Opinion Advocate General Ruth de Bock

in the case of [employee] v [employer]

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Summary of content: Preliminary questions (Article 392 of the Code of Civil Procedure, Rv). Employment law. Does an employee who is unfit for work – contrary to what Article 7:634(1) BW provides – accrue leave days at wage value during a dormant employment contract? Interpretation of the EU right to paid annual leave; Article 31(2) of the Charter; Article 7(1) of Directive 2003/88/EC (Working Time Directive); Article 52(1) of the Charter; CJEU 22 November 2011, C-214/10, ECLI:EU:C:2011:761 (KHS/Schulte); CJEU 22 September 2022, C-518/20 and C-727/20, ECLI:EU:C:2022:707 (Fraport)

Unofficial English translation of the Dutch original; only the Dutch text is authentic. Quotations from EU legislation follow the official English versions. Quotations from case law, legislation and literature have been translated from the Dutch text of the Opinion; for CJEU judgments the wording of the official English versions has been followed as closely as possible, but the passages have not been checked word for word against them.

1 Introduction and summary

1.1 These preliminary reference proceedings concern the question whether leave days accrue during a dormant employment contract (*slapend dienstverband*). The subdistrict court (*kantonrechter*) of the Rotterdam District Court has referred a preliminary question on this point to the Supreme Court (*Hoge Raad*).

1.2 The question must be answered on the basis of the rules on the right to annual leave developed in the law of the European Union. Under those European rules, the accrual of leave days is linked to having actually worked, but an exception applies to, among others, workers who are unfit for work. Workers who are unfit for work therefore accrue leave days even though they have not worked.

1.3 It also follows from EU law that the coming into existence of the right to annual leave may not be made subject to any condition. Dutch law does precisely that. After all, Article 7:634(1) of the Dutch Civil Code (*Burgerlijk Wetboek*, BW) makes the accrual of leave days dependent on the right to wages. As a result, employees do not accrue leave days during a dormant employment contract. This is contrary to EU law. In view of the direct effect of the right to annual leave, as laid down in Article 31(2) of the Charter, the courts must disapply Article 7:634(1) BW as regards the accrual of leave days during a dormant employment contract.

1.4 The case law of the CJEU has accepted an exception to the rule that leave days accrued during periods of incapacity for work cannot lapse or be reduced, namely in the situation where national law provides for a carry-over period (a period after which the entitlement lapses or becomes time-barred) for those days, provided that the carry-over period is substantially longer than the reference period in which the leave days were accrued. In that connection the CJEU has regarded as acceptable a statutory period of fifteen months, after the calendar year in which the days were accrued, at the end of which the entitlement lapses. Dutch law, however, has a limitation period of five years (Article 7:642 BW); the six-month period after which entitle-

ments lapse (Article 7:640a BW) does not apply if the employee was not reasonably able to take the leave, as is the case for an employee who is unfit for work and has been exempted from the reintegration obligations.

1.5 The case law of the CJEU offers no basis for accepting an exception to the EU-law principles that (a) a sick worker, too, accrues leave days at wage value, and (b) that this may not be made subject to conditions (such as the payment of wages). In any event, an exception to the right to annual leave guaranteed by Article 31(2) of the Charter will have to meet the requirements of Article 52(1) of the Charter. Dutch law does not provide for such an exception.

1.6 Against this background, the answer to the preliminary question is, in my view, that an employee who is unfit for work also accrues leave days at wage value during a dormant employment contract.

2 Facts and course of the proceedings

In cassation, the following facts may be taken as the starting point, derived from the interim decision of the subdistrict court of the Rotterdam District Court of 2 March 2026, paras. 3.1-3.3.[1]

2.1 The employee, born in 1960, was employed by the employer. The parties disagree on the length of the employment. According to the employee she has been employed since 16 April 1976, according to the employer since 30 March 2006. The employee has been unfit for work since 30 July 2023. The employer's obligation to continue paying wages ended on 27 July 2025, after 104 weeks of sickness. Since that date the employee has been entitled to a benefit under the Work and Income (Capacity for Work) Act (WIA).

2.2 In a letter of 21 August 2025 the employer wrote to the employee, in so far as relevant:

> "On 27 July 2025 you had been sick for 2 years. Under the law, after the end of these two years we have the possibility of terminating your employment. We have decided to make use of this possibility and have applied to the UWV for permission to dismiss you, which has been granted. We have therefore terminated the employment with effect from 27 July 2025. You will receive a final settlement and a transition payment from us."

2.3 The employer drew up a final settlement and paid the employee a transition payment (*transitievergoeding*) of € 13,866.89 gross, and paid out the outstanding leave days accrued up to 27 July 2025.

2.4 By application received on 21 November 2025, the employee requested (i) that the employer be ordered to pay an additional transition payment of € 24,494.99 (gross) and (ii) that it be determined that the employee also accrued leave days after the expiry of the 104-week period of incapacity for work, until the end of the employment contract, and that the employer be ordered to pay out those leave days.

2.5 The employee based these requests on the argument that, in calculating her transition payment, the employer had wrongly proceeded on the basis of employment from 30 March 2006. She submits that she has been continuously employed since 16 April 1976 by the employer or one of its legal predecessors. Furthermore, the employee takes the view that she is entitled to leave days which she accrued after the end of her two years (104 weeks) of sickness. After the end of those two years (which was on 27 July 2025) there was a dormant employment contract.

[1] Rotterdam District Court (subdistrict court) 2 March 2026, ECLI:NL:RBROT:2026:2021.

The employee was no longer entitled to wages after the employer had continued to pay wages for two years, and there was no suitable work for her with the employer on account of her incapacity for work.[2]

2.6 The employer lodged a statement of defence.

2.7 An oral hearing took place on 16 February 2026. The parties appeared, assisted by their representatives. Both parties submitted speaking notes. A record of the hearing was drawn up.

2.8 By interim decision of 2 March 2026 the subdistrict court decided that the employee would be given the opportunity to prove that she has been continuously employed since 16 April 1976 (or a later date) by the employer or its legal predecessors. In addition, the subdistrict court stated that it intended to refer a preliminary question to the Supreme Court on the accrual of leave days during a dormant employment contract. In this connection the subdistrict court considers that in the present case there was a dormant employment contract during the period 27 July 2025 - 21 August 2025 and that the employee is asking for payment of the leave days she accrued during that dormant employment contract (para. 4.10).

2.9 The subdistrict court further considers that an answer to the question whether leave days accrue during a dormant employment contract is necessary in order to decide on the employee's request. In addition, an answer to this question is of direct relevance to a multitude of cases still to be expected that are based on the same or similar facts and causes. The subdistrict court considers that in many cases a dormant employment contract arises at the end of the period of two years of sickness, because the employer has to ask the UWV for permission to dismiss and that procedure takes some time, after which the employer also has to observe a notice period. This issue also arises, the subdistrict court continues, in employment relationships in which a dormant employment contract continues for a longer time because the employer does not proceed to terminate the employment (and the employee only makes a '*Xella* request'[3] at a later point in time, para. 4.12).

2.10 Finally, the subdistrict court considers that it is aware that several sets of proceedings have by now been conducted on the question whether leave days accrue during a dormant employment contract. In this connection it refers to six partly conflicting decisions of subdistrict courts (for a discussion of these decisions see chapter 8 of this Opinion). The literature is divided as well, the subdistrict court considers (paras. 4.13 – 4.14).

2.11 After the parties had been given the opportunity to comment on the proposed questions, the subdistrict court referred the following preliminary question in its interim decision of 17 March 2026:[4]

> "Does an employee who is unfit for work – contrary to what Article 7:634(1) BW provides – accrue leave days at wage value during a dormant employment contract?"

2.12 The subdistrict court stayed the decision on the leave days until the preliminary question has been answered and the parties have been able to comment on the answer.

2.13 The Supreme Court has taken the preliminary question into consideration.

2.14 On 5 June 2026 the employer submitted written observations through a lawyer at the Supreme

[2] See para. 3.5 of the interim decision of 2 March 2026.

[3] Here, in footnote 6, the subdistrict court refers to Supreme Court 8 November 2019, ECLI:NL:HR:2019:1734 (*Xella*).

[4] Rotterdam District Court (subdistrict court) 17 March 2026, ECLI:NL:RBROT:2026:2603.

Court. The employee did not submit written observations.

2.15 The employee was given the opportunity to respond to the written observations on the part of the employer. She did not make use of this opportunity.

3 Introductory remarks

3.1 In recent years the Supreme Court has delivered several decisions on the legislation on leave days.[5] The question to be answered in these proceedings, namely whether an employee accrues leave days during a dormant employment contract, has not previously been addressed.

3.2 A dormant employment contract is an employment contract which an employer has not terminated after two years[6] of an employee's incapacity for work, although it is entitled to do so, and under which it no longer pays the employee wages, according to the Supreme Court in the *Xella* decision.[7]

3.3 It is therefore characteristic of a dormant employment contract that there is no longer any right to wages. In Dutch law, however, the accrual of leave days is explicitly linked to the right to wages. Article 7:634(1) BW provides:

> "For each year in which the employee has been entitled to wages for the full agreed working time, the employee acquires an entitlement to leave of at least four times the agreed working time per week or, if the agreed working time is expressed in hours per year, of at least a corresponding time."

3.4 On the basis of Article 7:634(1) BW, an employee therefore does not accrue leave days during a dormant employment contract. But the question is whether this outcome is compatible with the law of the European Union.

3.5 Under EU law, workers are entitled to paid annual leave of at least four weeks (hereinafter: the right to annual leave). It is settled case law of the CJEU that this right is a 'particularly important principle of social law' on which a worker can rely directly in a dispute with his employer.[8] The national court is required in that regard to disapply national legislation if it cannot be interpreted in conformity with the right to annual leave (see 4.10 - 4.21 of this Opinion).

3.6 In recent years a great deal of case law of the CJEU has also appeared protecting the right to annual leave. In this connection the CJEU speaks of the 'protective rules' it has developed with regard to the minimum period of the right to annual leave.[9]

3.7 The preliminary question referred by the subdistrict court must therefore be answered on the

[5] See Supreme Court 27 September 2024, ECLI:NL:HR:2024:1322 (*Mammoet Nederland*, on the question whether overtime pay counts in the calculation of holiday pay); Supreme Court 17 November 2023, ECLI:NL:HR:2023:1603 (*DAF Trucks*, on the deduction of leave days under Article 7:638(8) BW); Supreme Court 23 June 2023, ECLI:NL:HR:2023:955 (on the question whether the court of appeal had rightly disapplied Article 7:642 BW); and Supreme Court 9 June 2023, ECLI:NL:HR:2023:816 (*NS Reizigers*, on, among other things, the concept of pay for extra-statutory leave days).

[6] In certain cases the employer's obligation to continue paying wages may last longer, e.g. where a wage sanction (*loonsanctie*) has been imposed; see on this also my Opinion in *Xella* of 8 September 2019, ECLI:NL:PHR:2019:899, at 5.4.

[7] Supreme Court 8 November 2019, ECLI:NL:HR:2019:1734 (*Xella*), para. 2.1. In the order for reference the subdistrict court describes the dormant employment contract as the period in which the employment has not yet ended, but in which the employee who is unfit for work is not entitled to wages and no longer has any reintegration obligations (see para. 1.2 of the order for reference of 17 March 2026).

[8] See the references in footnote 14.

[9] CJEU 19 November 2019, C-609/17 and C-610/17, ECLI:EU:C:2019:981 (*TSN*), para. 36.

basis of EU law. For that reason, the remainder of this Opinion first deals with the EU-law and treaty-law rules on the right to annual leave (chapter 4) and the protective rules developed by the CJEU (chapter 5). It then deals with the Dutch legislation on leave days (chapter 6) and dormant employment contracts (chapter 7). This is followed by a discussion of the case law of the courts of fact and the literature (chapter 8) and of the answers to parliamentary questions on the incompatibility of the Dutch legislation on leave days with EU law (chapter 9). After that, the preliminary question is answered (chapter 10).

3.8 Finally, by way of introduction, it is noted that the preliminary question relates to the accrual of statutory leave days during a dormant employment contract. In practice, litigation often concerns the payment of leave days (whether or not accrued) at the end of the employment, as in the present case. What is said in this Opinion about the accrual of leave days applies in the same way, however, to the payment of untaken leave days at the end of the employment.

3.9 In addition, it is relevant that the question referred does not relate to the taking of leave days which, although taken during a dormant employment contract, were already accrued before the dormant employment contract. Nor does the question relate to the accrual of leave days in excess of the statutory minimum (*bovenwettelijke vakantiedagen*). These extra-statutory leave days, the entitlement to which usually arises from the individual employment contract or an applicable collective agreement, are left out of consideration.[10] As will be explained below, the 'protective rules' developed by the CJEU do not apply to extra-statutory leave days (see 4.9 and 4.22 below).

4. EU-law and treaty-law rules on the right to annual leave[11]

4.1 At EU level, the right to annual leave is laid down in the Working Time Directive[12] and the Charter of Fundamental Rights of the European Union (hereinafter: the Charter).

(i) The Working Time Directive

4.2 The purpose of the Working Time Directive is to lay down minimum safety and health requirements for the organisation of working time. The Working Time Directive also applies to minimum annual leave (Article 1(1) and (2)(a)).

4.3 The right to annual leave is elaborated in Article 7 of the Working Time Directive:

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[10]For the sake of completeness it is noted that it follows from the *NS Reizigers* judgment that it is not permitted to agree on a less broad concept of pay for extra-statutory leave days than for statutory leave days, Supreme Court 9 June 2023, ECLI:NL:HR:2023:816, para. 3.2.2. As regards the accrual of extra-statutory leave days, derogations *are* permitted. See, among others, Verhulp who, referring to Midden-Nederland District Court 27 January 2016, ECLI:NL:RBMNE:2016:434 and CJEU 19 November 2019, C-609/17 and C-610/17, ECLI:EU:C:2019:981 (*TSN*), observes that it is possible to provide for extra-statutory leave days that (i) they are accrued only during the first six months of incapacity for work or (ii) those days can be carried over to a following year only to a limited extent, E. Verhulp, *T&C Arbeidsrecht*, art. 7:634 BW, aant. 2a, current up to 1 April 2026.

[11]This chapter is partly based on my Opinions of 16 December 2022, ECLI:NL:PHR:2022:1198, at 4.1-4.3, 20 January 2023, ECLI:NL:PHR:2023:93, at 4.2-4.12 and 12 May 2023, ECLI:NL:PHR:2023:494, at 6.2-6.10.

[12]Directive 2003/88/EC of the European Parliament and of the Council of 4 November 2003 concerning certain aspects of the organisation of working time, OJ 2003, L 299/9. This Directive is a codification of the old Working Time Directive (Directive 93/104/EC). In the old Directive the right to annual leave was likewise laid down in Article 7, which corresponds word for word to Article 7 of the Directive currently in force. See further on the Working Time Directive the Interpretative Communication of the European Commission (dating from 2023) on Directive 2003/88/EC, OJ 2023, C 143/8 (pp. 43-50 concern the right to annual leave).

Article 7 of the Working Time Directive

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.

4.4 Article 7 of the Working Time Directive is fairly brief: paragraph 1 governs the entitlement to the minimum paid annual leave of four weeks (or rather: it instructs the Member States to take measures to that end) and it follows from paragraph 2 that the minimum leave days can only be paid out at the end of the employment contract.[13] The amount of the allowance in lieu referred to in paragraph 2 is determined in the same way as the amount of the wages that must be paid during a day of leave (see 4.9 below).

4.5 The case law of the CJEU has given further substance to the right to annual leave. According to settled case law of the CJEU, the right to annual leave must be regarded as 'a particularly important principle of EU social law from which there may be no derogations and whose implementation by the competent national authorities must be confined within the limits expressly laid down by [the Working Time Directive]'.[14] In its case law the CJEU also points out that the right to annual leave was not introduced by the Working Time Directive, but has its origin in particular in various international instruments.[15]

4.6 It likewise follows from that settled case law that Article 7 may not be interpreted restrictively at the expense of the rights which the worker derives from the Working Time Directive.[16]

4.7 According to the CJEU, the purpose of the right to annual leave as laid down in Article 7 of the Working Time Directive is twofold: the right is intended to enable the worker 'both to rest from carrying out the work he is required to do under his contract of employment and to enjoy a period of relaxation and leisure'.[17]

4.8 The right to annual leave comprises not only (free) time to rest or relax; it also includes the

[13] In 2006 the ECJ held that the Dutch legislation on the payment of statutory leave days was not in line with the Working Time Directive. Under the leave legislation then in force it was possible to have the statutory leave days not taken in a given year paid out in the following year. In the view of the ECJ, the Working Time Directive precludes a national provision which makes it possible, during the term of the employment contract, for the days of annual leave within the meaning of Article 7(1) of the Working Time Directive which are not taken in a given year to be replaced by an allowance in lieu in a following year, see ECJ 6 April 2006, C-124/05 (*FNV/Staat der Nederlanden*).

[14] See, among others, CJEU 22 November 2011, ECLI:EU:C:2011:761 (*KHS*), para. 23; CJEU 24 January 2012, ECLI:EU:C:2012:33 (*Dominguez*), para. 16; CJEU 6 November 2018, ECLI:EU:C:2018:874 (*Max-Planck*) para. 19; CJEU 25 November 2021, C-233/20, ECLI:EU:C:2021:960 (*job-medium*), para. 24; CJEU 13 January 2022, ECLI:EU:C:2022:19 (*Koch*), para. 23. See earlier already ECJ 26 June 2001, ECLI:EU:C:2001:356 (*BECTU*), para. 43 ('a particularly important principle of Community social law'), repeated in, among others, ECJ 20 January 2009, ECLI:EU:C:2009:18 (*Schultz-Hoff*), para. 22; ECJ 10 September 2009, ECLI:EU:C:2009:542 (*Pereda*), para. 18.

[15] See CJEU 6 November 2018, C-569/16 and C-570/16, ECLI:EU:C:2018:871, *NJ* 2019/245 with note by A.W.H. Meij (*Bauer*), para. 83 and CJEU 6 November 2018, C-684/16, ECLI:EU:C:2018:874, (*Max-Planck*), para. 72.

[16] See, among others, CJEU 6 November 2018, C-684/16, ECLI:EU:C:2018:874 (*Max-Planck*), para. 31 and, without the phrase 'at the expense of', e.g. CJEU 29 November 2017, C-214/16, ECLI:EU:C:2017:914 (*King*), para. 58.

[17] To this effect: CJEU 22 November 2011, C-214/10, ECLI:EU:C:2011:761 (*KHS*), para. 31; CJEU 9 December 2021, C-217/20 ECLI:EU:C:2021:987 (*Staatssecretaris van Financiën*), para. 23; CJEU 22 September 2022, C-518/20 and C-727/20, ECLI:EU:C:2022:707, (*Fraport*), para. 27. See further (in slightly different wording), among others, ECJ 20 January 2009, C-350/06 and C-520/06, ECLI:EU:C:2009:18, *NJ* 2009/252 with note by M.R. Mok (*Schultz-Hoff*), para. 25; CJEU 6 November 2018, C-684/16, ECLI:EU:C:2018:874 (*Max-Planck*), para. 32; CJEU 13 January 2022, C-514/20, ECLI:EU:C:2022:19, *JIN* 2022/59 with note by M. Maaijen (*Koch*), para. 30.

right to pay during that time (see also the quotation at 4.3 above). What is to be understood by 'pay' is not laid down in the Working Time Directive. A broad concept of pay has developed in the case law of the CJEU.[18] As early as 2006 it was held in the *Robinson-Steele* judgment that Article 7(1) of the Working Time Directive treats the right to annual leave and the right to payment on that account as two aspects of a single right. The purpose of the requirement of payment for leave is to put the worker, during his leave, in a position which is, as regards remuneration, comparable to the position of the worker during periods in which he performs work.[19] During leave a worker is therefore entitled to his normal or usual pay. Furthermore, in 2021 the CJEU held, in response to a preliminary question referred by the Overijssel District Court, in summary, that for the normal or usual pay regard must be had to the pay received in the period in which work is actually performed. A worker who is unfit for work and who receives lower wages under Article 7:629 BW is therefore entitled, during leave, to the full wages he receives when he is not unfit for work.[20]

4.9 Finally, it should be noted that the right to annual leave to which workers are entitled under Article 7(1) is a minimum right. The Working Time Directive therefore does not preclude more leave days from being granted at national level, on top of the minimum period of four weeks prescribed by Article 7 of the Working Time Directive. The Directive does not apply to such additional leave days, any more than the 'protective rules' which the CJEU has developed with regard to the minimum period of Article 7(1).[21] In short, Article 7(1) of the Working Time Directive and the associated case law of the CJEU do not apply to the so-called extra-statutory leave days.

(ii) The Charter[22]

4.10 The right to annual leave is also enshrined as a fundamental right in the Charter. Since the entry into force of the Treaty of Lisbon on 1 December 2009, the Charter has, pursuant to Article 6(1) TEU, the same legal value as the Treaties.[23]

4.11 Article 31(2) of the Charter provides:

> *Article 31(2) of the Charter*
>
> 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.

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[18] See in more detail on the concept of pay my Opinion of 16 February 2024, ECLI:NL:PHR:2024:180, at 4.13 et seq.

[19] CJEU 16 March 2006, ECLI:EU:C:2006:177 (*Robinson-Steele*), paras. 58-59. Repeated in, among others, CJEU 15 September 2011, ECLI:EU:C:2011:588, *JAR* 2011/279 with note by H.J. Funke (*Williams and Others/British Airways*), para. 20; CJEU 22 May 2014, ECLI:EU:C:2014:351, *JAR* 2014/163 with note by A. van Zanten-Baris (*Lock/British Gas Trading*), para. 20.

[20] CJEU 9 December 2021, C-217/20 ECLI:EU:C:2021:987 (*Staatssecretaris van Financiën*), para. 39. Incidentally, that case did not concern an employee under 'civil law' but a central government civil servant. At the time, that civil servant was not (yet) covered by Article 7:629 BW but by a comparable rule laid down in Article 37 of the General Civil Service Regulations (*Algemeen Rijksambtenarenreglement*, ARAR).

[21] See, among others, CJEU 19 November 2019, C-609/17 and C-610/17, ECLI:EU:C:2019:981, *JAR* 2020/16 with note by H.J. Funke, (*TSN*), paras. 32-36.

[22] This section is partly derived from my Opinion of 20 January 2023, ECLI:NL:PHR:2023:93 at 4.10-4.12 with the accompanying notes.

[23] This has also been repeatedly stated in the case law of the CJEU, see e.g. CJEU 22 September 2022, C-518/20 and C-727/20, ECLI:EU:C:2022:707 (*Fraport*), para. 25 with reference to CJEU 13 January 2022, C-514/20, ECLI:EU:C:2022:19 (*Koch*), para. 37.

4.12 According to the CJEU, Article 31(2) of the Charter gives expression to the right to annual leave as an 'essential principle of EU social law'.[24] On the relationship between this provision and Article 7 of the Working Time Directive, the CJEU has repeatedly held that Article 7 of the Working Time Directive 'reflects and gives concrete expression to' the 'fundamental right' to annual leave as laid down in Article 31(2) of the Charter. Whereas the latter provision guarantees the right to annual leave, the former provision implements that principle by fixing the duration of the annual leave, according to the CJEU.[25]

4.13 It follows from the case law of the CJEU that the fundamental right to annual leave also comprises (i) the right to receive a sum of money during the leave (that is, the right to pay) and (ii) the right to an allowance in lieu of annual leave not taken upon termination of the employment relationship (as is also provided in Article 7(2) of the Working Time Directive).[26]

4.14 As regards the content of the right to annual leave as laid down in Article 31(2) of the Charter, it has been observed in the literature that the CJEU gives substance to that right by means of (its case law on) the content of the right to annual leave of Article 7(1) of the Working Time Directive.[27]

4.15 Limitations on the right to annual leave as referred to in Article 31(2) of the Charter are possible only if the conditions laid down in Article 52(1) of the Charter are met.[28] That provision reads as follows:

> *Article 52(1) of the Charter*
>
> Any limitation on the exercise of the rights and freedoms recognised by this Charter must be provided for by law and respect the essence of those rights and freedoms. Subject to the principle of proportionality, limitations may be made only if they are necessary and genuinely meet objectives of general interest recognised by the Union or the need to protect the rights and freedoms of others.

4.16 Limitations on the fundamental right to annual leave (Article 31(2) of the Charter) must there-

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[24]CJEU 6 November 2018, C-569/16 and C-570/16, ECLI:EU:C:2018:871, *NJ* 2019/245 with note by A.W.H. Meij (*Bauer*), para. 83. The explanation on Article 31(2) of the Charter states that paragraph 2 is based on (the predecessor of) Article 7(2) of the Working Time Directive, Article 2 of the European Social Charter and point 8 of the Community Charter of the Fundamental Social Rights of Workers, see the Explanations relating to the Charter of Fundamental Rights, OJ 2007, C/303/17.

[25]See, among others, CJEU 22 September 2022, C-518/20 and C-727/20, ECLI:EU:C:2022:707 (*Fraport*), para. 26 with reference to CJEU 13 January 2022, C-514/20, ECLI:EU:C:2022:19 (*Koch*), para. 25; cf. also ('reflect and give concrete expression to') CJEU 8 September 2020, C-119/19 P and C-126/19 P, ECLI:EU:C:2020:676, para. 115 and CJEU 25 November 2021, C-233/20, ECLI:EU:C:2021:960 (*job-medium*), para. 25.

[26]See, among others, CJEU 27 April 2023, C-192/22, ECLI:EU:C:2023 (*Bayerische Motoren Werke*), para. 19; CJEU 25 November 2021, C-233/20, EU:C:2021:960 (*job-medium*), para. 29; and CJEU 25 June 2020, C-762/18 and C-37/19, ECLI:EU:C:2020:504, *JAR* 2020/182 with note by H.J. Funke (*QH*), para. 83.

[27]See, among others, C. Sieburgh & M. van de Moosdijk, 'Bauer: het Handvest van de Grondrechten van de Europese Unie is jarig en trakteert, ook in privaatrechtelijke verhoudingen', in: J. Krommendijk, H.C.F.J.A. de Waele & K.M. Zwaan (eds.), *Tien jaar EU-Grondrechtenhandvest in Nederland* (SteR nr. 47), Deventer: Wolters Kluwer 2019/13.3.3; J.R. Vos, 'Op reis met de vakantiewetgeving: het Handvest biedt nieuw uitzicht', *ArA* 2019/2.3, pp. 62, 67. See more recently also Laagland, who observes that the CJEU has embraced Article 31(2) of the Charter as an aid to interpretation in construing Article 7 of the Working Time Directive, F. Laagland, 'Het Handvest als aanjager voor het arbeidsrecht: feit of fictie', in: J.H. Gerards et al., *Waarde, werking en potentie van het EU-Grondrechtenhandvest in de Nederlandse rechtsorde. Preadviezen* (Handelingen Nederlandse Juristen-Vereniging 153e jaargang), Deventer: Wolters Kluwer 2024, section 5.4.2.3.

[28]This is also emphasised in CJEU 6 November 2018, C-569/16 and C-570/16, ECLI:EU:C:2018:871, *NJ* 2019/245 with note by A.W.H. Meij (*Bauer*), para. 59; CJEU 6 November 2018, C-684/16, ECLI:EU:C:2018:874 (*Max-Planck*), para. 54; CJEU 22 September 2022, C-518/20 and C-727/20, ECLI:EU:C:2022:707, *JIN* 2022/174 with note by M. Koster (*Fraport*), para. 33; CJEU 22 September 2022, C-120/21, ECLI:EU:C:2022:718, *JAR* 2022/271 (*LB*), para. 36.

fore (i) be provided for by law, (ii) respect the essence of the right; (iii) comply with the principle of proportionality; (iv) be necessary and (v) meet objectives of general interest of the Union or the need to protect the rights or freedoms of others.[29]

4.17 Article 51(1) of the Charter provides that the provisions of the Charter are addressed to the institutions, bodies, offices and agencies of the Union and to the Member States, the latter only when they are implementing Union law. In the *Bauer* and *Max-Planck* judgments, however, the CJEU held that Article 51(1) of the Charter does not preclude individuals from being, where appropriate, directly required to comply with a provision of the Charter. With regard to Article 31(2) of the Charter, the CJEU held more specifically in those judgments 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 [private; A-G] employer in a field covered by EU law and therefore falling within the scope of the Charter'.[30]

4.18 It follows from the considerations referred to above that the CJEU has accorded direct horizontal effect[31] to Article 31(2) of the Charter. This means – for cases falling within the scope of the Charter[32] – that in a dispute with his private employer a worker can rely directly on that provision in order to assert the right he derives from it.[33] Where the dispute is between a worker and a private employer, it follows from Article 31(2) of the Charter, according to the CJEU, that the national court is required to disapply national legislation that cannot be interpreted in conformity with Article 7 of the Working Time Directive and Article 31(2) of the Charter.[34]

4.19 The direct horizontal effect of Article 31(2) of the Charter is also apparent from the case law of

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[29]It follows from the explanations relating to the Charter that the objectives of general interest recognised by the Union cover both the objectives mentioned in Article 3 of the Treaty on European Union and other interests protected by specific provisions of the Treaties, such as Article 4(1) of the Treaty on European Union, Article 35(3) of the Treaty on the Functioning of the European Union and Articles 36 and 346 of that Treaty, see Charter of Fundamental Rights, OJ 2007, C/303/17.

[30]See CJEU 6 November 2018, C-569/16 and C-570/16, ECLI:EU:C:2018:871, *NJ* 2019/245 with note by A.W.H. Meij (*Bauer*), paras. 85 (quotation) 87, 90, 92; CJEU 6 November 2018, C-684/16, ECLI:EU:C:2018:874 (*Max-Planck*), paras. 74, 76, 79, 81.

[31]This term is used to indicate that 'European law directly affects the content of legal relationships between private parties; in other words, where it creates, modifies or extinguishes rights or obligations between them'. Asser/Hartkamp 3-I 2023/12 describes direct horizontal effect as 'the invocation of EU law between private parties, with the result that one private party can assert a right against another private party or is released from an obligation.' With regard to the doctrine of direct effect, a different terminology is sometimes also used, depending on whether the EU-law perspective or the private-law perspective is chosen; see further on this the Opinion of Advocate General Drijber preceding Supreme Court 25 March 2022, ECLI:NL:HR:2022:454, at 3.19-3.20, with further references.

[32]In *Bauer* (paras. 52-53) and *Max-Planck* (paras. 49-50) the CJEU considers in this connection, referring to earlier case law, that the fundamental rights guaranteed in the legal order of the Union are applicable in all situations governed by EU law, and then considers that the national rules at issue implement the Working Time Directive, so that Article 31(2) of the Charter can be applied.

[33]See e.g. C. Sieburgh & M. van de Moosdijk, 'Bauer: het Handvest van de Grondrechten van de Europese Unie is jarig en trakteert, ook in privaatrechtelijke verhoudingen', in: J. Krommendijk, H.C.F.J.A. de Waele & K.M. Zwaan (eds.), *Tien jaar EU-Grondrechtenhandvest in Nederland* (SteR nr. 47), Deventer: Wolters Kluwer 2019/13.4, 13.6.3.2, 13.6.4, 13.9; A.S. Hartkamp, 'Rechtstreekse doorwerking van het EU Handvest van de grondrechten in privaatrechtelijke rechtsverhoudingen', *AA* 2019/0218, at 6-7; D.F.H. Stein, 'Richtlijnen en privaatrecht', *MvV* 2019/7.2, p. 323 and – using a different terminology – M. de Mol, 'Het leerstuk van de horizontale directe werking van Unie-grondrechten op de voet gevolgd', *AA* 2019/0371, p. 375; A. Eleveld, 'Rechtstreekse horizontale werking van grondrechten van de Europese Unie', *NtEr* 2019/3.6, pp. 92-93; R. Krause, 'Horizontal Effect of the EU Charter of Fundamental Rights: Bauer and Willmeroth, MPG', *CMLR* 2021/1173, pp. 1193-1198. Cf. also B. ter Haar, 'Rechtstreekse horizontale werking van het EU Handvest in getrapte vorm', *ArA* 2021/3.8.

[34]*Max-Planck*, para. 81. See also *Bauer*, para. 92, from which it follows that this obligation also applies in a dispute between a worker (in that case, a legal successor of the deceased worker) and 'an employer that is a public authority', and in that case arises from Article 7 of the Working Time Directive and Article 31(2) of the Charter.

the Supreme Court. For instance, in a decision of 23 June 2023 the Supreme Court dismissed the appeal in cassation against a decision in which a court of appeal, referring to the case law of the CJEU discussed above, had disapplied Article 7:642 BW (limitation of leave entitlements after five years).[35] In the case law of the courts of fact on the question whether employees accrue leave days during a dormant employment contract, too, it is generally assumed that the national court must disregard national legislation where it is contrary to Article 31(2) of the Charter (for a discussion of that case law see chapter 8 below).[36]

4.20 In the more recent *Keolis Agen* judgment of the CJEU, as has also been observed in the literature,[37] the horizontal direct effect of Article 31(2) of the Charter was confirmed.[38] In that case several workers who had been on sick leave for more than a year had asked their employer Keolis Agen (a private undertaking holding a public service concession) to be allowed to take, or to be paid for, their annual leave days which they had been unable to take because of their sickness. The employer had refused those requests, among other reasons because the interruption of work had lasted more than a year.[39]

4.21 In the *Keolis Agen* case the French court had asked the CJEU, in summary, whether a worker can rely on Article 7 of the Working Time Directive even if the employer is a private undertaking. In reply, the CJEU considers that it is settled case law that Article 7 of the Working Time Directive reflects and gives concrete expression to the fundamental right to paid annual leave laid down in Article 31(2) of the Charter. Referring to the *Bauer* and *Max-Planck* judgments already mentioned above, the CJEU confirms that Article 31(2) of the Charter and Article 7 of the Working Time Directive must be interpreted as meaning that a worker can rely, as against his employer, on the right to paid annual leave laid down in the former provision and given concrete expression in the latter provision. It is irrelevant in that regard that the employer is a private undertaking holding a public service concession.[40]

4.22 Finally, it should be noted that Article 31(2) of the Charter does not relate to national rules concerning leave entitlements that go beyond the minimum right of Article 7(1) of the Working Time Directive.[41] Article 31(2) of the Charter, like Article 7 of the Working Time Directive, therefore does not apply to extra-statutory leave days.

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[35] Supreme Court 23 June 2023, ECLI:NL:HR:2023:955, *JIN* 2023/7 with note by J.C.A. Ettema. In that case the employer had not complied with its duty of care and duty to inform with regard to the taking of leave days by the employee.

[36] See e.g. Rotterdam District Court (subdistrict court) 11 September 2026, ECLI:NL:RBROT:2026:12105, para. 2.8 and Rotterdam District Court (subdistrict court, Dordrecht) 24 February 2026, ECLI:NL:RBROT:2026:1215, para. 2.8.2.

[37] See F. Van Reempts, 'De horizontale rechtstreekse werking van het recht op jaarlijkse vakantie met behoud van loon? Vanzelfsprekend' *SEW* 2024/5. Van Reempts states that it is clear from *Keolis Agen* that the horizontal direct effect of the right to paid annual leave can nowadays be regarded as self-evident. See to the same effect Zekić, who writes that the Court continues the reasoning it embarked on in *Bauer* and *Max-Planck*, namely the possibility of direct effect in horizontal relationships of the fundamental right to paid annual leave, N. Zekić, 'Keolis Agen (HvJEU, C 271/22–C 275/22) – Rechtstreekse horizontale werking grondrecht op vakantie: een vervolg op HvJ EU Bauer en Broßon', EHRC Updates annotation, *EHRC* 2023-0254. Cf. also H.H. Voogsgeerd, 'Kroniek Europees Arbeidsrecht 1 januari 2023-31 december 2024', *TRA* 2026/68, at 4.

[38] CJEU 9 November 2023, C-271/22 and C-275/22, ECLI:EU:C:2023:834 (*Keolis Agen*).

[39] See para. 10 of *Keolis Agen*.

[40] See paras. 16-28 of *Keolis Agen*.

[41] The reason for this is that such rules do not 'implement' the Working Time Directive within the meaning of Article 51 of the Charter, so that the Charter does not apply. See further CJEU 19 November 2019, C-609/17 and C-610/17, ECLI:EU:C:2019:981 (*TSN*), paras. 41-55.

An aside: ILO Convention No. 132[42]

4.23 The Working Time Directive states that account should be taken of the principles of the International Labour Organization (hereinafter: ILO) with regard to the organisation of working time (see recital 6). In its case law the CJEU has also repeatedly referred to this recital.[43] Reference has been made in particular to ILO Convention No. 132, which concerns annual holidays with pay.[44] ILO Convention No. 132 dates from 1970. The Netherlands has not ratified Convention No. 132.[45]

4.24 It follows from Article 3(1) and (3) of this ILO Convention that every worker is entitled to a minimum of three weeks' paid holiday per year. Article 5(1) provides that a minimum period of service may be required for entitlement to any annual holiday with pay. Article 5(4) provides, however, that, under conditions to be determined by the competent authority or through the appropriate machinery in each country, absence from work for such reasons beyond the control of the person concerned as illness, injury or maternity shall be counted as part of the period of service. The CJEU uses this latter paragraph partly to substantiate that, as regards the right to annual leave arising from EU law, absence on sick leave counts as working time (see 5.9 below).

4.25 Article 8 of the ILO Convention then provides that the annual holiday of three weeks may be taken in parts (paragraph 1), but that in principle one of those parts shall consist of at least two uninterrupted working weeks (paragraph 2). It follows from Article 9(1) that this uninterrupted part must be granted and taken no later than one year from the end of the year in respect of which the holiday entitlement has arisen. The remainder of the annual holiday must be taken no later than eighteen months from the end of the year in which the holiday entitlement has arisen. The CJEU has used these periods, among other things, to arrive at the rule that the leave entitlements of workers with long-term incapacity for work may lapse at some point. See 5.28 of this Opinion.

5. The protective rules developed by the CJEU for the right to annual leave in the event of long-term incapacity for work

(i) The coming into existence of the right to annual leave may not be subject to a condition

5.1 Article 7(1) of the Working Time Directive provides, see also the quotation at 4.3 above, that the Member States must take measures to ensure that every worker is entitled to annual leave, 'in accordance with the conditions for entitlement to, and granting of, such leave laid down by national legislation and/or practice'. It is apparent from the case law of the CJEU that this

[42] See at length on the ILO principles and the right to annual leave, F.J.L. Pennings, 'De invloed van IAO-beginselen op de ontwikkeling van het vakantierecht', *ArA* 2025/3. He observes that both the Dutch leave legislation and the case law of the CJEU are inspired by principles of the ILO. According to him, however, there are differences in how the principles are applied, which gives rise to frictions between Dutch and European annual leave law.

[43] See e.g. ECJ 20 January 2009, C-350/06 and C-520/06, ECLI:EU:C:2009:18, *NJ* 2009/252 with note by M.R. Mok (*Schultz-Hoff*), paras. 37-38; CJEU 4 October 2018, C-12/17, ECLI:EU:C:2018:799 (*Dicu*), para. 32.

[44] Convention concerning Annual Holidays with Pay (Revised), 1970 (Convention No. 132 adopted by the International Labour Conference at its fifty-fourth session); Geneva, 24 June 1970. The Dutch translation of this Convention was published in *Trb.* 1971, 91.

[45] The Netherlands did ratify the predecessor of this Convention, namely Convention No. 52 of 1936. The latter Convention provided for an annual holiday of at least six working days after one year of continuous service, see on this F.J.L. Pennings, 'De invloed van IAO-beginselen op de ontwikkeling van het vakantierecht', *ArA* 2025/3, p. 75.

provision does not mean that conditions may be attached under national law to the coming into existence of the right to annual leave. The coming into existence of the right to annual leave may not be made subject to any condition.[46]

5.2 This protective measure was formulated as early as 2001, in the *BECTU* judgment. That case turned on the question whether English national law, under which workers only accrue leave days after having been continuously employed by the same employer for thirteen weeks, is in line with Article 7(1) of the Working Time Directive. BECTU, a trade union for workers in the television, radio, film, theatre and stage industries, had brought proceedings because the abovementioned provision of English national law meant that workers in those sectors did not accrue leave days in practice. They generally had short-term employment contracts with different employers.

5.3 The ECJ held that the expression 'in accordance with the conditions for entitlement to, and granting of, such leave laid down by national legislation and/or practice' refers only to the arrangements for paid annual leave adopted in the various Member States. This means that the Member States may lay down, in their domestic legislation, the conditions for the exercise and implementation of the right to paid annual leave, by prescribing the specific circumstances in which workers may exercise that right. The very existence of the right to annual leave deriving directly from the Working Time Directive[47] may not, however, be made subject to 'any preconditions whatsoever', according to the Court.[48] The provision of English law that workers only accrue leave after having been continuously employed by the same employer for thirteen weeks was therefore contrary to Article 7(1) of the Working Time Directive.

5.4 The *BECTU* judgment did not involve a condition relating to long-term incapacity for work. That was the case, however, in the case at issue in the *Dominguez* judgment of 2012.[49] That case concerned a worker, Dominguez, who had been on sick leave for fourteen months following a road accident and who, as a result, was not entitled to leave under French national law. That law provided that an entitlement to paid leave exists only if at least one month of actual work was performed in the reference period of one year. In the Court's view, that provision of French law was contrary to Article 7(1) of the Working Time Directive. The Court reiterated that the existence of the right to paid annual leave may not be made subject to any preconditions

[46] An example of a rule that does fall under the 'conditions' of Article 7(1) of the Working Time Directive is a rule providing that, in fixing the time of the leave, account is taken of the wishes of the worker, unless compelling operational interests or the leave wishes of other workers which deserve priority from a social point of view preclude this, see CJEU 6 November 2018, C-684/16, ECLI:EU:C:2018:874 (*Max-Planck*), para. 36. It follows from the *Schultz-Hoff* judgment (also discussed in the main text at 5.7 et seq.) that a national provision laying down a carry-over period for annual leave not taken by the end of the reference period (the period in which leave days are accrued) is also an example of the conditions for the exercise and implementation of the right to paid annual leave, as referred to in Article 7(1) of the Working Time Directive. See ECJ 20 January 2009, C-350/06 and C-520/06, ECLI:EU:C:2009:18, (*Schultz-Hoff*), para. 42.

[47] At the time of that judgment the predecessor of the current Working Time Directive, Directive 93/104, was still in force. As regards the right to annual leave, however, there is no difference between the two Directives, as already noted in footnote 12 above.

[48] ECJ 26 June 2001, ECLI:EU:C:2001:356 (*BECTU*), para. 53.

[49] CJEU 24 January 2012, C-282/10, ECLI:EU:C:2012:33, *NJ* 2012/154 with note by M.R. Mok (*Dominguez*). The horizontal effect of the right to annual leave was also at issue in that case (see the second preliminary question, paras. 22-44). There was no such effect yet in that case. Van de Moosdijk and Sieburgh point out that the Charter did not yet have binding force at the time of the dispute. In their opinion, the right to paid annual leave, although it must be regarded as an important principle of EU social law, was not at the time a recognised general principle of EU law, see Van de Moosdijk and Sieburgh, op. cit. (note 33), section 13.5.1.

whatsoever.[50]

5.5 In other judgments, too, the CJEU has repeated the consideration that the very existence of the right to annual leave may not be made subject by the Member States to any preconditions whatsoever.[51]

(ii) Sick leave is treated as working time

5.6 It is likewise settled case law of the CJEU that, as regards the right to annual leave, sick leave is treated as working time.

5.7 In the *Schultz-Hoff* judgment of 2009 the Court held in this connection that, as regards the right to annual leave, the Working Time Directive makes no distinction between workers who are absent from work on sick leave, whether short-term or long-term, during the reference period (the period in which leave days are accrued) and workers who did work during that period. It follows that, with regard to workers on duly prescribed sick leave, the right to paid annual leave conferred by the Working Time Directive itself on all workers cannot be made subject by a Member State to a condition that the worker has actually worked during the reference period, according to the Court.[52]

5.8 The CJEU gives no further definition of sick leave; it merely observes that the right to sick leave is granted to the worker so that he can recover from an illness.[53] The Court further points out in this connection that the occurrence of incapacity for work owing to sickness is unforeseeable and that it follows from Article 5(4) of ILO Convention No. 132 that absence from work for reasons beyond the control of the worker concerned, such as illness, must be counted as working time (see also 4.24 above).[54] Sick workers, too, are therefore entitled to full accrual of minimum leave entitlements.[55]

5.9 In later judgments the CJEU elaborated on the foregoing by considering that the purpose of the right to annual leave (namely to enable the worker (i) to rest from carrying out his tasks and (ii) to enjoy a period of relaxation and leisure, see also 4.7 above) is based on the premise that the worker actually worked during the reference period. The objective of allowing the worker to rest presupposes, the CJEU considers, that the worker has been engaged in activities which justify, for the protection of his safety and health as provided for in the Working Time Directive, his being given a period of rest, relaxation and leisure. For that reason, entitlement to paid annual leave must, in principle, be determined by reference to the periods of actual work

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[50] See paras. 18-19 of the *Dominguez* judgment, cited in the previous footnote.

[51] See, among others, ECJ 20 January 2009, C-350/06 and C-520/06, ECLI:EU:C:2009:18 (*Schultz-Hoff*), para. 28; CJEU 29 November 2017, C-214/16, ECLI:EU:C:2017:914 (*King*), para. 34; CJEU 4 October 2018, C-12/17, ECLI:EU:C:2018:799 (*Dicu*), para. 26; CJEU 25 June 2020, C-762/18 and C-37/19, ECLI:EU:C:2020:504, *JAR* 2020/182 with note by H.J. Funke (*QH*), para. 56; CJEU 13 January 2022, C-514/20, ECLI:EU:C:2022:19, *JIN* 2022/59 with note by M. Maaijen (*Koch*), para. 22. In the *King* judgment the CJEU held in this connection that the Working Time Directive does not allow Member States to exclude the very existence of the right to paid annual leave, CJEU 29 November 2017, C-214/16, ECLI:EU:C:2017:914 (*King*), para. 51.

[52] ECJ 20 January 2009, C-350/06 and C-520/06, ECLI:EU:C:2009:18 (*Schultz-Hoff*), paras. 40-41. Repeated in, among others, CJEU 24 January 2012, C-282/10, ECLI:EU:C:2012:33, *NJ* 2012/154 with note by M.R. Mok (*Dominguez*), para. 20.

[53] See para. 25 of the *Schultz-Hoff* judgment. Contrary to what is argued in the employer's written observations, it cannot be inferred from the case law of the CJEU when there is 'justified sick leave', see points 37-38 of the written observations.

[54] See paras. 37-38 and 51 of the *Schultz-Hoff* judgment.

[55] This was also the conclusion of the government when the legislation on leave days was amended, in *Kamerstukken II* 2010/11, 32 465, nr. C (MvA), p. 9. See also *Kamerstukken II* 2009/10, 32 465, nr. 3 (MvT), p. 1. See on this chapter 6 below.

completed under the employment contract, according to the CJEU.[56]

5.10 In the event of sickness, however, the CJEU makes an exception to the abovementioned rule that the right to annual leave is determined on the basis of the working time actually worked. The reason for this is, as already mentioned above, that the occurrence of incapacity for work owing to sickness is unforeseeable and beyond the worker's control.[57]

5.11 In the more recent *QH* judgment the CJEU held that it is 'excluded' that a worker's right to the minimum paid annual leave, guaranteed by EU law, is reduced in a situation where the worker could not perform his obligation to work during the reference period because of an illness.[58] In the *Fraport* judgment the CJEU put it in such a way that it is excluded that the right guaranteed by EU law is 'curtailed' where the worker has been unable to perform his work because of sickness.[59]

5.12 In its case law the CJEU has accepted more exceptions to the main rule (no accrual of leave if no actual work has been performed). For instance, the exception also applies to female workers who are on maternity leave.[60] Workers who have been unlawfully dismissed and whose reinstatement has been ordered by the court are also entitled to accrual of leave for the period between the unlawful dismissal and the date of reinstatement. The fact that a worker has been unable to work in such a period is, like the occurrence of incapacity for work owing to sickness, in principle unforeseeable and beyond the worker's control, according to the Court.[61]

5.13 The case law of the CJEU also contains examples in which *no* exception applies to the main rule that the right to annual leave is determined on the basis of the working time actually worked. For instance, it is apparent from the *Dicu* judgment that in the case of parental leave the main rule applies that actual work must have been performed for leave days to accrue.[62] In the view of the CJEU, workers who take parental leave during the reference period cannot be treated in the same way as sick workers or female workers on maternity leave.[63] Taking parental leave, the Court considers, is not unforeseeable and in most cases results from the worker's wish to take care of his or her child. Moreover, the worker on parental leave is not subject to physical or psychological constraints caused by an illness. In that respect, too, such a worker differs from a worker who is unfit for work. There is likewise a difference from the female worker on maternity leave, because the latter leave is intended both to protect a woman's biological condition during and after pregnancy and to protect the special relationship between a woman and her child over the period which follows pregnancy and childbirth, by preventing that relationship from being disturbed by the multiple burdens which would result from the simultaneous pursuit

[56]CJEU 4 October 2018, C-12/17, ECLI:EU:C:2018:799 (*Dicu*), para. 28 with reference to CJEU 11 November 2015, C-219/4, EU:C:2015;745, para. 29 (*Greenfield*).

[57]See CJEU 4 October 2018, C-12/17, ECLI:EU:C:2018:799 (*Dicu*), para. 32 and also CJEU 29 November 2017, C-214/16, ECLI:EU:C:2017:914 (*King*), para. 49.

[58]CJEU 25 June 2020, C-762/18 and C-37/19, ECLI:EU:C:2020:504 (*QH*), para. 63, with reference to CJEU 19 September 2013, C579/12 RX-II, EU:C:2013:570 (*Review Commission/Strack*), para. 34.

[59]CJEU 22 September 2022, C-518/20 and C-727/20, ECLI:EU:C:2022:707, *JIN* 2022/174 with note by M. Koster (*Fraport*), para. 32 with reference to CJEU 9 December 2021, C-217/20, ECLI:EU:C:2021:987 (*X/Staatssecretaris van Financiën*), para. 32 and the case law cited there.

[60]CJEU 18 March 2004, C-342/01, EU:C:2004:160 (*Merino Gómez*). See also CJEU 4 October 2018, C-12/17, ECLI:EU:C:2018:799 (*Dicu*), para. 30.

[61]CJEU 25 June 2020, C-762/18 and C-37/19, ECLI:EU:C:2020:504 (*QH*), paras. 67 and 69.

[62]CJEU 4 October 2018, C-12/17, ECLI:EU:C:2018:799 (*Dicu*), in particular paras. 32-36.

[63]The main rule of that judgment is therefore not, as is argued in the employer's written observations, applicable to the situation of a dormant employment contract of an employee who is unfit for work, see point 46 of the written observations.

of employment. Finally, the CJEU also considers that, although the worker on parental leave remains a worker within the meaning of EU law, the reciprocal obligations of the employer and the worker as regards performance are temporarily suspended, in particular the worker's obligation to carry out the tasks incumbent on him in the context of the employment relationship.

5.14 Nor does any exception apply to workers who make use of short-time working; they are expressly not treated in the same way as workers who are unfit for work. It follows from the joined cases *Heimann* and *Toltschin* that workers who are placed on short-time working on the basis of a social plan do not accrue leave days in respect of the short-time working.[64]

5.15 The same applies where the employment relationship between employer and worker continues during periods of partial unemployment, but without the worker actually working, as follows from the *Hein* judgment.[65] In such a case, too, the main rule applies that leave days are accrued only in respect of the time actually worked.

(iii) Leave entitlements of workers who are unfit for work may, however, lapse

5.16 It further follows from the case law of the CJEU that a Member State may set limits to the right to annual leave of workers who are unfit for work, in the sense that the right to annual leave of those workers need not accumulate endlessly. This follows in particular from the *KHS* judgment of 2011, in which the Court expressly qualified what it had previously held in the *Schultz-Hoff* judgment of 2009.

5.17 The *Schultz-Hoff* case concerned a worker with long-term incapacity for work, Schultz-Hoff, who had been employed by his employer since 1971. From 1995 onwards he was, as a person recognised as severely disabled, alternately fit and unfit for work. From September 2004 he was continuously on sick leave until 30 September 2005, the date on which his employment contract ended. He had therefore been on sick leave for well over a year. In the month in which his employment contract ended, he was granted a pension for an indefinite period with retroactive effect from 1 March 2005. Before the German court the worker claimed an allowance in lieu of the paid annual leave not taken for the calendar years 2004 and 2005, referred to by the Court as the reference periods. Under German law, a carry-over period (that is, a period fixed by law within which accrued leave days must be used up before they lapse) of three months applied to each reference period: the worker's right to an allowance in lieu of leave not taken lapsed three months after the end of the preceding calendar year (unless a collective agreement derogates from this in favour of the worker). The German national courts interpreted those provisions as meaning that the annual leave not taken did not have to be paid out at the end of the employment contract if the worker was unfit for work until the end of the carry-over period. The German referring court referred preliminary questions on this point to the Court.

5.18 The Court first of all held, as already discussed at 5.7 above, that the right to annual leave contained in Article 7 of the Working Time Directive belongs to all workers, irrespective of their state of health, and that the right to annual leave may not be made subject by the Member States to the condition that workers who are unfit for work have actually worked during the reference period.[66]

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[64] CJEU 8 November 2012 C-229/11 (*Heimann*) and C-230/11 (*Toltschin*), para. 29.

[65] CJEU 13 December 2018, C-385/17, ECLI:EU:C:2018:1018 (*Hein*), para. 29.

[66] ECJ 20 January 2009, C-350/06 and C-520/06, ECLI:EU:C:2009:18, *NJ* 2009/252 with note by M.R. Mok (*Schultz-Hoff*), paras. 20-32.

5.19 The CJEU then considers, in summary, that under the Working Time Directive it is permitted for the right to annual leave to lapse at some point, provided that the worker who loses his right to paid annual leave has actually had the opportunity to exercise the right to annual leave. The Court continues that a worker who is continuously unfit for work until the end of the employment has no period at all in which he can take his paid annual leave. If, in such a situation, the right of the worker who is unfit for work were to lapse, this would undermine the social right directly conferred by Article 7 of the Working Time Directive on all workers.

5.20 The Court therefore concludes that Article 7(1) of the Working Time Directive precludes a national provision under which the right to annual leave lapses for workers who are unfit for work during the reference period and a subsequent carry-over period. For the Court it makes no difference in that regard whether the worker worked during part of the reference period. After all, every worker who has been unable to take a period of paid annual leave because of long-term sick leave is in the same situation, because the occurrence of incapacity for work owing to sickness is unforeseeable.[67]

5.21 A strict line thus emerges from the *Schultz-Hoff* judgment: a worker also accrues leave entitlements during incapacity for work, and those entitlements cannot lapse if the worker is subsequently unable, owing to incapacity for work, to take them. This would mean that where a worker cannot take leave days owing to long-term incapacity for work, he accrues leave days, in principle, without limit (which must then be paid out at the end of the employment).

5.22 That is nevertheless not the case, as is apparent from the *KHS/Schulte* judgment of 2011, in which the CJEU, in its own words, qualifies the abovementioned conclusion from the *Schultz-Hoff* judgment.[68] In that case the worker Schulte had become severely disabled in January 2002 as a result of an infarction. From October 2003 he received a benefit on account of total incapacity for work. His employment contract was not terminated until years later, with effect from 31 August 2008. Schulte had thus not worked for years (2002-2008) and had also not received any wages in all those years, but had remained in employment. His situation therefore closely resembles what is referred to in the Netherlands as a dormant employment contract.

5.23 Schulte claimed before the court an allowance in lieu of leave days not taken for the calendar years 2006, 2007 and 2008. Under German national law and the applicable collective agreement, a carry-over period of fifteen months after the end of the reference period applied to the leave days. The German court considered that the right to annual leave for 2006 had lapsed, because the carry-over period for that year had expired. The German court thereupon referred preliminary questions to the Court on the compatibility of that carry-over period with Article 7 of the Working Time Directive.

5.24 The CJEU held as follows:

> "26. Thus the Court has held that Article 7(1) of Directive 2003/88 does not preclude, in principle, national legislation which lays down conditions for the exercise of the right to paid annual leave expressly conferred by the directive, including even the loss of that right at the end of a leave year or of a carry-over period. However, the Court made that finding of principle subject to the condition that the worker who has lost his right to paid annual leave has actually had the opportunity to exercise the right conferred on him by the directive (see *Schultz-Hoff and Others*, paragraph 43).
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> 27. It must be stated that a worker who, like the applicant in the main proceedings with regard to

[67] See paras. 50, 51 and 44 of the judgment.

[68] CJEU 22 November 2011, C-214/10, ECLI:EU:C:2011:761, *JAR* 2012/19 with note by J. Dop (*KHS/Schulte*), para. 28.

the year 2006, is on sick leave during the whole of the reference period and beyond the carry-over period laid down by national law, has no period at all in which he can take his paid annual leave.

28. Although it follows from the abovementioned case law that a national provision laying down a carry-over period cannot provide for the lapse of the worker's right to paid annual leave without the worker having actually had the opportunity to exercise that right, such a conclusion must nevertheless be qualified in specific circumstances such as those of the main proceedings.

29. Otherwise, a worker, such as the applicant in the main proceedings, who is unfit for work for several consecutive reference periods [years] would be entitled to accumulate, without any limit, all the entitlements to paid annual leave that are acquired during the period of his absence from work.

30. A right to such unlimited accumulation of entitlements to paid annual leave, acquired during such a period of unfitness for work, would no longer reflect the actual purpose of the right to paid annual leave."

5.25 The principle that a national provision laying down a carry-over period cannot provide for the lapse of the right to annual leave without the worker having actually had the opportunity to exercise that right must therefore be qualified in specific circumstances such as those of the main proceedings, in order to prevent an unlimited accumulation of leave days.

5.26 The Court then points out that after a certain time leave loses its positive effect as a rest period and that the dual purpose of the right to annual leave is then no longer met:

"31. The right to paid annual leave (…) has a dual purpose, namely to enable the worker both to rest from carrying out the work he is required to do under his contract of employment and to enjoy a period of relaxation and leisure (…).

32. In this connection the Court has emphasised that, although the positive effect of paid annual leave for the safety and health of the worker is deployed fully if it is taken in the year prescribed for that purpose, namely the current year, the significance of that rest period in that regard remains if it is taken during a later period (Case C-124/05 *Federatie Nederlandse Vakbeweging* [2006] ECR I-3423, paragraph 30, and *Schultz-Hoff and Others*, paragraph 30).

33. Nevertheless, it must be stated that the right to paid annual leave acquired by a worker who is unfit for work for several consecutive reference periods can reflect both the aspects of its purpose set out in paragraph 31 above only in so far as the carry-over does not exceed a certain temporal limit. Beyond such a limit, annual leave ceases to have its positive effect for the worker as a rest period and is merely a period of relaxation and leisure.

34. In view of the purpose of the right to paid annual leave directly conferred on every worker by EU law, a worker who is unfit for work for several consecutive years and who is prevented by national law from taking his paid annual leave during that period cannot have the right to accumulate, without any limit, entitlements to paid annual leave acquired during that period."

5.27 After that the Court considers that it must be assessed whether the carry-over period of fifteen months, as applicable to Schulte, may reasonably be described as a period beyond which paid annual leave ceases to have its positive effect for the worker as a rest period. In this connection, according to the Court, the following factors must be taken into account:

"37. The right to paid annual leave is, as a principle of EU social law, not only particularly important, as noted in paragraph 23 of the present judgment, but is also expressly laid down in Article 31(2) of the Charter of Fundamental Rights of the European Union, which Article 6(1) TEU recognises as having the same legal value as the Treaties.

38. It follows that, in order to uphold that right, the objective of which is the protection of workers, any carry-over period must take into account the specific circumstances of a worker who is unfit for

work for several consecutive reference periods. Thus, the carry-over period must inter alia ensure that the worker can have, if need be, rest periods that may be staggered, planned in advance and available in the longer term. Any carry-over period must be substantially longer than the reference period in respect of which it is granted.

39. That period must also protect the employer from the risk that a worker will accumulate periods of absence of too great a length, and from the difficulties for the organisation of work which such periods might entail.

40. In the present case, the carry-over period laid down in the third subparagraph of Article 11(1) of the EMTV[69] is fifteen months, which is longer than the reference period to which it relates. This distinguishes the present case from the case which gave rise to the judgment in *Schultz-Hoff and Others*, in which the carry-over period was six months.

41. In that regard it should also be noted that, under Article 9(1) of Convention No. 132 of the International Labour Organisation of 24 June 1970 concerning Annual Holidays with Pay (revised), the uninterrupted part of the annual holiday with pay must be granted and taken no later than one year, and the remainder of the annual holiday with pay no later than eighteen months, from the end of the year in respect of which the holiday entitlement has arisen. That rule may be understood as being based on the consideration that when the periods for which it provides expire the purpose of the leave entitlement can no longer be fully achieved.

42. Therefore, given that, according to recital 6 in its preamble, Directive 2003/88 has taken account of the principles of the International Labour Organisation with regard to the organisation of working time, the calculation of the carry-over period should take into account the purpose of the right to annual leave, as it results from Article 9(1) of that convention."

5.28 Against this background, according to the CJEU, a carry-over period of fifteen months is not contrary to the Working Time Directive. The Court concludes that Article 7(1) of the Working Time Directive does not preclude national provisions which limit, by means of a carry-over period of fifteen months on the expiry of which the right to such leave lapses, the accumulation of entitlements to paid annual leave of a worker who is unfit for work for several consecutive reference periods.

5.29 Six months after the *KHS/Schulte* judgment, the CJEU held in the *Neidel* judgment that a carry-over period of nine months is contrary to Article 7 of the Working Time Directive.[70] In *Neidel* the Court reiterated that the duration of the carry-over period must be substantially longer than the duration of the reference period. That was not so in the case in question; the carry-over period of nine months was shorter than the reference period of one year.

5.30 The Court has repeated the considerations from the *KHS* judgment on several occasions. It did so, for instance, in the *Fraport* judgment.[71] In that case the German court had (once again) referred preliminary questions on the carry-over period of fifteen months, this time concerning a situation in which two workers had fallen ill during a reference period. Under German law those leave days had lapsed. The CJEU then answered the question whether the right to annual leave precludes national legislation under which the right to annual leave, acquired in a reference period in which total invalidity or incapacity for work occurred owing to an illness which has persisted since then, may lapse, either after a carry-over period authorised by national law or later, even though the employer did not enable the worker to exercise that right in good time.

[69] EMTV is the Uniform general collective agreement for the metal and electrical industry of North Rhine-Westphalia (*Einheitlicher Manteltarifvertrag für die Metall und Elektroindustrie Nordrhein-Westfalen*) of 18 December 2003.

[70] CJEU 3 May 2012, C-337/10, ECLI:EU:C:2012:263 (*Neidel*), in particular paras. 10, 12, 41 and 42.

[71] CJEU 22 September 2022, C-518/20 and C-727/20, ECLI:EU:C:2022:707 (*Fraport*). See also CJEU 29 November 2017, C-214/16, ECLI:EU:C:2017:914 (*King*), paras. 53 and 54.

5.31 In answering that question the CJEU repeats its settled case law in paras. 24-31 and then concludes, in para. 32, that it is therefore excluded that a worker's right to a minimum number of days of paid annual leave, guaranteed by EU law, is curtailed in a situation where the worker could not perform his obligation to work during the reference period because of an illness. After that the CJEU repeats the rule laid down in *KHS* that the foregoing does not mean, however, that the right to annual leave of workers with long-term incapacity for work can accumulate indefinitely (my underlining):*

> "33. Third, it should be recalled that limitations may be imposed on the fundamental right to paid annual leave enshrined in Article 31(2) of the Charter only under the strict conditions laid down in Article 52(1) of the Charter and, in particular, with due regard for the essence of that right.
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> 34. Thus, in the specific context in which the workers concerned were prevented from exercising their right to paid annual leave owing to their absence from work due to sickness, the Court has held that if a worker who is unfit for work for several reference periods were entitled to accumulate, without any limit, all the entitlements to paid annual leave acquired during the period of absence from work, such unlimited accumulation would no longer reflect the actual purpose of the right to paid annual leave (judgment of 29 November 2017, *King*, C-214/16, EU:C:2017:914, paragraphs 53 and 54 and the case law cited).
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> 35. The Court has already recognised that there are 'specific circumstances' which justify – in order to avoid the negative consequences of an unlimited accumulation of entitlements to paid annual leave acquired during a period of absence on account of long-term sickness – derogation from the rule that the right to paid annual leave cannot lapse. Such a derogation is based on the very purpose of the right to paid annual leave and must also protect the employer from the risk that a worker will accumulate periods of absence of too great a length and from the difficulties for the organisation of work which such periods might entail (judgment of 22 November 2011, *KHS*, C-214/10, EU:C:2011:761, paragraphs 34 and 39).
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> 36. In the specific circumstances in which a worker is unfit for work for several consecutive reference periods, the Court has therefore held that, having regard not only to the protection of workers pursued by Directive 2003/88, but also to the protection of employers from the risk that a worker will accumulate periods of absence of too great a length and from the difficulties for the organisation of work which such periods might entail, Article 7 of that directive must be interpreted as not precluding national provisions or practices which limit the accumulation of entitlements to paid annual leave of a worker who is unfit for work for several consecutive reference periods by means of a carry-over period of 15 months, on the expiry of which the right to such leave lapses (judgments of 22 November 2011, *KHS*, C-214/10, EU:C:2011:761, paragraphs 29 and 30, and of 29 November 2017, *King*, C-214/16, EU:C:2017:914, paragraph 55).
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> 37. Consequently, it must be examined, subject to the verifications to be carried out by the referring court, whether circumstances such as those of the main proceedings are 'specific' within the meaning of the case law cited in the preceding paragraph, so that they justify derogation from the principle laid down in Article 7 of Directive 2003/88 and in Article 31(2) of the Charter, as interpreted by the Court, that that right cannot lapse at the end of the reference period and/or of a carry-over period fixed by national law where the worker has been unable to take his leave."

5.32 *Fraport* thus confirms that, by way of exception, the right to annual leave of workers who are unfit for work may lapse, provided that the strict conditions of Article 52(1) of the Charter are met (for those conditions see 4.15-4.16). Such national legislation constitutes, as is apparent from the quotation, a derogation from Article 31(2) of the Charter that is permitted under Article 52(1) of the Charter.

*Translator's note: The underlining referred to here and elsewhere in the Opinion is not visible in the source text on which this translation is based.

5.33 The Court then adds that this exception does not automatically apply to workers who are unfit for work and who claim the right to annual leave which they accrued *before* they fell ill.[72] The Court therefore concludes that Article 7 of the Working Time Directive and Article 31(2) of the Charter preclude national legislation under which a worker's right to paid annual leave, acquired in a reference period in which that worker actually worked before becoming totally invalid or unfit for work as a result of an illness which has persisted since then, may lapse, either after a carry-over period authorised by national law or later, even though his employer did not enable him to exercise that right in good time.

5.34 It emerges from these decisions that a rule of national law under which leave days accrued during incapacity for work may lapse if they cannot be taken within a certain period is regarded by the CJEU as compatible with the EU right to annual leave. That period (the carry-over period) must, however, be substantially longer than the reference period (the period in which the days were accrued). Moreover, leave days accrued *before* the (total) incapacity for work occurred may not lapse.

5.35 The CJEU finds the justification for this, on the one hand, in the consideration that leave days should not accumulate without limit and, on the other hand, in the consideration that on expiry of a period of one year (for the uninterrupted part) or eighteen months (for the interrupted part) the purpose of leave days can no longer be achieved. With that latter consideration the Court aligns itself with Article 9(1) of ILO Convention No. 132 (see also 4.25).

5.36 It is important to note that the exception which the CJEU has thus accepted to the principle that workers who are unfit for work also accrue leave days at wage value, even if their incapacity for work is long-term, relates specifically to national rules which contain a period after which those leave days lapse. As discussed, the said principle is itself an exception to the main rule that the right to annual leave protected by EU law is calculated on the basis of the time actually worked (see 5.9-5.10).

(iv) The *GTC Dijon* order of 15 July 2025

5.37 Finally, reference may be made to the *GTC Dijon* order of the CJEU.[73] As will be discussed in chapter 8 below, several subdistrict courts have held, relying on this order, that no leave days accrue during dormant employment contracts.

5.38 It must first of all be noted about this order that it is an order under Article 99 of the Rules of Procedure of the Court. That article reads as follows:

> "Where a question referred to the Court for a preliminary ruling is identical to a question on which the Court has already ruled, where the reply to such a question may be clearly deduced from existing case-law or where the answer to the question referred for a preliminary ruling admits of no reasonable doubt, the Court may at any time, on a proposal from the Judge-Rapporteur and after hearing the Advocate General, decide to rule by reasoned order."

5.39 Pennings writes that the full procedure need not be followed for decisions giving effect to Article 99. According to him, such decisions somewhat resemble a decision of the Supreme Court under Article 81 of the Judiciary (Organisation) Act (*Wet op de rechterlijke organisatie*, RO), albeit that orders under Article 99 still give an extensive account of the case law of the Court.[74]

[72] CJEU 22 September 2022, C-518/20 and C-727/20, ECLI:EU:C:2022:707 (*Fraport*), para. 45.

[73] CJEU 15 July 2025, C-37/25, ECLI:EU:C:2025:586 (*GTC/Dijon*).

[74] F. Pennings, 'Opbouw van vakantiedagen tijdens slapend dienstverbanden: geldt de jurisprudentie van het Hof van Justitie

The order is available only in French. I received a sworn translation through the judiciary.

5.40 That case concerned a dispute between the worker YH and his employer (the registry of the commercial court in Dijon). YH had applied to the French national court for termination of his employment contract and had also requested that the employer be ordered to pay an allowance in lieu of the leave days he had accrued during sickness but not taken. YH had been sick since February 2022. It is apparent from an official report drawn up by a bailiff in 2024, on the basis of the freely accessible content of his Facebook account, that during his sickness YH regularly went on holiday and went out for dinner. The French referring court takes the view that YH is enjoying rest and has time for relaxation and recreation.

5.41 Against this background the French court refers preliminary questions which, according to the Court, in essence ask whether Article 7(1) of the Working Time Directive and Article 31(2) of the Charter must be interpreted as meaning that the right to annual leave accrued during a reference period may lapse or be reduced after the end of that period where the worker concerned was on sick leave in that reference period on account of a non-occupational illness, and that sick leave was not accompanied by any restriction on that worker's possibilities of going out or on his activities.

5.42 After noting that it is making use of Article 99, the Court repeats almost word for word paras. 24-29 and 31-32 of the *Fraport* judgment, and then concludes that in a situation such as that at issue in the main proceedings the right to paid annual leave cannot lapse or be reduced on the ground that it was accrued by the worker during his sick leave. This also applies where, during his sick leave, the worker is permitted to leave his home, to go on holiday and to engage in leisure activities, and where the illness is not of occupational origin. The Court then repeats its settled case law that the purpose of the right to sick leave is to enable the worker to recover from his illness and that, since incapacity for work owing to sickness is unforeseeable and beyond the worker's control, the period of incapacity for work must be counted as working time. After that the Court repeats, virtually word for word, paras. 33-36 of the *Fraport* judgment on the specific circumstances, as already identified in the *KHS* judgment, on the basis of which accrued leave entitlements of workers with long-term incapacity for work may lapse after the end of a carry-over period, as quoted at 5.28 above. See the following paragraphs:

> "30. Third, it should be recalled that limitations on the fundamental right to paid annual leave, as laid down in Article 31(2) of the Charter, may be imposed only in compliance with the strict conditions of Article 52(1) thereof, and in particular with due regard for the essence of that right (judgment of 22 September 2022, *Fraport and St. Vincenz-Krankenhaus*, C-518/20 and C-727/20, EU:C:2022:707, paragraph 33).
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> 31. Thus, in the specific context in which the workers concerned were unable to exercise their right to paid annual leave owing to absence from work as a result of sickness, the Court has held that, although a worker who is absent owing to incapacity for work for several consecutive reference periods would in principle be entitled to unlimited accumulation of all the entitlements to paid annual leave accrued during that period of absence, such unlimited accumulation would no longer reflect the actual purpose of the right to paid annual leave (judgment of 22 September 2022, *Fraport and St. Vincenz-Krankenhaus*, C-518/20 and C-727/20, EU:C:2022:707, paragraph 34 and the case law cited).
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> 32. The Court has already recognised the existence of 'specific circumstances' which justify, in order to avoid the negative consequences of an unlimited accumulation of entitlements to paid annual leave accrued during a period of absence on account of long-term sickness, derogating from

ook voor Nederland?', *AR Updates* annotation to ECLI:NL:RBROT:2026:2021.

> the rule that those entitlements cannot lapse. Such a derogation is based on the very purpose of the right to paid annual leave and on the need to protect the employer from the risk of an excessive accumulation of periods of absence of the worker and the difficulties which these may entail for the organisation of work (judgment of 22 September 2022, *Fraport and St. Vincenz-Krankenhaus*, C-518/20 and C-727/20, EU:C:2022:707, paragraph 35 and the case law cited).
>
> 33. Accordingly, with regard to the specific circumstances in which a worker is unfit for work for several consecutive reference periods, the Court has held that, having regard not only to the protection of the worker at which Directive 2003/88 is aimed, but also to that of the employer, who is faced with the risk of an excessive accumulation of periods of absence of the worker and the difficulties which this may entail for the organisation of work, Article 7 of that directive must be interpreted as not precluding national provisions or practices which, by means of a carry-over period of fifteen months on the expiry of which the right to paid annual leave lapses, limit the accumulation of entitlements to such leave for a worker who is unfit for work for several consecutive reference periods (judgment of 22 September 2022, *Fraport and St. Vincenz-Krankenhaus*, C-518/20 and C-727/20, EU:C:2022:707, paragraph 36 and the case law cited).
>
> 34. Nevertheless, the Court has held that there can be no derogation from the right laid down in Article 7 of Directive 2003/88 and Article 31(2) of the Charter, according to which an acquired right to paid annual leave may not lapse at the end of the reference period and/or of a carry-over period fixed by national law where the worker has not been enabled to take that leave, in particular if the employer has not complied in good time with its obligations to encourage and inform as regards the taking of paid annual leave (judgment of 22 September 2022, *Fraport and St. Vincenz-Krankenhaus*, C-518/20 and C-727/20, EU:C:2022:707, paragraphs 41 and 42)."

5.43 The Court concludes that the referring court has not set out the existence of specific circumstances. It is for the referring court to assess whether such specific circumstances arise in the main proceedings (para. 35).

5.44 The Court's answer to the preliminary questions is that Article 7(1) of the Working Time Directive and Article 31(2) of the Charter must be interpreted as meaning that the right to paid annual leave accrued during a reference period cannot lapse or be reduced after the end of that period where the worker concerned was on sick leave during that period on account of a non-occupational illness, and that sick leave was not accompanied by any restriction on that worker's possibilities of going out or on his activities, unless there are specific circumstances which could justify a derogation from the fundamental right to an annual period of paid leave.

5.45 It must be emphasised that, with its reference to the 'specific circumstances', the Court explicitly refers to the *Fraport* judgment. On this point it was held in *Fraport* (para. 36, quoted at 5.31) that EU law does not preclude national provisions or practices which limit the accumulation of entitlements to paid annual leave of a worker who is unfit for work for several consecutive reference periods by means of a carry-over period of fifteen months, on the expiry of which the right to such leave lapses. In that regard *Fraport* referred to the *KHS* case, in which a carry-over period of fifteen months was considered acceptable (paras. 37-42, quoted at 5.27).

5.46 Neither in *GTC Dijon* nor in *Fraport* nor in *KHS* did the Court refer in general terms to 'specific circumstances' or 'special circumstances' on the basis of which it would be possible to derogate from the fundamental principle that workers with (long-term) incapacity for work also accrue leave days at wage value. Only one exception has been accepted, for a period laid down in national law after which leave days accrued during periods of incapacity for work lapse, in order to prevent an unlimited accumulation of leave days (see also 5.34-5.36 above).

Interim conclusion

5.47 The case law of the CJEU on the right to annual leave of workers with (long-term) incapacity for work can be summarised as follows.

5.48 The right to annual leave is a particularly important principle of EU social law which is expressly laid down in Article 31(2) of the Charter. Article 7(1) of the Working Time Directive reflects and gives concrete expression to the fundamental right to annual leave laid down in the Charter. That fundamental right comprises not only the right to leave, but also the right to pay during the leave and the right to an allowance at the end of the employment in lieu of the leave days not taken. Member States may implement the right to annual leave only within the limits expressly laid down in the Working Time Directive. No conditions may be attached to the coming into existence of the right to annual leave.

5.49 The right to annual leave has a dual purpose: it enables workers (i) to rest from carrying out the tasks imposed by the employment contract and (ii) to enjoy a period of relaxation and leisure. The right to annual leave is therefore based on the premise that the worker has actually worked. In principle, the right to annual leave is therefore calculated on the basis of the time the worker has actually worked. There are, however, exceptions to this rule, among others in the situation where the worker is unfit for work. Because incapacity for work is unforeseeable and beyond the worker's control, sick workers are treated, as regards the right to annual leave, in the same way as workers who are fit for work.

5.50 The equal treatment of workers who are unfit for work with workers who have worked means that the right to annual leave of workers who are unfit for work does not, in principle, lapse after the end of the reference period and any carry-over period applicable in the Member States where they were unfit for work throughout that entire period.

5.51 The foregoing does not mean, however, that the right to annual leave of workers who are unfit for work must accumulate indefinitely. The Court recognises the existence of 'specific circumstances' in the sense that Member States may provide that accrued leave days of workers with long-term incapacity for work lapse after a carry-over period. The duration of that carry-over period must be substantially longer than the duration of the reference period. Such national legislation is a derogation from Article 31(2) of the Charter that is permitted under Article 52(1) of the Charter.

5.52 That derogation is based, in the words of the Court, on the very purpose of the right to annual leave; an indefinite accumulation of the right to annual leave does not reflect the purpose of the right to annual leave, which is to enable the worker to rest from the work performed. The interest of the employer is also taken into account here; a derogation from the rule that the right to annual leave cannot lapse protects the employer from the risk that a worker will accumulate periods of absence of too great a length and from the difficulties for the organisation of work which such periods might entail.

5.53 The foregoing has been settled case law of the CJEU for many years. The recent *GTC Dijon* order does not depart from this line, but in fact confirms it. Neither *GTC Dijon* nor any other decision of the CJEU offers any basis for the idea that Member States may limit the accrual of leave days during long-term incapacity for work.

6 The Dutch legislation on leave days

6.1 The statutory rules on leave days entered into force in 1966 and are now contained in Section 7.10.3 BW (Articles 7:634 BW to 7:645 BW).[75] In so far as relevant, these rules provide as follows.

Accrual of leave days in the event of incapacity for work

6.2 Article 7:634(1) BW concerns the accrual of leave days:

> "1. For each year in which the employee has been entitled to wages for the full agreed working time, the employee acquires an entitlement to leave of at least four times the agreed working time per week or, if the agreed working time is expressed in hours per year, of at least a corresponding time."

6.3 What is decisive for the accrual of leave days is therefore not whether work is performed, but whether there is a right to wages. This link between the right to wages and the right to leave has existed ever since the entry into force of the statutory rules on leave days in 1966. The explanatory memorandum from the 1960s states the following on this point:[76]

> "It would, generally speaking, go too far if in all circumstances the entitlement to leave were to grow by the mere fact of the continuation of the employment. It goes without saying that that entitlement grows as long as the work is performed normally. And this also seems reasonable in the case of absence or leave during which wages continue to be paid. For if, as far as the payment of wages is concerned, such a period is regarded as completed working time, there is no reason to take a different view as far as the entitlement to leave is concerned."

6.4 Article 7:635 BW then contains various exceptions to the main rule that leave days are accrued only if there is a right to wages. These concern, for example, the situation where an employee has been called up for military service (paragraph 1(a)), is a member of the Senate (paragraph 1(e)) or is on short-term or long-term care leave (paragraph 1(f)). Female employees on pregnancy or maternity leave (paragraph 2) and employees on adoption leave (paragraph 3) also accrue leave days (in full), even though they have not been (fully) entitled to wages during the year.

6.5 Furthermore, Article 7:635(1)(d) BW contains a more general exception, namely that an employee who, otherwise than as a result of pregnancy, maternity or adoption leave, is unable against his will to perform the agreed work nevertheless accrues leave days despite the absence of a right to wages. One may think here of an employee who is willing to work during a strike.[77]

6.6 The current legislation on leave days contains no explicit provision on the accrual of leave days during incapacity for work. Until 1 January 2012, however, that was different. Under the then Article 7:635(4) BW (old), leave days were accrued only in respect of the last six months of

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[75] Act of 14 July 1966, *Stb.* 1966, 290.

[76] *Kamerstukken II* 1962/63, 7168 nr. 3, p. 7. This concerned the explanatory notes on Article 1638dd BW, the predecessor of the current Article 7:634 BW. On the link between the accrual of leave days and the right to wages see also Pennings, who observes that this link is not accidental, because the bill was based on ILO Recommendation No. 98 and that recommendation also contained this link, F.J.L. Pennings, 'Het doel van het recht op vakantie: is herbezinning nodig?', *TRA* 2025/23, at 7.

[77] Thus Verhulp. He writes that according to case law of the Supreme Court (7 May 1976, *NJ* 1977/55) an employee who is willing to work may, in certain circumstances, not be entitled to continued payment of his wages. On the basis of this statutory provision the accrual of leave entitlements is in any event not at risk, see E. Verhulp, *T&C Arbeidsrecht*, art. 7:635 BW, aant. 1 under e, fifth edition, 2008.

the period of sickness.[78] A limitation therefore applied here in the sense that, despite the right to wages, there was nevertheless no (full) right to accrual of leave days.

6.7 With the *Schultz-Hoff* judgment of the CJEU (2009), in which the Court held that the Working Time Directive makes no distinction between sick workers and workers who actually perform work (see 5.7 above), Article 7:635(4) (old) BW proved to be no longer tenable.[79] For that reason the limitation in Article 7:635(4) (old) BW was deleted.[80]

6.8 The explanatory memorandum states that, as a result of the deletion, no distinction is made any longer between sick and healthy employees as regards the accrual of leave days:[81]

> "Sick employees thereby obtain the same entitlements to minimum leave as other employees, because the acquisition of entitlement to leave is linked to the right to wages, which also exists in the event of sickness (Article 7:629 BW)."

6.9 The parliamentary documents do not state explicitly that the accrual of leave days stops after two years of sickness. That does, however, appear to be assumed. For instance, the memorandum of reply observes that the deletion of the limitation on the accrual of leave days during sickness means that employees with long-term sickness will accrue full minimum leave days and will therefore accrue, over a period of two years, a maximum of thirty days[82] more than had been the case until then.[83] That the question of accrual after two years of sickness was not explicitly addressed is, incidentally, not all that surprising. After all, dormant employment contracts are primarily a phenomenon of the Work and Security Act (*Wet werk en zekerheid*). Under the old law on dismissal dormant employment contracts also occurred, but to a much lesser extent than in the first years after the introduction of the new law on dismissal (see on this also chapter 7).

6.10 In any event, the observation in the explanatory memorandum (see 6.8 above) that with the deletion of Article 7:635(4) (old) BW no distinction is made any longer between sick and healthy employees as regards the accrual of leave days was not entirely complete. After all, the distinc-

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[78] Or in respect of the part of the time in which the partially unfit employee actually performed work. Because employees with a dormant employment contract no longer perform work, this aspect is left out of further consideration.

[79] For the sake of completeness it is noted that this amendment of the law changed more in the rules on leave days, partly also in response to the *Pereda* judgment (ECJ 7 November 2009, C-277/08), which mainly concerned situations in which workers fall ill before or during leave that has already been scheduled. Those changes are not relevant to the present case and I therefore leave them out of further consideration. See on this my Opinion of 12 May 2023, ECLI:NL:PHR:2023:494, at 7 and 8.

[80] Incidentally, in two judgments concerning State liability for incorrect implementation of the Working Time Directive, the Supreme Court held that already after the *BECTU* judgment (which dates from 2001, that is, ten years before the *Schultz-Hoff* judgment) the State had to take account of the interpretation which the CJEU had given in so many words in *Schultz-Hoff* (namely that no distinction may be made between sick and healthy workers as regards the accrual of leave days). After all, it had already been expressly held in *BECTU* that the very existence of the right to annual leave may not be subject to any preconditions whatsoever. See Supreme Court 18 September 2015, ECLI:NL:HR:2015:2722 and 2723, both para. 3.5.3. For criticism of this consideration see M.S.A. Vegter, 'Aansprakelijkheid Staat voor misgelopen vakantiedagen', *TRA* 2015/102 and J.R. Vos in *JAR* 2015/257.

[81] *Kamerstukken II* 2009/10, 32 465, nr. 3, p. 4.

[82] In the case of full-time employment the minimum of four weeks' leave per year results in twenty leave days per year. Over two years that is forty days. Under Article 7:635(4) (old) BW those same two years resulted in only ten leave days (because leave days were accrued only in respect of the last six months of sickness).

[83] *Kamerstukken I* 2010/11, 32 465, C, p. 1. In the Note following the report, too, it had already been observed, in the context of the costs for employers, that after the amendment employees with long-term sickness accrue thirty extra leave days, see *Kamerstukken II* 2010/11, 32465, nr. 6, p. 11. Cf. also J.R. Vos, 'Het doolhof van vakantie en ziekte (deel 1 - opbouw)', *TAP* 2026/114, p. 11 (footnote 19).

tion was removed only for sick employees who are entitled to wages.

6.11 Several authors have argued that the statutory rules on the accrual of leave days are still not in conformity with EU law, because the employee who is unfit for work and receives no wages does not – owing to the link in Article 7:634 BW between wages and accrual of leave – accrue any leave days. According to Bouwens, among others, however, Article 7:635(1)(d) BW (see 6.5) can be used as a basis for an interpretation of the Dutch leave rules in conformity with EU law.[84] After all, under that provision leave is nevertheless accrued, despite the absence of a right to wages, by the employee who "otherwise than as a result of the circumstances (…) is unable against his will to perform the agreed work". The employee who is unfit for work can be brought within this category, and can thus nevertheless claim the accrual of leave days.

6.12 In view of the direct horizontal effect of the EU-law right to annual leave, however, it is less relevant whether Article 7:635(1)(d) BW offers a 'hook' for the accrual of leave days for employees who are unfit for work and no longer receive wages. I therefore do not go into this question any further.

Lapse of statutory leave days

6.13 With effect from 1 January 2012, a period of six months after which statutory leave days lapse was introduced in Article 7:640a BW:

> "The entitlement to the minimum referred to in Article 634 (https://wetten.overheid.nl/BWBR0005290/2026-07-01/0) lapses six months after the last day of the calendar year in which the entitlement was acquired, unless the employee has not reasonably been able to take leave up to that time. The period of six months referred to in the first sentence may be derogated from in favour of the employee by written agreement."

6.14 The purpose of this period is to encourage the regular and timely taking of minimum leave, also by employees who are sick and to whom reintegration obligations apply. The period also applies to those employees, as follows from the parliamentary explanatory notes:[85]

> "The period after which entitlements lapse applies both to healthy employees and to employees with (long-term) sickness, in so far as they are reasonably able to take minimum leave days. For employees with long-term sickness, too, the taking of minimum leave days has a recuperative function, namely recovering or resting from the activities which their reintegration obligation entails. Now that healthy employees are required to take minimum leave days in order to be able to recuperate, there is no apparent reason why this may not be required of employees with long-term sickness (with reintegration obligations)."

6.15 Furthermore, the legislative history of the amended leave legislation states that (as 'a logical consequence' of the abolition of the limited accrual) in the event of partial incapacity for work statutory leave days are taken in full: for employees who are unfit for work and who can partly perform the stipulated work, leave days are deducted, when the minimum leave is taken, for the full contractual working time, and thus not only for the hours actually worked, so it is stated.[86]

6.16 The period after which entitlements lapse does not, however, apply to employees who, for medical reasons or in connection with other special circumstances, have not reasonably been

[84] W.H.A.C.M. Bouwens, Vakantie en ziekte, Hof van Justitie EU 24 januari 2012, zaak C-282/10 (Dominguez)', *Ars Aequi* 2012/385.

[85] *Kamerstukken I* 20110/11, 32 465, C, p. 2.

[86] *Kamerstukken II* 2009/10, 32 465, nr. 3, p. 5.

able to take the leave days:[87]

> "Situations are conceivable, however, in which the employee has not been able to take the minimum leave. In that case, according to the interpretation of Article 7 of Directive 2003/88/EC by the CJEU, the minimum leave entitlements may not lapse. In connection with this, an exception is proposed for the situation where the employee has not reasonably been able to take his minimum leave. These are situations in which, during the year of accrual and the following 6 months, the employee has not reasonably been able, for medical reasons or in connection with other special circumstances, to make use of his minimum leave entitlement."

6.17 If the period after which entitlements lapse does not apply because the employee has not reasonably been able to take the leave days, a limitation period of five years applies under Article 7:642 BW. Employees who are totally unfit for work and who have been exempted from reintegration obligations fall within this category: they have not reasonably been able to take the leave days. They are therefore not subject to the period of Article 7:640a BW (six months), but only to the period of Article 7:642 BW (five years).

6.18 Finally, it should be noted in this connection that, with the amendments discussed above, the Dutch legislature did not take account of the *KHS* judgment of the CJEU. That judgment dates from November 2011, whereas the amendments discussed here entered into force on 1 January 2012. At the time the *KHS* judgment appeared, the parliamentary consideration of the bill had already been completed. As already discussed above, it follows from the *KHS* judgment, among other things, that, in order to prevent an indefinite accumulation of leave entitlements, EU law does not preclude leave entitlements of workers with long-term incapacity for work from lapsing after the end of a carry-over period. It is relevant in that regard, however, that the carry-over period is substantially longer than the reference period.

6.19 Against this background it has been observed in the literature that the six-month period after which entitlements lapse may be contrary to EU law in certain situations, for example in the situation where an employee with long-term incapacity for work does perform reintegration activities and therefore cannot rely on the exception to the six-month period contained in Article 7:640a BW.[88] For employees with long-term sickness who perform no reintegration activities at all, this question does not arise. After all, that period does not apply to them, and the leave days become time-barred under Article 7:642 BW only after five years.

Conclusion

6.20 In Dutch law, the accrual of leave days is in principle linked to the right to wages. Only in a number of exceptional cases mentioned in Article 7:635 BW is there nevertheless a right to accrual of leave days without there being a (full) right to wages. Incapacity for work is not mentioned as one of those exceptions. Until 1 January 2012, Article 7:635(4) (old) BW even contained an exception in the sense that, despite the existence of the right to wages, a right to accrual of leave days existed only during the last six months of incapacity for work. The *Schultz-Hoff* judgment prompted the legislature to delete that limitation. This still left a

[87] *Kamerstukken I* 20110/11, 32 465, C, p. 2.

[88] See, among others, E. Verhulp, in: *T&C BW*, art. 7:638 BW, aant. 7 (online, current up to 01-04-2026); F.M. Dekker, 'Opbouw van vakantiedagen tijdens ziekte', *TRA* 2024/82 at 5; S.S.M. Peters, *Arbeidsovereenkomst*, art. 7:640a BW, current up to 08-07-2024; K.A. Görgün and C. Gunning, 'De zieke werknemer met vakantie: kosten noch moeite bespaard', *ArbeidsRecht* 2022/28, at 5.3; H.J. van Drongelen, J. Ten Hoor, S.J. Rombouts, 'An all-European holiday? De vakantieregeling in de Arbeidstijdenrichtlijn en het Burgerlijk Wetboek', *ArA* 2015/2, pp. 20-22; A.G. Veldman, 'Verval vakantierechten bij langdurige arbeidsongeschiktheid', *TRA* 2012/41.

distinction, however, namely between employees who have been unfit for work for more than two years and therefore no longer receive wages, and employees who have not.

7 Dormant employment contracts

7.1 There is no statutory definition of a dormant employment contract. But since the introduction of the Work and Security Act (Wwz) such an employment contract has become an established concept in employment law.[89] Although dormant employment contracts also existed under the 'old' law on dismissal, the legal reality was, in the words of Frikkee and Verhulp, a different one.[90] They write that before the introduction of the Wwz the employee was sometimes also kept in dormant employment because the employer felt that the employee who was unfit for work still belonged: he was, for example, invited to the annual Christmas drinks and to anniversaries and still received a Christmas hamper. In addition there was a category of 'forgotten' employees, who had disappeared from the employer's view at the moment the obligation to continue paying wages had ended and the employee became entitled to an incapacity benefit from the UWV.[91]

7.2 In the first years after the introduction of the Work and Security Act (Wwz) the number of dormant employment contracts increased enormously. The reason for this was that under the 'new' law on dismissal employers are obliged to pay the statutory transition payment (also) to employees with long-term incapacity for work. In order to escape this obligation, many employers kept the employment contract with employees with long-term incapacity for work in existence. According to estimates at the time, there were between several thousand and tens of thousands of dormant employment contracts.[92]

7.3 With the Transition Payment Compensation Scheme Act (*Wet compensatieregeling transitievergoeding*), under which employers are (largely) compensated for the payment of a transition payment to employees with long-term incapacity for work, the legislature intended to put an end to the phenomenon of 'dormant employment contracts'.[93] In the *Xella* decision the Supreme Court held that this compensation scheme and the reasons given in the legislative history for its introduction mean that it is a standard of good employment practice within the meaning of Article 7:611 BW that a 'dormant employment contract' ought in principle to be terminated if the employee so wishes and the employer has no reasonable interest in its continuation. That standard also means that in that case the employer ought in principle to award the employee a payment equal to the statutory transition payment, according to the Supreme Court.[94]

7.4 Although I have found no concrete figures, the compensation scheme and the *Xella* decision of the Supreme Court appear to have curbed the phenomenon of dormant employment contracts considerably.

7.5 Dormant employment contracts nevertheless still occur in practice. This is apparent, for exam-

[89] Cf. also Pennings at 8.13 of this Opinion.

[90] C.J. Frikkee and E. Verhulp, 'Slapende dienstverbanden na het Hoofdlijnenakkoord 2024', *ArbeidsRecht* 2025/12, at 1. In footnote 7 they point out, with reference to Supreme Court 12 May 1989, ECLI:NL:HR:1989:AC2497, *NJ* 1989/801, with note by P.A. Stein, that there were still a few cases of a dormant employment contract after mitigation of wages.

[91] On dormant employment contracts under the 'old' law on dismissal see also my Opinion preceding the *Xella* decision, 18 September 2019, ECLI:NL:PHR:2019:899, at 4.10-4.14.

[92] See my Opinion preceding the *Xella* decision, 18 September 2019, ECLI:NL:PHR:2019:899, at 11.1.

[93] Thus the Supreme Court in the *Xella* decision of 8 November 2019, ECLI:NL:HR:2019:1734, para. 2.7.2.

[94] See likewise para. 2.7.2 of the *Xella* decision.

ple, from the case law of the courts of fact, to be discussed in chapter 8 below, on the accrual of leave days during a dormant employment contract.

7.6 In addition, as the subdistrict court considers in the order for reference of 2 March 2026, a dormant employment contract arises in practice with some regularity at the end of the period of two years of sickness, because the employer has to ask the UWV for permission to dismiss. That procedure takes some time. According to the UWV a decision is usually taken within four weeks.[95] But the procedure can take longer, for example where the employer has not submitted a complete application or where the UWV obtains expert advice on the employee's occupational-medical capacities.[96]

7.7 After receiving the permission, the employer still has to observe a notice period when giving notice of termination of the employment contract. In that regard, the time taken by the procedure for applying for the dismissal permit may be deducted from the notice period, albeit that a notice period of at least one month always remains (Article 7:672(6) BW). As a result, a 'dormant period' may arise prior to the termination of the employment of an employee who is unfit for work. These are therefore relatively short dormant employment contracts, of a few weeks to months. The present case, too, concerns a short dormant employment contract, namely from 27 July 2025 to 21 August 2025.

7.8 The question is whether an employer can in practice prevent such a 'dormant period'. An employer can of course apply for a dismissal permit before the end of the waiting period. But it cannot do so *too* far in advance of the end of the waiting period either. A dismissal permit is valid for no longer than four weeks (Article 7:671a(6) BW). If an employer receives a dismissal permit more than four weeks before the end of the waiting period, the employer therefore cannot use it. Moreover, the UWV does not grant a dismissal permit if the prohibition on giving notice during sickness still applies, unless it may reasonably be expected that the prohibition on giving notice will no longer apply within four weeks of the date of the decision on the application (Article 7:671a(11) BW). For this reason, too, the employer must not apply for a dismissal permit too early.

7.9 Whether 'dormant periods' between the end of the obligation to continue paying wages and the termination of the employment contract occur frequently is not known to me. I have not been able to find any information on this.[97] If there were indeed a widespread problem – making it difficult in practice to have the end of the waiting period and the termination of the employment contract follow one another seamlessly – the legislature could provide that the dismissal permit obtained from the UWV is valid for longer (amendment of Article 7:671a(6) BW) or that a dismissal permit can be granted earlier, despite a prohibition on giving notice still existing (amendment of Article 7:671a(11) BW).

7.10 The remainder of this chapter briefly considers recent developments which may come to affect the phenomenon of dormant employment contracts.

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[95] See *Uitvoeringsregels ontslag wegens langdurige arbeidsongeschiktheid*, p. 25, available at www.uwv.nl.

[96] See Article 4(3) of the UWV Dismissal Procedure Regulations (*Regeling UWV ontslagprocedure*).

[97] Figures are known, however, on the number of applications for dismissal on grounds of incapacity for work submitted and granted. Figures from the UWV show that in 2025 3,379 applications for dismissal were submitted and 2,296 dismissal permits were granted. In 2024 there were 3,204 applications submitted and 2,249 dismissal permits granted. See *UWV Kwantitatieve informatie 2025*, p. 43, available at www.uwv.nl.

(i) The transition payment compensation scheme

7.11 Until recently it looked as though the statutory compensation scheme would disappear.[98] Under the Schoof government a bill had been introduced under which the compensation scheme would continue to apply only to small employers.[99] Limiting the possibility of compensation to small employers was regarded as appropriate, as can be read in the explanatory memorandum, because medium-sized and large employers are expected to be financially strong enough to pay the transition payment upon dismissal without any compensation in return. The explanatory memorandum states that it is recognised that in the case of employees with (long-term) sickness various burdens on employers are at issue, including the obligation to continue paying wages. Those obligations, however, serve a different purpose from that pursued by the transition payment, namely to encourage the employer to make efforts to prevent sickness and to make efforts for the reintegration of sick employees. The transition payment serves, on the one hand, as compensation for the dismissal; on the other hand, the payment is intended to facilitate the transition to other work. Although the government acknowledges that the burdens on employers with regard to sick employees can be considerable, the payment of the transition payment upon dismissal must be viewed separately from the obligations with regard to continued payment of wages and reintegration, according to the explanatory memorandum.[100] The considerable burdens on employers in the case of employees with long-term incapacity for work were therefore no reason for the Schoof government to maintain the compensation scheme for employers other than small employers.

7.12 The coalition agreement of the present government, however, provides that the compensation for the transition payment after two years of sickness will be abolished for all employers. At the same time, the intention is also that the existing transition payment will be reformed. Employers who have invested in good time and sufficiently in further training or retraining, or who make maximum efforts in connection with the reintegration obligations under the Gatekeeper Improvement Act (*Wet poortwachter*), will have lower or no obligations at all with regard to the new transition payment, according to the coalition agreement.[101]

7.13 Just before the 2026 summer recess a memorandum of amendment was then submitted to the bill of the previous government referred to at 7.11 above. The memorandum of amendment, however, provided solely for the abolition of the compensation scheme with effect from 1 January 2027 and not for a revision of the transition payment.[102] In the meantime it can be read in the Budget Memorandum (*Miljoenennota*) that the starting date of the measure is being postponed to 1 January 2028.[103] An (amended) bill for this has not yet been introduced. What this abolition will look like and/or whether it will (immediately) be accompanied by a reform of the transition payment is therefore not yet known. Nor is it clear what the consequences of the abolition of the compensation scheme will be for the '*Xella* obligation' of employers to cooperate in a termination of the dormant employment contract with the award of the transition payment (see also 7.3 above). In this connection the memorandum of amendment observes that

[98] See on this also the employer's written observations, point 17.

[99] *Kamerstukken II* 2025/26, 36 869, nr. 2 (bill). The explanatory memorandum states that this measure leads to an 80% decrease in the number of compensation awards and results in a structural saving of approximately € 380 million, *Kamerstukken II* 2025/26, 36 869 nr. 3, p. 2.

[100] *Kamerstukken II* 2025/26, 36 869 nr. 3, p. 3.

[101] *Aan de slag. Bouwen aan een beter Nederland*, Regeerakkoord 2026-2030, p. 45.

[102] *Kamerstukken II* 2025/26, 36 869, nr. 9 (memorandum of amendment).

[103] *Kamerstukken II* 2026/27, 37020, nr. 1, p. 40.

it is plausible that there will be an effect on the operation or scope of the rules developed in the case law, but that it is for the courts to decide in an individual case which obligations good employment practice entails.[104]

(ii) The employer's obligation to continue paying wages[105]

7.14 Under Article 7:629 BW, in the event of incapacity for work owing to sickness an employee in principle retains part of his entitlement to wages for 104 weeks. This period of 104 weeks corresponds to the regular waiting period for the Work and Income (Capacity for Work) Act (*Wet WIA*). That, too, is 104 weeks and starts to run from the first working day on which the employee did not work because of sickness or stopped working during working hours. As a rule, therefore, an employee only becomes eligible for a benefit under the Wet WIA after having been continuously unfit for work for two years and having received continued payment of (part of) his wages. During the period of the obligation to continue paying wages the employer is responsible for the reintegration of the employee, both in the first and in the second track.[106]

7.15 The amount of the obligation to continue paying wages is 70% of the wages fixed by reference to time.[107] In practice the obligation to continue paying wages often turns out higher for the employer, because under the applicable collective agreement there is usually an obligation to continue paying the employee's full wages in the first year of incapacity for work.[108]

7.16 Compared with other (European) countries, the duration of the obligation to continue paying wages in the Netherlands is very long. The employer's written observations point out that, after the Netherlands, Iceland has the longest obligation to continue paying wages in Europe, at 52 weeks, followed by the United Kingdom at 28 weeks.[109]

7.17 The current obligation to continue paying wages stems from a deliberate choice by the legislature to privatise social security. In 1996 the legislature opted for this on the basis of the idea that the employer can limit the occurrence (and continuation) of incapacity for work in its business by pursuing an active working-conditions and reintegration policy.[110] In this connection, an obligation to continue paying wages for 52 weeks was introduced in 1996 by the Act on the Extension of the Obligation to Continue Paying Wages during Sickness (*Wet uitbreiding loondoorbetalingsplicht bij ziekte*, Wulbz).[111] In 2004 the second year of sickness was also

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[104] *Kamerstukken II* 2025/26, 36 869, nr. 9 (memorandum of amendment).

[105] See at length on the obligation to continue paying wages my Opinion preceding the *Xella* decision, 18 September 2019, ECLI:NL:PHR:2019:899, section 5.

[106] Incidentally, some reintegration obligations remain in force after the end of the obligation to continue paying wages. See at length on these obligations both during and after the period of continued payment of wages, W.L. Roozendaal, 'Re-integratie', D.M.A. Bij de Vaate (ed.), *De zieke werknemer* (Monografieën Sociaal Recht nr. 16), Deventer: Wolters Kluwer 2021, chapter 5.

[107] An upper limit applies (the so-called maximum daily wage) and during the first 52 weeks the statutory minimum wage applicable to the employee applies as a lower limit. For an explanation see J.M. van Slooten, *T&C Arbeidsrecht*, art. 7:629 BW, aant. 2 (current up to 01-04-2026).

[108] According to Minister Aarts, for more than half of employees extra-statutory supplements mean full continued payment of wages in the first year of sickness, see his letter to the House of Representatives of 8 September 2026 (2026-0000301480) on the inventory of scenarios for continued payment of wages during sickness.

[109] See the employer's written observations, points 8 and 9 with reference to the *UWV Kennisverslag 2024-1, Inzicht in acht Europese arbeidsongeschiktheidsstelsels*. See also the letter of Minister Aarts to the House of Representatives of 8 September 2026 (2026-0000301480) on the inventory of scenarios for continued payment of wages during sickness, p. 2.

[110] See in more detail on this I.P. Asscher-Vonk and W.L. Roozendaal, in: D.M.A. Bij de Vaate (ed.), *De zieke werknemer* (Monografieën Sociaal Recht nr. 16), Deventer: Wolters Kluwer 2021, pp. 103-105.

[111] *Kamerstukken* 24 439.

privatised by the Act on the Extension of the Period of Continued Payment of Wages during Sickness (*Wet verlenging loondoorbetalingsverplichting bij ziekte*, Wet VLZ).[112]

7.18 By now many employers have taken out insurance to cover the financial risk of the obligation to continue paying wages. Research by SEO shows that the total weighted insurance rate across all employers is 60%. Among the group of employers with up to 50 persons employed, the percentage is higher: the insurance rate here is 70%.[113] In order to ease the burden on SME employers, those employers have had the possibility since 1 January 2020 (as a result of an agreement on this between the government and insurance companies) of taking out an SME absenteeism insurance that also relieves them of the associated tasks (*MKB-verzuim-ontzorgverzekering*). This not only covers part of the obligation to pay wages, but also 'unburdens' employers by giving them professional support in absence management and the reintegration of sick employees.[114]

7.19 There has long been a debate about the duration of the obligation to continue paying wages.[115] Recently Minister Aarts, in response to various motions,[116] informed the House of Representatives about various scenarios, such as limiting extra-statutory agreements on the level of continued payment of wages, shortening the duration of the period from two years to one and a half years or one year, or collectivising the second year of sickness for small employers.[117] The government wants to enter into discussions with the House of Representatives and the social partners about the various scenarios, as can be read in the letter.

(iii) The revision of the WIA[118]

7.20 Employees with a dormant employment contract are generally entitled to a benefit under the WIA. The Wet WIA is administered by the UWV and comprises two separate schemes: (i) the Income Provision Scheme for Persons Fully Unfit for Work (*Inkomensvoorziening Volledig Arbeidsongeschikten*, IVA) and (ii) the Return to Work Scheme for Persons Partially Unfit for Work (*Werkhervatting Gedeeltelijk Arbeidsongeschikten*, WGA).[119]

7.21 The IVA benefit is intended for insured persons who are fully and permanently unfit for work. 'Fully' unfit for work means that an insured person is 80-100% unfit for work and is therefore only able to earn through work at most 20% of the reference earnings (*maatmaninkomen*) per hour.[120] 'Permanently' means a medically stable or deteriorating situation or a medical situation in which there is a small chance of recovery in the long term.

7.22 Most persons unfit for work who fall under the Wet WIA are, however, entitled to a WGA

[112] *Kamerstukken* 29 231.

[113] SEO, *Verzuim verzekerd, een analyse van de verzuimverzekeringsgraad onder werkgevers*, October 2025, p. 4.

[114] See in more detail on this insurance, S. Klosse and G.J. Vonk, *Hoofdzaken Socialezekerheidsrecht*, 2025, p. 123.

[115] For an overview see K. Janssens, *Arbeidsovereenkomst*, art. 7:629 BW, aant. 24 (current up to 03-05-2026).

[116] *Kamerstukken II* 2025/26, 36 800 XV, nr. 65 and *Kamerstukken II* 2025/26, 36 800, nr. 37.

[117] Letter of Minister Aarts to the House of Representatives of 8 September 2026 (2026-0000301480) on the inventory of scenarios for continued payment of wages during sickness.

[118] For an extensive discussion of the WIA see my Opinion in *Xella* of 18 September 2019, ECLI:NL:PHR:2019:899, at 6.

[119] The Wet WIA proceeds on the basis of a different concept of 'incapacity for work' from that of the BW. Whereas under the BW what is decisive is whether the employee is medically able to perform the stipulated (agreed) work, for the application of the Wet WIA regard is had to what the insured employee, given his medical limitations, can still earn through work ('the residual earning capacity'), compared with the wages he earned when he did not yet have those medical limitations ('the reference earnings'), see A.R. Houweling (ed.) et al., *Loonstra & Zondag. Arbeidsrechtelijke themata II*, 2018, pp. 479-481.

[120] See further A.R. Houweling (ed.) et al., *Loonstra & Zondag. Arbeidsrechtelijke themata II*, 2018, pp. 483-484; S. Klosse and G.J. Vonk, *Hoofdzaken Socialezekerheidsrecht*, 2018, section 5.4.2.

benefit.[121] The WGA applies both to employees who are between 35-80% unfit for work and to employees who are more than 80%, but not permanently, unfit for work.[122]

7.23 Employees who are partially fit for work are, as a rule, also under an obligation to perform, or to obtain, suitable work as regards their residual earning capacity (Article 30(1) WIA). Like unemployed employees, or employees entitled to a benefit under the Sickness Benefits Act (*Ziektewet*), this group of employees is entitled to holiday while retaining benefit. The Regulation on exemption from obligations under social security legislation (*Regeling vrijstelling verplichtingen sociale zekerheidswetten*) applies in this connection. Article 4(2) of that regulation provides in this connection that insured persons are exempted from the obligations under Article 30(1) WIA up to a maximum of twenty working days per year. The insured person then has holiday while retaining benefit in the sense that during the days of holiday he is under no obligation to perform or obtain suitable work.

7.24 There is also much debate about the WIA.[123] For instance, the policy review 'Werk aan de WIA – naar een stelsel dat weer werkt', published in December 2025, concluded that the system of laws and rules for sickness and incapacity for work has become gridlocked through a combination of an increasing inflow, growing waiting lists and shortcomings in the system. The report proposes various measures, of which strengthening implementation is mentioned as the most urgent step.[124] The current coalition agreement states that the government intends to abolish the IVA for new cases.[125] At least for the time being, however, this appears to be off the table again.[126]

8 Case law of the courts of fact and literature

Case law of the courts of fact

8.1 For some years there has been a debate in the case law of the courts of fact on the question whether leave days are accrued during a dormant employment contract, which must then be paid out at the end of the employment contract.

8.2 In two decisions of the Gelderland District Court it was held that Article 7:634 BW is contrary to the law of the European Union. The Nijmegen subdistrict court considered, however, that this could not lead to the granting of the claim for payment of leave days in respect of the dormant employment contract, because an interpretation in conformity with the directive is not possible.[127] This meant that the employee concerned was not entitled to payment of leave days in respect of a period of almost eight months of dormant employment. By contrast, according to the Arnhem subdistrict court Article 7:634 BW must be disapplied on the basis of Article 31(2) of the Charter. The employee had accrued leave days in respect of a dormant employment contract of well over seventeen months, which had to be paid out at the end of the

[121] I.A.M. van Boetzelaer-Gulyas, *Basisboek Socialezekerheidsrecht 2019*, 2-019, p. 212.

[122] See also A.R. Houweling (ed.) et al., *Loonstra & Zondag. Arbeidsrechtelijke themata II*, 2018, p. 484; S. Klosse and G.J. Vonk, *Hoofdzaken Socialezekerheidsrecht*, 2026, section 5.4.3.

[123] See on this also K. Janssens, *Arbeidsovereenkomst*, art. 7:629 BW, aant. 24 (current up to 03-05-2026) and in more detail S. Klosse and G.J. Vonk, *Hoofdzaken Socialezekerheidsrecht*, 2026, section 5.4.3.

[124] IBO Wet werk en inkomen naar arbeidsvermogen, *Werk aan de WIA – naar een stelsel dat weer werkt*, December 2025, p. 6 et seq.

[125] *Aan de slag. Bouwen aan een beter Nederland*, Regeerakkoord 2026-2030, p. 45.

[126] See the government's letter to Parliament of 29 September 2026, pp. 5-6.

[127] Gelderland District Court (subdistrict court, Nijmegen) 5 June 2024, ECLI:NL:RBGEL:2024:3780, para. 2.11.

employment.[128]

8.3 This is not, however, the prevailing line. At the end of 2025, Olsthoorn and Van Reijen write, a clear tendency is visible in the case law of the courts of fact (exclusively subdistrict courts) to assume that an employee with a dormant employment contract does *not* accrue leave days.[129]

8.4 For instance, the Groningen subdistrict court dismissed an application for payment of leave days in respect of a period of almost 1.5 years of dormant employment.[130] The subdistrict court's reason was that during a dormant employment contract there can be no question of leave being 'paid' (*behoud van loon*, literally 'retention of wages') as referred to in Article 7(1) of the Working Time Directive. After all, there is no longer any right to wages. The subdistrict court also considered it relevant that during a dormant employment contract the purposes of the right to annual leave formulated by the CJEU can no longer be achieved and that an employee with a dormant employment contract often receives a social security benefit which in principle continues during holiday.[131] On more or less the same grounds the Utrecht subdistrict court also dismissed a claim for payment of leave days in respect of a period of well over one year of dormant employment.[132]

8.5 At the beginning of 2026 the Dordrecht subdistrict court held that there was no entitlement to payment of leave days in respect of the period of a dormant employment contract. Referring to the *GTC Dijon* order of 15 July 2025 discussed above (see 5.38 et seq.), the subdistrict court considered that in the case of a dormant employment contract there are specific circumstances which justify a derogation from the fundamental right to annual leave.[133] In the view of the subdistrict court those specific circumstances are as follows:

> "(1) It is characteristic of a dormant employment contract that the core obligations of the employment contract, namely the performance of work and the payment of wages, can no longer and need no longer be complied with. The legislature has not, however, chosen to have the contract end by operation of law in such a case, whereas the contract has in fact become devoid of content. After the end of the 104 weeks in which wages were paid and the employee accrued full leave days, the employee therefore no longer has any reintegration obligations. The recuperative function of annual leave thereby loses its purpose. After all, leave days are intended to enable employees to rest and recover from work and to regain their strength. The employee with a dormant employment contract has no work to recover from.
>
> (2) The fact that holiday pay is intended to put employees in an economically comparable position during their leave, as the CJEU has repeatedly held, plays no role in the case of a dormant employment contract either. A sick employee who is unable to work will, as a starting point, be entitled to a benefit after 104 weeks and, by virtue of that benefit, be entitled to paid holiday. This also applies to [applicant]. After all, he has been receiving an IVA benefit since 9 October 2024."

8.6 In view of the above, it cannot be said that Article 7:634(1) BW is contrary to Article 31(2) of the

[128] Gelderland District Court (subdistrict court, Arnhem) 12 August 2025, ECLI:NL:RBGEL:2025:7054, paras. 4.9-4.10.

[129] A. Olsthoorn & E.C.E. van Reijen, Slapend rijk? 'De opbouw van vakantiedagen bij een slapend dienstverband', *ArbeidsRecht* 2026/37, at 2.3.

[130] Noord-Nederland District Court (subdistrict court, Groningen) 19 December 2025, ECLI:NL:RBNNE:2025:5517.

[131] See para. 4.33, cited in the previous footnote.

[132] Midden-Nederland District Court (subdistrict court, Utrecht) 18 February 2026, ECLI:NL:RBMNE:2026:688, paras. 4.17-4.18.

[133] Rotterdam District Court (subdistrict court, Dordrecht) 5 February 2026, ECLI:NL:RBROT:2026:1215, para. 2.8.2.

Charter, according to the subdistrict court.[134] Subdistrict courts in Rotterdam and Amsterdam have reached the same conclusion on virtually the same considerations.[135] These subdistrict courts thus use the *GTC Dijon* order, in which a preliminary question was before the Court on the lapse of accrued leave days, to substantiate their view that employees with a dormant employment contract do not accrue any leave days at all.

8.7 It has already been noted above that this interpretation of the *GTC Dijon* order is not correct (see 5.42 et seq.). The considerations of the Court in *GTC Dijon* are no more than a repetition of its settled case law that the right to paid annual leave cannot lapse or be reduced because it was accrued by the worker during his sick leave, and that for the accrual of leave days the period of incapacity for work must be counted as working time. Furthermore, the CJEU considers, referring to *Fraport*, that limitations on the fundamental right to paid annual leave, as laid down in Article 31(2) of the Charter, may be imposed only in compliance with the strict conditions of Article 52(1) of the Charter, and with due regard for the essence of the right to annual leave. There may, however, be "specific circumstances" which justify an exception being made to the main rule that leave days accrued during sickness cannot lapse, in order "to avoid the negative consequences of an unlimited accumulation of entitlements to paid annual leave accrued during a period of absence on account of long-term sickness". A period laid down in national law after which entitlements lapse is therefore permitted, provided that it is substantially longer than the reference period. Such a period complies with Article 52(1) of the Charter.

8.8 It can by no means be inferred from the *GTC Dijon* order, however, that the national court would be free to derogate, on the basis of "specific circumstances of the case", from the right to annual leave enshrined in Article 31(2) of the Charter and from the settled case law of the CJEU that leave days are also accrued during incapacity for work. Nor does other case law of the CJEU offer any basis whatsoever for such an interpretation.

Literature

8.9 The tendency in the literature is different from that in the case law of the courts of fact. The literature is virtually unanimous: Article 7:634(1) BW is contrary to EU law as regards the accrual of leave days during a dormant employment contract.

8.10 As early as 2012, in his annotation to the *Dominguez* judgment (see 5.4), Bouwens observed that it is questionable whether the link in Article 7:634 BW between the accrual of leave days and the right to wages is compatible with Article 7 of the Working Time Directive. Over the years various authors have consistently taken the position that Article 7:634 BW is not in conformity with EU law.[136]

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[134] See para. 2.8.3 of the decision, cited in the previous footnote.

[135] Rotterdam District Court (subdistrict court) 24 February 2026, ECLI:NL:RBROT:2026:1852, paras. 2.19-2.21; Amsterdam District Court (subdistrict court) 30 March 2026, ECLI:NL:RBAMS:2026:3722, para. 4.14; Amsterdam District Court (subdistrict court) 16 June 2026, ECLI:NL:RBAMS:2026:9693, para. 4.14; and Rotterdam District Court (subdistrict court) 11 September 2026, ECLI:NL:RBROT:2026:12105. In other proceedings the Rotterdam subdistrict court stayed the proceedings as regards the claim for payment of leave days accrued during a dormant employment contract, see Rotterdam District Court (subdistrict court) 22 May 2026, ECLI:NL:RBROT:2026:6220, para. 2.27. See earlier also Limburg District Court (subdistrict court, Roermond) 11 April 2017, ECLI:NL:RBLIM:2017:3293, *JIN* 2017/132, with note by J.A. Tersteeg, para. 4.4.1.

[136] See, among others, M. Ledesma Marin and F.M. Dekker, 'Vakantie na Schultz en Schulte, use it or lose it', *TAP* 2012/1, p. 6, footnote 13; Q. van Vliet, 'Geen arbeid, geen loon en tóch vakantie', *ArbeidsRecht* 2024/28; A.R. Houweling (ed.) et al., *Loonstra & Zondag. Arbeidsrechtelijke themata I*, Den Haag: Boom juridisch 2020, p. 514; J.A. Tersteeg in her annotation in *JIN* 2017/132; F.M. Dekker, 'Opbouw van vakantiedagen tijdens ziekte', *TRA* 2024/82, at 6; S.S.M. Peters, *Arbeidsovereenkomst*, art. 7:635 BW, aant. 4.2.1, current up to 08-07-2024.

8.11 Vos, among others, has been critical of the decisions of the subdistrict courts in which it was held that leave days are no longer accrued during a dormant employment contract.[137] Referring to Article 52(1) of the Charter, he observes that a complete exclusion of the accrual of leave days during a dormant employment contract goes further than is necessary within the meaning of that provision. The intended effect, counteracting unlimited accumulation, can also be achieved by applying a period after which entitlements lapse. That is, he continues, also the route chosen by the CJEU in *KHS*: no exclusion of accrual, but lapse after the end of a certain period.

8.12 Vos writes that the arguments put forward by the courts of fact are understandable from a practical perspective, but debatable from a legal perspective. They fail to recognise that the CJEU has held that no conditions may be attached to the coming into existence of the right to annual leave (see also 5.1-5.5) and that absence due to sickness is treated as working time (see also 5.6-5.15). The argument that during a dormant employment contract no further effect is given to reintegration, and that recuperation is therefore no longer at issue, does not hold either, in his view. Many workers in the cases that came before the CJEU also had a dormant employment contract. The argument that employees with a dormant employment contract receive a WIA benefit from which they can go on holiday (see on this also 7.22 above) is not decisive either, in his opinion. He points out that in Germany a worker receives an incapacity benefit after only six weeks and then no longer receives wages from his employer. That the WIA provides for a possibility of holiday which would make it permissible to stop the accrual of leave therefore does not appear to be a distinguishing feature compared with other countries either. He also observes that it is not exceptional (in comparison with other countries) that employees can go on holiday while retaining a benefit, whether or not after permission from the benefits agency.

8.13 Pennings has likewise set out at length that the idea that no leave days are accrued during a dormant employment contract is contrary to EU law. He explains that the situation of a dormant employment contract is no different from that in the cases assessed by the Court:[138]

> "In the Dutch debate there is talk of 'dormant employment contracts', and these appear to be regarded as a special phenomenon, so that some take the view that the case law of the Court of Justice would not apply here.
>
> The term 'dormant employment contract' does not occur in legislation, but has by now become an established concept in employment law. It refers to the situation in which an employee who is unfit for work is no longer entitled to protection against dismissal and is not entitled to wages either.
>
> In foreign systems, incidentally, the term 'dormant employment contracts' is not used in such a situation, because there it is normal for the sick worker not to receive wages and to have no, or hardly any, protection against dismissal any longer. In the cases before the Court which involve the accrual of leave days during sickness (*Schultz-Hoff*, *KHS-Schulte*, etc.) there are therefore, in Dutch terminology, dormant employment contracts, and there too a long period of sickness was involved, such as five years in *KHS-Schulte*.
>
> The Court of Justice, however, refers neither to protection against dismissal nor to the existence of the obligation to continue paying wages in cases concerning the accrual of leave entitlements. The situation of a dormant employment contract is therefore no different from that in the cases assessed by the Court. We must therefore assume that under European employment law leave days are also accrued during dormant employment contracts."

8.14 Pennings is therefore critical of the recent decisions in which subdistrict courts held that em-

[137] J.R. Vos, 'Het doolhof van vakantie en ziekte (deel 1 - opbouw)', *TAP* 2026/114, pp. 11-13.

[138] F.J.L. Pennings, annotation to Rotterdam District Court (subdistrict court) 2 March 2026, ECLI:NL:RBROT:2026:2021, *AR updates* 2026-0321, at 4.

ployees do not accrue leave days during a dormant employment contract.[139] He observes, for instance, that the recent *GTC Dijon* order, on which some subdistrict courts rely, is no more than a confirmation of the existing case law of the CJEU. And that case law means, as has already been discussed at length, that an unlimited accumulation of leave days on the basis of successive periods of sickness would no longer reflect the objective of the right to paid annual leave, and that the Court therefore considers it permissible for a limit to be set on the carry-over period for those entitlements. That is therefore, Pennings concludes, quite different from saying that the Court now takes the view that there are special circumstances which limit the accrual of leave days. The principle that leave days are also accrued during sickness still applies.

8.15 Pennings writes that one may find it unfortunate that leave entitlements are accrued during dormant employment contracts, but that the CJEU has also offered a possibility of limiting unjustified outcomes by allowing a period after which entitlements lapse, even if the sick worker cannot take leave. The Netherlands has not made use of this.[140] But one cannot simply brush European law aside, certainly not where national legislation implementing a directive is concerned, because one does not agree with the outcome of its application in Dutch law. In which connection he points out yet again that European law forms part of our legal order.

8.16 Against all this criticism, if I see it correctly, only Frikkee has argued in the literature that an employee no longer accrues leave days during a dormant employment contract.[141] In her annotation to the decision of the Arnhem subdistrict court discussed above, in which Article 7:634(1) BW was disapplied on account of incompatibility with Article 31(2) of the Charter (see 8.2 above), she observes that it is questionable whether there is in fact any incompatibility with Article 31(2) of the Charter. She wonders how, if an employee is no longer entitled to wages during a dormant employment contract, there can be any question of leave being 'paid' (*behoud van loon*) as referred to in the Charter.[142]

8.17 Moreover, Frikkee continues, the principle that paid leave days are still accrued during a dormant employment contract is at odds with the rationale behind the European legislation and case law on leave days; the Court always expressly considers that holiday pay is intended to put workers in an economically comparable position during their leave to that during their work, in order to prevent financial motives from deterring workers from actually taking leave (on holiday pay see also 4.8 above). In this connection she also points to the economic position of the employee:

> "7. The economic position of the employee with a dormant employment contract is that he has

[139] Incidentally, his view on the question whether Article 7:634(1) BW is contrary to European law is nuanced. He points out that the link between the accrual of leave days and the right to wages can also be favourable to employees, in the sense that *more* periods can count towards the accrual of leave days than only those based on work. But, he continues, the periods acquired on the basis of work and on the basis of assimilated periods, such as sickness, are minimum periods which must count. If *only* periods of wages are taken into consideration, and this yields less than the minimum period, a conflict arises with the case law of the Court, see F.J.L. Pennings, 'De invloed van IAO-beginselen op de ontwikkeling van het vakantierecht', *ArA* 2025/3, at 8.4.

[140] F.J.L. Pennings, 'De invloed van IAO-beginselen op de ontwikkeling van het vakantierecht', *ArA* 2025/3, p. 90.

[141] C.J. Frikkee, 'Slapend dienstverband: alle dagen vakantie!', *TRA* 2025/96.

[142] She adds that in other languages the terminology of the provision is different. In English it is 'paid holiday' and in the German, French and Danish translations the terminology is comparable. It is not entirely clear to me what exactly she means by this. If it were that those other languages express better that there must first be an entitlement to wages before one can speak of 'retention of wages' (*behoud van loon*), then that approach is not correct: in all the cases of the CJEU discussed there was no continued payment of wages, but there was accrual of leave. See also F.J.L. Pennings, annotation to Rotterdam District Court (subdistrict court) 2 March 2026, ECLI:NL:RBROT:2026:2021, *AR updates* 2026-0321, pp. 6-7.

> received wages for two years and is, as a rule, subsequently entitled to a social security benefit. If the employee receives a benefit, he may also take holiday while retaining benefit. After all, that benefit continues during holidays. In our national legislation there is therefore another provision which also provides for paid holiday for the employee with a dormant employment contract. The accrual of leave days at wage value during a dormant employment contract is difficult to reconcile with that. Since employees with a dormant employment contract are not entitled to wages, there can also be no question of financial motives deterring them from taking leave."

8.18 All this is, according to Frikkee, quite apart from the question why an employee with a dormant employment contract should still accrue leave days at all in order then to be able to take paid leave. After all, in the case of a dormant employment contract the recuperative function is not at issue. She adds that the leave days during a dormant employment contract moreover lead to an additional financial burden, on top of the obligations to continue paying wages and the costs of the reintegration obligations (see on this also chapter 7 of this Opinion).

8.19 On this point Pennings writes that the Court has not explicitly addressed the rationale for the accrual of leave days during long-term sickness culminating in termination of the employment contract, but that the approach apparently is that the right to annual leave must be strictly upheld.[143]

8.20 Finally, Frikkee points out that an employee, too, may have an interest in the continuation of a dormant employment contract. As an example she mentions that the pension fund Pensioenfonds Zorg en Welzijn has a special scheme for survivors' pensions, which comes down to this: in the event of death during participation, the missing years of participation between the date of death and the participant's pensionable age are counted. A good employer will have to take this interest of an employee into account before deciding to proceed to dismissal. It should not be the case that the employer can then still be confronted with a large claim for leave days in respect of the period of the dormant employment contract.

8.21 In summary, it can be established that in the literature there is in fact hardly any doubt about the answer to the preliminary question: EU law compels an answer in the affirmative. This ties in with the interim conclusion in chapter 5, in which the case law of the CJEU was discussed: the accrual of leave days may not be made subject to conditions, such as the right to wages, and for the right to annual leave sick workers are treated in the same way as workers who are fit for work. Member States may (subject to conditions) provide that accrued leave days of workers with long-term incapacity for work lapse after a carry-over period. The case law of the CJEU offers no basis for the idea that Member States may limit the accrual of leave days during long-term incapacity for work.

9 Parliamentary questions

9.1 In 2025 the then Minister of Social Affairs and Employment, Minister Paul, stated in response to parliamentary questions that in the view of the (then) government the Dutch leave legislation is not contrary to European law and that the (then) government does not intend to amend the law. See her answers:[144]

> "Question 1

[143] F.J.L. Pennings, annotation to Rotterdam District Court (subdistrict court) 2 March 2026, ECLI:NL:RBROT:2026:2021, *AR updates* 2026-0321, p. 3.

[144] *Aanhangsel Handelingen II* 2025/26, nr. 238.

Are you familiar with the decision of the Gelderland District Court of 12 August last, in which it was held that employees in dormant employment are also entitled to the accrual and payment of leave days?[145]

Answer 1 Yes.

Question 2 How do you interpret this decision?

Answer 2 This is a decision of the Gelderland District Court in proceedings between the employer and the employee. The employee has long-term incapacity for work and is in a so-called dormant employment contract; there is still an employment contract, but no longer any right to wages. At the employee's request the employment contract is terminated by the court. The court also rules on the accrual of leave days in respect of the time during which the employment is dormant. Under the Civil Code (Article 7:634(1)), leave days are accrued only in respect of the periods for which the employee is entitled to wages. This would mean that he has not accrued any more leave days in respect of the period after 29 February 2024 until 12 August 2025. The subdistrict court states that this is contrary to European legislation and case law, and therefore disapplies the provision of the BW on the accrual of leave hours. The court awards the leave days to the employee after all.

Questions 3 and 4 Does the government consider that Dutch legislation is in line with European law and case law? Why or why not? How do you reflect on Article 7:634 BW, Article 7(1) of Directive 2003/88/EC and on case law of the European Court of Justice (CJEU)?

Answer 3 and 4 Article 7:634 BW governs, among other things, the accrual of leave entitlements. Leave is accrued in respect of periods in which there is a right to wages. The government does not consider that the provisions on the accrual of leave in Dutch legislation are contrary to European law. The decision of the subdistrict court stands alone for the time being and offers insufficient concrete grounds for concluding that Dutch legislation is not in line with European law. The European Directive referred to states that all workers accrue leave. At the same time it is clear, in the government's view, that this directive is intended for the situation in which there is work or work is being performed, or in any event for the situation in which there is a right to wages. After all, the directive lays down minimum requirements in the field of safety and health in the organisation of working time. These concern, for example, daily rest and annual leave. The importance of recovery time for workers is central here. It is not apparent from the directive that it is thereby also intended to lay down rules on the accrual of leave entitlements of employees for whom (after at least two years of) incapacity for work the period of continued payment of wages during sickness has expired. Nor, according to the government, does case law of the European Court of Justice lead to a different view.[146] The judgments mainly concern – put briefly – the possibility of taking leave that was accrued during working time. The case law also makes clear that the annual minimum of accrued leave days may not lapse if the worker has been unable to make use of it because of sickness. The case law is concerned in particular with possibilities of making use of the right to annual leave (accrued during the period in which work was performed) and not with the accrual of leave entitlements itself (during the period of sickness). According to the directive, too, the purpose of leave is to offer workers a period of rest, relaxation and leisure in order to protect their safety and health. According to the European Court of Justice[147] this means that the worker has previously performed work which justifies the granting of leave. Entitlements to paid annual leave are in principle calculated on the basis of the periods of actual work completed under the employment contract. According to the government this does not mean that the accrual of leave also continues after the period of continued payment of wages during sickness.

Question 5 How do you reflect on the publication «Geen arbeid, geen loon en toch vakantie» by Q. van Vliet in ArbeidsRecht 2024/28?

Answer 5 In the article «Geen arbeid, geen loon en tóch vakantie» the author comes to the conclu-

[145]Reference is made to Gelderland District Court 12 August 2025, ECLI:NL:RBGEL:2025:7054. See also 8.2 above.

[146]Reference is made to ECJ 20 January 2009, ECLI:EU:C:2009:18, C-350/06 *Schultz-Hoff*, C-520/06 *Stringer*; ECJ 10 September 2009, ECLI:EU:C:2009:542, C-277/08 *Pereda*.

[147]Reference is made to CJEU 9 December 2021, ECLI:EU:C:2021:987, C-217/20, *XXXX v Staatssecretaris van Financiën*.

> sion that an interpretation in conformity with the directive means that an employee also accrues leave days after the second year of sickness. In the article the author takes the position that linking the accrual of leave days to the right to wages, on the basis of the abovementioned provision of the BW, is a different starting point from that of the said Directive, in which the accrual of leave days is linked to the performance of work. The author takes the view that on the basis of the Directive it is plausible that in principle all sick workers are entitled to full accrual of leave. In the answer to questions 3 and 4 it was explained that the government sees this differently and that, in the government's view, there are at present insufficient concrete grounds for proceeding to amend legislation.
>
> Question 6 Are you going to bring Dutch legislation into line with European law by means of an amendment of the law? If so, when can the House expect this legislation? If not, why not?
>
> Answer 6 As also explained above, the Dutch leave legislation is, in the government's view, not contrary to European law. At present the government therefore does not intend to proceed to amend the law."

9.2 It clearly emerges from what has been discussed in the preceding chapters that the position of the Minister is not correct and that the account given of EU law is wrong. The Dutch leave legislation *is* contrary to European law.

9.3 The incorrect answers of the Minister can be regarded as a missed opportunity.[148] If it is acknowledged that the leave legislation is in parts contrary to EU law, this would also open the door for the legislature to take measures, for example, by which, if so desired, the carry-over of leave days accrued during sickness is capped in time.

10 Discussion of the preliminary question

10.1 In my view the preliminary question must be answered in the affirmative: an employee accrues leave days at wage value during a dormant employment contract. This follows from the law. Article 7:634(1) BW must to that extent be disapplied on account of incompatibility with Article 31(2) of the Charter. This can be explained as follows.

10.2 The right to annual leave is a particularly important principle of EU social law which is expressly laid down as a fundamental right in Article 31(2) of the Charter and which has direct horizontal effect. In a dispute with his or her private employer a worker can therefore rely directly on that provision. Article 7(1) of the Working Time Directive reflects and gives concrete expression to the fundamental right to annual leave laid down in the Charter (4.13-4.21).

10.3 According to settled case law of the CJEU, no conditions may be attached to the coming into existence of the right to annual leave (5.1-5.5).

10.4 Although the right to annual leave is in principle determined on the basis of the working time actually worked, an exception is made to this for (among others) sick workers, because the occurrence of incapacity for work owing to sickness is beyond the worker's control. In EU law, workers who are unfit for work are treated, as regards the right to annual leave, in the same way as workers who have actually performed work (5.6-5.11).

10.5 Member States may provide that accrued leave days of workers with long-term incapacity for work lapse after a carry-over period (a period after which entitlements lapse), provided that the duration of that carry-over period is substantially longer than the duration of the reference

[148] Cf. also Pennings in his annotation to Rotterdam District Court (subdistrict court) 2 March 2026, ECLI:NL:RBROT:2026:2021, *AR updates* 2026-0321.

period. Moreover, leave days accrued *before* the (total) incapacity for work occurred may not lapse. Such national legislation is a derogation from Article 31(2) of the Charter that is permitted under Article 52(1). An unlimited accumulation of leave days is thereby prevented. It is also thereby prevented that the purpose of leave days can no longer be achieved (5.16-5.34).

10.6 The law of the European Union thus has a link between the right to annual leave and working time worked, with workers who are unfit for work, and who cannot work for reasons beyond their control, being treated in the same way as workers who have actually worked. Dutch law, however, has a different link, namely between the right to leave and the right to wages. The right to leave is thereby dependent on a condition. That is not permitted under EU law, at least not where this would mean that employees who are unfit for work and have a dormant employment contract no longer accrue leave days as a result.

10.7 In any event, Article 7:634(1) BW, in which the accrual of leave days is linked to the right to wages, cannot be regarded as an 'exception' that meets the strict conditions of Article 52(1) of the Charter, on the basis of which it is permissible to derogate from the right to annual leave laid down in Article 31(2) of the Charter, in particular from the rule that leave days accrued during incapacity for work cannot lapse (*Fraport* and *GTC Dijon*, see 5.30-5.33 and 5.43-5.46).

10.8 It by no means follows from the said *Fraport* and *GTC Dijon* decisions that the national court may, as it sees fit, select 'specific circumstances' in national law or the national situation as a basis for derogating from Article 31(2) of the Charter. For a derogation from this directly effective provision of the Charter, the requirements laid down in Article 52(1) of the Charter must in any event be met. This means that the derogation (i) must be provided for by law, (ii) must respect the essence of the right; (iii) must comply with the principle of proportionality; (iv) is necessary and (v) must meet objectives of general interest of the Union or the need to protect the rights or freedoms of others (4.15-4.16 and 8.7-8.8).

10.9 In my view Article 7:634(1) BW does not meet these requirements, if only because the scheme of the provision is, as stated, at odds with EU law. Moreover, requirements (iii), (iv) and (v) are not met either, in which regard it should be pointed out in particular that an employer largely has it in its own hands whether a dormant employment contract arises. The employer is compensated for the costs of the transition payment and therefore in principle has no reasonable interest in allowing the employment to continue after the expiry of the period of continued payment of wages. In so far as a 'dormant period' between the end of the obligation to continue paying wages and the termination of the employment contract is concerned, this will generally be a short period, in which a few leave days have been accrued. It is for the legislature to take measures here if so desired, such as a longer period during which the dismissal permit obtained from the UWV is valid (Article 7:671a(6) BW) or making it possible to obtain a dismissal permit earlier despite a prohibition on giving notice still existing (Article 7:671a(11) BW, see 7.9). A period after which leave days accrued during long-term incapacity for work lapse could also be introduced, on the basis of the idea that after a certain time the purpose of leave can no longer be achieved.

10.10 It should also be noted here that the fact that in the Netherlands the wages of an employer [*sic*; read: employee] who is unfit for work must be paid by the employer for two years, and are not paid out of a collective scheme, is based on a deliberate political choice to privatise social security (see 7.16). It is not apparent how this circumstance could be construed as a 'specific circumstance' which meets the requirements of Article 52(1) of the Charter and on the basis

of which a derogation from the EU-law right to annual leave could be construed. The same applies to other circumstances, whether or not considered together, such as the costs which the employer has had to incur for the reintegration of the employee who is unfit for work, or the possibility that the employee who is unfit for work also receives a WIA benefit in which (compensation for) leave days are included.[149]

10.11 Finally: in my view there can be no reasonable doubt about the interpretation of EU law. It is therefore not necessary to refer questions on this to the CJEU.[150]

11 Conclusion

The Opinion is that the preliminary question should be answered as stated at 10.1 above.

The Procurator General at the
Supreme Court of the Netherlands

A-G

[149]This in response to the written observations of mr. Sagel on behalf of the employer.

[150]Cf. CJEU 6 October 2021, C-561/19, ECLI:EU:C:2021:799 (*Consorzio Italian Management*), paras. 33, 39 and 66.