Reports of Cases

OPINION OF ADVOCATE GENERAL
MENGOZZI
delivered on 12 June 2014[1]

Case C-316/13

Gérard Fenoll
v
Centre d'aide par le travail La Jouvene,
Association de parents et d'amis de personnes handicapées mentales (APEI)

(Request for a preliminary ruling from the Cour de cassation (France))

(Social policy — Concept of worker — Directive 2003/88/CE — Person admitted to a work rehabilitation centre — Person with a disability — Entitlement to paid annual leave — Charter of Fundamental Rights — Application ratione temporis — Direct effect of a directive — Horizontal dispute)

1. May the right to paid annual leave laid down by Article 7 of Directive 2003/88/EC of the European Parliament and of the Council of 4 November 2003 concerning certain aspects of the organisation of working time[2] and, now, by Article 31 of the Charter of Fundamental Rights of the European Union[3] ('the Charter'), be relied on by a person placed, by reason of his disability, in a particular centre which offers various activities not only of a medico-social nature but also of an occupational nature? That is the question at issue in this reference for a preliminary ruling.

I – **Legal background**

A – *Union law*

2. Article 31 of the Charter, relating to fair and just working conditions, provides as follows:

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

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

3. Under Article 1 of Directive 2003/88, read in conjunction with Article 2 of Council Directive 89/391/EEC of 12 June 1989 on the introduction of measures to encourage improvements in the safety and health of workers at work,[4] Directive 2003/88 applies to all sectors of activity, whether private or public, concerning certain aspects of the organisation of working time of workers.

1 — Original language: French.
2 — OJ 1988 L 299, p. 9.
3 — OJ 2007 C 303, p. 1.
4 — OJ 2010 L 183, p. 1.

4. Article 7 of Directive 2003/88 is worded 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.’ [5]

B – *French law*

5. Work rehabilitation centres (‘CATs’) were non-profit making centres of a socio-medical nature for disabled persons the purpose of which was set out in Article L. 344-2 of the Code de l’action sociale et des familles (Social Action and Families Code), in the version applicable to the facts of this case. The centres are open to adolescents and adults with disabilities who are unable, temporarily or permanently, to work in either a mainstream company or in a sheltered work environment, or for a centre distributing work to be done at home, or pursue an occupation or activity as a self-employed person. These centres offer various activities of an occupational nature, medico-social support and educational assistance, in addition to living arrangements which facilitate personal development and social integration. The opening of such centres was subject to authorisation under control of the State. [6] A pricing authority supervised each CAT’s revenue and expenditure. [7]

6. The disabled person whose ability to work had in principle to be lower than one third of normal capacity was admitted to a CAT by decision of a committee. [8] That person was paid a guaranteed income from his or her work [9] but calculation of the remuneration was not based on the number of hours worked. [10] That guaranteed income was none the less expressly regarded as ‘payment’ for work for the purposes of Article L. 242-1of the Social Security Code. [11] By contrast the only provisions of the French Employment Code applicable to disabled persons staying in a CAT were those relating to hygiene and safety at work. [12]

7. The first CATs started their operations in the 1960s. From 2002, CATs were replaced by work rehabilitation establishments and assistance services (établissements et services d’aide par le travail, or ESATs) but the centres already in existence kept the title of CAT. [13] The French Republic now has nearly 1 400 such centres, serving more than 110 000 people. The legal framework governing their activities was further added to a degree in 2007 but remains essentially the same. [14]

5 — Article 7 of Directive 2003/88 is a codification with the law remaining unchanged of Article 7 of Council Directive 93/104/EC of 23 November 1993 concerning certain aspects of the organisation of working time (OJ 1993 L 307, p. 18).

6 — Articles L. 313-1, L. 313-13 and L. 313-5 of the Social Action and Families Code in the version in force respectively until 2 December 2005, 7 March 2007 and 11 February 2005.

7 — See in particular Articles R. 314-34 and R. 314-56 of the Social Action and Families Code, which entered into force on 26 October 2004.

8 — Articles 1 and 5 of Decree No 77-1546 of 31 December 1977 (JORF 12 January 1978, p. 333).

9 — Article L. 243-4 of the Social Action and Families Code in the version in force from 23 December 2000 to 11 February 2005. As from 2007, a disabled person placed in such a centre is to receive, in respect of any full time professional activity, a guaranteed income, the amount of which is between 55 and 110% of the minimum wage (see Article R. 243-5 of the Social Action and Families Code which entered into force on 1 January 2007). That guaranteed income paid by the centre is to a substantial extent reimbursed by the State.

10 — As was stated at the hearing by the representative of the APEI, which was not challenged.

11 — Article L. 243-5 of the Social Action and Families Code in the version in force from 23 December 2000 to 11 February 2005.

12 — See, in particular, Article 9 of Decree No 77-1546 of 31 December 1977, cited above.

13 — For convenience I shall only use the term ‘CAT’ in my reasoning.

14 — Thus, a disabled person working in an ESAT enters into a contract for support and assistance through work with the ESAT once his ability to integrate into it has been established by the competent committee. Although the wage paid continues to be defined as pay in respect of work, it none the less does not constitute a salary for the purposes of the French Employment Code (see Article L. 243-5 of the Social Action and Families Code in the version in force from 12 February 2005).

8. The APEI representative stated at the hearing, without being challenged by the other parties present, that CATs pay social security charges on payments made to disabled persons and that contributions in respect of sickness insurance, pension insurance and professional training are deducted from that pay. By contrast, because they are not regarded under French law as employees, and because directors of CATs cannot dismiss disabled persons residing in CATs, they do not pay unemployment insurance contributions.

9. Finally, before 2007, there was no provision for entitlement to paid annual leave for persons residing in CATs, so that such entitlement depended solely on the goodwill of each CAT. Since 1 January 2007, Article R. 243-11 of the Social Action and Families Code expressly provides for the right to paid annual leave for disabled persons residing in an ESAT.

II – **Main proceedings and questions referred for a preliminary ruling**

10. Mr. Fenoll is described by the national court as a 'user' of a CAT managed by the association of parents and friends of mentally handicapped persons, ('APEI') of Avignon, which he joined in 1996. As from 16 October 2004, Mr Fenoll was placed on sick leave. For the reference period from 1 June 2003 to 31 May 2004, there remained in his favour 12 days paid leave.[15] Mr Fenoll remained on sick leave until 31 May 2005, then left the CAT on 20 June 2005. The CAT considers that, for the period from 1 June 2004 to 31 May 2005, Mr Fenoll, who worked for only 78 days was entitled to only 6 days of paid leave which were effectively paid to Mr Fenoll in July 2005.

11. Mr Fenoll brought an action against the CAT before the Tribunal d'Instance d'Avignon (District Court, Avignon) in order to obtain payment in respect of paid holidays acquired but not taken for the period from 1 June 2003 to 31 May 2004 and for the period from 1 June 2004 to 31 May 2005. The District Court dismissed the application on the basis that the CAT's calculation was based on a correct interpretation of the French legislation under which a worker cannot claim compensatory payment in respect of paid leave not taken owing to illness and periods of sick leave do not in themselves give rise to entitlement to paid leave.

12. Mr Fenoll then brought an appeal before the referring court. He maintains first that, having regard to the purpose of paid annual leave under Directive 2003/88, where the employee is unable to take such leave owing to sickness, the directive requires that the paid leave entitlement acquired must be deferred until after the date on which work is resumed or, in the event of termination of the employment relationship, compensated for. Secondly, he argues that Article 7 of Directive 2003/88 applies to any worker and that the French legislation must be interpreted in the light of that directive as meaning that the reason for the absence of the employee who is absent owing to sickness cannot be taken into consideration in order to deprive him of his right to annual leave and that entitlement to paid leave thus acquired during the period of sick leave must be compensated for, where the employment contract is terminated, as it was in this case.

13. For its part, the national court notes that both Article 31 of the Charter and Article 7 of Directive 2003/88 lay down a right to annual paid leave. It states that the Court has already recognised this right as a particularly important manifestation of a principle of social law — as its presence in the Charter attests — which cannot be derogated from.[16] The national court then refers to the definition of the concept of worker in the case law under Union law, emphasising the fact that that concept has autonomous scope and must not be interpreted restrictively.

15 — It is clear from the file that Mr Fenoll was entitled in 2004 to 18 days of paid leave and that prior to 2004, he regularly benefited from 5 weeks' annual paid leave.

16 — The national court refers here in particular to the judgment in *KHS* (C-214/10, EU:C:2011:761).

14. The national court notes also the task entrusted to CATs under Article L. 344-2 of the Social Action and Families Code, in the version applicable at the time of the facts in this case. Finally, it states that persons resident in CATs did not have employee status and were not linked to those centres by employment contracts.[17] Under French employment law, only the rules of the Employment Code on health and safety applied to them and no provision of French law conferred on such persons entitlement to paid leave.

15. The national court is therefore uncertain whether, on the one hand, a person such as Mr Fenoll may be classified as a 'worker' within the meaning of Union law in general and of Directive 2003/88 read in conjunction with Directive 89/391, in particular, and, on the other hand, whether he may rely on an entitlement to paid annual leave in the context of a dispute described by the national court as horizontal.[18]

16. Thus, faced with a difficulty relating to the interpretation of Union law, the national court decided to stay the proceedings and, by decision received at the Court Registry on 10 June 2013, to refer the following three questions to the Court for a preliminary ruling under Article 267 TFEU:

'(1) Must Article 3 of [Directive 89/391] to which Article 1 of [Directive 2003/88], determining the scope thereof, refers, be interpreted as meaning that a person placed in a work rehabilitation centre can be classified as a "worker" within the meaning of that Article 3?

(2) Must Article 31 of the Charter … be interpreted as meaning that a person, such as a person described in the previous question, can be classified as a "worker" within the meaning of that Article 31?

(3) Can a person, such as a person described in the first question, rely directly on the rights conferred on her or him by the Charter in order to obtain entitlement to paid leave if national legislation does not provide for any such entitlement, and must the national courts, in order to ensure that those rights are fully effective, set aside any contrary provision of national law?'

III – **Procedure before the Court**

17. The applicant in the main proceedings, the APEI, the French and Netherlands Governments, and the European Commission, have lodged written observations with the Court.

18. At the hearing on 27 March 2014, the APEI, the French Government and the Commission presented oral argument.

IV – **Legal analysis**

A – *Preliminary observations*

19. In order to clarify the terms of the discussion, a certain number of preliminary remarks should be made.

17 — That explains the jurisdiction of the District Court, Avignon, to hear the main proceedings at first instance and not that of the Conseil des Prud'hommes (Employment Tribunal).

18 — In that connection, the Court of cassation mentions a judgment delivered by the French Conseil d'État on 22 February 2007 (ECLI:FR:CESEC:2007:264541.20070222) which disallowed the possibility that the task entrusted to private bodies which manage the CATs has the character of a public service mission.

20. First of all, it is important to emphasise that the national court is asking the Court only whether Mr Fenoll can rely as a worker on the right to paid annual leave of a minimum of four weeks; it is not asking whether Union law is compatible with the French rules whereby, first, leave not taken as a result of sickness cannot give rise to compensation and, secondly, periods of sick leave do not give rise to an entitlement to paid leave. The national court plainly feels sufficiently informed by the case-law available on this subject, some of which originates from it, in order to answer any questions which it has not in any event referred to the Court.

21. Secondly, the wording of the questions referred for a preliminary ruling calls for two sets of observations.

22. First of all, a typographical error must be corrected since, contrary to what is stated in the wording of the first question, Article 1 of Directive 2003/88 does not refer to Article 3 of Directive 89/391 [19] but to Article 2 thereof.

23. Next, with regard to the third question which relates to whether a person such as Mr Fenoll may rely directly on any rights he may enjoy under the Charter, and in particular Article 31, I should like to point out at the outset that in my view the Charter is not applicable *ratione temporis* to the dispute in the main proceedings and in this respect I share the view of the Netherlands Government. The Charter came into force only in 2009 while the facts in the main proceedings occurred between 2003 and 2005. The prohibition on retroactivity is yet more compelling given that the main proceedings are described as a dispute between individuals, although I shall have occasion to return to this point later in my analysis.

24. Therefore, the problem now before the Court is twofold: must Mr Fenoll be regarded as a worker within the meaning of Union law, which confers on all workers a right to paid leave and, if so, to what extent can he rely on that right in the circumstances of the dispute in the main proceedings?

B – *Whether Mr Fenoll may be classified as a 'worker' within the meaning of Directive 2003/88*

25. Having briefly set out the importance which the Court accords in its case-law to the right to paid annual leave, I shall recall its case-law on the concept of a worker before applying it to this case.

26. The interpretation, then, of the concept of worker within the meaning of Article 7 of Directive 2003/88 which I shall commend to the Court naturally applies equally to Article 31(2) of the Charter in order to ensure the uniformity of the scope of application *ratione personae* of the right to paid leave.

1. The right to paid annual leave as a principle of Union social law

27. It is clear from the settled case-law of the Court that every worker's right to paid annual leave must be regarded as a particularly important principle of Union social law, henceforth enshrined in Article 31(2) of the Charter; it cannot be derogated from and is to be implemented by the competent national authorities only within the limits expressly set out in Directive 2003/88. [20] That right was conferred directly by Union law on every worker [21] and Article 7 of Directive 2003/88 which enshrines

19 — See also judgment in *Union syndicale Solidaires Isère* (C-428/09, EU:C:2010:612, paragraph 27).

20 — *Dominguez* (C-282/10, EU:C:2012:33, paragraph 16 and the case-law cited), *Commission* v *Strack* (C-579/12 RX II, EU:C:2013:570, paragraph 26 and the case-law cited).

21 — *KHS* (EU:C:2011:761, paragraph 34).

it imposes a clear and precise obligation on Member States to achieve a specific result.[22] That right has the dual purpose of enabling the worker both to rest from carrying out the work he is required to do under his contract of employment and to enjoy a period of relaxation and leisure.[23] Finally the right to paid annual leave cannot be interpreted restrictively.[24]

28. It is in holding all the foregoing considerations in mind that one must examine whether Mr Fenoll can be considered to be a holder of that right to leave. For the moment let us return to the state of the case-law on the definition of the concept of 'worker'.

2. Review of the case-law on the concept of 'worker'

29. There is no single definition of worker in Community law: it varies according to the area in which the definition is to be applied.[25] Yet Directive 2003/88, the Court has already pointed out, did not refer to the definition given to the concept of worker either in Directive 89/391 or in national legislation or practice.[26] It concluded that 'for the purposes of applying Directive 2003/88, that concept may not be interpreted differently according to the laws of the Member States but has an autonomous meaning specific to EU law. The concept must be defined in accordance with objective criteria which distinguish the employment relationship by reference to the rights and duties of the persons concerned. The essential feature of an employment relationship is that for a certain period of time a person performs services for and under the direction of another person, in return for which he receives remuneration'.[27] The Court therefore considers that the worker to whom Directive 2003/88 is addressed is defined in the same way — save for one reservation which I shall set out below — as the worker to whom Article 45 TFEU is addressed.[28] Reference may therefore usefully be made in this Opinion to the classic case-law of the Court in the field of freedom of movement for workers.

30. Furthermore, the classification of the concept of worker must be based on objective criteria and an overall assessment of all the circumstances of the case must be made.[29] In that connection, the *sui generis* legal nature of the employment relationship under national law cannot have any consequence in regard to whether or not the person is a worker for the purposes of EU law. That means in the specific context of this case that the fact that handicapped persons staying in a CAT are subject only to certain of the provisions of the Employment Code cannot constitute an impediment to the potential classification of such persons as 'workers' within the meaning of Directive 2003/88.[30]

31. Finally, the Court has held that: 'any person who pursues activities which are real and genuine, to the exclusion of activities on such a small scale as to be regarded as purely marginal and ancillary, must be regarded as a worker'.[31] It is, in principle, a matter for the national court to determine whether the condition of the pursuit of real and genuine activity for remuneration is satisfied, and the national court must base its examination on objective criteria and make an overall assessment of all the circumstances of the case[32] and in particular ascertain whether the services actually performed are capable of being regarded as forming part of the normal labour market.[33]

22 — See, with regard to Article 7 of Directive 93/104 on the identical wording, *BECTU* (C-173/99, EU:C:2001:356, paragraph 34).

23 — *KHS* (EU:C:2011:761, paragraph 31 and case-law therein cited).

24 — *Heimann* (C-229/11 and C-230/11, EU:C:2012:693, paragraph 23 and the case-law cited), *Commission* v *Strack* (RX II, EU:C:2013:570, paragraph 29 and the case-law cited) and order in *Brandes* (C-415/12, EU:C:2013:398, paragraph 29).

25 — *O'Brien* (C-393/10, EU:C:2012:110, paragraph 30 and the case-law cited). See also point 25 of the Opinion in *O'Brien* of Advocate General Kokott (C-393/10, EU:C:2011:746).

26 — And, contrary to what the national court gives to understand, see *Union syndicale Solidaires Isère* (EU:C:2010:612, paragraph 27).

27 — *Union syndicale Solidaires Isère* (EU:C:2010:612, paragraph 28).

28 — See *Neidel* (C-337/10, EU:C:2012:263, paragraph 23).

29 — *Union syndicale Solidaires Isère* (EU:C:2010:612, paragraph 29).

30 — See, by analogy, *Union syndicale Solidaires Isère* (EU:C:2010:612, paragraph 30).

31 — See, inter alia, *Trojani* (C-456/02, EU:C:2004:488, paragraph 15).

32 — *Trojani* (EU:C:2004:488, paragraph 17).

33 — *Trojani* (EU:C:2004:488, paragraph 24).

3. Application to this case

32. I am of the view that the relationship between disabled persons and the CATs satisfies the conditions set out by the Court on the 'nature of the employment relationship'. It is true that the Director of the CAT could not dismiss Mr Fenoll, since this could be done only by a committee. None the less, for that part of time during which Mr Fenoll was engaged in activities that were not of a socio-medical nature — which I cannot for now classify as occupational — he did so on the instructions of the staff working in and managing the CAT.

33. I also tend to the view that Mr Fenoll was indeed receiving pay in consideration for services which he was providing. The French legislature demonstrated a degree of ingeniousness in insisting that sums paid to persons living in CATs are not salaries, whilst making them subject to various social security deductions so as to continue to deny to those persons the status of worker and deprive them of any right to bring a claim in that regard. However, those national findings cannot bind the Court. Furthermore, the Court has already held that neither the low level of the pay — a possible consequence of the low productivity of the persons concerned — nor the public origin of the funds as such preclude those persons from being recognised as workers within the meaning of Union law. [34]

34. It remains to be seen whether Mr Fenoll supplied services to the CAT. That question will be examined together with the question whether Mr Fenoll's activities satisfy the requirement laid down by the case-law that those activities be real and genuine. [35]

35. In that connection the parties to these proceedings have extensively debated the judgment in *Bettray* and its relevance to the resolution of this case.

36. By way of reminder, the Court held in that judgment that a person working in an undertaking specially created by a Dutch local authority for the sole purpose of providing an occupation for persons who are temporarily or for a longer period unable to take up ordinary employment cannot be regarded as a worker by reason of the fact that the activities concerned did not constitute real and genuine economic activity, because they were merely a means of rehabilitation or reintegration. [36] Furthermore, they were reserved posts [37] and the persons employed were not selected on the basis of their capacity to perform a certain activity; on the contrary, these activities were adapted in the light of the capabilities of those persons. [38]

37. It could be tempting to apply that judgment to this case by analogy. But a series of issues prompt me to adopt a circumspect approach.

38. First of all, it is interesting to note that the Court elaborated its concept of real and genuine activities in the context of freedom of movement for workers by ruling that 'it is clear both from the terms in which the principle of freedom of movement for workers is expressed and the place occupied by the provisions concerning that principle in the structure of the Treaty that those provisions guarantee freedom of movement only for persons pursuing or wishing to pursue an

34 — See, inter alia, *Bettray* (344/87, EU:C:1989:226, paragraph 15); *Bernini* (C-3/90, EU:C:1992:89, paragraph 16); *Kurz* (C-188/00, EU:C:2002:694, paragraph 33); and *Trojani* (EU:C:2004:488, paragraph 16).

35 — See, inter alia, *Bettray* (EU:C:1989:226, paragraph 13 and the case-law cited).

36 — *Bettray* (EU:C:1989:226, paragraphs 17 and 20).

37 — *Bettray* (EU:C:1989:226, paragraph 18).

38 — *Bettray* (EU:C:1989:226, paragraph 19).

economic activity and that, consequently, they cover only the pursuit of an effective and genuine activity'.[39] In those circumstances I doubt whether that condition is especially decisive when it comes to defining the concept of workers not in the context of freedom of movement but in that of protection at work.

39. Secondly, in accordance with the principle whereby the concept of worker must be interpreted broadly, the Court has on at least two occasions stated in its subsequent case-law that the *Bettray* case could be accounted for only by the specific features of that case.[40]

40. Even though it is a question of ruling on the genuine and effective nature of the activities carried on by Mr Fenoll, it must be borne in mind that the CATs are intended to receive persons who are not capable of working in mainstream undertakings or in a sheltered working environment, and that they are intended for severely disabled persons.

41. That being the case, capacity for work is evaluated by the committee at the time when it takes its decision to channel a person towards the CATs and only persons capable of working, that is to say persons having a capacity for work less than or equal to one third of normal capacity, are admitted. It is of course a matter of potential aptitude for work and it is true that disabled persons are not admitted on the basis of specific qualifications or occupational competences. None the less, the committee will take its decision based on whether the person concerned will turn out to be capable of carrying on the activities engaged in within the CAT. I see that as being an initial distinction from the *Bettray* case (EU:C:1989:226), since Mr Bettray was not selected on the basis of his capacity to perform a certain activity, but rather the activities were chosen in the light of his capabilities.[41]

42. As regards, next, the activities themselves, we do not have any information about those performed by Mr Fenoll. However, it is apparent from the file and in particular the written observations of the French Government and of the APEI that they may involve the industrial subcontracting of various types of services,[42] agricultural and food products or the marketing of the CAT's own products. Those activities are adapted to the capacities of the persons concerned but, at least in the first two cases, they meet the actual needs of the subcontracting undertakings or of the individuals making use of the services of the CATs. In my view, therefore, they form a normal part of the employment market. Here again this is a difference which distinguishes this case from the *Bettray* case, where the activities offered were artificially created.[43] The link with the normal employment market appears to be borne out by the fact that since February 2005 the non-medico-social activities carried on in the CATs have conferred an entitlement to validation of the experience acquired and to professional training.

43. Clearly, a CAT's mission is twofold. It seeks to encourage an adapted form of professional and social integration, while also providing necessary support for the acquisition of personal and social autonomy, even if that integration and autonomy may perhaps never be achieved. Plainly, then, professional activities are undertaken in association with medico-social and educational support

39 — *Bettray* (EU:C:1989:226, paragraph 13 and the case-law cited). On the link between the requirement of genuine and effective activities and freedom of movement for workers see also *Levin* (53/81, EU:C:1982:105, paragraphs 16 and 17).

40 — *Birden* (C-1/97, EU:C:1998:568, paragraph 31) and *Trojani* (EU:C:2004:488, paragraph 19).

41 — See *Bettray* (EU:C:1989:226, paragraph 19).

42 — Such as household, maintenance of green spaces, and services connected with the restaurant trade.

43 — Advocate General Jacobs states as follows: 'the goods produced and the work done are carefully circumscribed so as not to compete improperly with open market goods and work. The scheme is comparable to those, often run by charitable foundations, under which the disabled make or package small household items. These may then be sold, but the purchaser generally buys the items not because he particularly needs them, but in order to contribute to the charity. In this way, the charity can fulfil a double purpose. It raises funds and also provides something for its beneficiaries to do — and those same beneficiaries are also given the chance to feel that they are contributing to their own upkeep. But the work done by the beneficiaries is not intended to contribute to the economic activities of the Community, nor to raise the standard of living; it is purely social and deliberately kept away from the open market'. (Opinion in *Bettray* (344/87, EU:C:1989:113, point 33)).

activities with the result that the two go hand in hand. Therefore, and subject to any additional investigations to be carried out by the national court, the foregoing elements support the argument that the occupational activities carried on are not reduced to the point of appearing to be 'purely marginal and ancillary'[44] to the social purpose of the CATs.

44. Such an assessment appears, moreover, to be fully in keeping both with the principle that the case-law based on *Bettray* (EU:1989:226) must be strictly confined to its own facts and with the idea put forward above that the condition as to the real genuineness for the activities may be less crucial in a social context rather than when it is linked to freedom of movement for workers, and must therefore be applied more loosely.

45. I would add that, as may also be the case in ordinary working life, this is a 'win-win' situation. By working in a CAT, disabled persons benefit from monitoring and work towards their future occupational and social integration whilst reacquiring a sense of social usefulness. From another perspective, by benefitting from the tasks carried out by those persons the CAT continues to satisfy the conditions which have to be of necessity met in order to continue to enjoy State recognition and with it the aid made available by the State for accomplishing its mission. It cannot therefore be at all ruled out that the activities performed by handicapped persons within the CATs benefit those CATs, at least in part, even if it is the social and therapeutic mission of those centres which prevails and, with it, the benefit afforded to disabled persons.

46. Finally, although I am well aware that imposing on structures such as CATs too many social obligations could impair their functioning, or even threaten their existence, conferring on handicapped persons the status of worker under Article 7 of the directive and Article 31(2) of the Charter may enhance and protect the social dignity of those persons which they may perhaps think they have lost.

47. For all those reasons I suggest that the Court should reply that Article 7 of Directive 2003/88, read in conjunction with Article 31 of the Charter, must be interpreted as meaning that a person admitted to a CAT may, in principle, be classified as a 'worker' for the purposes of those provisions.

C – *Whether Mr Fenoll may rely on Article 31 of the Charter in the dispute in the main proceedings*

48. By its third question the national court seeks to ascertain whether Mr Fenoll may rely on Article 31(2) of the Charter in the context of the main proceedings directly.

49. In that connection I would recall that, according to the national court, the dispute in the main proceedings is a horizontal dispute. That court has not asked about whether the CAT might fulfil the definition of 'a body, irrespective of its legal form, which has been entrusted by a measure adopted by a public authority with providing, subject to the control of that public authority, a service in the public interest and which enjoys, to that end, exceptional powers as compared with the rules applicable to relations between individuals'.[45] In any event, I do not think that the CAT can be regarded as such given the fact that the Court has already held that a private-law association, even one having a social vocation, must be regarded as an individual.[46]

50. The claim by Mr Fenoll in relation to his paid holidays concerns the period from June 2004 to May 2005. However, the Charter acquired mandatory force only from the date of entry into force of the Lisbon Treaty, that is to say, on 1 December 2009.

44 — See, inter alia, *Trojani* (EU:C:2004:488, paragraph 15).

45 — *Farrell* (C-356/05, EU:C:2007:229, paragraph 40 and the case-law cited) and *Dominguez* (C-282/10, EU:C:2012:33, paragraph 39 and the case-law cited).

46 — *Association de médiation sociale* (C-176/12, EU:C:2014:2).

51. To confer on Mr Fenoll the right to invoke Article 31(2) of the Charter as the primary source of his entitlement to leave — which could be envisaged in principle — would, in the circumstances of the dispute in the main proceedings, be retroactively to confer on that provision horizontal direct effect.

52. I note that in a recent case concerning whether Article 7 of Directive 2003/88 could be applied and relied on in relation to facts occurring in 2005 to 2007, in a dispute which was *a priori* horizontal in which the Member State had not fulfilled its obligations under the directive, the Court did not even mention the Charter. [47] It would therefore be surprising for it to do so here. Article 31 may only serve, if appropriate, as a basis of interpretation. [48]

53. Above all, before seeing whether Article 31 of the Charter is directly applicable one should establish that Article 7 of Directive 2003/88 is not sufficient on its own to resolve the dispute in the main proceedings. It does not seem to me that that is necessarily the case.

54. The Court has already held that Article 7 of Directive 2003/88 satisfies the conditions required for it to be recognised as having direct effect. [49] The fact remains, as I pointed out above, that the dispute in the main proceedings is a dispute between individuals and that directives are not always recognised as having horizontal direct effect. [50]

55. However, the Court has held that, when hearing a case exclusively between individuals, a national court is required, when applying the provisions of domestic law adopted for the purpose of transposing obligations laid down by a directive, to consider the whole body of rules of national law and to interpret them, so far as possible, in the light of the wording and purpose of the directive in order to achieve an outcome consistent with the objective pursued by the directive. This principle that national law must be interpreted in conformity with Union law cannot however result in an interpretation *contra legem* of national law. [51] The question whether a national provision must be disapplied in as much as it conflicts with EU law arises only if no compatible interpretation of that provision proves possible. [52]

56. I note that the national court has not indicated to the Court that such interpretation was not possible. The problem was mainly that of classifying Mr Fenoll and, with him, any handicapped person residing in a CAT as a worker within the meaning of Directive 2003/88 so as to entitle him to leave; it is for the national court to determine whether it is possible to envisage an interpretation which complies with the national provisions applicable *ratione temporis* to the dispute in the main proceedings implementing entitlement to annual paid leave to mean that such entitlement must be granted to Mr Fenoll. [53]

47 — See *Dominguez* (EU:C:2012:33, paragraph 22 et seq.) and points 72 to 74 and 88 of the Opinion of Advocate General Trstenjak in that case (C-282/10, EU:C:2011:559).

48 — See, inter alia, Opinion in *Association belge des Consommateurs Test-Achats and Others* of Advocate General Kokott (C-236/09, EU:C:2010:564, point 28).

49 — *Dominguez* (EU:C:2012:33, paragraphs 33 to 36).

50 — *Dominguez* (EU:C:2012:33, paragraphs 36 to 37 and 42).

51 — *Dominguez* (EU:C:2012:33, paragraph 24 and 25) and *Association de médiation sociale* (EU:C:2014:2, paragraphs 38 and 39).

52 — *Dominguez* (EU:C:2012:33, paragraph 23). In *Association de médiation sociale* (EU:C:2014:2), the Court followed another approach by first examining whether the provision of Union law satisfied the conditions to be recognised as having direct effect before examining whether an interpretation in conformity with the national provision was possible (see paragraphs 35 to 40 of the judgment).

53 — I would add that, if I refer to the national provisions which appear to have served as the basis for dismissing Mr Fenoll's claim at first instance, that is to say, Articles L. 3141-3 and L. 3141-5 of the Employment Code, and subject to verification by the national court of the applicability of those provisions to the main proceedings, it is apparent from those provisions that periods of non-occupational sick leave do not in fact form part of the various cases listed in Article L. 3141-5 deemed to be periods of actual work for the purposes of determining the period of leave. The national court must therefore verify whether the addition of a new item to that provision does not exceed the limits of a compliant interpretation cited above.

57. In that connection I note that the French legislation was sufficiently flexible, imprecise or, at least, subject to sufficiently differing interpretations to give rise to divergent practices amongst the CATs.[54] The one in which Mr Fenoll resided regarded itself as bound to pay him annual paid leave for the whole duration of his stay, that is to say, for nine years. The national court has not said that that practice was against the law. It may therefore be supposed that at the time when the facts in the main proceedings occurred there was sufficient interpretative room for the French legislation to be construed as not necessarily precluding entitlement to paid annual leave for disabled persons residing in a CAT.

58. If that were not the case, that is to say, if an interpretation in conformity with Union law is not possible, the only possibility remaining open to Mr Fenoll, who is the party harmed by the non-conformity of national law with Union law, would be to rely on the judgment in *Francovich and Others*[55], that is to say, to argue before the national courts that the Member State is liable with a view to obtaining, in an appropriate case, reparation for losses suffered.[56]

59. Nor could the right to paid annual leave be relied on as a general principle of Union law which, under the line of case-law established in *Mangold*[57] and *Kükükdeveci*,[58] could found an obligation on the national court not to apply any national provision to the contrary.

60. That possibility was already envisaged by Advocate General Trstenjak in her Opinion in *Dominguez* (EU:C:2011:559) in which she stated that, even though, in principle, the right to annual paid leave satisfied the conditions for it to constitute a general principle of Union law, direct application of such a principle where an interpretation in conformity with national law is not possible and as applied in *Kücükdeveci* cannot be envisaged.[59] Besides, in its judgment in *Dominguez*,[60] the Court did not enshrine the right to paid annual leave as a general principle of law even though it plainly had the opportunity to do so.

61. It follows from all the foregoing that it is for the national court to verify, taking into account the whole body of rules of national law and applying its methods of interpretation in order to ensure the full effect of Article 7 of Directive 2003/88, whether it is able to interpret the national provisions relevant to resolution of the dispute before it in such a way as to conform with Union law. In the event that the national court cannot provide such an interpretation without it proving to be *contra legem*, and however unsatisfactory such a solution might be in terms of principle,[61] Mr Fenoll may always seek to render the Member State liable before the national courts for an infringement of Union law.

54 — See point 9 of this Opinion.

55 — C-6/90 and C-9/90, EU:C:1991:428.

56 — That is, moreover, what the Court suggested in *Dominguez*, in the event that an interpretation which complied with national law were to prove impossible (see *Dominguez* EU:C:2012:33, paragraph 43).

57 — *Mangold* (C-144/04, EU:C:2005:709).

58 — *Kücükdeveci* (C-555/07, EU:C:2010:21).

59 — EU:C:2011:559, points 89 to 169.

60 — EU:C:2012:33.

61 — See point 69 of the Opinion in *Kücükdeveci* of Advocate General Bot (C-555/07, EU:C:2009:429).

V – **Conclusion**

62. In the light of the foregoing considerations, I propose that the Court's answer to the questions referred by the Cour de cassation should be as follows:

Article 7 of Directive 2003/88/EC of the European Parliament and of the Council of 4 November 2003 concerning certain aspects of the organisation of working time, read in conjunction with Article 31(2) of the Charter of Fundamental Rights of the European Union must be interpreted as meaning that a person admitted to a work rehabilitation centre may, in principle, be classified as a 'worker' for the purposes of that provision.

It is for the national court to verify, taking into account the whole body of rules of national law and applying its methods of interpretation in order to ensure the full effect of Article 7 of Directive 2003/88, whether it is able to interpret the national provisions relevant to resolution of the dispute before it in such manner as to conform with Union law. In the event that the national court cannot provide such an interpretation without it proving to be *contra legem*, the party harmed by the non-conformity of national law may always seek to render the Member State liable before the national courts for an infringement of Union law.