Recent Court of Justice judgments on working time

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1 Introduction

Directive 2003/88, the “Working Time Directive”,¹ has established entitlements for ‘every worker’ in the EU to a maximum 48-hour average working week and a minimum four weeks of paid annual leave, except those in sectors subject to separate arrangements.² Other matters regulated by the Directive include entitlements for workers to weekly and daily rest periods, rest breaks and limits on night work.³

The essential conceptual idea is that working time and rest periods are mutually exclusive to ensure a balance between working life on the one hand and personal/family life on the other. This bipolarity is set out in Article 2 where ‘working time’ is defined as ‘any period during which the worker is working, at the employer’s disposal and carrying out his activity or duties . . .’, whereas a ‘rest period’ is defined as ‘any period which is not working time’. Such a work/life equilibrium is regarded

¹ European Parliament and Council Directive 2003/88/EC, concerning certain aspects of the organisation of working time [2003] OJ L 299/9.

² Ibid., Arts. 6, 7. Mobile workers, offshore workers, and workers on board seagoing fishing vessels are excluded under Arts. 20 and 21. Separate sectoral measures apply to seafarers, road haulage, rail workers, and those working in aviation

³ Ibid., Arts. 3, 4, 5 and 8.

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as essential for the protection of workers' health and safety, productivity and good industrial relations. Moreover, to reinforce the primacy of the health and safety rationale, recital 4 of the preamble states that improvement of workers' health and safety 'should not be subjected to purely economic considerations'.

Workers' entitlements under the Directive are given a rights-based dimension by Article 31(2) of the EU Charter of Fundamental Rights (the Charter), which recognises the 'right' of 'every worker' to 'working conditions that respect his or her health, safety and dignity' and 'to limitation of maximum working hours, to daily and weekly rest periods and to an annual period of paid leave'. The Charter is frequently cited and applied in the case law of the EU Court of Justice (CJEU) concerning working time, and has gained particular significance post-2009 when, following the Treaty of Lisbon, it was granted the 'same legal status' as the Treaties under Article 6(1) of the Treaty on European Union (TEU).

Nevertheless, the Directive is intended to balance rights with flexibility of application whilst ensuring the protection of the health and safety of workers.⁴ At the extreme end this allows Member States, if they wish, to legislate to permit a voluntary opt-out for workers from the maximum weekly working time limit,⁵ but, more generally, there are extensive derogations concerning, inter alia, the application of rest periods and breaks, with variations permitted following collective bargaining.

1.1 Recent Case Law of the Court of Justice

The scope of protection offered by the Directive, read in conjunction with the Charter, has been widely litigated before the CJEU.

A. Who is a 'worker'?

One issue of immense significance in an age of increasing precariousness in employment and uncertainty about employment status (including the boundary between employment and self-employment), is to establish who is a 'worker'? The scope of the Working Time Directive is determined by reference to the parent Framework Health and Safety Directive, 89/391, which, under its Article 2(2), excludes workers performing 'specific public service activities' from entitlements in its "daughter" directives but, notwithstanding this exclusion, as those falling within this category are 'workers', their employer has a general duty to protect their health and safety at work. These issues have been tested in the recent case of the *Sindicatul Familia Costanța*,⁶ heard before the Grand Chamber of the CJEU which gave its judgment on 20 November 2018.

The dispute was brought as a group action by a trade union, *Sindicatul Familia Costanța* (SFC), on behalf of foster parents employed by the Directorate-General (DG), a public institution whose purpose is the protection of the family and the rights of minors in the municipality of Bucharest, Romania. Each foster parent had an individual employment contract with the DG and a placement agreement for each child

⁴Ibid., Recital 15 of the preamble.

⁵Ibid., Art. 22.

⁶Case C-147/17 *Sindicatul Familia Costanța and Others v Direcția Generală de Asistență Socială și Protecția Copilului Costanța*, EU:C:2018:926.

placed in their care. Under these contractual arrangements foster parents were required to take children who had been permanently or temporarily withdrawn from their parents into their own homes. The foster parents would then provide for the maintenance and upbringing of those children. Under their employment contract, the foster parents were paid wages except for rest periods and annual leave. As the referring court noted, the activity of the foster parents is performed on the basis of a special contract for the protection of the child which stipulates that for the upbringing of the child, its care and education, the continuity of that work must be ensured including during weekly rest days, public holidays and non-working days, with the working hours being determined on the basis of the needs of the child. Foster parents could receive authorisation to take annual leave without their child but typically did not do so. Two main questions were referred:

- (i) Are foster parents under the Romanian system ‘workers’ for the purpose of the Directive?
- (ii) Do they perform ‘specific public service activities’ excluded from the scope of the Directive?

Starting with the first question, the CJEU, following previous case law, applied a whole EU conception of a ‘worker’:

‘For the purpose of applying Directive 2003/88, the concept of ‘worker’ may not be interpreted differently according to the law of Member States but has an autonomous meaning specific to EU law. It 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, however, 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 ...’.⁷

From this starting point it follows that ‘an employment relationship implies the existence of a hierarchical relationship between the worker and his employer. Whether such a relationship exists must, in each case, be assessed on the basis of all the factors and circumstances characterising the relationship between the parties’.⁸

Applying this definition, the CJEU concluded that the foster parents in question are ‘workers’ falling within the scope of the Directive because they:⁹

- (i) provide care and education on a continuous basis for children placed with them by a public authority in return for which they receive remuneration;
- (ii) have an employment contract which can be suspended or terminated;
- (iii) are supervised and assessed by a public authority in a hierarchical relationship, and;
- (iv) have discretion as to daily tasks and similarity of responsibilities to parents who have their own children, but this does not prevent them from being ‘workers’.

⁷Ibid., para. 41, citing Case C-428/09 *Union syndicale Solidaires Isère*, EU:C:2010:612, para. 28.

⁸Ibid., para. 42, applying Case C-47/14 *Holterman Ferho Exploitatie and Others*, EU:C:2015:574, para. 46.

⁹Ibid., para. 48.

On this point the CJEU differed from Advocate General Wahl who gave the Opinion in the case.¹⁰ The Advocate General took the view that the ‘worker’ concept requires a relationship of subordination. Applying the subordination requirement strictly, the Advocate General found it lacking because the parental duties are continuous. Having found the foster parents not to be ‘workers’, the Advocate General did not consider the remaining question referred by the national court. By contrast, the CJEU preferred a broad meaning of worker which includes all those who have an employment relationship in which they are not wholly autonomous.

Turning to the second question, the CJEU considered whether the foster parents, as ‘workers’, are excluded from the specific entitlements in the Directive, on the basis that they are performing ‘certain specific public service activities’ that are, under Article 2(2) of the parent Directive 89/391, ‘strictly necessary’ to safeguard State interests for community protection. This is a provision that has been very rarely referred to by the CJEU with only one previous case cited.¹¹ As an exclusion it must be strictly interpreted. It relates exclusively to the specific nature of certain tasks performed by workers in the public service which are necessary to guarantee the effective protection of the community at large.¹²

The CJEU held that concept of ‘public service’ must be given an autonomous and uniform interpretation throughout the EU. It includes ‘work for a private person who performs, under the control of the public authorities, a task in the public interest which forms part of the essential functions of the State’.¹³ Such a functional interpretation of ‘public service’ applies to all foster parents in Romania whether employed by a public authority in charge of the protection of minors or a private body under its control. In the context of the employment relationship, the work of the foster parents contributed to the protection of minors, which is a task in the public interest ‘forming part of the essential functions of the State’.¹⁴ The specific activity of the foster parents, by contrast with other child protection-related activities, results from the fact that ‘it aims to integrate the foster child *on a continuous and long-term basis*, into the home and family of his or her foster parent’.¹⁵ It follows, therefore, according to this reasoning, that such an activity is covered by the ‘specific public service activities’ referred to in the exclusion.¹⁶

The continuity requirement is an important limitation on the scope of the exclusion. It must be assessed by reference to the specific nature of the activity in question and does not cover most public service workers but rather applies ‘only in circumstances whose gravity and scale are exceptional’.¹⁷ The CJEU was satisfied that the nature of the activities of the foster parents in question is ‘absolutely incompatible

¹⁰See Case C-147/17 *Sindicatul Familia Constanța and Others v Direcția Generală de Asistență Socială și Protecția Copilului Constanța*, ECLI:EU:C:2018:518 (Opinion issued on 28 June 2018), paras. 57–93.

¹¹Case C-132/04 *Commission v Spain*, EU:C:2006:18.

¹²Case C-147/17, n6, para. 55.

¹³*Ibid.*, para. 56.

¹⁴*Ibid.*, para. 61.

¹⁵*Ibid.*, para. 62. Emphasis added.

¹⁶*Ibid.*, para. 63.

¹⁷*Ibid.*, para. 67.

with planning of working time'¹⁸ because the child is 'integrated on a continuous and long-term basis, into the home family'¹⁹ of the foster parent to safeguard its 'best interests', citing Article 24 of the Charter on the rights of the child.²⁰

In conclusion, the characteristics 'peculiar' to the work of the foster parents in this case, but not necessarily all foster parent contracts, in which the integration requirement was essential, strictly precluded the application of the entitlements in the Directive to such foster parents.²¹ Public authorities are left with a duty to ensure the health and safety of the foster parents 'as far as possible'.²²

The CJEU distinguished the earlier case of *Hälvä and Others*,²³ which concerned 'relief parents' under a child protection system in Finland where care is provided in "children's villages", each with several houses for children. The children's houses are home to the children in care and house three to six children and one or two 'foster parents' (or 'relief parents' when the 'foster parents' are absent). In that case the CJEU found that the exclusion from the entitlements in the Working Time Directive did not apply to the relief parents because they were not bound by an obligation of continuous integration of the child into their home and family. Their work was largely predetermined by employment contracts under which there would be 24-hour periods when they would be responsible for running a children's home when the regular foster parents were on leave.²⁴ As the relief parents were not wholly autonomous workers they had full protection under the Working Time Directive including maximum weekly working time, entitlements to the stipulated rest periods and breaks, and the minimum period of paid annual leave.

Notwithstanding the exclusion in Directive 89/391, the foster parents in *Sindicatul Familia Costanța* were within the scope of EU law, by virtue of the finding that they were 'workers', and therefore entitled to protection under Article 31(2) of the Charter (see Part 1 above). Article 52(1) of the Charter provides strict conditions for the limitations of any rights to ensure that workers receive the 'essential content' of that right.²⁵ This requirement was satisfied in this case because the foster parents were entitled to a limited right to paid annual leave and some free time which had to be balanced with the rights of the child under Article 24 of the Charter.²⁶

This case law demonstrates a strict approach by the CJEU to the exclusion, which takes account of its rationale, to provide an exclusion from the Working Time Directive for workers performing a narrow range of essential public interest functions where continuity of service provision is required consistent with the best interests of the child. By adopting a broad conception of a 'worker' based on a Union definition that has evolved in the case law, the CJEU brought the foster parents within the scope

¹⁸Ibid., para. 68.

¹⁹Ibid., para. 70.

²⁰Ibid., para. 71.

²¹Ibid., para. 76.

²²Ibid., para. 78.

²³Ibid., para. 77. See Case C-175/16, EU:C:2017:617.

²⁴*Hälvä and Others*, Ibid., para. 33.

²⁵Case C-147/17, n6, para. 83.

²⁶Ibid., paras. 86–87.

of the Framework Directive and the Charter and thus ensures that public authorities owe them a general duty of health and safety protection and must provide them with some paid annual leave and free time whilst protecting the rights of the child.

B. The right to paid annual leave

Under Article 7 of the Working Time Directive ‘every worker’ is entitled to a minimum period of at least four weeks paid annual leave. This minimum period may not be replaced by an allowance in lieu except where the employment relationship is terminated. Moreover, as discussed in the previous section, the entitlement of workers to a period of annual leave is recognised as a fundamental right in Article 31(2) of the Charter. Recent cases have mapped out the scope of this entitlement and the reach of the Charter for workers seeking to rely on their right to paid annual leave before the courts and tribunals of the Member States.

In the first case, *King*,²⁷ judgment of 29 November 2017, the CJEU was asked to consider the issue of retrospective payment of an allowance in lieu of annual leave that had not been granted to the worker. The facts were as follows. Mr King worked from 1999 to 2012 on a ‘self-employed commission-only contract’ for a company that sold windows in the United Kingdom. He had no contractual right to paid annual leave. In some years he took unpaid leave and in others he took no leave at all. When his employment relationship was terminated, he claimed an allowance in lieu of 13 years paid annual leave entitlement. The UK Employment Tribunal had ruled that King was a ‘worker’ within the scope of the Directive. UK administrative law prevented King from being paid for leave not taken except for the previous 12 months.

The main question referred to the CJEU by the national court was whether Article 7 of the Directive precluded national provisions or practices that prevent a worker from carrying over or accumulating entitlements to paid annual leave until the time of termination where those rights were not exercised because the employer refused to remunerate the worker for leave? This was a new question for the CJEU as all previous cases concerning the carry-over of leave between years had concerned long-term sickness.

In its judgment, the CJEU answered in the affirmative. It reiterated, based on its previous case law, that the right to annual leave, and to payment for that leave, are two aspects of a single right. The purpose of the right is ‘to put the worker, during such leave, in a position which is, as regards salary, comparable to periods of work’.²⁸ In King’s case, the CJEU found that he was left in a position of uncertainty about his right to take leave or to be paid during the leave period, which meant that, firstly, he was unable to fully benefit from that leave ‘as a period of relaxation and leisure’ as intended by Article 7,²⁹ and, secondly, it was likely to dissuade him from taking leave and, in that regard, ‘any practice or omission of an employer that may potentially deter a worker from taking his annual leave is equally incompatible with the purpose of the right to paid annual leave’.³⁰

²⁷Case C-214/16 *Conley King v The Sash Window Workshop Ltd and Richard Dollar*, EU:C:2017:914.

²⁸*Ibid.*, para. 35, citing Case C-539/12 *Lock v British Gas Trading Ltd*, EU:C:2014:351, para. 17.

²⁹*Ibid.*, para 38.

³⁰*Ibid.*, para. 39.

Moreover, in answering the question, the CJEU invoked the Charter to guarantee the right to be paid retrospectively for the leave that had been refused to King. The CJEU ruled that, in these circumstances, the national rule preventing King from bringing an action for an allowance or payment for the 13 years paid annual leave to which he was entitled was incompatible not only with Article 7 of the Directive and Article 31(2) of the Charter, but also with the right to an effective remedy protected under Article 47 Charter because it would effectively force the worker to take leave without pay to access the right.³¹ Where non-payment of annual leave, taken or not taken, had accumulated over a period of years, for reasons beyond the control of the worker prior to termination, the national court must consider the employment relationship as it existed and persisted.³² It followed that, upon the termination of employment, a worker is entitled to a payment in lieu of paid annual leave that has accumulated over several years until the time of termination because the employer refused to remunerate the worker for the leave.³³ The CJEU emphasised that the right to paid annual leave cannot be interpreted restrictively—it is not subject to any derogations³⁴—and is payable for every year consistent with Convention No 132 of the International Labour Organisation. King was able to rely on the direct effect of Article 7 because the UK had fully implemented the substantive right to paid annual leave. The Member State was therefore precluded from relying on its procedural rules and it followed that King was entitled to payment for the accumulated leave not taken and not paid over the full 13-year period.³⁵

King has been followed by two cases, *Bauer* and *Broßonn*,³⁶ referred from courts in Germany. The CJEU Grand Chamber gave a single ground-breaking judgment in both cases on 6 November 2018. In both cases employers of workers who had deceased had refused to pay their widows a payment in lieu for paid annual leave that the workers had not taken prior to their deaths. National law precluded an allowance in lieu of wages from forming part of the estate of the deceased. The cases were therefore different from *King* where the UK had not denied the right but restricted access to it. A critical difference lay in the facts of *Bauer* and *Broßonn*: Mr Bauer had been employed in the public sector, whereas Mr Broßonn had a private employer.

In *Bollacke*,³⁷ an earlier case referred from a German court, the CJEU held, on 12 June 2014, that Article 7 of the Directive must be interpreted as precluding separate national legislation which provided that the entitlement to paid annual leave was lost without conferring entitlement to an allowance in lieu of outstanding paid annual leave, where the employment relationship was terminated by the death of the worker. Now the national court raised the issue of the direct effect of Article 31(2) of the

³¹Ibid., paras. 44–47.

³²Ibid., para. 50.

³³Ibid., para. 65.

³⁴Ibid., para. 58.

³⁵Ibid., para. 65.

³⁶Joined Cases C-569/16 and C-570/16 *Stadt Wuppertal v Maria Elisabeth Bauer and Volker Willmeroth v Martina Broßonn*, EU:C:2018:871.

³⁷Case C-118/13, EU:C:2014:1755.

Charter. It asked two key questions on the scope of the Directive and the Charter right.³⁸

- (i) Does Article 7 of the Directive or Article 31(2) of the Charter grant the heir of a worker who died while in an employment relationship a right to financial compensation for the worker's minimum annual leave prior to his death, which is precluded by national legislation?
- (ii) If the first question is answered in the affirmative: does this also apply where the employment relationship is between two private persons?

The second question, specific to the *Broßonn* case, raised the prospect of the horizontal direct effect of Article 31(2) in a dispute between private parties.

On the first question the CJEU noted that *Bollacke* had established the principle that death cannot retroactively entail the total loss of the right acquired by the worker. Crucially, notwithstanding the health and safety imperative of the Directive, Article 7 also bestows a pecuniary right. As emphasised in *King*, Article 7 must not be interpreted restrictively, and the right is to both pay and leave. Upon termination of the employment relationship, the actual taking of paid annual leave to which a worker was entitled is no longer possible. The CJEU explained that:

'It is in order to prevent this impossibility from leading to a situation in which the worker loses all enjoyment of that right, even in pecuniary form, that Article 7(2) of Directive 2003/88 provides that the worker is entitled to an allowance in lieu for the days of annual leave not taken'.³⁹

The right to paid annual leave gives the worker the opportunity for relaxation and leisure, according to the CJEU, but it is also a financial right of the worker and, notwithstanding the fact that the worker cannot enjoy the relaxation and leisure that the right was intended to confer, the effect of Article 7(2) is that death cannot retroactively entail the total loss of the right acquired,⁴⁰ and, therefore, cannot deprive his estate—his intended beneficiaries—from 'the effective enjoyment of the financial aspect of the right to paid annual leave'.⁴¹ Loss of the right to payment in lieu in these circumstances 'would undermine the very substance of that right'.⁴² The effectiveness of the entitlement is at stake because the payment of the allowance in respect of the worker's death is 'essential to ensure the effectiveness of the entitlement to paid annual leave granted to the worker'.⁴³

As in *King*, Article 31(2) of the Charter was applied by the CJEU to pre-empt conflicting national law. The CJEU emphasised that 'the fundamental rights guaranteed in the legal order of the European Union are applicable in all situations governed by EU law'.⁴⁴ In this case the national law in question implemented the Working Time Directive and was deemed to be within the scope of the Charter, by virtue of

³⁸Joined Cases C-569/16 and C-570/16, n36, para. 19.

³⁹*Ibid.*, para. 43.

⁴⁰*Ibid.*, para. 46.

⁴¹*Ibid.*, para. 48.

⁴²*Ibid.*, para. 49.

⁴³*Ibid.*, para. 50.

⁴⁴*Ibid.*, para. 52.

Article 51(1) thereof. Noting its sourcing from both Article 7 of the Working Time Directive and Article 2 of the European Social Charter of the Council of Europe,⁴⁵ Article 31(2), applied in the context of the case, has the effect of enshrining the right to a minimum period of paid annual leave as a fundamental right for all workers that cannot be interpreted restrictively and is not subject to any derogations.⁴⁶ It followed that, as the Charter is primary EU law by virtue of Article 6(1) TEU, it pre-empted Member States from adopting national law that conflicted with Article 31(2):

‘Therefore, in relation to situations falling within the scope of Article 31(2) of the Charter, that provision has the effect, in particular, that it is not open to Member States to adopt legislation pursuant to which the death of a worker retroactively deprives him of the right to paid annual leave acquired before his death, and, accordingly, his legal heirs of the allowance in lieu thereof by way of the financial settlement of those rights’.⁴⁷

This meant that the answer to the first question was that Article 7 of the Directive and Article 31(2) of the Charter combined to preclude the national legislation because otherwise the worker’s pecuniary right to the payment for the annual leave would be retroactively lost.⁴⁸

Having answered the first question in the affirmative the CJEU turned to the second question which asked whether such an interpretation must also prevail where the former employer is a private individual?

It had already been established by the CJEU that Article 7 of the Working Time Directive is unconditional and sufficiently precise to be directly effective. It confers a right directly on the worker and, in consequence of his death, if there is leave not taken, his legal heir, and can be relied on by them against the Member State.⁴⁹ It followed that in the case of *Bauer*, the spouse of the deceased worker, who had been employed by the State, was able to rely on the direct effect of Article 7 to ensure that she received the payment of an allowance in lieu for leave not taken at the time of the worker’s death.⁵⁰

In the case of *Broßonn*, however, the deceased worker had a private sector employer which precluded direct effect because, under the CJEU’s settled case law, ‘a directive cannot of itself impose obligations on an individual and cannot therefore be relied upon as such against an individual’.⁵¹ This leads to the question of how to ensure that the right in Article 31(2) of the Charter is made effective in this scenario bearing in mind that the CJEU had already found, when answering the first question, it is intended to apply to situations, such as those in this case, where the national legislation is precluded because it is incompatible with that provision.

⁴⁵Ibid., para 55, by reference to the Charter explanations and Art. 6(1) TEU concerning the interpretation of the explanations.

⁴⁶Ibid., paras. 58–59.

⁴⁷Ibid., para. 61.

⁴⁸Ibid., para. 63.

⁴⁹Ibid., paras. 70–73, citing Case C-282/10 *Dominguez*, EU:C:2012:33, paras. 33–36 and, in respect of Article 7(2) specifically, *Bollacke*, n37, para. 28.

⁵⁰Ibid., para. 75.

⁵¹Ibid., para. 76, citing the most recent iteration in Case C-122/17 *Smith*, EU:C:2018:631, para. 42.

In considering Article 31(2), the CJEU noted that paid annual leave is an ‘essential principle’ of EU social law, a fundamental right, and is ‘mandatory in nature’.⁵² This ‘essential principle’ is sourced from ILO Convention No 132, the European Social Charter and the Community Charter of the Fundamental Social Rights of Workers, the latter directly referenced in Article 151 TFEU as a source of ‘fundamental social rights’.⁵³ It follows that this ‘essential principle’ of the right to paid annual leave was not established by Article 7 of the Directive, but is based international law that is the source of EU social law. Article 31(2) reflects that ‘essential principle’.⁵⁴

Thus, as Article 31(2) is as an expression of higher EU social law—primary law based on fundamental social rights—the issue of its potential horizontal direct effect of that provision must be considered as a separate question because, referencing its recent Grand Chamber judgment in *Egenberger*:

‘The right to a period of paid annual leave, affirmed for every worker by Article 31(2) of the Charter, is thus, as regards its very existence, both mandatory and unconditional in nature, the unconditional nature not needing to be given concrete expression by the provisions of EU or national law, which are only required to specify the exact duration of annual leave and, where appropriate, certain conditions for the exercise of that right. It follows that that provision is sufficient in itself to confer on workers a right that they may actually rely on in disputes between them and their employer in a field covered by EU law and therefore falling within the scope of the Charter’.⁵⁵

Having found that the situation in the *Broßonn* case was within the scope of Article 31(2), when answering the first question, the CJEU rationalised that the need to guarantee its ‘unconditional nature’ meant that Article 31(2) has an exclusionary effect in the sense that the national court must disapply national legislation that deprives the legal heirs of the worker from receiving a financial settlement for the worker’s acquired rights.⁵⁶ The effect of this disapplication is that ‘employers cannot rely on that national legislation in order to avoid payment of the allowance in lieu which they are required to pay pursuant to the fundamental right guaranteed by that provision’.⁵⁷ This so-called estoppel principle applying to the private employer is not necessarily precluded by the limited nature of Article 51(1) of the Charter according to the CJEU. Article 51(1), concerning the scope of the Charter, refers to its application to EU institutions, Member States—when they are implementing EU law. It is silent on any application to private individuals, but it does not ‘systematically preclude’ the possibility that they may be ‘directly required to comply with certain provisions of the Charter’.⁵⁸

⁵² *Ibid.*, para. 83.

⁵³ *Ibid.*, para. 81.

⁵⁴ *Ibid.*, para. 84.

⁵⁵ *Ibid.*, para. 85. See, by analogy, Case C-414/16 *Egenberger*, EU:C:2018:257, para. 76).

⁵⁶ *Ibid.*, para. 86.

⁵⁷ *Ibid.*

⁵⁸ *Ibid.*, para. 87.

Such a leap was possible for three reasons. Firstly, the fact that certain provisions of primary law, such as Article 51(1), are ‘addressed principally to the Member States does not preclude their application to relations between individuals’.⁵⁹ Secondly, the CJEU has already held that Article 21(1) of the Charter, prohibiting certain forms of unlawful discrimination, ‘is sufficient in itself to confer on individuals a right which they may rely on as such in a dispute with another individual ... without, therefore, Article 51(1) of the Charter preventing it’.⁶⁰ Thirdly, Article 31(2), specifically, ‘by its very nature’, entails ‘a corresponding obligation on the employer, which is to grant such periods of paid leave’.⁶¹

Based on this reasoning the CJEU ruled that a horizontal application of Article 31(2) was necessary:

‘... where it is impossible to interpret a national rule such as that at issue in the main proceedings in a manner consistent with Article 7 [of the Directive] and Article 31(2) of the Charter, the national court, before which a dispute between the legal heir of a deceased worker and the former employer of that worker has been brought, must disapply that national legislation and ensure that the legal heir receives payment from the employer of an allowance in lieu of paid annual leave acquired under those provisions and not taken by the worker before his death. *That obligation on the national court is dictated by Article 7 [of the Directive] and Article 31(2) of the Charter where the dispute is between the legal heir and an employer which has the status of a public authority, and under the second of those provisions where the dispute is between the legal heir and an employer who is a private individual*’.⁶²

Bauer and *Broßonn* mark a new teleological advancement in EU social law, building on the conceptual approach to the Charter developed in *Egenberger*, in respect of Article 21, and, as in *Sindicatul Familia Costanța* and *King*, Article 31(2) is elevated and given its own status and meaning. Unlike the Advocate General in the case,⁶³ the CJEU does not refer to horizontal direct effect explicitly but the effect of its ruling is the same in practice because it requires the national court to ensure the judicial protection of individuals relying on Article 31(2), independently of Article 7 of the Directive, guaranteeing them the rights flowing from the right to paid annual leave.

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⁵⁹Ibid., para. 88, applying para 78 of the Advocate General’s Opinion (EU:C:2018:337) and *Egenberger*, n55, para. 77.

⁶⁰Ibid., para. 89, applying *Egenberger*, n55, para. 76.

⁶¹Ibid., para. 90.

⁶²Ibid., para. 92 (emphasis added).

⁶³Advocate General Bot, n59, who, at para. 95, advises that ‘while not every provision of the Charter recognising fundamental social rights possesses the qualities needed for it to be held to have direct horizontal effect, the provisions which are mandatory and sufficient in themselves do possess those qualities. In a word, the present cases provide the Court with an opportunity to ensure that the recognition of fundamental social rights is not a ‘*simple incantation*’ (‘mere entreaty’)’.

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