doubts concerning the compatibility of the Italian law at issue with the Working Time Directive. It quotes the following paragraph of that judgment: 'it is also apparent from settled case-law that Article 7(2) of [the Working Time Directive] 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'. [15]

26. It follows from that finding that Member States cannot introduce any additional conditions for the entitlement of the allowance in lieu to arise.

27. As for the first condition, which links the allowance in lieu to the termination of the employment relationship, the case-law confirms that, if paid annual leave is granted on the basis of a reference period (which is usually 12 months), monetisation cannot happen during or at the end of that reference period. [16] The Court explained that, if the leave is not used by the end of that period due to reasons not imputable to the worker, there has to be a carry-over period. [17] If the worker is still in employment, he or she cannot ask for payment in lieu.

[15] *Job-medium*, paragraph 31. That paragraph refers to paragraph 44 of judgment 6 November 2018, *Bauer and Willmeroth* (C-569/16 and C-570/16, EU:C:2018:871, '*Bauer and Willmeroth*'). Similar statements could also be found in earlier judgments of 12 June 2014, *Bollacke* (C-118/13, EU:C:2014:1755); of 20 July 2016, *Maschek* (C-341/15, EU:C:2016:576, '*Maschek*'); and, later, of 25 June 2020, *Varhoven kasatsionen sad na Republika Bulgaria and Iccrea Banca* (C-762/18 and C-37/19, EU:C:2020:504, paragraph 84).

[16] Judgment of 6 April 2006, *Federatie Nederlandse Vakbeweging* (C-124/05, EU:C:2006:244, paragraph 35).

[17] See, to that effect, judgments of 22 November 2011, *KHS* (C-214/10, EU:C:2011:761, '*KHS*', paragraph 38), and of 3 May 2012, *Neidel* (C-337/10, EU:C:2012:263, paragraphs 41 and 42).

28. Thus, allowance in lieu is not a self-standing right granted to workers by the Working Time Directive; a worker cannot choose to take allowance in lieu instead of paid annual leave. It is only where the employment relationship is terminated that Article 7(2) of the Working Time Directive permits an allowance to be paid in lieu of paid annual leave. [18]

29. Furthermore, allowance in lieu is only an exception [19] and, as expressed in the second condition in *job-medium*, [20] it is dependent on the existence of the entitlement to annual leave at the moment allowance in lieu is requested: it arises if the worker has not taken all annual leave to which he or she *was entitled* on the date when the employment relationship ended.

30. Thus, the right to allowance in lieu exists only if the entitlement of the paid annual leave still exists.

31. That entitlement to paid annual leave arises directly from the Working Time Directive, on the basis of the very existence of the employment relationship, and Member States cannot put in place any additional conditions for such a right to arise. [21] However, Member States may impose conditions on which the right to annual leave can be exercised. [22] In that respect, they may envisage that the acquired right expires if it is not used within a certain period of time. Thus, Member States may set limits on the duration of the carry-over period of unused annual leave. [23]

32. In *Max-Planck-Gesellschaft*, the Court has ruled that 'Article 7(1) of [the Working Time Directive] does not in principle preclude 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'. [24]

33. The conclusion which follows from the foregoing is that, when the employment relationship ends, the Working Time Directive does not always preclude the loss of unused paid annual leave.

34. If the entitlement to unused annual leave has expired at the moment of the termination of a employment relationship, there is no secondary right to allowance in lieu.

18 Judgment of 10 September 2009, *Vicente Pereda* (C-277/08, EU:C:2009:542, paragraph 20 and the case-law cited).

19 That payment in lieu is only an exception to the actual use of annual leave and is also reflected in the choice of wording in Article 7(2) of the Working Time Directive, according to which actual use of paid annual leave may not be replaced by an allowance in lieu *except* where the employment relationship is terminated. For example, the German language uses '*außer*', the French '*sauf*', the Croatian '*osim*' and the Italian '*salvo*'.

20 See point 25 of the present Opinion.

21 Judgment of 24 January 2012, *Dominguez* (C-282/10, EU:C:2012:33, paragraph 18).

22 Judgment of 20 January 2009, *Schultz-Hoff and Others* (C-350/06 and C-520/06, EU:C:2009:18, '*Schultz-Hoff*', paragraph 28).

23 See, to that effect, *KHS*, paragraph 39.

24 Judgment of 6 November 2018, *Max-Planck-Gesellschaft zur Förderung der Wissenschaften* (C-684/16, EU:C:2018:874, '*Max-Planck-Gesellschaft*', paragraph 35). On that matter, see previously, *Schultz-Hoff*, paragraph 43, and, more recently, judgment of 22 September 2022, *LB (Limitation period for the right to paid annual leave)* (C-120/21, EU:C:2022:718, '*LB*', paragraph 25 and the case-law cited).

35. In *job-medium*, the Court ruled that voluntary termination of work cannot in itself be a reason for refusing the allowance in lieu. However, that case concerned a situation in which the entitlement to annual leave existed. [25] Had the entitlement to annual leave expired or ceased to exist for any reason, the worker could not request allowance in lieu at the end of the employment relationship.

36. Whether such a loss of the allowance in lieu may be tolerated depends on the verification that the worker was in fact given the opportunity to exercise their right to paid annual leave. That is the reason why such a loss cannot be automatic. [26]

37. As explained by the Court, where the worker has refrained from taking his or her paid annual leave deliberately and in full knowledge of the ensuing consequences, after having been given the opportunity actually to exercise his or her right thereto, but without the employer being required to force that worker to actually exercise that right, Article 7(1) and (2) of the Working Time Directive and Article 31(2) of the Charter do not preclude the loss of that right or, in the event of the termination of the employment relationship, the corresponding absence of an allowance in lieu of paid annual leave not taken. [27]

38. In addition to the requirement that the worker be given a real opportunity to use annual leave, the Court has also emphasised the need for the employer to inform the worker concerned of the possible loss of his or her entitlement. [28]

39. Thus, the right to allowance in lieu is not a self-standing right granting a worker a choice between taking the annual leave or receiving financial compensation for not taking it. It is instead a right contingent on the existence of the entitlement to unused paid annual leave, the duration of which Member States are entitled to limit.

40. The subsidiary nature of the allowance in lieu follows logically from the purpose of the annual leave, which is to protect the health of workers by creating an opportunity to rest from work. Therefore, by virtue of Article 7(1) of the Working Time Directive, paid annual leave, in principle, must actually be taken. [29] In the following section, I shall briefly show that annual leave indeed has benefits if actually taken, before addressing the issue of whether Member States can adopt measures, such as those in the present case, in order to encourage annual leave to actually be taken.

[25] In *job-medium*, the Court found that the fact that the worker unilaterally terminated the employment relationship early and without cause does not in itself affect the entitlement to allowance in lieu. The case that gave rise to that judgment concerned a situation in which a person resigned after a few months of work without providing any explanation. In that reference year, and taking into consideration the number of days the applicant in that case had worked, he was still entitled to a few additional days of paid annual leave that were not used. Thus, the entitlement to allowance in lieu followed from the existence of the entitlement to annual leave.

[26] *Max-Planck-Gesellschaft*, paragraphs 40, 55 and 61; judgments of 6 November 2018, *Kreuziger* (C-619/16, EU:C:2018:872, '*Kreuziger*', paragraphs 47 and 56), and of 22 September 2022, *Fraport and St. Vincenz-Krankenhaus* (C-518/20 and C-727/20, EU:C:2022:707, '*Fraport*', paragraph 39).

[27] *Max-Planck-Gesellschaft*, paragraph 56, and *Kreuziger*, paragraph 54.

[28] *Max-Planck-Gesellschaft*, paragraphs 45 and 61; *Kreuziger*, paragraphs 52 and 56; *Fraport*, paragraph 42; and *LB*, paragraphs 25 and 45.

[29] Judgment of 16 March 2006, *Robinson-Steele and Others* (C-131/04 and C-257/04, EU:C:2006:177, paragraph 49); *Bauer and Willmeroth*, paragraph 40; *Kreuziger*, paragraph 38; and *Max-Planck-Gesellschaft*, paragraph 31.

2. The benefits of paid annual leave

41. The preference for the actual use of paid annual leave over its monetisation, reflected in the wording of Article 7 of the Working Time Directive, [30] is justified by the purpose of the right paid annual leave. As the case-law explains, the purpose of that right is to enable the worker both to rest from carrying out the work he or she is required to do under his or her contract of employment and to enjoy a period of relaxation and leisure. [31]

42. The Court has repeatedly considered that the effect that paid annual leave has on the safety and health of workers is fully beneficial if it is taken in the year prescribed for that purpose.

43. Furthermore, the Court has ruled that the significance of that rest period remains if it is taken during a later period. [32] However, in *KHS*, the Court considered that beyond a certain temporal limit, 'annual leave ceases to have its positive effect for the worker as a rest period and is merely a period of relaxation and leisure'. [33] That finding justifies the possibility that Member States may limit the duration of the carry-over period of the unused annual leave. [34]

44. Empirical research backs the Court's position in that respect.

45. There seems to be a common agreement in the literature that respite beyond the daily and weekly rest does have beneficial effects on workers' health and well-being. [35] Those benefits concern both short-term [36] as well as long-term leave. [37]

46. What is maybe less known or less suspected is that those beneficial effects are short-lived. [38] Some of the beneficial effects 'fade within one month of returning to work'. [39]

47. One could infer from those studies that paid annual leave is most beneficial if taken on a frequent basis, combining shorter and longer breaks from work throughout the year. In any case, research confirms that it is important to take the paid annual leave during the reference year.

30 See footnote 19 of the present Opinion.

31 *KHS*, paragraph 31 and the case-law cited; *Maschek*, paragraph 34; *job-medium*, paragraph 28; and *Fraport*, paragraph 27. The Court also considered that the purpose of the right to paid annual leave is different from other leave, such as the right to sick leave (judgments of 30 June 2016, *Sobczyszyn*, C-178/15, EU:C:2016:502, '*Sobczyszyn*', paragraph 25 and the case-law cited, and of 4 June 2020, *Fetico and Others*, C-588/18, EU:C:2020:420, paragraph 33 and the case-law cited) or the right to parental leave (judgment of 4 October 2018, *Dicu*, C-12/17, EU:C:2018:799, '*Dicu*', paragraphs 29, 32 and 33).

32 Judgments of 6 April 2006, *Federatie Nederlandse Vakbeweging* (C-124/05, EU:C:2006:244, paragraph 30); in *KHS*, paragraph 32; and in *Sobczyszyn*, paragraph 33.

33 *KHS*, paragraph 33.

34 In my Opinion in Joined Cases *Keolis Agen* (C-271/22 to C-275/22, EU:C:2023:243, point 51) – in which the judgment is yet to be delivered – I consider that the EU legislature left the possibility open to the Member States to limit the duration of the carry-over period. At the same time, the Member States are also free to choose to allow for the accumulation of the unused entitlements to paid annual leave until the end of the employment relationship.

35 Hurrell, A. and Keiser, J., 'An Exploratory Examination of the Impact of Vacation Policy Structure on Satisfaction, Productivity, and Profitability', *The BRC Academy Journal of Business*, Vol. 10, No 1, 2020, pp. 33-63.

36 Blank, C. and Gatterer, K., 'Short Vacation Improves Stress-Level and Well-Being in German-Speaking Middle-Managers – A Randomized Controlled Trial', *International Journal of Environmental Research and Public Health*, Vol. 15, No 1, 2018, p. 130.

37 de Bloom, J., Kompier, M., Geurts, S., de Weerth, C., Taris, T. and Sonnentag, S., 'Do We Recover from Vacation? Meta-analysis of Vacation Effects on Health and Well-being', *Journal of Occupational Health*, Vol. 51, No 1, 2009, pp. 13-25; de Bloom, J., Geurts, S. and Kompier, M.A.J., 'Vacation (after-) effects on employee health and well-being, and the role of vacation activities, experiences and sleep', *Journal of Happiness Studies*, Vol. 14, 2013, pp. 613-633.

38 de Bloom, J., Geurts, S. and Kompier, M.A.J., 'Vacation (after-) effects on employee health and well-being, and the role of vacation activities, experiences and sleep', op. cit.; Etzion, D., *Work, Vacation and Well-being*, London, Routledge, 2019, Chapter 5.

39 Sonnentag, S., Cheng, B.H. and Parker, S.L., 'Recovery from Work: Advancing the Field Toward the Future', *Annual Review of Organizational Psychology and Organizational Behavior*, Vol. 9, 2022, pp. 33-60, at p. 46 (with further literature quoted).

48. Even if one may choose to accumulate paid annual leave for different personal reasons (important trip, distant family, etc.), it is disputable, without calling into question that personal choice, that it will be beneficial from the perspective of the restoration of the workforce.

49. Furthermore, while not making full use of paid annual leave could lead to an increase in income, it has nevertheless been linked to impairing quality of life (significant deterioration of satisfaction with leisure time and health combined with an increase in absences from work due to illness). [40]

50. The effective exercise of the right to paid annual leave is thus an important way for workers to recover their mental and physical energy and, more generally, to contribute to their health at and outside work.

51. Those findings support the case-law according to which, beyond a certain carry-over period, annual leave ceases to have its positive effect for the worker as a rest period and is merely a period of relaxation and leisure. [41] It also justifies the case-law in which the Court has repeatedly stated that the minimum period of paid annual leave may not be replaced by an allowance in lieu, except where the employment relationship is terminated. Article 7(2) of the Working Time Directive also aims to ensure that workers are entitled to actual rest, with a view to ensuring effective protection of their health and safety. [42]

3. Can Member States limit the right to allowance in lieu?

52. Member States are thus allowed to encourage actual use of paid annual leave instead of its monetisation by introducing time limits to the duration of the acquired right to annual leave (by setting a limit on the duration of the carry-over period). Could Member States try to achieve the same aim in different ways, including by adopting a law such as the one at issue in the present case?

53. One option for the Court is to decide that setting a time limit on the carry-over period, after which the entitlement to unused days expires, is the only acceptable way in which Member States may encourage workers to make actual use of paid annual leave.

54. However, in the area of shared competences, such as the one within which the Working Time Directive was adopted, the EU legislature opted not to regulate the particularities by which workers could be encouraged to actually take paid annual leave. It had only stated a clear preference for its use, considering the monetisation in lieu of leave as a secondary right. In such circumstances, Member States retain a power to choose appropriate rules to encourage workers to make use of their given time of annual rest. That means that limits to the carry-over period could not be seen as the only possibility to encourage actual use of paid annual leave during the reference year in which that leave is meant to be used. Nevertheless, every legislative option chosen by the Member States needs to be made in accordance with the Working Time Directive, as interpreted by the Court.

[40] Schnitzlein, D., 'Extent and Effects of Employees in Germany Forgoing Vacation Time', *Leibniz Information Centre for Economics*, Berlin, 2012, pp. 25-31, at p. 31.

[41] *KHS*, paragraph 33.

[42] See, to that effect, *Kreuziger*, paragraph 40 and the case-law cited, and *Bauer and Willmeroth*, paragraph 42 and the case-law cited.

55. Does national law such as Article 5(8) of Decree-Law No 95 satisfy the requirements of Article 7 of the Working Time Directive?

56. Italian law, at least as interpreted by the Corte costituzionale (Constitutional Court), seems to have the objective of encouraging the actual use of annual leave. For that reason, as well as preserving public savings, it has introduced the rule according to which the unused periods of paid annual leave cannot be monetised.

57. As interpreted by the the Corte costituzionale (Constitutional Court), Italian law prevents workers from requesting allowance in lieu of the unused annual leave if they were aware when their employment relationship was going to terminate and could, thus, plan to use the annual leave before that moment. Such a law encourages workers to take annual leave during the reference year. [43]

58. Taking into account the case-law of the Court, [44] Italian law can be in accordance with Article 7 of the Working Time Directive if the following conditions are met. First, the prohibition to request allowance in lieu cannot cover the right to annual leave acquired in the reference year in which the termination of work happens. Second, the worker must have had an opportunity to take the paid annual leave in the previous reference years, including during the minimal carry-over period. Third, the employer had encouraged the worker to take the annual leave. Fourth, the employer had informed the worker that unused paid annual leave cannot be cumulated in order to be replaced by an allowance in lieu at the moment of the termination of the employment relationship.

59. It is for the national court to assess whether the relevant Italian law can be interpreted in that way and whether the enumerated conditions are met in the case at hand.

60. I therefore propose that the Court reply to the referring court's first question that Article 7 of the Working Time Directive does not preclude national law which does not permit the monetisation of unused paid annual leave at the end of the employment relationship, where:

– the prohibition to require allowance in lieu does not cover the right to annual leave acquired in the reference year in which the termination of work happens;

– the worker had the opportunity to take the paid annual leave in the previous reference years, including during the minimal carry-over period;

– the employer has encouraged the worker to take the paid annual leave;

– the employer has informed the worker that unused paid annual leave cannot be cumulated in order to be replaced by an allowance in lieu at the moment of the termination of the employment relationship.

[43] It should be recalled that, according to the case-law, an employer cannot unilaterally decide when the worker should take paid annual leave. See, in that respect, the judgment of 7 September 2006, *Commission* v *United Kingdom* (C-484/04, EU:C:2006:526, paragraph 43); see also *Max-Planck-Gesellschaft*, paragraph 44, and *Kreuziger*, paragraph 51.

[44] See, for instance, references in footnotes 17, 24, 26 and 45 to the present Opinion.

B. The second question

61. By its second question, the referring court asks, in essence, who bears the burden of proof in showing that the conditions enumerated in the preceding point are fulfilled – the worker or the employer.

62. The case-law of the Court interpreting Article 7 of the Working Time Directive contains certain elements which provide guidance in answering that question. The Court has, for instance, considered in *Fraport*, that it is for the national court to ascertain whether the employer has fulfilled, in good time, its obligations to inform the worker of the leave and to invite him or her to take it. [45] It thus rests on the employer to prove that it respected its own obligations.

63. It also results from settled case-law that, should the employer not be able to show that it has exercised all due diligence in order to enable the worker actually to take the paid annual leave to which he or she is entitled, the loss of the right to such leave in the event of the termination of the employment relationship and the corresponding absence of a payment of an allowance in lieu of paid annual leave not taken would constitute a failure to have regard to Article 7(2) of the Working Time Directive. [46]

64. In other words, the burden of proof is not on the worker, but on the employer.

65. I therefore propose that, in answer to the second question referred, the Court rule that Article 7(2) of the Working Time Directive requires that the employer demonstrate that it enabled and encouraged the worker to take the leave, informed him or her that the monetisation would not be possible at the moment of the termination of the employment relationship and that, nevertheless, the worker chose not to take the annual leave. In the event that the employer failed to do so, compensation should be paid to the worker.

IV. Conclusion

66. In the light of the foregoing, I propose that the Court of Justice answer the questions referred by the Tribunale di Lecce (District Court, Lecce, Italy) as follows:

(1) Article 7 of the 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

does not preclude national law which does not permit the monetisation of unused paid annual leave at the end of the employment relationship, where:

– the prohibition to require allowance in lieu does not cover the right to annual leave acquired in the reference year in which the termination of work happens;

– the worker had the opportunity to take the paid annual leave in the previous reference years, including during the minimal carry-over period;

– the employer has encouraged the worker to take the paid annual leave;

[45] *Fraport*, paragraph 42.

[46] *Max-Planck-Gesellschaft*, paragraph 46, and *Kreuziger*, paragraph 53.

– the employer has informed the worker that unused paid annual leave cannot be cumulated in order to be replaced by an allowance in lieu at the moment of the termination of the employment relationship.

(2) Article 7(2) of Directive 2003/88

requires that the employer demonstrate that it enabled and encouraged the worker to take the leave, informed him or her that the monetisation would not be possible at the moment of the termination of the employment relationship and that, nevertheless, the worker chose not to take the annual leave.

In the event that the employer failed to do so, compensation should be paid to the worker.