Accrual of annual leave during dormant employment contracts: does the case law of the Court of Justice also apply to the Netherlands?

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Lawyers: Ph. Ekering and D. Uygul-van Dam · **Judge:** C.J. Frikkee
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1 Introduction

In its judgment of 2 March 2026, the Rotterdam subdistrict court announced that it would refer a preliminary question to the Supreme Court (*Hoge Raad*) on the accrual of annual leave during a so-called dormant employment contract (*slapend dienstverband*).[1] It notes that the decisions of subdistrict courts on this subject diverge, and asks the Supreme Court to provide clarity. Since the decisions do indeed differ from one another (see section 5), it is very much to be welcomed that this question is being referred.

2 The accrual of leave entitlements under European and national law

Dutch law provides that leave days accrue over the days on which the employee receives wages (Article 7:634 of the Dutch Civil Code (*Burgerlijk Wetboek*, BW)). There are a number of exceptions to this main rule, for instance where the employee is on parental leave (Article 7:635 BW). Until 2011, the latter article also provided that leave entitlements accrued during sickness (even if no wages were paid). However, accrual during sickness was limited to the last six months of the period of sickness.[2]

The Dutch rules were amended after the Court of Justice had considered the accrual of leave days during sickness in the Schultz-Hoff judgment.[3] In the EU context, the right to annual leave is based on Article 7 of the Working Time Directive. That article is, however, very brief; the Court therefore based its interpretation on the presumed purpose of the right to annual leave and also on ILO Convention No. 132. Article 5(4) of that Convention provides that in some cases leave days also accrue when no work is performed, including during sick leave. The Court followed this. It also held that accrued leave entitlements do not

1. Rotterdam District Court 2 March 2026, ECLI:NL:RBROT:2026:2021, see also AR Updates 2026-0321 (announcement of the question). The question was referred in the order of 17 March 2026, ECLI:NL:RBROT:2026:2603.
2. In my article in Arbeidsrechtelijke Annotaties I showed that this approach (namely accrual during sickness, but subject to a limit in time) corresponds to Convention No. 132 of the International Labour Organization (ILO) and in particular to the accompanying Recommendation: F. Pennings, 'De invloed van IAO-beginselen op de ontwikkeling van het vakantierecht', *ArA* 2025/3, p. 68 et seq.
3. ECJ 20 January 2009, Case C-350/06, ECLI:EU:C:2009:18 (Schultz-Hoff).

lapse if the worker has not been able to take leave, even if this means that the leave days must be paid out at the end of the employment relationship. In that connection the Court also considered that a person who is on sick leave cannot be said to be taking annual leave at the same time: the period of rest during sickness is, after all, intended for recovery, whereas the right to annual leave is intended to enable the worker to rest from work. In support of its approach, the Court consistently emphasises that the right to annual leave is an important right under EU law, of which the worker may not be deprived.

Since it follows from the Schultz-Hoff judgment that no limitation applies to the accrual of leave entitlements during sickness, the Dutch legislature had to amend Article 7:635 BW, because, as already noted, that article did provide for limited accrual. From then on, the legislature linked the accrual of leave days to days on which there was a right to wages. On the one hand this was a simplification, so that the provision of Article 7:635 on sickness could be repealed; on the other hand it introduced a limitation on accrual, since at a certain point the right to wages during sickness ends.[4]

The Court of Justice itself subsequently 'qualified' its case law in KHS-Schulte, by allowing, in the case of accrual during successive years of sickness, leave entitlements to lapse after a certain period, even though the person concerned has not been able to take them.[5] The Court found acceptable an arrangement (in a collective agreement) under which entitlements lapse fifteen months after the year in which they were acquired. Entitlements thus do accrue during sickness, even if it lasts a very long time, but the older entitlements may lapse.

The Netherlands has not incorporated this latter case law in its leave legislation. Article 7:640a BW provides that the entitlement to the statutory leave days lapses six months after the last day of the calendar year in which the entitlement was acquired, unless the employee was not reasonably able to take leave up to that time. The period of six months may be departed from by written agreement in favour of the employee. Article 7:642 BW provides that a legal claim for the granting of leave becomes time-barred five years after the last day of the calendar year in which the entitlement arose. If the employee was unable to take his or her leave days because of sickness, the five-year period applies.

Since the Working Time Directive offers no further guidance on the accrual of leave when no work is performed, and ILO Convention No. 132 does not contain precise criteria for this either, the Court has developed its case law on the accrual of leave entitlements in cases other than sickness as far as possible on the basis of its earlier reasoning as to why annual leave and sick leave do not coincide. Since the purpose of annual leave is to rest from work, the accrual of leave presupposes (apart from the express exception of sickness) that work has been performed. That is why a person on parental leave does not accrue leave entitlements during that period, since he or she is not working, according to the Court in the Dicu judgment.[6] Dutch law, incidentally, does provide that leave entitlements accrue during parental leave; a Member State may of course be more generous than the Court.

The Court treats the right to an allowance in lieu of leave days not taken in the same way as the accrual and the taking of leave days. In Schultz-Hoff the Court considered that the Working Time Directive contains no

4. Act of 26 May 2011, *Stb.* 2011, 318.
5. CJEU 22 November 2011, Case C-214/10, ECLI:EU:C:2011:761 (KHS-Schulte).
6. CJEU 4 October 2018, Case C-12/17, ECLI:EU:C:2018:799 (Dicu).

further provisions on this allowance. The right to annual leave and the right to the allowance are treated by the Directive as two aspects of a single right, according to the Court (para. 60). That is why the allowance must be calculated as if the leave days had actually been taken.[7]

Strictly speaking, the Court cannot rely in all cases on the purpose of annual leave here, namely that leave is intended to enable rest from work, because persons with long-term incapacity for work will often not return to work after the termination of their employment and can enjoy leave whenever they wish. The Court does not expressly address the question of what becomes of the purpose of annual leave after the end of the employment relationship in the case of a worker who is fully incapacitated for work. Apparently its approach to the allowance in lieu of leave days not taken is intended to enforce the right to annual leave strictly, and acquired entitlements may therefore not lapse. That is why, also in cases other than sickness in which the employer has failed to comply with its obligations, leave days must be paid out, even if a period of thirteen years is concerned.[8] The only exception is the case already mentioned, in which it would go too far to continue to compensate leave entitlements where these have accrued over a very long period without work (KHS-Schulte).

3 The issue of dormant employment contracts

The Netherlands takes as its starting point for the accrual of leave days that there must be a right to wages; Article 7:635 BW does contain exceptions, such as parental leave, but sickness is no longer among them. If a sick employee no longer has a right to wages (after two years of sickness or, in the event of a wage sanction, after three years), he or she therefore no longer accrues leave days under the Dutch rules. But how does this relate to the case law of the Court of Justice? That is the question which has divided the subdistrict courts and has ultimately led to the preliminary question of the Rotterdam subdistrict court to the Supreme Court.

In the Dutch debate, reference is made to ‘dormant employment contracts’, and these appear to be regarded as a special phenomenon, so that some consider that the case law of the Court of Justice would not apply here.

The term ‘dormant employment contract’ does not appear in the legislation, but has by now become an established concept in employment law. It refers to the situation in which an employee who is incapacitated for work no longer has a right to dismissal protection and has no right 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 employee to receive no wages and to have little or no dismissal protection left. In the cases before the Court which concerned the accrual of leave days during sickness (Schultz-Hoff, KHS-Schulte, etc.), there were therefore, in Dutch terminology, dormant employment contracts, and those cases too concerned a long period of sickness, such as five years in KHS-Schulte.

The Court of Justice, however, refers neither to dismissal protection nor to the existence of the obligation to continue paying wages in cases concerning the accrual of leave entitlements.

7. See also CJEU 20 July 2016, Case C-341/15, ECLI:EU:C:2016:576 (Maschek).
8. CJEU 29 November 2017, Case C-214/16, ECLI:EU:C:2017:914 (King).

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 labour law, leave days also accrue during dormant employment contracts.

4 How, then, is the case law to be applied, given the wording of Article 7:634 BW?

But how, then, can we reconcile the provision of the BW, under which wages are the decisive factor for the accrual of leave days, with the case law of the Court of Justice?

Until the case law on Article 31(2) of the Charter of Fundamental Rights of the European Union (Charter), this was still a difficult question. The national court must indeed interpret national law in conformity with the directive (including the Court's case law on it), but not contrary to the intention of the legislature. Did the Dutch legislature intend to go against EU law? According to the Court's case law, this should not readily be assumed if the legislature has not said so expressly. Nevertheless, one may hesitate on this point in respect of the Dutch rules on accrual during sickness, because the legislature also stated that only a sick employee who cooperates in reintegration efforts accrues leave entitlements (where the continued payment of wages is suspended because of insufficient efforts, there would then be no accrual of leave)[9] – a position which, incidentally, runs directly counter to the Court's case law.

The case law on Article 31(2) of the Charter, however, makes the uncertainty about the possibility of directive-conforming interpretation less pressing. This article provides that every worker has the right to an annual period of paid leave. The Court of Justice held that, because this provision is unconditional and sufficiently precise, the corresponding provision of the directive (Article 7 of the Working Time Directive) can be relied on in order to set aside conflicting provisions of national legislation; see the Max Planck judgment and the Bauer and Broßonn judgment.[10] Because it gives specific expression to Article 31(2) of the Charter, Article 7 of the Working Time Directive can also be relied on in horizontal relationships (that is, against the employer).

Article 7:634 BW must therefore be interpreted in accordance with the Court's case law. The Dutch starting point that leave entitlements accrue while wages are paid is permissible, but entitlements to leave days also accrue outside the situation referred to in that article if this follows from the Court's case law, and thus also in the event of sickness when no wages are paid.

5 The diverging decisions of subdistrict courts

On the interpretation of the case law of the Court of Justice on the accrual of leave during sickness and its consequences for the Dutch rules, the literature is unanimous, with the exception of the case note by

9. *Kamerstukken II* 2009/10, 32465.
10. CJEU 6 November 2018, Case C-684/16, ECLI:EU:C:2018:874 (Max Planck) and CJEU 6 November 2018, Joined Cases C-569/16 and C-570/16, ECLI:EU:C:2018:871 (Bauer and Broßonn).

the Rotterdam subdistrict court judge who referred the question to the Supreme Court.[11] The decisions of subdistrict courts, however, diverge considerably. In the judgment in which it announces that it will refer a question to the Supreme Court, the Rotterdam subdistrict court mentions a number of decisions, of which I will discuss the published ones here.[12]

5.1 Decisions accepting the accrual of leave entitlements during dormant employment contracts

In 2024 the Gelderland subdistrict court considered that 'it has rightly been observed in the literature[13] that Article 7:634 BW is contrary to Article 7(1) of Directive 2003/88/EC and the case law of the European Court of Justice. Although the Dutch court is required to interpret in conformity with the directive where statutory provisions are concerned by which European directives have been incorporated into Dutch legislation, that is impossible here. Article 7:634 BW leaves no room for interpretation. The article is clear, but contrary to the European directive referred to above. In view of the wording of Article 7:634 BW and the legislative history of that article, an employee who is in his third year of sickness does not fall within the scope of Article 7:635 BW. There is a task here for the legislature.'[14]

The subdistrict court does not explain why directive-conforming interpretation is not possible. It has already been noted above that this is indeed a difficult issue.[15]

In a case note on this decision, however, Dekker pointed out that case law on Article 31(2) of the Charter has since been delivered and that it offers the possibility, where necessary, of setting aside a Dutch provision if it is contrary to Article 7 of the Working Time Directive.[16] In 2025 the Gelderland District Court held, with reference to the literature and the case note mentioned, that Article 31(2) of the Charter permits the national court, where a national rule cannot be interpreted in such a way as to be compatible with this article of the Charter, to disapply, where necessary, the national rule that conflicts with it.[17]

It is interesting to look briefly at the facts: the case concerned an employee in respect of whom the employer's obligation to continue paying wages had been extended to three years because the employer had not sufficiently fulfilled its reintegration obligations (the obligation to continue paying wages ultimately ended on 1 March 2024). The employee's lawyer then requested that the employment contract be terminated, but the employer refused, because it did not want to pay a transition payment. Ultimately the

11. J.R. Vos, 'Op reis met vakantiewetgeving: het Handvest biedt nieuw uitzicht', *ArA* 2019, no. 2, pp. 50-80; W. Bouwens, 'Vakantie en Ziekte', *Ars Aequi* 2012, p. 385 et seq.; Q. van Vliet, 'Geen arbeid, geen loon en tóch vakantie', *Arbeidsrecht* 2024/28; S.S.M. Peters, 'Zieke werknemer (artikel 7:635, lid 1 sub d BW)', in: S.S.M Peters (ed.), *Arbeidsovereenkomst* (online/loose-leaf), Deventer: Kluwer; F.M. Dekker, 'Opbouw van vakantiedagen tijdens ziekte', *TRA* 2024/82. For a different view: C. Frikkee, 'Slapend dienstverband: alle dagen vakantie!', *TRA* 2025/96.
12. After this case note was submitted, a further decision was published: Midden-Nederland District Court 18 February 2026, ECLI:NL:RBMNE:2026:688.
13. The subdistrict court refers to the publication by Van Vliet, see note 11.
14. Gelderland District Court 5 June 2024, ECLI:NL:RBGEL:2024:3780.
15. See extensively M. Brenncke, 'Hybrid Methodology for the EU principle of Consistent interpretation', *Statute Law Review* 2018, no. 2, pp. 134-154.
16. F.M. Dekker, 'Opbouw van vakantiedagen tijdens ziekte', *TRA* 2024/82.
17. Gelderland District Court 12 August 2025, ECLI:NL:RBGEL:2025:7054.

subdistrict court dissolved the employment contract as of 1 August 2025, and that date is decisive for the calculation of the leave days. The employer had thus caused the additional costs through its own obstinacy and ultimately had to pay for it.

5.2 Decisions not accepting the accrual of leave entitlements during dormant employment contracts

The Groningen subdistrict court takes the view that in the case of a dormant employment contract there is no right to paid annual leave.[18] It does refer to the case law of the Court of Justice, but to the Dicu judgment, which is precisely *not* about sickness.[19]

It argues, first, that Article 7(1) of the Working Time Directive speaks of '*behoud van loon*' (literally: 'retention of wages'). In the case of a dormant employment contract there is no right to wages, so there can be no question of retention of wages.

This interpretation is rather surprising. Does the – abundant – case law of the Court of Justice on this article not matter for its interpretation? After all, in none of those cases was there any 'retention of wages', was there?

The purpose of Article 7 of the Working Time Directive is that the worker receives paid leave; after all, it is also conceivable – and this was the case before the right to paid leave was introduced – that you are granted leave, but at your own expense.

The Dutch text of Article 7 of the Working Time Directive and of Article 31(2) of the Charter does indeed state that the worker retains the right to wages during leave, but that does not mean that one must have a right to wages up to the moment the leave is taken. Otherwise there would have been no accrual of leave entitlements in any of the cases in the judgments of the Court of Justice discussed above.

'*Behoud van loon*' is in itself a good translation of, for example, the English text, which speaks of 'paid holiday'; after all, not every form of payment satisfies Article 7 – what is at stake is full pay. But one cannot infer from '*behoud van loon*' that wages must have been paid during the accrual period, or that wages must be paid up to the moment the leave is taken.

Even if one might think so on the basis of a strictly linguistic interpretation, such an interpretation obviously cannot suffice. A comparison with other language versions of the directive and of the Charter, and with the Court's case law, very quickly refutes that interpretation.

As a second argument, the court states that the premise during the period of continued payment of wages is that the employee will return to work, and that this fits with treating the employee who is incapacitated for work in the same way as the employee who has actually worked.

In doing so, it apparently follows the premise of the Dicu judgment it cites, namely that work must have been performed for leave to accrue. But that premise precisely does not apply in the case of sickness.

18. Noord-Nederland District Court 19 December 2025, ECLI:NL:RBNNE:2025:5517.
19. CJEU 4 October 2018, Case C-12/17, ECLI:EU:C:2018:799 (Dicu), para. 2.

It is striking that the subdistrict court sets about arriving at an interpretation of the Working Time Directive entirely on its own, without asking how this interpretation relates to the settled case law of the Court of Justice. In the case of sickness, the accrual of leave days is precisely not conditional on the worker working, as the Court made clear in Schultz-Hoff and has maintained ever since. Nor, therefore, does a worker have to meet the requirement of having worked after all by way of reintegration obligations. In the Schultz-Hoff or KHS-Schulte cases there is nothing whatsoever that points to (an obligation to engage in) reintegration activities.

While the subdistrict court claims to follow the case law of the Court of Justice, it thus takes the wrong judgment (Dicu) and does not follow the Court's case law at all. The employee had cited the 2025 decision of the Gelderland District Court, but the subdistrict court does not discuss it, nor does it discuss the literature.

The other decision is that of the Dordrecht subdistrict court.[20] It expressly states that it is aware of the settled case law of the Court of Justice on leave entitlements and refers in this respect to the Max Planck and KHS-Schulte judgments. It adds, however, that in the YH/GTC Dijon decision the Court recognises that there may be special circumstances that justify a derogation from the fundamental right to (paid annual) leave.[21]

The decision to which the subdistrict court refers is, however, an order under Article 99 of the Rules of Procedure of the Court. On that basis the Court may, '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', give a decision without having to conduct the full procedure (see also para. 14 of the decision). The YH decision can therefore be found only in the original language of the order; a translation was not considered necessary. It somewhat resembles a Supreme Court decision under Article 81 of the Judiciary (Organisation) Act (*Wet op de rechterlijke organisatie*), but the Court's order is still an extensive exposition of its case law. It is therefore rather creative to read into this decision that the Court is changing course.

Where the Court speaks of special circumstances in this decision, it is referring to situations it has dealt with before, inter alia in KHS-Schulte. This concerns the situation in which a worker is incapacitated for work for several consecutive reference periods. Because an unlimited accumulation of leave days on the basis of those successive periods of sickness would no longer correspond to the purpose of the right to paid annual leave, the Court considers it permissible to limit the carry-over period for those entitlements.[22] Limiting the period after which entitlements lapse to fifteen months after the calendar year in which the days were acquired is permissible.

That is quite different from the Court now taking the view that there are special circumstances that limit the accrual of leave days. It still requires accrual during sickness; only old entitlements may lapse.

20. Rotterdam District Court 5 February 2026, ECLI:NL:RBROT:2026:1215.
21. CJEU 15 July 2025, Case C-37/25, ECLI:EU:C:2025:586 (YH/GTC Dijon).
22. CJEU 22 September 2022, Joined Cases C-518/20 and C-727/20, ECLI:EU:C:2022:707 (Fraport and St. Vincenz-Krankenhaus).

The subdistrict court, however, seizes on the 'special circumstances' in order to give substance to them entirely on its own authority. Those specific circumstances are, according to the subdistrict court, that after the 104 weeks during which wages have continued to be paid, the employee no longer has any reintegration obligations. As a result, the recuperative function of annual leave loses its purpose, since leave days are intended to enable workers to rest. The subdistrict court also writes that the purpose of holiday pay, namely to put workers in a comparable economic position during their leave, likewise plays no role in a dormant employment contract. A sick employee who is unable to work will be entitled to an incapacity benefit after 104 weeks.

Nowhere in the Court's case law, however, can it be found that leave entitlements accrue only if a worker takes part in reintegration activities. If this reasoning of the subdistrict court were correct, there would have been no accrual of entitlements in the Schultz-Hoff and KHS-Schulte cases either.

The YH/Dijon case in fact concerned an employee who had been living it up during her sick leave, as the French court had established on the basis of a bailiff's official report. Her Facebook account had shown that during her sick leave she regularly went on holiday and also visited a restaurant a few times. The French court took the view that she was enjoying rest, leisure and recreation. It asked the Court whether, where there is sick leave while no restrictions apply to the worker's activities, the accrued right to leave may lapse.

The Court of Justice then simply repeats its case law: despite the freedom the employee had, the purpose of the right to paid annual leave differs from the purpose of the right to sick leave; her leave days therefore cannot be reduced. That reintegration would be a condition for the accrual of leave days is thus entirely irreconcilable with this decision.

The subdistrict court mentions neither the literature on the European case law on the right to leave nor decisions of colleagues to the contrary. Nor does it discuss what problems there would be if it *were* accepted that leave days accrue during dormant employment contracts.

6 Is the accrual of leave days during dormant employment contracts really problematic?

In the case note on the 2025 decision of the Gelderland District Court, Frikkee gives a number of arguments as to why it is problematic that leave days accrue during dormant employment contracts.[23] This case note thus offers a valuable insight into arguments that could be put to the Court of Justice in order to have it adjust its case law.

She writes that the view that an employee could still accrue leave days during a dormant employment contract leads to an additional financial burden for employers. After all, there are already two years of continued payment of wages, or even three years in the event of a wage sanction. The costs of reintegration are also high. Furthermore, an employee may have an interest in maintaining a dormant employment contract, for example for the accrual of pension rights.

23. C. Frikkee, 'Slapend dienstverband: alle dagen vakantie!', *TRA* 2025/96.

It does not seem to me, however, that these arguments can really convince the Court of Justice that there are special circumstances in which no leave entitlements accrue or in which entitlements may lapse. After all, the leave days at issue here accrue when dismissal protection has already expired, that is, after the period of continued payment of wages. The employer can easily avoid those costs by making use of dismissal law. In the case before the Gelderland District Court in 2025, the employer refused, as we saw, to accept the proposal for dissolution made by the employee. Its obstinacy in not wanting to pay a transition payment thus turned out badly.

In the case before the Rotterdam subdistrict court, too, the employer had not terminated the employment contract in time. It then argued that the employment had meanwhile been terminated with retroactive effect; in this way it wanted to avoid the transition payment.[24] The subdistrict court rightly put a stop to that; dismissal law must be respected in the case of dormant employment contracts as well. This employer too had to pay dearly for its clever attempt to avoid the transition payment.

Employers can therefore easily prevent the accrual of leave entitlements during a dormant employment contract by making timely and proper use of dismissal law. If they do not do so, there is an improper motive behind it.

Secondly, the Court will observe that the Netherlands has not made proper use of the possibility of having leave days accrued (during sickness) lapse. As we saw, under the Dutch rules leave days can still be claimed up to five years after they were acquired, and this also applies to the statutory days in the event of sickness if they cannot be taken. The period of fifteen months accepted by the Court is admittedly long, but nevertheless shorter, and can sometimes be useful. As we saw in the case before the Gelderland District Court in 2025, there may after all be situations in which leave days accrue during a period of sickness lasting more than four years. That possibility can be used in a situation in which a dormant employment contract is prolonged in the interests of the employee.

If the legislature does not wish to regulate the matter differently, employers (and possibly the parties to collective agreements) can already take measures now. Article 7:640a BW provides for an (admittedly too short) period after which statutory leave days lapse in the event of sickness, but this period can be extended by agreement in favour of the employee. It seems to me that there is no objection to using that 'in favour of' by, on the one hand, adopting the period of fifteen months applied by the Court but, on the other hand, also providing that statutory days then lapse even if the employee has not been able to take them.

Thirdly, it may be noted that, with the rules on continued payment of wages during sickness, the legislature intended not to worsen the legal position of employees compared with the situation in which they received a benefit under the Sickness Benefits Act (*Ziektewet*). The costs for the employer therefore cannot be a reason to reduce the accrual of leave entitlements. If the legislature does see a problem here, it can solve it itself by amending the rules on continued payment of wages and on the transition payment. The Court of Justice will therefore probably not be impressed by this argument either.

24. That must, after all, be done within three months after the termination of the employment, Article 7:686a(4), opening words and (b), BW.

7 Concluding remarks

The reader may wonder: why do you argue so strongly for the acquisition of leave entitlements during a dormant employment contract? Surely these employees are leaving employment and, if they are still able to go on holiday, they can easily do so, since they no longer have to work.

Apart from the situations that may still arise in which an employee who has left employment while incapacitated for work is nevertheless still able to start working in a new job and will at some point want to take leave while he has not yet accrued enough, my main concern is the matter of principle.

European and national law belong to the same legal order, so that it is important always to follow the Court's case law closely, certainly in the case of national legislation implementing a directive. The Court's case law is thus not just an opinion, but forms part of our legal order.

A court is bound by it, and there are even examples of infringement proceedings against the Netherlands because the courts did not apply European law correctly.[25] Now the European Commission naturally has other things on its mind than bringing proceedings over every judicial decision that in its view does not comply with European law. Nevertheless, even if such action is not taken, compliance with European law remains essential. If there is no such compliance, this leads to legal uncertainty and unequal treatment, for example between the employee who comes before a subdistrict court in Nijmegen and the one who has to seek justice in Dordrecht. An appeal is admittedly possible, but so far it has not come to that, as the Rotterdam subdistrict court notes. For the employees concerned that is, after all, quite a step.

The need also to take European labour law into consideration when dealing with national law is, moreover, only increasing. For example: in a recent publication we showed that recent directives have already built in the need for directive-conforming interpretation.[26] They expressly refer to the case law of the Court of Justice on the concept of worker, whereas that provision has not been implemented as such in the directives concerned (Platform Work, Transparent and Predictable Working Conditions, and Adequate Minimum Wages). The subdistrict court will therefore increasingly have to play chess on two boards at once; that may also mean that it has to depart from the literal text of Dutch employment law. That may not feel familiar, but it is unavoidable.

Now it may of course be that a court disagrees with the Court's case law. I too made critical remarks on the Court's case law on annual leave in my article in Arbeidsrechtelijke Annotaties.[27]

But a court that disagrees with case law of the Supreme Court, for example on the question whether a transition payment must be paid after two years of sickness, does not simply set that case law aside. There is quite a lot to be said against that transition payment: the employer has, after all, if all is well, already made considerable efforts to get the sick employee back to work and has also incurred costs in doing so. Moreover, the purpose of a transition payment, namely to help the employee move to another job, can often no longer be achieved in the case of an employee who is fully incapacitated for work. Yet the

25. ECJ 6 November 2003, Case C-311/01, *ECR* 2003, p. I-3103, ECLI:EU:C:2003:598 (Commission v Netherlands).
26. F. Pennings & S. Peters, 'De ontwikkeling van het Europese arbeidsrecht: Van ondergeschoven kind naar volwaardig gezinslid?', *NJB* 2026(3), pp. 190-199.
27. See note 2.

subdistrict court does not refuse the transition payment on the reasoning that its purpose can no longer be achieved.

In such a case preliminary questions can be referred to the Supreme Court and, if it is not to be expected that it will change course, one can always take up the pen in order to persuade the legislature to make changes.[28] The case law of the Court of Justice should be approached in the same way.

A court can submit to the Court that it considers an adjustment of the case law necessary. As we saw in KHS-Schulte, the Court does indeed respond to this if it considers it necessary. Undesirable effects, or possibly a conflict with other provisions of EU law or with a provision of the Charter, can be invoked in this respect.

In that respect it is a pity that the Minister did not take up the invitation implicit in the parliamentary questions put by Member of Parliament Patijn on 10 September 2025 in response to the 2025 decision of the Gelderland District Court.[29] The Minister writes that it follows from Schultz-Hoff that ‘according to the European Court of Justice the worker (must have) performed work beforehand which justifies the granting of leave. The entitlements to paid annual leave are in principle calculated on the basis of the periods of actual work completed under the employment contract’.

As we saw in section 2, the Court has in fact said that in the case of sickness an exception applies to the rule that one must work in order to accrue leave entitlements, so the Minister too gives her own reading of the case law. She does not want to take measures to solve the problem, and that is a pity.

The initiative of the Rotterdam subdistrict court to restore unity in this area is therefore very useful, because it is undesirable for such great differences to exist in the way European law is given effect. Perhaps the Supreme Court can make the Minister change her mind.

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28. E.g. on transition payments, C.J. Frikkee & E. Verhulp, ‘Slapende dienstverbanden na het Hoofdlijnenakkoord 2024’, *ArbeidsRecht* 2025/2, pp. 22-25.
29. *Aanhangsel Handelingen II* 2025/26, no. 238.