Reports of Cases

OPINION OF ADVOCATE GENERAL
BOBEK
delivered on 5 September 2018 [1]

Case C-385/17

Torsten Hein
v
Albert Holzkamm GmbH & Co.

(Request for a preliminary ruling from the Arbeitsgericht Verden (Labour Court, Verden, Germany))

(Reference for a preliminary ruling — Social policy — Organisation of working time — Collective agreement in the construction industry — Right to paid annual leave — Remuneration for annual leave — Consequences flowing from short-time work periods)

I. Introduction

1. Under federal law in Germany, there must be at least 24 working days of paid annual leave per year. Earning less as a result of short-time work cannot, in principle, affect the calculation of the payment by an employer for annual leave. However, parties to a collective agreement are entitled to derogate from those federal rules on leave. In the construction industry, working conditions are regulated by a specific framework collective agreement. The latter provides that workers are entitled to 30 days of paid annual leave. But the calculation of the payment for annual leave takes into account reductions in earnings due to periods of short-term work.

2. Mr Hein works in the construction industry. He was on short-time work for a period of several weeks in 2015 and 2016. He took paid annual leave. In his view, the calculation of the remuneration he was paid for annual leave should not have taken into account any periods of short-time work.

3. In the present case, the Court is called upon to determine whether EU law precludes a national rule, contained in a collective agreement, which allows reductions in earnings due to short-time work to be taken into account for the purposes of calculating a worker's entitlement to remuneration for annual leave.

1 Original language: English.

II. Legal framework

A. EU law

1. The Charter

4. Article 31(2) of the Charter of Fundamental Rights of the European Union ('the Charter') provides: 'Every worker has the right to limitation of maximum working hours, to daily and weekly rest periods and to an annual period of paid leave.'

2. Directive 2003/88

5. Article 1 of Directive 2003/88/EC concerning certain aspects of the organisation of working time ('Directive 2003/88' or 'the Working Time Directive')[2] defines its purpose and scope:

'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…'

6. Article 2(1) 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) defines 'rest period' as 'any period which is not working time'.

7. Article 7 reads as follows:

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

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

8. Pursuant to Article 15, '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'.

2 Directive 2003/88/EC of the European Parliament and of the Council of 4 November 2003 (OJ 2003 L 299, p. 9).

B. German law

1. Law on minimum leave entitlement for workers

9. Paragraph 3(1) of Mindesturlaubsgesetz für Arbeitnehmer (Bundesurlaubsgesetz — BUrlG) (Law on minimum leave entitlement for workers) ('the Federal Law on leave')[3] provides that 'annual leave shall amount to at least 24 working days each year…'.

10. Paragraph 11(1) states that:

'Payment for annual leave shall be calculated on the basis of average earnings that the worker received in the last 13 weeks prior to the start of the leave, not including earnings additionally paid 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...'.

11. Paragraph 13(1) permits the parties to a collective agreement to derogate from the rules of the Federal Law on leave, with the exception of Paragraphs 1, 2 and 3(1) thereof. Paragraph 13(2) allows collective agreements in the construction industry in particular to derogate from paragraphs 1, 2 and 3(1) as well, provided that this is necessary in order to safeguard continuous annual leave for all workers.

2. The Federal collective framework agreement for the construction industry

12. Paragraph 8(1) of the Bundesrahmentarifvertrag für das Baugewerbe (Federal collective framework agreement for the construction industry) ('BRTV-Bau')[4] provides that:

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

…

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

13. Paragraph 8(2) is on the calculation of the duration of leave:

'…

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.

3 BGBl. III, S. 800-4, zuletzt geändert durch Gesetz vom 20 April 2013 (BGBl. I S. 868).

4 Bundesrahmentarifvertrag für Baugewerbe vom 4 Juli 2002 in der Fassung vom 17 Dezember 2003, 14 Dezember 2004, 29 Juli 2005, 19 Mai 2006, 20 August 2007, 31Mai 2012, 17 Dezember 2012, 5 Juni 2014 und 10 Dezember 2014.

3. Days of employment shall include all calendar days on which employment relationships exist 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 their duration is longer than 14 days…'.

14. Paragraph 8(4) concerns remuneration for annual leave and reads as follows:

'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 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 payment for annual leave. It may be credited against additional holiday pay granted by the company.

In respect of annual leave accrued after 31 December 2015 and before 1 January 2018, the remuneration for annual leave shall amount to 13.68% of the gross wage or 15.96% for severely disabled persons within the meaning of the statutory provisions. The remuneration for annual leave shall consist of the 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 20% of the payment for annual leave. It may be credited against additional holiday pay granted by the company.

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);

...

3. The remuneration for annual leave for 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.

...

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

15. Under Paragraph 8(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) ('VTV').

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.

...

4. However, in respect of annual leave accrued after 31 December 2015 and before 1 January 2008, in derogation from points 5.1 and 5.2, the percentage for the minimum remuneration for annual leave shall be 13.68%.'

III. Facts, proceedings and questions referred

16. Mr Hein ('the Applicant') has been employed by Albert Holzkamm GmbH & Co. ('the Defendant' or 'the employer') as a concrete worker since 1980. He was paid an hourly wage of EUR 19.57 (gross) in 2015 and EUR 20.04 (gross) in 2016.

17. The employer introduced, through work agreements, short-time work for the months of August, September, October and November 2015. Together with other short-time periods in other months within the same year, Mr Hein worked short-time for a total of 26 weeks in 2015.

18. In 2015, he acquired 30 days of annual leave. From 19 October 2015 to 31 October 2015, he used 10 of those days of annual leave, corresponding to a total of 82 hours based on his weekly working hours for October (41 hours). The employer calculated the remuneration for annual leave[5] using an hourly wage of approximately EUR 10.96 (gross) as a basis. Compared with Mr Hein's normal hourly wage in the year 2015 (EUR 19.57 gross), there is a total difference of approximately EUR 705.88 (gross): the amount he claims is owed to him. In respect of the additional collectively agreed holiday pay, he claims there is a difference of EUR 176.50 (gross). Mr Hein also took one day's annual leave on 22 December 2015. For that day, he claims EUR 69.45 (gross) as payment of annual leave and EUR 17.22 (gross) for the holiday pay.

19. In 2016, Mr Hein took annual leave from 4 October to 28 October, a total of 155.5 hours. His employer calculated the remuneration for annual leave based on an hourly wage of approximately EUR 11.76 (gross). Compared with the Applicant's hourly wage in 2016 — EUR 20.04 (gross) — Mr Hein thus claims a total difference of approximately EUR 1 287.85 (gross). In respect of the additional holiday pay, Mr Hein also claims EUR 413.39 (gross).

20. Mr Hein considers that for both years the periods of short-time work should not lead to a reduction in the entitlement to remuneration for annual leave. The rule in Paragraph 8 of the collective agreement leads to a significant reduction in the remuneration for annual leave in the case of short-time work. Thus, Mr Hein claims that the referring court should order his employer to pay EUR 2 670.27 (gross), plus interest, as remuneration for annual leave.

21. Albert Holzkamm GmbH & Co. considers that the rule in Paragraph 8 of the collective agreement is covered by Paragraph 13(1) and Paragraph 13(2) of the Federal law on leave. The latter provision and the collectively agreed rule based on it are in conformity with EU law. The employer adds that it should be noted that in the revised version of the collective agreement the parties to that agreement did not reduce the number of days of leave that could be claimed where short-time work had been arranged beforehand. It nevertheless compensated for previously arranged short-time work by increasing the amount of remuneration for annual leave. According to the employer, Mr Hein's action should therefore be dismissed.

5 Under Paragraph 8(4) of the BRTV-Bau, the remuneration for annual leave consists of the payment for annual leave of 11.4% of the gross wage — 13.3% for severely disabled persons — and additional holiday pay. Additional holiday pay is a percentage of the payment for annual leave. Except where it is more accurate to refer to the payment for annual leave strictly speaking, I will use the term 'remuneration for annual leave'.

22. It is within this factual and legal context that the Arbeitsgericht Verden (Labour Court, Verden, Germany) decided to stay the proceedings and to refer the following questions to the Court:

'1. Are Article 31 of the Charter of Fundamental Rights of the European Union and Article 7(1) of Directive 2003/88/EC of 4 November 2003 concerning certain aspects of the organisation of working time 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 of Fundamental Rights of the European Union and on Article 7(1) of Directive 2003/88/EC of 4 November 2003 concerning certain aspects of the organisation of working time 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?'

23. Written submissions were lodged by the Applicant, the Defendant, the German and Italian Governments, and the European Commission. With the exception of the Italian Government, they all presented oral argument at the hearing held on 14 June 2018.

IV. Assessment

24. In this Opinion, I will first discuss, as a preliminary point, the consequences, if any, of the fact that the national rule in question is part of a collective agreement that derogates from the default national legislation on leave in order to take into account the specificities of the construction industry (A). Second, I will set out the minimum requirements that EU law provides for the right to annual leave, especially regarding remuneration for annual leave (B). Third, I will examine whether, in the present case, EU law precludes the taking into account of short-time work to calculate the remuneration for annual leave (C).

A. A collective agreement in the construction industry

25. The construction industry has features which are specific to it. That sector is subject to variations in work patterns over the year, notably due to changing weather conditions or economic hazards. Thus, workers in that sector are likely to be subjected to periods of so-called 'short-time work', especially (but not only) in winter, and periods of a high workload, where overtime is usually required. Those variations in work patterns can make it rather complex to determine the duration of annual leave and remuneration for annual leave.

26. Under Paragraph 11(1) of the German Federal law on leave, payment for annual leave shall be calculated on the basis of the average earnings of the worker, excluding overtime. That average is taken from a period of 13 weeks (the 'reference period'), counted backwards from the date leave was taken. Reductions in earnings occurring in the reference period as a result of short-time work are not considered in the calculation of the payment for annual leave.

27. However, Paragraph 13 of that law allows collective agreements in the construction industry to derogate from the rules of the Federal Law on leave. The BRTV-Bau has made use of this faculty, both in how *duration* (30 working days instead of 24) and *remuneration* for that annual leave are calculated. In particular, in the way that the average hourly gross wage is determined, the system devised by Paragraph 8(4) of the BRTV-Bau, dealing with remuneration for annual leave, takes into account reductions in earnings due to short-time work to calculate that remuneration.

28. Within such a specific legislative context, the German Government argues that the subject matter of this case is the compatibility with EU law of the *legislation enabling the derogation* (namely Paragraph 13 of the Federal law on leave), and not the substantive provisions of the BRTV-Bau. The referring court has also asked its first question from the perspective that that legislative provision authorises social partners to derogate.

29. I agree that on the formal level, it is indeed the Federal law on leave that could be seen as the primary source of potential incompatibility with EU law, to the extent that it has permitted parties to a collective agreement to depart from otherwise generally applicable national legislation. However, leaving that aside, I fail to see what in fact could be assessed substantively in the present case with regard to the Federal law on leave, since the applicable rules in question are contained in the BRTV-Bau, for both key elements in the present case: the duration of and the remuneration for the annual leave.

30. It might be recalled that even if national rules have been drawn up and agreed by social partners, they do not escape the reach of EU law, as long as, of course, they are materially within its scope. The Court has already examined the substantive compatibility of a collective agreement with EU law in the past, including when that agreement derogates from national legislation.[6] Where social partners adopt measures within the scope of EU law, they must respect the latter.[7]

6 See, for instance, judgment of 22 November 2011, *KHS* (C-214/10, EU:C:2011:761), where the Court examined the compatibility of a collective agreement (pertaining to another sector) that derogated from the German Federal law on leave with Article 7(1) of Directive 2003/88. For an example of where the Court assessed the compatibility of the national legislative rule maintaining the effects of a collective agreement despite its rescission with EU law, see judgment of 11 September 2014, *Österreichischer Gewerkschaftsbund* (C-328/13, EU:C:2014:2197).

7 See, to that effect, judgments of 15 January 1998, *Schöning-Kougebetopoulou* (C-15/96, EU:C:1998:3); of 12 October 2010, *Rosenbladt* (C-45/09, EU:C:2010:601, paragraph 53); and of 13 September 2011, *Prigge and Others* (C-447/09, EU:C:2011:573, paragraphs 46 and 48).

31. The fact that the authorities of a Member State have not actually drafted the rules in the collective agreement is not material from an EU law perspective. What matters is that those authorities have allowed for such rules, and made them part of the applicable legal rules in the given sector, and would enforce them within their jurisdiction. In a nutshell, various forms of legislative 'outsourcing' neither shield those rules from EU law nor deprive the Member State of its ultimate responsibility for the content of such rules.[8]

32. Thus, in the present case, the Court is clearly competent to assess the substantive compatibility of the contested provisions of the BRTV-Bau with EU law.

33. However, although the rules in question do not escape the scope of EU law, the fact that they have been agreed in the form of a collective agreement by the social partners is, in my view, of relevance, albeit from a different angle.

34. EU law recognises the importance of social dialogue. Article 28 of the Charter guarantees the right to negotiate and conclude collective agreements. Such agreements are an expression of the social dialogue. The (sector specific) rules contained in those agreements are likely to be endowed with an enhanced level of legitimacy because they are not unilaterally (and generally) imposed by public authorities, but have been negotiated by the relevant social actors, typically in view of the particularities of a given sector. As a result, it may be assumed that collective agreements reflect an overall subtle balance between, on the one hand, the interests of the workers and, on the other hand, those of employers.

35. Moreover, the terms that ought to be stressed in such a context are indeed '*overall balance*'. If authorised by a legal system, collective agreements are unlikely to derogate from merely one or two elements of applicable national (labour) law. They tend to put in place rather more complex structures, incorporating a number of trade-offs and compensation. Thus, the individual rules contained therein cannot be viewed in isolation, but as part of a package.

B. Minimum requirements deriving from EU law for annual leave

36. As a preliminary remark, it is to be noted that EU law only provides for minimum protection of workers, including the right to annual leave.[9] It is for the Member States to lay down, within the limits of EU law, conditions for the exercise of that right without encroaching on its existence.[10] What ultimately matters under EU law is that the actual opportunity to exercise the right exists and thus that the essence of the right to annual leave is not affected.[11]

37. However, exactly what are the minimum requirements regarding the right to annual leave that must be fulfilled in order for national law, including collective agreements, to be compatible with EU law?

8 By broader analogy with the case-law on State liability, it will always be the Member State that is liable from the point of view of EU law for any damage caused to individuals by non-compliance with EU law, irrespective of which of the bodies was responsible for that violation (see, for example, judgments of 1 June 1999, *Konle* (C-302/97, EU:C:1999:271, paragraph 62); of 30 September 2003, *Köbler* (C-224/01, EU:C:2003:513, paragraphs 31 to 33), and of 25 November 2010, *Fuß* (C-429/09, EU:C:2010:717, paragraph 46)). Thus, whatever legislative or constitutional arrangements a Member State has in place, both on the horizontal (legislature — executive — judiciary — and/or other central bodies) or vertical levels, what will be enforced on the territory of a Member State is ultimately its responsibility, irrespective of the actor(s) in question.

9 On the possibility for Member States to go further than what EU law requires, see, for instance, in the context of the calculation of the remuneration for annual leave, the judgment of 15 September 2011, *Williams and Others* (C-155/10, EU:C:2011:588, paragraphs 29 to 30). See also, regarding entitlements to paid leave given in addition to the entitlement to a minimum paid annual leave of four weeks under EU law, judgments of 3 May 2012, *Neidel* (C-337/10, EU:C:2012:263, paragraph 36), and of 20 July 2016, *Maschek* (C-341/15, EU:C:2016:576, paragraph 39).

10 Judgment of 16 March 2006, *Robinson-Steele and Others* (C-131/04 and C-257/04, EU:C:2006:177, paragraph 57), and of 20 January 2009, *Schultz-Hoff and Others* (C-350/06 and C-520/06, EU:C:2009:18, paragraph 28).

11 See, to that effect, judgment of 20 January 2009, *Schultz-Hoff and Others* (C-350/06 and C-520/06, EU:C:2009:18, paragraphs 45 to 46).

38. Pursuant to Article 31(2) of the Charter, every worker has the right to an annual period of paid leave: no further details are provided on that right. Article 7(1) of Directive 2003/88, which the Court has ruled has direct effect,[12] gives specific expression to that right. It provides that 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 the granting of, such leave as laid down by national legislation and/or practice.

39. The Court has emphasised on several occasions that the right to paid annual leave must be regarded as a particularly important principle of EU social law,[13] which aims both at ensuring every worker a period of rest but also a period for relaxation and leisure.[14] That right has two aspects: entitlement to annual leave and remuneration for that leave.[15] It may not be interpreted restrictively.[16]

40. Concerning remuneration for annual leave in particular, it is to be noted that there is no provision on that aspect of the right in Directive 2003/88.[17] However, it is settled case-law that workers must receive *normal remuneration* for the period of rest that corresponds to the number of hours of annual leave that is taken.[18] They must be put in a situation comparable to the periods of work that have been carried out.[19] The rationale behind 'normal remuneration' is to ensure that workers will take the days to which they are entitled in order to rest. Should the amount of the remuneration for annual leave be too low, workers might be tempted not to take their annual leave. In such a scenario, the right to annual leave could become devoid of substance.[20]

41. However, from those statements, it is not immediately obvious what 'normal remuneration' to be paid during annual leave is in professional situations that involve variations in working time during the reference period. These variations may render the calculation of annual leave more difficult, whether looking at its duration or at the remuneration of it, as attested by a number of cases dealt with by the Court.

42. First, regarding the consequences of sick leave on annual leave, the Court has made clear that the fact of having been on sick leave should not reduce the entitlement to annual leave.[21] 'The right to paid annual leave conferred by [Directive 2003/88] on all workers cannot be made subject by a Member State to a condition that the worker has actually worked during the reference period laid down by that

12 See judgment of 24 January 2012, *Dominguez* (C-282/10, EU:C:2012:33, paragraph 35).

13 See, for instance, judgments of 20 January 2009, *Schultz-Hoff and Others* (C-350/06 and C-520/06, EU:C:2009:18, paragraphs 22 and 54 and the case-law cited therein), and of 15 September 2011, *Williams and Others* (C-155/10, EU:C:2011:588, paragraph 17).

14 See judgment of 20 January 2009, *Schultz-Hoff and Others* (C-350/06 and C-520/06, EU:C:2009:18, paragraph 25).

15 See judgment of 15 September 2011, *Williams and Others* (C-155/10, EU:C:2011:588, paragraph 26).

16 See judgments of 21 June 2012, *ANGED* (C-78/11, EU:C:2012:372, paragraph 18), and of 8 November 2012, *Heimann and Toltschin* (C-229/11 and C-230/11, EU:C:2012:693, paragraph 23).

17 As confirmed by the judgment of 11 November 2015, *Greenfield* (C-219/14, EU:C:2015:745, paragraphs 48 to 50), regarding in particular the calculation of the allowance in lieu of annual leave.

18 See judgments of 16 March 2006, *Robinson-Steele and Others* (C-131/04 and C-257/04, EU:C:2006:177, paragraph 50) and of 20 January 2009, *Schultz-Hoff and Others* (C-350/06 and C-520/06, EU:C:2009:18, paragraphs 58 and 60).

19 See judgments of 15 September 2011, *Williams and Others* (C-155/10, EU:C:2011:588, paragraph 20), and of 22 May 2014, *Lock* (C-539/12, EU:C:2014:351, paragraph 17).

20 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 51), where the Court made clear that the remuneration for work done shall not negate the entitlement to paid annual leave. See also judgment of 15 September 2011, *Williams and Others* (C-155/10, EU:C:2011:588, paragraph 21), where the Court held that an allowance, the amount of which was just sufficient to ensure that there is no serious risk that the worker will not take his leave, would not satisfy the requirements of EU law.

21 See, for instance, judgments of 20 January 2009, *Schultz-Hoff and Others* (C-350/06 and C-520/06, EU:C:2009:18, paragraphs 48 to 49), and of 21 June 2012, *ANGED* (C-78/11, EU:C:2012:372, paragraph 21).

State'.[22] Accordingly, being on sick leave for a period of time, both an unintentional and unforeseeable event, cannot have any impact on the duration of and remuneration for annual leave. It follows that having fewer *effective* working hours due to sick leave has no bearing on the entitlement to annual leave.[23]

43. Second, regarding the determination of 'normal remuneration' for jobs involving variations in tasks and working schedule, it would appear that that remuneration shall correspond to the tasks that have been carried out by the worker. In *Williams*, the Court gave guidance as to what an air pilot's 'normal remuneration' is. The Court stated that where the remuneration received by the worker is composed of several elements, and is to be determined by the provisions and practice 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. Accordingly, any inconvenient aspect which is linked intrinsically to the performance of the tasks which the worker is required to carry out under his contract of employment and in respect of which a monetary amount is provided … must necessarily be taken into account for the purposes of the amount to which the worker is entitled during his annual leave … By contrast, the components of the worker's total remuneration which are intended exclusively to cover occasional or ancillary costs arising at the time of performance of the tasks which the worker is required to carry out under his contract of employment, such as costs connected with the time that pilots have to spend away from base, need not be taken into account in the calculation of the payment to be made during annual leave'.[24]

44. Thus, it would appear that 'normal remuneration' is supposed to be a 'mirror' of the 'normal' working conditions that are intrinsic to the job in issue. With a certain degree of generalisation, it would thus seem that the remuneration for annual leave must be determined in the light of the overall remuneration actually received as consideration for the tasks *effectively* completed on a regular basis.

45. Third, as regards the impact of part-time work on the right to annual leave, the Court has applied, with reference to the EU framework agreement on part-time work, the *pro rata temporis* principle to the *duration* of annual leave in order to make it commensurate with the *effective* (part-time) work. For instance, in *Zentralbetriebsrat der Landeskrankenhäuser Tirols*, concerning the effects on the right to paid annual leave of a change in the working hours of a worker from full-time work to part-time work, the Court held that, for a period of employment on a part-time basis, the reduction of annual leave in comparison to that granted for a period of full-time employment is justified on objective grounds. However, that principle cannot be applied *ex post* to a right to annual leave accumulated during a period of full-time work.[25]

46. Subsequently, in *Heimann*, the Court extended the application of the *pro rata temporis* principle to a very peculiar situation of short-time work, namely 'zero-hours short-time working'. That situation was brought about by a social plan[26] in order for dismissed workers who previously worked full-time to get an allowance in lieu of annual leave. Addressing that specific situation, the Court described the

22 See judgments of 20 January 2009, *Schultz-Hoff and Others* (C-350/06 and C-520/06, EU:C:2009:18, paragraph 41), and of 24 January 2012, *Dominguez* (C-282/10, EU:C:2012:33, paragraph 20).

23 For a similar treatment of maternity leave, see judgment of 18 March 2004, *Merino Gómez* (C-342/01, EU:C:2004:160, paragraphs 32 to 33).

24 See judgment of 15 September 2011, *Williams and Others* (C-155/10, EU:C:2011:588, paragraphs 19 to 25 and the case-law cited therein).

25 See judgment of 22 April 2010, *Zentralbetriebsrat der Landeskrankenhäuser Tirols* (C-486/08, EU:C:2010:215, paragraph 33).

26 That social plan provided for the extension of the employment contracts of dismissed workers for one year from the date of their dismissal, while suspending, by the application of 'zero-hours short-time working' ('Kurzarbeit Null'), the worker's obligation to work, and the employer's obligation to pay him a salary.

concerned workers as de facto 'temporary part-time workers'[27] and went on to apply the *pro rata temporis* principle. Thus, in *Heimann*, the Court effectively transposed the *pro rata temporis* principle to the determination of a certain type of short-time workers' duration of annual leave. In this way, the Court adapted the duration of annual leave to the work *actually* carried out by those workers.

47. However, the Court has never applied the *pro rata temporis* principle to the right to *remuneration* for annual leave. It may nonetheless be noted that that principle may also have an impact on a number of certain benefits enjoyed by part-time workers. For instance, in *Schönheit and Becker*, the Court applied the *pro rata temporis* principle to calculate (and thus reduce) the retirement pension of a person in the case of part-time employment.[28] However, the Court insisted that the reduction of the pension had to be strictly proportionate.[29] Also, in *Österreichischer Gewerkschaftsbund*,[30] concerning another type of benefit, namely a dependent child allowance, the Court held that if, according to the terms of the employment relationship in that case, the worker is employed part-time, the calculation of the dependent child allowance in accordance with the principle of *pro rata temporis* is objectively justified. What follows from this line of case-law is that part-time workers are entitled to payment of an amount calculated *pro rata* on the number of hours actually worked.

48. Finally, in *Greenfield*, the Court was confronted with the reverse scenario of an *increase* in working hours, not in the context of short-time work, but because of unforeseeable variations in working hours. In that case, there was a contract stipulating that the working hours differed from week to week. Accordingly, the worker's remuneration also varied on a weekly basis. The Court held that the entitlement to minimum paid annual leave must be calculated by reference to the days and hours worked and specified in the contract of employment.[31] As a result of the change in working hours, Member States are not required to recalculate retroactively the leave already accrued (and possibly taken) *before* the change. EU law only requires a new calculation for the *subsequent* period of work during which the number of hours worked had increased.[32] This also shows that, apart from situations comparable to sick leave, annual leave tends to be based on the working hours *effectively* completed.

49. In sum, it would appear that, in situations involving variations in the working hours due to a number of different events, annual leave is, in general, calculated on the basis of *effective* working hours. This is notably the case in situations where the event giving rise to the variation is *foreseeable* or *voluntary*, typically because it is inherent in the type of contract at issue, for instance with regard to specific jobs or for part-time workers and certain short-time workers that can be assimilated to the former. The only clear exception to the 'effective-working-hour-rule' relates to variations due to periods of sick leave. The rationale behind this exception is to ensure that an *unforeseeable* or *unintentional* event, such as work incapacity caused by sickness, does not unduly affect the autonomous right to annual leave, the purpose of which is very different to that of the right to sick leave. Apart from this specific case, effective working hours, as opposed to theoretical ones, would appear to be the standard for the purposes of determining annual leave.[33]

27 Judgment of 8 November 2012, *Heimann and Toltschin* (C-229/11 and C-230/11, EU:C:2012:693, paragraph 32).

28 See judgment of 23 October 2003, *Schönheit and Becker* (C-4/02 and C-5/02, EU:C:2003:583, paragraphs 90-91).

29 See judgment of 23 October 2003, *Schönheit and Becker* (C-4/02 and C-5/02, EU:C:2003:583, paragraph 93).

30 Judgment of 5 November 2014, *Österreichischer Gewerkschaftsbund* (C-476/12, EU:C:2014:2332).

31 See judgment of 11 November 2015, *Greenfield* (C-219/14, EU:C:2015:745, paragraph 32).

32 See judgment of 11 November 2015, *Greenfield* (C-219/14, EU:C:2015:745, paragraphs 38 to 39 and 43 to 44).

33 See also, to that effect, in the context of the relationship between annual leave and parental leave, the Opinion of Advocate General Mengozzi in *Ministerul Justiției and Others* (C-12/17, EU:C:2018:195, points 23 to 29).

C. The present case

50. The rule at stake in the main proceedings concerns *the method of calculation* of remuneration for annual leave, as laid down in the collective agreement in the construction industry, the BRTV-Bau. The central issue underpinning the referring court's first question is whether, for the purpose of calculating that remuneration, EU law allows for the taking into account of reductions in actual working hours (and thus in earnings) due to short-time work decided through collective agreements (work agreements): that is in the particular context of what would formally appear to be a full-employment relationship, in a sector that is often subject to important variations in the working schedule.

51. According to the referring court, the German rules on annual leave link the amount of the remuneration for annual leave to the earnings that the worker effectively received in the reference period. It is on the basis of these actual earnings, themselves based on actual working hours, that the relevant hourly wage, which then serves to determine the overall amount of the remuneration for annual leave, is calculated.

52. The Applicant maintains that short-time work during the reference period has entailed a reduction of almost 50% of the average hourly wage, which is decisive for the calculation of the remuneration for annual leave. Where there is continued short-time work over the entire reference period, the hourly wage during that period could even be zero. Yet, the amount of the remuneration for annual leave must be at least as high as the remuneration that the worker would have received if he had continued working as usual. The right to remuneration for annual leave is a true right to remuneration. Thus, the 'value' of the annual leave should not depend on when the leave is taken during the reference period.

53. According to the Defendant, the BRTV-Bau is quite protective of workers in the construction industry. In view of the advantages that the former offers, the inconvenience of a lower remuneration for annual leave appears to be negligible. For instance, workers have 30 days of paid annual leave for a 5-day working week, instead of 24 days for a 6-day working week. The number of days to which the workers are entitled is not reduced if short-time work has been agreed. In addition, calculation of the remuneration for annual leave includes overtime.

54. The Defendant further stated that during periods of short-time work, workers can rest and indulge in leisure activities since their obligations vis-à-vis the employer are suspended. Moreover, in the periods of short-time work, although the obligations of the employee are suspended, the employee still receives a minimum (tax free) pay as set out by appropriate tables, which are published annually by the Federal Government. The employer also continues to pay his social security contributions in full (sickness insurance and pension contributions). Finally, periods of short-time work, which essentially aim to prevent economically-motivated dismissals, are foreseeable, because they have been decided through work agreements.

55. The German Government maintains that to calculate remuneration for annual leave on the basis of the gross wage *effectively received* over the period of reference, thereby taking into account the reductions in earnings due to short-time work, is compatible with EU law. The German Government claims that a rule, which seems to operate at the expense of a worker in one specific aspect, is part of a whole set of rules adopted by social partners that should be taken into account when assessing that rule. The collective agreement should be presumed to be fair. The possible 'negative' effects are compensated by other rules in the collective agreement that have positive effects on workers such as the additional payment of holiday pay or a higher basic salary to compensate the hardship inherent in the construction industry.

56. According to the Commission, there is no need to specifically examine the Charter because Article 7 of Directive 2003/88 is a specific expression of Article 31(2) of the Charter. The Commission recalls that the worker is entitled to his normal remuneration calculated on the basis of an average over a reference period that is judged to be representative. There are no exceptions or derogations

possible to that right. When a Member State grants more than four weeks of annual leave, it can freely set the conditions and decide, for example, whether to grant remuneration for days that have not been taken, and to decide the conditions under which it can occur. For the Commission, the national legislation in issue is compatible with Directive 2003/88 if it is established that this legislation has transposed the *pro rata temporis* principle. It is for the referring court to determine whether the collective agreement in question has applied it.

57. I agree with the preliminary remark made by the Commission, namely that Article 31(2) of the Charter is not necessary to consider in the present case. That provision merely states, in a general and abstract way, that 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*. The Charter does not even state the minimum duration of guaranteed annual leave, let alone what rules govern the method of calculation of remuneration while on annual leave.

58. Turning to Article 7(1) of Directive 2003/88 and the case-law interpreting that provision, I note that there is nothing in either that provision, nor in the case-law interpreting it, which would prescribe how exactly Member States must calculate remuneration for annual leave. The only requirement it states is that any such normal remuneration shall not fall below minimum requirements in a manner that would devoid the right to annual leave of its substance. On the facts presented to this Court, I fail to see how that risk would materialise in the present case.

59. The case-law [34] requires that workers receive *normal remuneration* during annual leave so that they are put in a situation comparable to the periods of work that have been carried out. In particular, it must be ensured that workers are not tempted *not* to take their annual leave, which could accordingly strip the right to annual leave of its substance.

60. In the present case, what is, under EU law, the 'normal remuneration' of a worker who finds himself on short-time work quite frequently due to the specificity of the construction industry? Is it the remuneration corresponding to 'theoretical' work that is the remuneration that the worker would have received if he had kept working normally throughout the reference period, as argued by the Applicant? Or is it rather the one that corresponds to the actual work completed by the worker?

61. The Court's judgment in *Williams* stated that remuneration for annual leave is to be determined in the light of the *overall* remuneration actually received as consideration for the tasks effectively completed on a regular basis. [35] Thus, as a minimum under EU law, remuneration for annual leave includes the remuneration closely connected to the work *actually* performed. However, Member States can decide to adopt more favourable provisions. Should they do so, it is purely a matter for national law since EU law does not require them to go beyond the remuneration corresponding to the work actually completed over the reference period.

62. Moreover, as remuneration for annual leave cannot reasonably be assessed in isolation from the duration of the annual leave, both these elements cannot in turn be viewed in complete isolation from the broader structure they belong to. As stressed by the Defendant and by the German Government in their written and oral submissions, the rule in question is part of a package that reflects the overall balance of interests that has been reached by social partners through the BRTV-Bau. Concerning arrangements relating to annual leave, the BRTV-Bau provides that the duration of annual leave is 30 days per year, which is 10 more days than the minimum that is required by Directive 2003/88, irrespective of whether workers are actually working or are in short-time work. For remuneration for annual leave, if the amount of it *does* vary depending on that latter factor, overtime is taken into account as the basis for calculation, thereby enlarging that basis, and a rather high percentage is

34 Outlined above, in particular at point 40.

35 Above, points 43 and 44. See also, to the same effect, judgments of 23 October 2003, *Schönheit and Becker* (C-4/02 and C-5/02, EU:C:2003:583), and of 5 November 2014, *Österreichischer Gewerkschaftsbund* (C-476/12, EU:C:2014:2332).

applied to that basis. Moreover, as stated by the German Government at the hearing, the reference period appears to be the whole calendar year, which allows for the balancing out of periods of effective work with periods of short-time work. Finally, as suggested by the Defendant and confirmed by the German Government at the hearing, during short-time work periods, employees receive not only continuous pay (a short-time working benefit paid by the employer and ultimately reimbursed by the German employment agency [36]), but are also still covered by health insurance and pension schemes.

63. The BRTV-Bau should, within certain limits, be interpreted as being the product of an 'overall balance' and the complex structures put in place mean that the individual rules must not be read in isolation, but as part of a package. [37] From the perspective of the right to paid annual leave guaranteed under Directive 2003/88, the bottom line remains that the core of the right to annual leave must not be affected. It is indeed true that the latter is an autonomous right serving a specific purpose. Thus, interferences with annual leave, if any, cannot be 'compensated' by other types of social advantages that result from the BRTV-Bau. Thus, if there is 'compensation' between certain advantages and inconveniences, it is *within* the arrangements regarding annual leave. The fact that a collective agreement can be very favourable in other respects certainly does not allow the essence of the right to annual leave to be affected.

64. Although it is ultimately for the referring court to assess, that does not seem to be the case here. Social partners in Germany have opted for the solution to offer more days of annual leave and remuneration for annual leave that, inter alia, takes into account overtime *but also* short-time work when calculating annual leave. That social partners' choice does not appear to deter workers from exercising their right to annual leave — quite the contrary. That the same amount is spread over more days may even be said to serve as an incentive for workers to take all 30 days of annual leave in order to receive the full, yearly amount of remuneration for annual leave that they are entitled to under the BRTV-Bau. Thus, the latter arrangements regarding annual leave do not seem to violate the core of the right to paid annual leave.

65. That conclusion remains unaffected by the issue, which was extensively discussed at the hearing, of the potential applicability of the *pro rata temporis* principle to the present case. In its written submissions, the Commission suggested that the case at hand is comparable to that of part-time workers. As a consequence, although the *pro rata temporis* principle is apparently not supposed to apply to the duration of annual leave (4 weeks is the minimum in all circumstances), it should apply to remuneration for annual leave in the present case.

66. In support of its argument, the Commission invoked *Heimann*. [38] It is true that in that case, the Court stated that 'workers on short-time working must be qualified as "temporary part-time workers", since their situation is de facto comparable to that of part-time workers'. [39] The Court went on to apply the *pro rata temporis* principle to a type of short-time work with regard to the calculation of (the duration of) annual leave.

67. However, on the facts, *Heimann* concerned a full suspension of both the workers' and the employers' obligations, a complete 'Kurzarbeit-Null' that was used for one year following the effective ending of Mr Heimann's employment contract under an agreed social plan. It was within this context that the *national law* stated that any claims to annual leave under such 'Kurzarbeit-Null' should be calculated using the *pro rata temporis* principle. The question posed by the referring court in that case enquired whether EU law precluded the national provisions that applied the *pro rata temporis* principle in such situations, meaning that if there was no effective work in that year, then the days accrued for the calculation of annual leave would also be zero.

36 The German Government stated at the hearing that the short-time working benefit amounts to at least 60% of the worker's salary.

37 See above points 34 and 35 of this Opinion.

38 Judgment of 8 November 2012, *Heimann and Toltschin* (C-229/11 and C-230/11, EU:C:2012:693).

39 Judgment of 8 November 2012, *Heimann and Toltschin* (C-229/11 and C-230/11, EU:C:2012:693, paragraph 32).

68. It was in such a specific context that the Court replied, drawing the de facto parallel between short-time workers and temporary part-time workers, that EU law *does not* preclude national provisions which are structured in that way.

69. Now what the Commission is effectively suggesting in this case is a triple extension of *Heimann*. First, short-time work within an otherwise apparently continuous employment relationship should be, for all practical purposes, treated as part-time work. Second, the *pro rata temporis* principle would then be applicable not just to the *duration* of annual leave, but effectively also to the *remuneration* for annual leave. Third, the applicability of the *pro rata temporis principle* would be transformed: from being an optional tool for Member States, and to which the EU law is not opposed, under certain conditions, into an obligation imposed by EU law on the Member States, against which the Member States would be obliged to check whether or not they are compliant with minimum standards of EU law.

70. In addition, that triple extension advanced by the Commission could potentially lead, in the context of the present case, to a rather paradoxical result: depriving the Member States of the discretion that they legitimately enjoy under Article 7(1) of Directive 2003/88, to calculate normal remuneration for annual leave in order to *lower* the protection of workers which is already available in a specific industry.

71. All those elements only underline, in my view, the need to reaffirm the original finding made at points 58 and 59 of this Opinion: in the cases like the present one, EU law simply does not provide for precise rules for the calculation of remuneration for annual leave. It is for the Member States to shape them, provided that the essence of the right to paid annual leave is not undermined by those rules.

72. In view of the suggested answer to the first question submitted by the referring court, there is no need to address the second question.

V. Conclusion

73. In the light of the aforementioned considerations, I propose that the Court answer the first question posed by the Arbeitsgericht Verden (Labour Court, Verden, Germany) as follows:

– 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 does not preclude national legislation, such as that in the main proceedings, under which 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. However, it is ultimately for the referring court to assess, in the light of the overall economy of the federal collective framework agreement for the construction industry and, in particular, its arrangements on annual leave, whether the essence of the right to paid annual leave is not undermined by those rules.