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ARTICLE

The influence of ILO principles on the development of the law on annual leave

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*The Dutch Holidays Act (*Vakantiewet*) had to be amended in 2011 as a result of the judgment of the Court of Justice in Schultz-Hoff and Others. Since then, too, the law on annual leave has not been a settled matter, as is apparent, among other things, from several recent decisions of subdistrict courts. Both the case law of the European Court of Justice and the provisions of the Dutch Civil Code are inspired by ILO principles. They have, however, been applied in different ways. This article describes how the ILO principles have shaped the Dutch law on annual leave. It then examines the application of ILO principles by the European Court. This shows that the cursory way in which the Working Time Directive regulates the right to annual leave explains the Court's use of ILO principles. The way in which the directive regulates annual leave also explains why the Court has given the ILO principles an interpretation of its own. This insight is relevant to the EU directive on annual leave proposed in this article. In the shorter term, too, the Dutch legislature can ease a number of problems.*

KEYWORDS Annual leave · Working Time Directive · Schultz-Hoff and Others judgment · ILO Convention No. 132 · Leave entitlements during sickness

1 Why is research into the ILO principles in the law on annual leave important?

Since the turn of the century, the Court of Justice of the European Union (CJEU, hereinafter also: the Court) has delivered a number of high-profile judgments on the right to annual leave. Among other things, these meant that the Dutch Holidays Act (*Vakantiewet*) of 1966 – at the time laid down in Articles 1638bb et seq. of the Dutch Civil Code (*Burgerlijk Wetboek*, BW),[1] now Articles 7:634 et seq. BW – had to be amended in 2011 (see section 5.4). Both the Holidays Act and the case law of the Court are inspired by principles of the International Labour Organization (ILO) on the right to annual leave, as is apparent from the legislative history and the case law respectively. These principles are not laid down as such in a single document, but can be derived from ILO Conventions and Recommendations; I will discuss them in particular in sections 5.1, 5.2 and 6.1.

There prove to be differences between the ways in which the ILO principles have been applied in Dutch legislation and in the case law of the Court respectively. It is therefore useful to analyse these differences, in order to discuss on that basis how frictions between Dutch and European annual leave law have arisen. Some frictions still exist, as is apparent from, among other things, recent decisions of subdistrict courts, in

1. Stb. 1966, 290.

particular on the accrual of leave days during sickness, and the response of the Minister of Social Affairs and Employment to them (section 7.1). Discussing the cause of those frictions can help in making recommendations for resolving them. ILO principles can, moreover, serve as a guide for proposals to amend the legislation on annual leave.

In this contribution I cannot discuss all topics of annual leave law; I will concentrate on those topics in respect of which the case law of the Court refers to ILO principles and which have given rise to debate. I first discuss the relevant ILO instruments and their influence on the Dutch Holidays Act (section 2); I then turn to the relationship between the EU directives and the ILO principles (section 3). Next I consider the purpose of the right to annual leave (section 4), the acquisition of leave days, in particular during periods in which work is interrupted, such as sickness (section 5), and the taking, lapse and limitation of leave days (section 6). In section 7 I will consider the implementation by the Netherlands of the case law of the Court. I will also deal with decisions of Dutch courts on this matter.

In section 8 I draw conclusions on the way in which the Court has applied ILO principles and on why the case law has led to differences with the Dutch Holidays Act. Finally, I will make proposals for amending the Working Time Directive and the Holidays Act.

2 The genesis of the Holidays Act and ILO annual leave law

The Netherlands prepared its Holidays Act in the 1950s and early 1960s. The bill was based on an advisory report of the Social and Economic Council (SER) of 1957.[2] An annex to this report contained a translation of ILO Recommendation No. 98 concerning holidays with pay (1954). The report also contained a letter from the responsible ministers, which concluded with the remark that 'it is naturally the intention of the first undersigned to take account of the content of the Recommendation, as far as seems at all possible, in the draft Holidays Act that is being prepared'. It is apparent from both the SER report and the parliamentary papers[3] that Recommendation No. 98 was an important source of inspiration for the Holidays Act.

Recommendation No. 98 was not the first ILO instrument on annual leave; Convention No. 52 and Recommendation No. 47 had already been adopted in 1936. The preparation of these instruments shows how international annual leave law has developed. The report in which Convention No. 52 was prepared explains that this Convention was preceded by an inventory of the annual leave arrangements in the various ILO Member States. This showed that there were many differences between national systems and practices. At national level, after all, the right to annual leave arose when employers began to grant their employees paid days of leave, sometimes on their own initiative, sometimes on the basis of a collective agreement. As a result of this bottom-up development, considerable differences arose between the various economic sectors of a country; there also proved to be great differences between the ILO Member States.

Because the right to annual leave and its content constitute a term of employment, ILO Member States wished to stay as close as possible to the current state of affairs in their country; they did not wish to be forced by a Convention to make employers in their country meet higher requirements. For that reason they

2. SER, *Advies betreffende een voorontwerp van wet tot wettelijke regeling van vakantie met behoud van loon*, 1957.
3. *Kamerstukken II* 1962/63, 7168, no. 3.

did not agree to lay down standards in the Convention that were higher than those they already met.[4] A Recommendation, by contrast, was considered suitable for promoting a higher level of annual leave rights. When, eighteen years after the adoption of Convention No. 52, the time was considered ripe for higher standards, these too were laid down in a Recommendation: Recommendation No. 98 (hereinafter also: the Recommendation).[5] This is the Recommendation which, as stated, played an important role in the design of the Dutch Holidays Act.

During the preparation of Convention No. 132 in the 1960s, an inventory was again made of the annual leave arrangements in the ILO Member States. The interpretations of Convention No. 52 and Recommendation No. 98 were also addressed in that context. In a survey by the Committee of Experts, the replies of the Member States to the questionnaire were discussed.[6] In the following sections I will refer to the observations made there.

Convention No. 132 was adopted in 1970.[7] Its predecessor, Convention No. 52, is still in force for those Member States which have ratified that Convention but not Convention No. 132. At the time when the Dutch Holidays Act was being prepared, Convention No. 52 was outdated and there was not yet a text of the later Convention No. 132. That is why the Act was aligned with Recommendation No. 98, which also contains more detailed provisions than either Convention. During the preparation of Convention No. 132 the Dutch government stated that, in view of the recent entry into force of the Holidays Act, it was not inclined to agree to Convention provisions that would require the Holidays Act to be amended.[8] Nor was Convention No. 132 ratified later; for the reasons, see section 6.2.

3 Inclusion of the right to annual leave in Community law

3.1 The genesis of Directive 93/104

In the European Community the right to paid annual leave was first mentioned in the Community Charter of the Fundamental Social Rights of Workers, a declaration of the Heads of State or Government of 1989. Under the heading ‘Improvement of living and working conditions’, point 7 states: ‘The completion of the internal market must lead to an improvement in the living and working conditions of workers in the European Community.’ Point 8 continues: ‘Every worker of the European Community shall have a right to a weekly rest period and to annual paid leave, the duration of which must be progressively harmonized in accordance with national practices.’

These ambitions were given effect in Working Time Directive 93/104. The first version of the proposal for this directive merely provided that ‘Member States shall take the necessary measures to ensure that

4. ILC, *Holidays with Pay*, 20th Session 1936, Report II, 1936, p. 126.
5. For a more extensive discussion of the development of ILO annual leave law, see F. Pennings, ‘The role of ILO principles on annual leave in the case law of the Court of Justice’, *European Labour Law Journal* 2025/3, pp. 325-342.
6. Committee of Experts, *Survey of the Reports on the International Labour Instruments concerning Holidays with Pay* (1964), included in ILC, *Holidays with Pay*, Report VI(1), 1968.
7. On Convention No. 132 see, inter alia, R. Blanpain, ‘The Holidays with Pay Convention of the ILO (No. 132); a Commentary’, *IJCLLIR* 2000, pp. 359-396; C. Spinelli, ‘IAO-Verdrag 132’, in: E. Ales et al. (eds.), *International and European Labour Law*, Baden-Baden: Nomos 2018, pp. 1370-1381.
8. ILC, *Holidays with Pay*, 54th Session 1970, Report IV(2), 1970, p. 27.

all workers are able to enjoy paid annual leave during a minimum period'.[9] During the discussion of this proposal, the Economic and Social Committee of the European Parliament expressed its disappointment: 'It is regrettable that, in drawing up the proposed directive, the Commission did not take sufficient account of the Social Charter of the Council of Europe and the ILO standards.' As regards the provision on annual leave, it observed that this was 'quite simply too vague'.[10]

The European Parliament subsequently adopted an amendment to include the following recital in the directive: 'Whereas it is appropriate that the Community should, in this field, at least respect the Conventions of the International Labour Organization.'[11] After the European Commission had presented a number of successive, differing versions of the draft directive in which this amendment had been incorporated, the following recital was ultimately included: 'Whereas account should be taken of the principles of the International Labour Organization with regard to the organization of working time, including those relating to night work.'[12] Neither the Commission documents nor the directive give an explanation of this text. The amendment of the Parliament thus did not relate specifically to the ILO principles on annual leave. The text, however, speaks of principles of the ILO, so that principles in the field of the right to annual leave are also covered.

Directive 93/104 was based on Article 118a of the EC Treaty, which concerned the safety and health of workers. Article 7 of Directive 93/104 concerns the right to annual leave:

> '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.'

3.2 Directive 2003/88 and the Charter of Fundamental Rights of the European Union

At the beginning of the twenty-first century it was considered necessary to replace Directive 93/104, among other things so that the case law of the Court on working time and rest periods[13] could be codified.[14] This was done by Directive 2003/88, this time based on Article 137(2) of the EC Treaty (subsequently Article 153(2) of the Treaty on the Functioning of the European Union (TFEU)). On that basis the Union legislature may adopt minimum requirements concerning working conditions. The legal basis for Directive 2003/88

9. COM(1990)317.
10. OJ 1991 C 60, pp. 26-32.
11. OJ 1991 C 72, p. 86 et seq. This amendment mentioned three ILO instruments concerning weekly rest periods, none concerning annual leave.
12. No reference is made here to the European Social Charter. The European Social Charter of 1961 did set a clear standard for annual leave (Article 2(3)), and the Advocate General in his Opinion in BECTU (point 23) (see section 4.3) would also refer to it. The European Social Charter, however, elaborates working time and rest periods to a much lesser extent than the ILO Conventions. That will have been the reason why the preamble mentions only the ILO principles.
13. There is not enough room here to discuss all aspects of the Court's case law on annual leave; for an overview, see: Interpretative Communication on Directive 2003/88/EC, OJ C 2023, 143/8.
14. COM(2002)336.

was thus no longer the provision on the health of workers. The new directive refers to the ILO principles in the same terms (now recital 6 of the preamble); Article 7, too, has the same wording as its predecessor.

A milestone in the development of the right to annual leave was the adoption of the Charter of Fundamental Rights of the European Union (hereinafter: the Charter), Article 31(2) of which reads: 'Every worker has the right to (…) an annual period of paid leave.' The Charter thus recognises the right to annual leave as a fundamental right; here the right is not made dependent on national legislation and practice.[15] This article has acquired particular significance in the case law of the Court, especially where a national provision is not in conformity with EU law.

In the event of such a discrepancy it must first be examined whether that national provision can be interpreted in a manner consistent with Union law (interpretation in conformity with the directive). The national court must interpret national law as far as possible in the light of the wording and the purpose of the directive concerned (having regard to the case law of the Court), in order to achieve the result sought by it.[16] There are limits to this; the court need not go so far that the interpretation is *contra legem* (that is to say: contrary to the intention of the national legislature).

If the provisions of a directive are, as regards their content, unconditional and sufficiently precise, individuals may rely on those provisions before the national court against the State where it has failed to transpose the directive into national law in good time or has transposed it incorrectly. According to the Court, Article 7(1) of Directive 2003/88 meets these criteria of unconditionality and sufficient precision.[17] In that situation, therefore, national provisions can be set aside (*contra legem* application).

Provisions of directives do not, however, have horizontal effect, and this is where Article 31(2) of the Charter comes in. According to the Court, the right to annual leave under this article is both mandatory and unconditional in nature. The Working Time Directive merely supplements this article with a provision on the duration of the right. As a result, Article 31(2) gives workers the right to rely on Article 7 of Directive 2003/88 in proceedings against their employer (including a private employer), and this may even lead to *contra legem* interpretations.[18]

4 The purpose of the right to annual leave

4.1 ILO

In annual leave law the purpose of the right to annual leave plays a major role, as we will see in the following sections, even though that purpose is not laid down in the instruments concerned. ILO Convention No. 52, for instance, contains no recital or provision describing the purpose of the right to annual leave. The preamble to Recommendation No. 47, by contrast, does state that 'the purpose of such holidays is to secure to employed persons opportunities for rest, recreation and the development of their faculties'. In Convention No. 132, as in its predecessor, no provision on the purpose of the right to annual leave is to be

15. See also J.R. Vos, 'Op reis met vakantiewetgeving: het Handvest biedt nieuw uitzicht', *ArA* 2019/2, pp. 50-80.
16. See CJEU 24 January 2012, Case C-282/10, ECLI:EU:C:2012:33 (Dominguez).
17. CJEU 6 November 2018, Joined Cases C-569/16 and C-570/16, ECLI:EU:C:2018:871 (Bauer and Broßonn).
18. Ibid.

found.

Looking back on the genesis of Convention No. 132, the ILO recalls in a report of 2000 that this Convention was prepared in follow-up to a resolution of 1961 which called for higher standards than those of Convention No. 52.[19] Its sponsors had found that (in some parts of the world) productivity and prosperity had increased sharply and that many workers had been given longer holidays than the minimum duration under Convention No. 52 (six days).

According to the 2000 report, the objectives at the time of the Convention to be developed were, first, that workers would have more time to recover from their work. This had become possible as a result of increased productivity and profits. Secondly, the resolution had the objective of redistributing the gains resulting from productivity increases among workers in the form of more leisure time.[20] Recuperation from work, but also redistribution of prosperity, were thus mentioned as objectives.

During the Conference at which the draft of Convention No. 132 was discussed, some speakers argued that international labour standards are intended not only to confirm existing practices, which makes it easier to obtain ratifications; standards must also set goals in order to promote social progress.[21] More specifically, the purpose of Convention No. 132 should be to protect the safety and health of workers and to provide a means of redistributing the gains resulting from productivity increases. Other participants, however, were reluctant to include a redistribution objective in the Convention; in some parts of the world (in particular developing countries) there were priorities in the redistribution of increased prosperity other than the granting of more annual leave.[22]

In the end the fear of too few ratifications was decisive and standards were included which did not differ too radically from the previous Convention; nor was the purpose of the right to annual leave stated. The minimum duration of annual leave was, however, now set at three weeks.

4.2 The Netherlands

The purpose of the right to annual leave was also addressed during the preparation of the Dutch Holidays Act in the 1960s. The government wished to lay down in legislation, and to generalise, the right to annual leave, which until then had been regulated sector by sector. This extension to all employees was substantiated with the proposition that ‘not having to perform work is a manifestation of prosperity. Free time opens the way to other elements of prosperity, the enjoyment of which depends on having free time at one’s disposal.’[23] The purpose of the right to annual leave was not, however, laid down in the Civil Code.

It could be inferred from some provisions that, in addition to the redistribution of prosperity, the protection of the health of employees was also a purpose; young employees were entitled to longer annual leave than older ones.

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19. ILO, *Short survey concerning the Holidays with Pay Convention (Revised), 1970 (No. 132)*, GB.279/LILS/WP/PRS/1/2, Geneva 2000, p. 9.
20. Ibid.
21. ILC, *Record of Proceedings*, 54th Session (1970), Provisional Record, no. 36, pp. 613, 626, 632.
22. Ibid., pp. 614, 628.
23. *Kamerstukken II* 1962/63, 7168, no. 3, p. 1.

4.3 EU

The Working Time Directive does not state the purpose of the right to annual leave either. The Court therefore had to establish this purpose itself. In order to understand better why and how it did so, it is useful to recall that under Article 7 of the Working Time Directive the entitlement to, and granting of, annual leave depend on the conditions laid down by national legislation and/or practice. When the Court wished to give rulings on the right to annual leave that entail obligations for Member States, it therefore had to answer the question whether the powers reserved to the Member States stand in the way of this; this question was put explicitly by the British High Court in the BECTU case.[24] The purpose of the right to annual leave stated by the Court thus served to argue which rights for workers flow from Article 7, in other words, which limits could be set to the powers of the Member States to regulate the right to annual leave.

The development took place in phases. The first was that of the BECTU judgment.[25] At issue was a British rule which made the acquisition of the right to annual leave subject to the condition that the worker had been continuously employed by the same employer for thirteen weeks. The workers concerned were employed in sectors such as broadcasting, film and theatre, where they were engaged on short-term contracts. As a result, most of them did not meet that condition. The Court came to the conclusion that the British condition was contrary to the directive by considering that the right to annual leave is a particularly important principle of Community social law. For that reason the national authorities may implement it only within the limits expressly laid down by the directive itself. According to the Court, the right to annual leave is such an important principle because of its purpose: having regard to the legal basis of the directive at the time, Article 118a of the EC Treaty, and the wording of Article 1 of the Working Time Directive, that purpose was, according to the Court, to lay down minimum requirements intended to improve the living and working conditions of workers. We can infer from this that, because the Court had to substantiate that the right to annual leave is such an important right, it focused on, and confined itself to, the purpose of allowing the worker to rest from work. The purpose of improving working conditions, mentioned in the Community Charter (see section 3.1), is, after all, not suited to being imposed as mandatory on the Member States; in that respect they have much more policy discretion of their own.

In the BECTU judgment the Court does refer to the Community Charter (para. 39), but only to the provision on health, not to the redistribution of the growth in prosperity. A second argument of the Court for the importance of the right to annual leave was that Article 17 of the Working Time Directive does not permit derogations from Article 7, whereas it does in the case of other provisions of that directive. Because the right to annual leave is an important right, Member States may not, the Court concludes, make it subject to a condition which has the effect of excluding certain workers from that right. This is also seen as an application of the principle of the effectiveness (*effet utile*) of Union law.[26]

When the Court had to answer questions on how far the powers of Member States could be limited, the

24. See also Advocate General Tizzano in Case C-173/99 (BECTU), points 19 et seq. The case law of the Court, incidentally, relates only to the minimum entitlement required by the directive; see CJEU 19 November 2019, Case C-609/17, ECLI:EU:C:2019:981 (TSN); also J.R. Vos, 'Bovenwettelijke vakantie en de reikwijdte van het EU-recht', *AR Updates* 4 March 2020.
25. ECJ 26 June 2001, Case C-173/99, ECLI:EU:C:2001:356, para. 53.
26. Advocate General Trstenjak in Case C-350/06, ECLI:EU:C:2008:37, point 46 (Schultz-Hoff and Others).

second phase began, namely with the judgment in Schultz-Hoff and Others (see also section 5.3). In that judgment the purpose of annual leave, namely to allow workers to recover from work, was not only invoked to substantiate the importance of the right; consequences for the content of the right to annual leave were also drawn from this purpose. I will discuss these in the following sections.

4.4 Summary

In the drafting phase of all three systems discussed, statements can be found which mention both the purpose of recovery from work and the purpose of sharing in increased prosperity. The purpose of the right to annual leave has not, however, been laid down in the instruments themselves. This means that the courts themselves have to give an interpretation of that purpose. In that regard, the purpose of health lends itself better to the courts drawing consequences from it than the purpose of redistributing prosperity, in respect of which employers and Member States have more policy freedom. The following sections consider the consequences of this dual but unrecorded objective.

5 Acquisition of leave days

5.1 The ILO principles on the acquisition of leave days and their elaboration in the Holidays Act

Convention No. 52 provides for an annual holiday of at least six working days after one year of continuous service (perhaps superfluously: at the time there was a six-day working week).[27] This provision evidently proceeds from a duty of care on the part of the employer where an employee has been in service for at least one year. There is no accrual of rights: where the employment has lasted less than one year there is no right to annual leave.

According to ILO Recommendation No. 98, every worker should be entitled to an annual holiday with pay, the duration of which should be proportionate to the length of service performed, and not less than two working weeks for twelve months of service. The Recommendation thus provides not only for a longer holiday, but also for proportionate accrual.

The Convention does not define the terms ‘service’ and ‘interruption’ any further, which raised the question whether every interruption of work may lead to the assumption that the service has been interrupted. The Recommendation can be of help here: according to Paragraph 7(1) of Recommendation No. 98, interruptions of work during which the worker continues to receive his wages affect neither his entitlement to annual leave nor its duration. This provision relates to interruptions, whatever the reason, during which the worker continues to receive his wages.[28]

Under Article 1638bb BW of the Holidays Act of 1966, the employer was obliged to grant the employee annual leave of two weeks for each year that the employment had lasted (in line with Recommendation

27. I use the present tense here because the Convention is still in force for some Member States.

28. According to sub-paragraph 2, interruptions of work which terminate neither the employment relationship nor the contract of employment should not affect the leave entitlements which the worker had acquired before the interruption. In other words: acquired rights are not lost.

No. 98). Article 1638dd BW provided that the employee did not accrue leave entitlements over the time during which he[29] was not entitled to wages because he did not perform the agreed work.

Although the BW provision was worded in the negative, it followed the principle that the accrual of annual leave was determined by periods of payment of wages. 'The choice of this criterion follows Recommendation No. 98', as the minister responsible at the time also stated.[30]

The current Article 7:634(1) BW lays down explicitly that leave days are acquired over every period in which there is an entitlement to wages.

5.2 The ILO principles concerning periods of inactivity and their elaboration in the Holidays Act

In connection with ILO Convention No. 52 the question also arose whether certain interruptions of the period of service during which no wages were paid had to be disregarded for the question whether there was an entitlement to the minimum period of annual leave. Recommendation No. 98 does give answers to that question (see below), but Convention No. 52 itself does not. The survey mentioned in section 2 concluded that many countries had general or specific situations of permitted interruptions of the period of service. There was, however, little agreement on which interruptions did not affect the right to annual leave, apart from those due to sickness and industrial accidents. For that reason it did not prove possible to include in Convention No. 132 a clear criterion as to which interruptions do not interfere with the accrual of annual leave.[31] Article 5(4) does provide 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[32] of the employed person concerned as illness, injury or maternity shall be counted as part of the period of service.[33]

This text therefore requires that periods of absence from work beyond the control of the worker count towards the period of service, but Member States have the possibility of determining the conditions under which this happens. Those conditions may also concern the duration of the assimilation.[34]

Paragraph 7(3) of Recommendation No. 98 gives a considerably more extensive list than Convention No. 132 of situations in which interruptions of work, even though no wages are paid, are counted as part of the period of service. Each Member State should determine the manner in which interruptions of work count towards the acquisition and duration of leave entitlements where they are the result of:

29. For the sake of brevity, the pronouns 'he' and 'his' are also used here for 'she' and 'her'.
30. *Kamerstukken II* 1962/63, 7168, no. 3, p. 7.
31. Survey, p. 28.
32. The English text speaks of 'reasons beyond the control of the employed person'; the French, German and Spanish texts speak of 'reasons independent of the will'. In the Dutch language versions of judgments of the Court (section 5.3) this condition is rendered as '*losstaand van de wil*' or '*buiten de wil van de werknemer*' (unconnected with, or outside, the will of the worker) (for instance the Dicu judgment). No difference in meaning is intended by these variations.
33. In the Dutch original of this article I use the Dutch translation of the Convention as published in Trb. 1971/91, as corrected by Trb. 1997/198; this translation follows the English text of the Convention.
34. Compare also the preparatory documents: ILC, *Holidays with Pay*, 54th Session 1970, Report IV(2), 1970, p. 29.

- sickness, accident, and rest periods before and after childbirth;[35]
- absence owing to family events;[36]
- military obligations;
- the exercise of civic rights and duties;[37]
- the performance of duties arising from trade union responsibilities;[38]
- changes in the management of the undertaking;
- intermittent involuntary unemployment.[39]

Article 1638dd BW followed Recommendation No. 98 closely. It provided that the employee, even though he was not entitled to wages, did accrue leave entitlements over the period in which he could not work because of: (a) sickness or accident, (b) military service, (c) transfer of annual leave to a new employer, (d) participation, with the employer's consent, in trade union activities, and (e) involuntary unemployment. Periods of pregnancy and childbirth, and periods during which a young employee attended education, were also assimilated to periods of wages.[40] The entitlement on the basis of this assimilation was, however, acquired only over a period of at most one year and lapsed if the employment was terminated by the employee.

The current Article 7:635 BW has broadly the same structure, but does not mention assimilation in the case of sickness (see section 5.4 on this) and no longer contains a limit in time. It does contain a general assimilation: the employee also accrues leave entitlements (d): 'during a period in which, against his will, he is unable to perform the agreed work'. This provision is evidently inspired by Article 5(4) of Convention No. 132. To the situations mentioned in Recommendation No. 98, Article 7:635(1)(f) BW adds that a period of parental leave leads to the accrual of leave entitlements.

We thus see that the legislature of the Holidays Act followed Recommendation No. 98 meticulously and that this influence is still visible in the Civil Code. In other words, ILO principles have strongly influenced the Holidays Act.

5.3 The Court of Justice on periods of sickness

Section 4.3 dealt with the fact that the Court set limits to the power of Member States to lay down conditions for entitlement to annual leave, and that case concerned conditions relating to periods of work. The case of Schultz-Hoff and Others[41] concerned periods of sickness. The Court held in that case that workers accrue

35. Survey, p. 24; these were the most common interruptions that did not affect the continuity of the employment.
36. Survey, p. 25.
37. According to the Survey, p. 26, these are activities as a guardian, jury service, activities at elections, the exercise of a public mandate, tasks within social bodies, communal or other fiduciary tasks imposed by law, or full-time work in a people's committee.
38. The Survey, p. 26, states that in some countries lock-outs and strikes were also counted under this heading, sometimes only for access to the right to annual leave, not for the calculation of its duration.
39. The Survey states that this concerned involuntary unemployment with the same employer.
40. The explanatory memorandum does not address interruptions in connection with family events, the exercise of civic rights and changes in the management of the undertaking; I assume that it was taken for granted that wages continued to be paid in those cases.
41. ECJ 20 January 2009, Case C-350/06, ECLI:EU:C:2009:18. The treatment of periods of sickness was confirmed in CJEU 24 January 2012, Case C-282/10, ECLI:EU:C:2012:33 (Dominguez).

leave entitlements during periods of sickness as well. In order to arrive at this interpretation it had to argue why Member States were limited in their power to provide that leave entitlements were accrued only during periods of work (paras 34 et seq.). Evidently the Court considered that the *effet utile* principle offered too little basis for this. This is where the ILO principles came in: according to recital 6 in the preamble, the Court stated, Directive 2003/88 has taken account of the principles of the ILO.

The Court then referred to Article 5(4) of Convention No. 132: '… absence from work for such reasons beyond the control of the employed person concerned as illness, … shall be counted as part of the period of service' (para. 38).

The ellipses in the quotation (which indicate omissions) were inserted by the Court; the Court thus leaves out an essential part of the provision, namely that Member States may lay down conditions in this respect. With its reference to that article of the Convention, the Court concluded that a Member State cannot make the right to annual leave conferred by Directive 2003/88 on sick workers subject to the condition that they have actually worked during the reference period (para. 41).[42]

The ILO principles as interpreted by the Court are therefore used to interpret Article 7 of Directive 2003/88.

5.4 The amendment of the limitation in the Civil Code on the accrual of leave days following Schultz-Hoff and Others

As we saw in section 5.2, Article 1638dd BW counted periods of sickness towards the acquisition of leave days, but only up to a maximum of twelve months. In 1988 a fourth paragraph was added to this article, which limited the acquisition of leave days during sickness to the last six months of sickness.[43] In the new Civil Code this became Article 7:635(4) BW.

As a result of the judgment in Schultz-Hoff and Others this provision had to be amended, because a limit in time was no longer permitted.[44] The fourth paragraph was deleted; from then on Article 7:634 BW, which links the accrual of leave days to periods of payment of wages, was regarded as sufficient to regulate the acquisition of leave days in the event of sickness. Sick employees are, after all, in principle entitled to continued payment of wages. A special provision on accrual during sickness was therefore no longer considered necessary. In Dutch case law this arrangement has led to contradictory results. Because other elements are also relevant here, such as the lapse of leave entitlements, this is addressed after those have been discussed, in section 7.

5.5 The Court of Justice and periods of inactivity other than sickness

Does the case law on the assimilation of periods of sickness to periods of work also apply to other periods in which no work is performed?

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42. The reference period is the period laid down in national law over which leave entitlements are acquired (in the Netherlands: per calendar year).
43. Act of 9 June 1988, Stb. 1988, 281. Prepared in *Kamerstukken II* 1985/86, 19575. The original proposal provided for three months.
44. Act of 26 May 2011, Stb. 2011, 318. The amendment was prepared in *Kamerstukken II* 2009/10, 32465.

5.5.1 Parental leave

In order to answer this question in the case of parental leave, the Court relied in the Dicu judgment[45] on the purpose of the right to annual leave: if the worker must be enabled to rest from his work and to have a period of relaxation and leisure, it is evidently presupposed that the worker has actually worked during the reference period. It is, after all, from that work that he must rest. The right to annual leave must therefore, in principle, be determined by reference to the periods of actual work. There are exceptions to this in certain specific situations, such as sickness and maternity leave, laid down in ILO Convention No. 132 and (for maternity also) in Union legislation. No such exception exists, however, in the case of parental leave, according to the Court.

In order to answer the question whether parental leave must then be treated by analogy with sick leave, the Court went on to consider the distinction between sick leave and parental leave. Sickness is in principle unforeseeable and occurs beyond the worker's control. In that connection the Court refers to Article 5(4) of ILO Convention No. 132, but in doing so smuggles in the criterion 'unforeseeable'. According to the Court, the taking of parental leave is not unforeseeable and in most cases results from the worker's wish to take care of his child. Furthermore, the worker on parental leave is not subject to physical or psychological constraints caused by an illness, so that he is in a different situation from a sick worker, according to the Court.[46] The Court thus added to the element 'beyond the control' of the worker, as contained in Article 5(4) of Convention No. 132, the criteria 'unforeseeable' and 'physical or psychological constraints caused by an illness' in order to be able to distinguish periods of sickness from other periods of not working.

As we saw in section 5.2, in the Netherlands leave days do accrue during parental leave. That is of course also permitted; the Court proceeds only from the minimum obligations. In the Netherlands – as under Convention No. 132 or Recommendation No. 98 – it is not work that is the basis for the accrual of leave days, but – in principle – the payment of wages. The Court's interpretation that work is the basis for the accrual of leave entitlements can be explained by the purpose of annual leave as the Court had established it earlier.

5.5.2 Short-time working

Application of the criteria for distinguishing periods of sickness from other periods meant that periods of short-time working do not count towards the acquisition of leave entitlements either, as is apparent from the judgment in Heimann and Toltschin.[47] The case concerned workers who for one year received a benefit under a social plan, while they did not have to work for their employer and received no wages. The Court held that short-time working differs fundamentally from sickness. Short-time working is, after all, foreseeable for the workers and they are free to rest or to devote themselves to recreational and leisure activities. Nor are they subject to physical or psychological constraints, as in the case of sickness, in taking annual leave. The Court also took into consideration that if the employer were obliged to grant leave days during the period of short-time working, he might become reluctant to agree to a social plan. That may

45. CJEU 4 October 2018, Case C-12/17, ECLI:EU:C:2018:799.
46. For criticism, see E. Caracciolo di Torella, 'Here we go again: The Court, the value of care and traditional roles within the family: *Dicu*', *Common Market Law Review* 2020/57, pp. 877-888.
47. CJEU 8 November 2012, Joined Cases C-229/11 and C-230/11, ECLI:EU:C:2012:693.

also be disadvantageous for workers.

In this case law we see an ad hoc development of criteria. Their application leads to a different outcome from that which would follow from Recommendation No. 98. After all, among the unpaid periods to be assimilated, Recommendation No. 98 also mentions involuntary unemployment. Short-time working falls within this.

The current Article 7:635 BW does not mention unemployment as a separate ground, but the general ground (d) – the employee is unable, against his will, to perform the work – does cover this circumstance. We can therefore also conclude that not all ILO principles have been incorporated in the Court's interpretation.

5.5.3 Reinstatement after unlawful dismissal

In the QH case, application of the criteria did lead to a result favourable to a worker.[48] The worker concerned had been dismissed and was reinstated after four years, after the court had found that her dismissal was unlawful. There was therefore no reinstatement with retroactive effect (the case arose under Bulgarian law). When she was dismissed again after a few days, she did not appeal against this, but claimed an allowance in lieu of the leave not taken over the preceding four years. The Court held that the situation in which a worker is not allowed to work because of an unlawful dismissal is, as a rule, not foreseeable and is beyond the worker's control. The period between the date of the unlawful dismissal and the date of the worker's reinstatement therefore had to be treated as a period of actual work for the purpose of determining the right to annual leave.

This, too, is an outcome that is difficult to reconcile with Recommendation No. 98 and would not follow from Article 7:635 BW either. Article 7:634 BW, as part of Book 7, Title 10, after all presupposes the existence of a contract of employment for the accrual of leave entitlements. See section 6.3.3 on the carry-over period in this situation.

5.5.4 Summary

The Court of Justice had to rule on the question whether leave entitlements are also accrued during periods of sickness. It answered that question in the affirmative, with reference to Article 5(4) of Convention No. 132, but did not take over from that provision that Member States may attach conditions and limits to this. The Netherlands had included a limitation, in line with Recommendation No. 98, and that would also be in line with Article 5(4) of Convention No. 132.

Other forms of interruption of work, apart from maternity, are not expressly regulated by Convention No. 132; here the Court had to arrive at an interpretation by means of a comparison with sickness. In doing so it did not fall back on Recommendation No. 98.

6 Taking, limitation and lapse of leave entitlements

48. CJEU 25 June 2020, Joined Cases C-762/18 and C-37/19, ECLI:EU:C:2020:504.

6.1 Taking leave days under ILO Convention No. 132

Article 8 of Convention No. 132 allows Member States to provide that the period of annual leave acquired is taken in parts. Unless otherwise provided in an individual or collective agreement, one of the parts, according to this provision, shall consist of at least two uninterrupted working weeks. Article 9(1) provides that this uninterrupted part shall be granted and taken no later than one year after the year in which the entitlement to annual leave arose; the remaining leave days no later than eighteen months. According to the International Labour Office,[49] the purpose of this provision is to ensure that the worker actually takes at least part of his leave days each year and that the remaining part is not postponed indefinitely. This principle can be applied with a large degree of flexibility, the Office explained.[50] The article in question therefore mentions time limits within which the employer must have the worker take annual leave; it provides nothing on the consequences if the provision is not complied with.[51]

Article 10 gives the employer the means to fulfil the obligations contained in Article 9. In principle he can determine the period in which the annual leave is to be taken, albeit after consultation with the worker concerned or his representatives. Member States must ensure that the provisions of Convention No. 132 are complied with: effective measures must be taken to ensure, by means of adequate inspection or otherwise, the proper application and enforcement of the regulations or provisions concerning annual leave. Convention No. 132 contains no provision on the lapse or limitation of leave entitlements; in view of the scheme of Convention No. 132 it is implausible that the drafters of the Convention had limitation or lapse in mind as one of the instruments of enforcement. What they intended, by contrast, was that the employer should actually have the worker take annual leave, that this leave should not be fragmented, and that it could be bought off only in the exceptional case of termination of employment (Article 11).

6.2 The Netherlands and limitation of leave entitlements

Under the Civil Code the employer is obliged to enable the employee each year to take the minimum period of annual leave (Article 7:638 BW). The employer may oblige the employee to take annual leave by fixing the dates on which the leave begins and ends if the individual contract or collective agreement so provides, unless there are compelling reasons against this. The Civil Code does not impose an obligation on the employee to take annual leave.[52] There is indirect pressure, however: the Holidays Act of 1966 already contained a limitation period of two years after the time at which the entitlement had arisen (Article 1638ll BW). In 2001 the limitation period was extended to five years, in order to broaden the possibility of saving up leave.[53]

While most of the differences between the Holidays Act and Convention No. 132 have meanwhile become

49. The International Labour Office provides the secretariat of the Organization and, among other things, prepares new Conventions.
50. ILC, *Holidays with Pay*, 54th Session 1970, Report IV(2), 1970, p. 39.
51. It is therefore not clear to me why H.J. van Drongelen, J. ten Hoor and S.J. Rombouts (‘An All-European holiday?’, *ArA* 2015/9, p. 20) take the view that Article 9(1) of Convention No. 132 contains expiry periods and that the Dutch limitation period of five years (see section 6.2) ‘is really not acceptable’.
52. *Kamerstukken II* 2009/10, 32465, no. 3, pp. 4, 6.
53. Act of 30 November 2000, Stb. 2000, 545.

obsolete,[54] the rule in Article 9 on the taking of annual leave has remained a stumbling block to ratifying Convention No. 132. Article 9, after all, provides that the uninterrupted leave is to be taken within one year, and the remaining leave days within one and a half years. The government observed on this point that the Convention provision imposes an obligation, without Convention No. 132 determining what the consequences are if it is not complied with.[55] The Civil Code gave employers and employees more freedom and the government wished to retain it.[56] The government thereby overlooked the fact that the Convention provision gives a great deal of flexibility to make arrangements on the spreading of leave days and also on their postponement (see the previous section), so that there was not really an inconsistency. In later parliamentary papers, too, the government observed that there were no fundamental objections to Convention No. 132, but that the differences in scheme mentioned still existed.[57]

6.3 The Court of Justice and the carry-over period for leave days

6.3.1 Lapse of leave days after a period of sickness[58]

On the question whether Member States could be limited in their power to provide that leave entitlements lapse or become time-barred, too, the Court had to ask itself how this issue relates to the powers left to the Member States by Article 7 of the Working Time Directive.

In the judgment in Schultz-Hoff and Others the Court held that Article 7 also means that the Member States have the power to lay down rules on the carry-over period for leave days. They may even provide that leave days not taken lapse at the end of a carry-over period. One condition applies here: the worker whose right to annual leave is lost must actually have had the opportunity to exercise it. If a worker is sick during the whole of the annual reference period and the right to annual leave lapses at the end of the carry-over period, he is deprived of the social right which, according to the Court, the Working Time Directive confers directly on all workers. That is not permitted, in view of the principle developed in the BECTU judgment that Member States may not frustrate the right to annual leave.

This approach was confirmed in the Maschek judgment,[59] in which the Court held that the allowance in lieu of leave not taken may not be affected where a person has been unable to take annual leave because of sickness, whatever the reason for the termination of the employment relationship (such as retirement or resignation). In so far as sickness was not the reason why leave was not taken, however, no restrictions apply to the Member State. The judgment in Schultz-Hoff and Others also addressed the question whether days of sickness can coincide with days of annual leave. The Court held that ‘it is common ground that the purpose of the entitlement to paid annual leave is to enable the worker to rest and to enjoy a period of relaxation and leisure’ (para. 25). This purpose differs from that of sick leave, which is to enable the

54. Such as the fact that the Convention requires an uninterrupted period of annual leave of two weeks, whereas the Civil Code (at the time) required only one week; see *Kamerstukken II* 1976/77, 14303, no. 1.
55. *Kamerstukken II* 1976/77, 14303, no. 1, p. 3.
56. Ibid., p. 3.
57. *Kamerstukken II* 1986/87, 19575, no. 5, pp. 3-4. See also *Kamerstukken II* 1998/99, 26079, no. 5, pp. 10-11.
58. Perhaps superfluously: in the case of lapse (*verval*) the rights are lost by operation of law, whereas limitation (*verjaring*) can be interrupted.
59. CJEU 20 July 2016, Case C-341/15, ECLI:EU:C:2016:576.

worker to recover from an illness. That is why, if a worker does not take annual leave during sickness, the leave days accrued remain. The worker *may* take annual leave, but if he does not, the annual leave must be granted to him during a period in which he is no longer sick. This was confirmed in the Pereda judgment.[60] Where it concerns a period in which the worker is *not* sick, for instance where he is in quarantine in order to protect others against the SARS-CoV-2 virus, the Court's ruling is different.[61]

The possibility of carrying over leave days not taken to a later year, and the limitation on that possibility, are relevant not only for being able to take those days at a later time. Many cases on the right to annual leave concern the allowance in lieu of days not taken at the end of the employment relationship, as did the judgment in Schultz-Hoff and Others. In that judgment the Court considered that the Working Time Directive contains no further provisions on this allowance. The right to annual leave and the right to the allowance are treated by the Working Time 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.

6.3.2 Carry-over of entitlements acquired during successive years of sickness

It could be inferred from the judgment in Schultz-Hoff and Others that the duration of the carry-over period may not be limited at all where a worker has been unable to take annual leave because of sickness. The question was whether this also applied to a worker who had been sick for several successive years; this was at issue in the KHS-Schulte case.[62] Schulte continued to accrue leave entitlements during successive years of sickness. The applicable collective agreement, however, limited the carry-over of these accrued leave entitlements to fifteen months after the end of the calendar year in which the days could not be taken. When this worker claimed the allowance in lieu at the end of the employment relationship, the question was raised whether this limitation was permitted.

In order to answer this question, Convention No. 132 was again considered. In her Opinion the Advocate General referred to the period of eighteen months in Article 9 of Convention No. 132; she regarded this as a maximum period, after which the existing leave entitlements lapse.[63] She considered this period long enough to guarantee the effective exercise of leave entitlements, although Member States may lay down a longer expiry period.

The Court took a different route. It considered that the conclusion that could be drawn from the judgment in Schultz-Hoff and Others, namely that there may be no limit to the carry-over period in the event of sickness, had to be 'qualified' in the specific circumstances of this case. Otherwise the inference drawn from that judgment could lead to an unlimited accumulation of leave entitlements accrued during sickness. This would not be consistent with the dual purpose of the right to annual leave, namely to enable the worker, on the one hand, to rest from carrying out the tasks imposed on him by his contract of employment and, on the other, to have a period of relaxation and leisure (para. 31). Where the carry-over exceeds a certain

60. ECJ 10 September 2009, Case C-277/08, ECLI:EU:C:2009:542. See also CJEU 30 June 2016, Case C-178/15, ECLI:EU:C:2016:502 (Alicja Sobczyszyn).
61. CJEU 14 December 2023, Case C-206/22, ECLI:EU:C:2023:984. The criterion of being 'subject to physical or psychological constraints caused by an illness' is not met here. According to the Court, the period of quarantine therefore does not in itself prevent the purpose of annual leave from being achieved.
62. CJEU 22 November 2011, Case C-214/10, ECLI:EU:C:2011:761.
63. Opinion of 7 July 2011, ECLI:EU:C:2011:465, point 30.

temporal limit, annual leave loses its positive effect for the worker as a rest period. It then retains only its quality as a period of relaxation and leisure, the Court considered.

Evidently, according to the Court, the latter purpose is not sufficient for leave days to be retained after the carry-over period. The Court does not explain exactly how the purposes of recuperation and of leisure relate to each other. It appears to regard the purpose of recuperation as essential, evidently because this served as the basis for recognising the right to annual leave as a fundamental right and for curbing the powers of the Member States. The purpose of relaxation and leisure would be insufficient for this.

A discrepancy can now be seen, however, between the purpose that is decisive for the Court and the actual situation: where the employment relationship ends and the incapacity for work continues, there will usually no longer be any recuperation from work through annual leave. In reality what is at issue is then accrued leave days as a term of employment which are converted into money. Because the Court applies only the purpose of recuperation, the reasoning is less convincing.

In the KHS-Schulte judgment the Court then examined whether a carry-over period of fifteen months – as applied in the applicable collective agreement – could reasonably be regarded as a period beyond which annual leave no longer has a positive effect for the worker. It considered that a carry-over period must ensure that the worker can have rest periods that can be staggered, planned in advance and available in the longer term. Any carry-over period must therefore be substantially longer than the reference period in respect of which it is granted (paras 38-39). The Court then referred to Article 9(1) of ILO Convention No. 132. As we saw in section 6.1, this article provides that annual leave must preferably be taken in the year in which the entitlement to it was acquired. In any event, annual leave must be taken within eighteen months after the year in which the entitlement arose. Nothing is said, however, about the consequences if this period is exceeded.[64] The Court nevertheless considered that this rule can be understood as being based on the consideration that, once the periods laid down have expired, the purpose of the right to annual leave can no longer be fully achieved (para. 41). In calculating the carry-over period, account must be taken of the purpose of the right to annual leave, as follows from Article 9(1), according to the Court. The Court thus refers to the purpose of Article 9, but gives it an interpretation of its own. In section 6.1 it was discussed that the periods mentioned in Article 9 are intended to restrict the employer in postponing the granting of annual leave; Member States must ensure that the employer complies with his obligations. No other purpose of this article is mentioned in the preparatory documents. The Court held, however, that it can reasonably be considered that a carry-over period of fifteen months does not disregard the purpose of the right to annual leave, and is therefore permitted.[65] It ignored the period mentioned in the article itself and gave no explanation of why it departs from it.[66]

In itself it is entirely justifiable that, if we regard the accrual of leave days as part of the terms of employment, limits are set to it in the case of long-term sickness, certainly where payment in lieu of days not taken is concerned. The Court, however, earlier took a path allowing unlimited accrual, and now has difficulty in arguing consistently when and how limits can be set to it.

64. This was also observed by Advocate General Trstenjak in Case C-350/06. See also Spinelli 2018, p. 1377 (note 7 above).

65. In CJEU 3 May 2012, Case C-337/10, ECLI:EU:C:2012:263 (Neidel), the Court held that a carry-over period of nine months, that is to say shorter than the reference period, is contrary to the directive.

66. For a critical discussion, see also A.G. Veldman, ‘Het Europese grondrecht van jaarlijkse vakantie: voorwaarden bij ziekte en (horizontale) doorwerking’, *Arbeidsrechtelijke Annotaties* 2012/2, p. 52 et seq., in particular pp. 66 and 67.

6.3.3 The Court of Justice and carry-over periods in cases other than sickness

There are also situations in which, according to the Court, carry-over periods may not be limited at all. One of these is where a worker was unable to take annual leave for a number of years because his employer refused to continue paying wages during leave. The King case[67] concerned a period of thirteen years. The Court held that King's leave days over all these years had not lapsed; he was therefore entitled to an allowance in lieu on termination of his employment relationship. Any derogation from the system put in place by Directive 2003/88 must, the Court considered, be interpreted in such a way that its scope is limited to what is strictly necessary in order to safeguard the interests which that derogation protects (para. 58). In this case the interests of the employer could not justify a derogation from the worker's right to annual leave.

Another example of a situation in which, according to the Court, leave entitlements are not lost is that in which the employer has been in default. The case concerned an employer who had to reinstate the worker four years after an unlawful dismissal, the QH case,[68] dealt with in section 5.5.3. Evidently the quality of leave days as a term of employment is decisive for the Court here, for no link with the purpose of recuperation can be seen any longer.

7 The Netherlands and the implementation of the case law of the Court

7.1 The amendment of the Civil Code following Schultz-Hoff and Others and the case law on it

As we saw in section 5.4, Article 7:635(4) BW, on the accrual of leave days during sickness, was deleted as a result of the judgment in Schultz-Hoff and Others. Article 7:634 BW, which links the accrual of leave days to periods of wages, was regarded as sufficient to regulate the acquisition of leave days in the event of sickness. Because in the event of sickness there is 'only' an entitlement to continued payment of wages for a maximum of 104 weeks (leaving aside an extension by way of a wage sanction), the new rules on the accrual of annual leave during sickness do raise the question of the position of sick employees who are no longer entitled to wages. According to the explanatory memorandum to the Act which introduced this amendment, no leave entitlements are accrued if no wages are paid during sickness, in particular if the employee refuses to take part in reintegration activities.[69]

This position is difficult to reconcile with the case law of the Court, as discussed in section 5. The Court, after all, does not attach further conditions to the accrual of leave days during sickness. If, as in the Dutch system, accrual takes place because the employee receives wages during sickness, that is fine. This system may not mean, however, that where a sick employee receives no wages, no leave days are accrued.

Leaving the existing EU case law aside, one may of course ask whether the accrual of leave entitlements is appropriate where an employee refuses to cooperate in his reintegration. It should then be borne in mind, however, that the employer has various other means of putting pressure on this employee to cooperate

67. CJEU 29 November 2017, Case C-214/16, ECLI:EU:C:2017:914 (King).
68. CJEU 25 June 2020, Joined Cases C-762/18 and C-37/19, ECLI:EU:C:2020:504 (QH).
69. *Kamerstukken II* 2009/10, 32465, no. 3, p. 10.

after all. He can ask the UWV (the Employee Insurance Agency) for an expert opinion, suspend the continued payment of wages and even terminate (or threaten to terminate) the contract of employment. It is therefore very doubtful whether suspending the accrual of leave entitlements is indispensable for this purpose. Moreover, it is very doubtful whether the distinction which the Court draws between the purpose of annual leave and the purpose of sick leave (see Schultz-Hoff and Others) becomes any different where reintegration takes place (or has to take place) during the sick leave.

Another question connected with the linking of the accrual of annual leave to the payment of wages concerns employees who are still employed by their employer after the period of payment of wages. In answering this question the Limburg District Court relied solely on the wording of Article 7:634 BW. The District Court held, without paying attention to EU law, that an employee no longer accrued leave entitlements after the period of 104 weeks of continued payment of wages had expired.[70] This interpretation by the District Court does not appear, as already argued above, to be in conformity with the case law of the Court.[71]

In 2024 the Gelderland District Court considered that Article 7:634 BW is indeed contrary to the case law of the Court of Justice, but that an interpretation in conformity with the directive (see section 3.2) was not possible because that would lead to a *contra legem* interpretation.[72] Case notes on this decision pointed to the case law of the Court of Justice which did derive from Article 31(2) of the Charter the possibility of *contra legem* interpretation, including in horizontal relationships (see also section 3.2).[73]

A decision of the Gelderland District Court of 2025, WEGA, concerned an employer who did not wish to grant leave days over the period after the entitlement to continued payment of wages had ended. There was at that time a dormant employment contract (*slapend dienstverband*), under which the employee received an IVA benefit (a benefit for full and permanent incapacity for work). The District Court followed the case notes on the earlier decision and ruled that the employee had accrued leave hours during the entire period of incapacity for work, including after the continued payment of wages had ended.[74] This time an annotator argued that Article 31 of the Charter does not compel the assumption that leave entitlements are accrued, because this article (in its Dutch version) speaks of '*vakantie met behoud van loon*' (literally: leave with retention of wages). During a dormant employment contract wages are no longer paid, and so they are not retained either, according to this reasoning.[75] This interpretation overlooks, however, that the term 'leave with retention of wages' means that wages are paid during the day of leave; when the right to annual leave was introduced, that was precisely what was new.

The case law of the Court on the accrual of leave days during sickness would not have been delivered if the interpretation that wages must have been retained were correct. In other countries, after all, a benefit is paid in the event of sickness; the Dutch system of continued payment of wages throughout the entire

70. Limburg District Court 11 April 2017, ECLI:NL:RBLIM:2017:3293, *JAR* 2017/143.
71. To the same effect 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.
72. Gelderland District Court 5 June 2024, ECLI:NL:RBGEL:2024:3780.
73. Inter alia F.M. Dekker, 'Opbouw van vakantiedagen tijdens ziekte', *TRA* 2024/82.
74. Gelderland District Court 12 August 2025, ECLI:NL:RBGEL:2025:7054 (WEGA).
75. C. Frikkee, 'Slapend dienstverband: alle dagen vakantie!', *TRA* 2025/96.

period of sickness is unique.

Parliamentary questions on the decision were put to the Minister of Social Affairs and Employment, with reference to literature on this subject.[76] She replied that the case law of the Court of Justice is concerned in particular with the 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). Nor does she consider a legislative amendment necessary.[77]

It is not clear why the Minister does not recognise that in several judgments of the Court, such as Schultz-Hoff and Others and KHS-Schulte (as discussed in sections 5.3 and 6.3.2, where the relevant paragraphs are cited), the accrual of rights during sickness was very much at issue. The proposition that the case law of the Court does not apply to dormant employment contracts is difficult to follow. Schulte, in KHS-Schulte, after having received sickness benefit, received a full incapacity benefit from 2003 until into 2008, while he was still employed. Translated to the Dutch situation:[78] he had a dormant employment contract of five years. That case, too, as we have seen, concerned the question whether he accrued leave entitlements over those years of his 'dormant employment contract'. The answer was in the affirmative, but in that case a limited carry-over period could be applied.

In the WEGA case there was a dormant employment contract from 1 March 2024, and in June 2024 the employee requested that the employment be terminated. The employer refused, and the contract of employment was subsequently dissolved by the subdistrict court with effect from 1 July 2025. The contested accrual of leave entitlements was thus considerably prolonged by the employer's own doing. There is little to support the proposition that this case was very different from KHS-Schulte. The WEGA decision therefore seems to me to be entirely in conformity with the case law of the Court of Justice.

7.2 Amendment of the Dutch limitation provision

The Act which amended the provision on the accrual of leave entitlements during sickness also introduced an expiry period. When the bill was being debated, the KHS-Schulte judgment, which permits limits on the carry-over period, had not yet been delivered. Perhaps that circumstance contributed to the adoption of a provision containing a short expiry period. Its aim is to limit the consequences of the accumulation of leave entitlements accrued during sickness (as followed from the Schultz-Hoff and Others case law).

The new Article 7:640a BW provides that the minimum entitlement to annual leave (the so-called 'statutory part') 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 annual leave up to that time. The expiry period applies to days accrued on the basis of both periods worked and periods not worked, such as sickness. If an employee has no possibilities for reintegration, and for that reason cannot take his leave days, the general limitation

76. See note 71.

77. 2025Z16517 of 14 October 2025.

78. This cannot be translated with complete precision. A 'dormant employment contract' is understood to mean the period after the continued payment of wages ceases. In Germany, however, that is already the case after six weeks. If one interprets 'dormant employment contract' as the moment at which the prohibition of dismissal during sickness no longer applies, the term can be used internationally. Germany, however, has no fixed rule on this. For the comparison I have therefore taken the start of the incapacity benefit as the point of departure.

period of five years applies.

In the KHS-Schulte judgment the Court considered that a carry-over period (in the event of sickness) must ensure that rest periods can be staggered, planned in advance and available in the longer term. Is this requirement met if the expiry period is only six months? If one works during sickness, it may in fact be difficult to plan or spread annual leave, for instance because the combination of working and sickness imposes constraints on the employee. The Court decided that an expiry period of fifteen months is reasonable. That is therefore longer than the period in Article 7:640a BW.

So far the Court has allowed the power to apply this expiry period in the case of sick workers only in the situation in which the leave days were accrued over successive years of sickness. The Dutch rule is worded much more generally, for the expiry period applies to all days of the minimum entitlement, hence also where the employee has been sick during only one reference year.

If the employee cannot take annual leave during the expiry period, the limitation period (five years) applies under the Civil Code. This is much longer than the minimum that must be observed according to KHS-Schulte. That is of course permitted, and the expiry period would not then be incompatible with the case law of the Court, were it not for the fact that the government has formulated criteria of its own for assuming when the employee has not reasonably been able to take annual leave. I will come back to this in the next section.

After KHS-Schulte was delivered, the legislature saw no reason to amend the Act. In some cases that may mean that the expiry period for leave days is too short. In other cases, however, it may be that more leave days have to be paid out as an allowance on termination of employment than is necessary under the case law of the Court.

One may consider it unfortunate that leave entitlements are accrued during dormant employment contracts. The accrual may, after all, concern a series of years of sickness, and during the dormant employment contract and on its termination the employee also receives other payments. The Court of Justice has, however, offered a possibility of limiting unjustified outcomes by permitting an expiry period, even where the sick worker cannot take annual leave. That period is, however, substantially longer than six months. The Netherlands has not yet made use of this possibility. The parliamentary questions mentioned in the previous section suggest to the Minister that the Act be amended, but she did not take up that suggestion.

7.3 The criterion ‘not reasonably able to take annual leave’

According to the explanatory memorandum to the Act which introduced Article 7:640a BW, the Minister understands ‘not reasonably able to take annual leave’ to mean that if an employee has usable capacities to perform work (*benutbare mogelijkheden*) and can therefore reintegrate, he can also take leave days during sickness.[79] The Minister assumes that most employees who are incapacitated for work are able, and therefore also obliged, to make reintegration efforts.[80] If an employee refuses to make reintegration

79. *Kamerstukken II* 2009/10, 32465, no. 3.
80. Ibid., p. 8.

efforts, he is nevertheless deemed to have reasonably been able to take his leave days.[81] In the case of, for instance, employees who for medical reasons are unable to perform their own work and have no other lasting usable capacities either, reintegration efforts are not at issue. It can then be assumed that they have not reasonably been able to take leave days, according to the Minister.[82]

The interpretation that employees who can make reintegration efforts can also take annual leave has not been included in the Act, but is followed in the case law.[83] One example is the 's-Hertogenbosch Court of Appeal.[84] That court, however, translates the criterion 'no lasting usable capacities' as 'it must be established that, on a lasting basis, there are no usable capacities'. In that case the company doctor had periodically established that, apart from a short period, there were no usable capacities. There was, however, no certainty about the longer term, and the company doctor had not reported that this situation would be lasting. The Court of Appeal concluded that the short expiry period therefore *did* apply to the leave entitlements.

The criterion that it must be established that there are, on a lasting basis, no usable capacities differs considerably from the passage in the explanatory memorandum discussed above: the Minister reasoned that if there are no lasting usable capacities, annual leave can in any event not be taken. That does not, however, rule out that there are other situations in which annual leave cannot be taken either. If it is established for a particular period that there are no usable capacities, then logically no annual leave can be taken during that period either, even though that may perhaps be possible later. If it then turns out in retrospect that for several or all periods it was established that there were no usable capacities, it holds for all of those periods that annual leave could not be taken.[85] It must then be established which period remains in which there were usable capacities. The interpretation of the 's-Hertogenbosch Court of Appeal thus already sits poorly with the wording of Article 7:640a BW.

This interpretation is further removed still from the case law of the Court of Justice, according to which (as we saw in section 6.3.1) it is not for the employer to determine whether a sick worker can take annual leave; this is for the sick worker himself (Pereda judgment).[86] Under this case law we must conclude that an employee who is reintegrating is formally still sick. He *may* take annual leave, and where he is actually performing reintegration work he will presumably do so, since otherwise he has to carry on working while his colleagues are on holiday. In that case, however, only the leave hours actually taken should be deducted from the balance, and the remaining leave days should not lapse until the employee is actually able to take them.

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81. If the continued payment of wages is then suspended, he is not entitled to wages and does not accrue any leave days either, according to the Minister.
82. *Kamerstukken II* 2009/10, 32465, no. 3, pp. 7-8.
83. For instance Limburg District Court 11 April 2017, ECLI:NL:RBLIM:2017:3293.
84. 's-Hertogenbosch Court of Appeal 7 December 2017, ECLI:NL:GHSHE:2017:5399, para. 3.8.4. This concerns the (double) appeal in the case mentioned in the previous note.
85. In this case the employee had taken a number of days of leave in the short period in which she was able to work, albeit only on a therapeutic basis, and those can be taken into account. It cannot be inferred from this, however, that she could also have taken annual leave in other periods.
86. ECJ 10 September 2009, Case C-277/08, ECLI:EU:C:2009:542.

8 Conclusions and recommendations

In this section I will discuss the following questions:

- Why is some of the case law in which the Court relies on the purpose of the right to annual leave not convincing?
- How does the Court's approach to the accrual of leave days during periods of inactivity depart from the ILO principles?
- How could more consistent legislation on annual leave be arrived at, both at EU level and at national level?

8.1 The purpose of the right to annual leave

In its judgments the Court often refers to the purpose of the right to annual leave. From the analyses in the preceding sections it can be understood why the Court refers to the purpose of recuperation and why this does not always produce convincing outcomes.

It turns out that in the development of the ILO standards, in the original European documents and in the case law of the Court of Justice alike, two purposes of the right to annual leave are mentioned, namely resting from work performed and the granting of leisure time. The first purpose leads to an obligation for the employer which, because of the link with health, is such that it can also be imposed on the basis of international or European standards. The other purpose depends more on the economic development of a country. There is a connection between the two purposes: the minimum periods of annual leave in the ILO Conventions, and also in the Civil Code, have not become longer over time as a result of a growing understanding that longer leave is needed to recover from work. They have been extended because increased prosperity made that possible. If health were the only purpose, the question would immediately arise why people without a contract of employment often have no right to paid annual leave.[87]

Now that the purposes of annual leave have not been formulated in the legislation, the Court relies solely on that of health. If only that purpose is mentioned in a judgment, however, that judgment is not always convincing. Take, for example, a worker whose employment relationship is terminated after he has been sick for several years. Suppose that he cannot resume his work elsewhere either. Is the recuperation purpose of annual leave sufficient to decide that he can claim the unused leave entitlements? This worker has the opportunity to rest even without those leave entitlements. If, however, we regard leave entitlements as acquired terms of employment, it becomes clearer why they are not lost in this case either.

But if leave days are seen as terms of employment, that also explains why their accrual during many years of sickness is regarded as problematic; the acquisition of a term of employment must, after all, remain connected in some way with the work. The outcomes in the King and QH judgments, too, are easier to understand if we regard leave entitlements as acquired terms of employment which must be protected where the employer has not fulfilled his obligations. Because this element of leave entitlements as a term of employment can hardly come into its own in the case law if the right is not elaborated further in the

87. It is interesting that the Belgian system is designed in such a way that, by means of a social security construction, a broader group of working people can have leave days paid.

Working Time Directive, I will propose below that it should be so elaborated.

8.2 The case law of the Court and the acquisition of leave days in the event of sickness

The original rules on the accrual of annual leave during sickness in Article 7:635(4) BW (old) were inspired by ILO Recommendation No. 98. In accordance with the possibility given in Recommendation No. 98 and also in Article 5(4) of Convention No. 132, the article limited the accrual of leave entitlements in time.

In its case law the Court of Justice relied on Article 5(4) of ILO Convention No. 132. From its quotation of that article, however, it omitted the fact that Member States have the possibility of laying down conditions under which leave entitlements are accrued during periods in which work is interrupted. That the Court leaves out that part is understandable, for if the Court had taken it over, it could not have continued its reasoning; what it wanted was precisely to limit the possibilities for Member States to regulate the matter themselves. The consequence of the case law of the Court of Justice is that workers on long-term sick leave can acquire leave days over several years. By permitting a limited carry-over period where accrual takes place during successive years of sickness (KHS-Schulte), the periods on the basis of which leave days can be claimed shift. Leave entitlements acquired before a period of sickness lasting many years may be lost as a result. The entitlements acquired during sickness in earlier years may also be lost once the carry-over period has expired. The leave entitlements which the worker has acquired over the more recent periods of sickness can, however, be relied on.

This approach may sometimes have the same outcome as the ILO scheme, but that is then a coincidence. It may also lead to different outcomes, depending on the order and type of the successive periods. It matters, after all, whether, for how long and in what order the worker has completed periods of work, sickness or other leave (such as maternity leave). Moreover, the limitation of the expiry period in the event of sickness permitted in the KHS-Schulte case exists only in the situation of successive periods of sickness. There is thus no general freedom for Member States to regulate expiry periods in the event of sickness. This may create legal uncertainty and may sometimes produce differences, which are hard to justify, between situations that are similar in many respects.

8.3 Work for the EU legislature

The main cause of the problems that we have seen in EU annual leave law is that the Working Time Directive is very brief about this right. The Working Time Directive and the Charter give a right to a minimum of four weeks, but beyond that it is laid down only that the Member States have retained the power to determine the conditions for the right. As a result, the content of the right had to be developed in the case law, where the Court had little to go on. The need to justify why the powers of the Member States in regulating the right to annual leave are subject to limits led the Court to rely consistently on the one purpose of the right to annual leave that was strong enough for this limitation: the recuperation function. The lack of points of reference for annual leave law in the Working Time Directive is probably also the explanation of why the Court has not applied the ILO principles systematically, but refers to them ad hoc in support of a particular interpretation which it favoured in any event. It is probably also for this reason that the Court looked only at Convention No. 132. The standards cited must, after all, be strong enough to

set limits to the powers of the Member States, and that is less the case with Recommendation No. 98. In other words, the Court's approach did not really provide a basis for also applying ILO principles that do not directly fit the recuperation purpose of the right to annual leave.

Because of the extremely cursory way in which the Working Time Directive has regulated the right to annual leave, annual leave law has in fact become judge-made law. This area of law does not really lend itself well to that, precisely because the right to annual leave also comprises the right to relaxation and leisure. If this latter element has not been regulated, however, as in the Working Time Directive, the courts have little to hold on to in ruling on it.

The right to annual leave should therefore be regulated more precisely and more extensively by the EU legislature, by amending the Working Time Directive or in a new directive. In doing so the EU legislature could be guided by the ILO principles, not on the basis of a selection from them, however, but by considering them systematically. Drawing up new EU rules seems at first sight a high threshold. Yet the Member States might well be open to this. It is, after all, not excessively critical to say that the Commission and the EU legislature have not paid much attention to regulating the right to annual leave in the directives.

In the meantime the right to annual leave has been recognised in the Charter as a fundamental social right. That justifies its elaboration. A great deal of case law on the right to annual leave has also appeared, as a result of which its contours have become clearer. Member States will not be equally happy with all of the case law and its consequences. This could encourage them to regulate the right to annual leave anew at EU level.

The allowance in lieu of leave days not taken can then also be regulated in more detail. At present, in the absence of any elaboration in the Working Time Directive, the Court aligns this with the remuneration for leave days. The possibility of regulating the allowance more specifically could tempt Member States to consider new rules. For the new rules I would recommend the scheme laid down in particular in Recommendation No. 98. Under this scheme the Member States have the power and the duty to regulate the accrual of leave days during periods of sickness, and also during other interruptions. It must of course be ensured that they cannot frustrate the essence of the right to annual leave. Minimum requirements for accrual must therefore in any event be laid down in the directive, and these may differ from one circumstance to another.

This works better than formulating general criteria, which the Court has tried to develop in the course of successive judgments. Article 5(4) of Convention No. 132 offers hardly any points of reference for this either, as was already noted in the drafting phase of that Convention.[88] Whether a sick or pregnant worker is unable to work 'beyond her control' or 'independently of her will', and whether this inability to work is foreseeable, is by no means always objectively certain. Ultimately, social norms, such as protection of the health of those concerned (such as mother and child), play a large, sometimes decisive, role here. Such social norms may also exist in the case of other interruptions, such as parental leave. It is therefore better to regulate these expressly for each circumstance.

88. A. Stöhr, 'The Purpose of Annual Leave and its Relevance for Legislation and Interpreting the Law', *IJCLLIR* 2024, p. 171, proposes using as a criterion whether the reason for not performing the work falls within the employer's sphere of risk. It is not clear, however, why he comes to the conclusion that this criterion is useful and can better explain the case law of the Court. Does sickness of the worker belong to the employer's sphere of risk, and do, for example, periods of quarantine and short-time working not?

If the accrual of leave entitlements during periods of inactivity is limited, rules on carry-over and lapse are much less necessary in order to enforce the actual taking of annual leave. It could also be examined whether Article 10 of ILO Convention No. 132, which proceeds on the basis that the employer can and must designate periods of annual leave (in consultation with the worker, of course),[89] can be given a modern application where that is necessary in order to prevent leave from not being taken. In these times of increasing reports of stress, such a direct policy makes more sense for the purpose of health than expiry periods.

8.4 There is also work to be done by the Dutch legislature

A structural amendment of Dutch annual leave law depends on whether EU law is indeed changed, as proposed in the previous section. In the shorter term, however, amendments are possible by which some of the problems that now exist can be addressed.

The Civil Code now makes do with Article 7:634 for regulating the accrual of leave days during sickness. A system such as the Dutch one, in which the acquisition of leave days is linked to the receipt of wages, is permitted, for Member States may themselves regulate the conditions for the acquisition of annual leave. Such a link may, after all, also be favourable to employees, in the sense that more periods count than those based on work. The periods that are acquired on the basis of work and on the basis of assimilated periods, such as sickness, are, however, minimum periods that must count. If *only* periods of wages are taken into consideration, and this yields less than the minimum periods, a conflict with the case law of the Court arises.

It makes matters difficult for employers and employees, however, if the applicable law cannot be read in Dutch legislation. It is therefore desirable that the legislature incorporate the case law of the Court in the Civil Code as well as it can. In the example of accrual during sickness this can be done simply by reinserting the old Article 7:635(4) on the accrual of annual leave during sickness, but without a limit in time.

The provision on the expiry period for the minimum leave days should also be amended. This has the advantage that undesirable effects of the present rules can be addressed. At present the short expiry period of six months does not apply if the employee cannot reasonably take annual leave during sickness. The government, however, developed an interpretation of this exception that does not square with the case law of the Court of Justice. If the KHS-Schulte rule is adopted, a simpler arrangement applies which offers more legal certainty.[90]

8.5 In conclusion

The right to annual leave has acquired particular significance in the case law of the Court, reinforced further by its codification in the Charter of Fundamental Rights of the European Union. Now that the case

89. Also to be found in Article 7:638 BW, albeit that the initiative lies with the employee here, unless the individual contract or collective agreement provides otherwise.

90. In that amendment of the Civil Code it can also be examined whether other problems can be solved as well, such as the remuneration for leave days in excess of the statutory minimum; see, for example, F. Pennings, ‘Het doel van het recht op vakantie: is herbezinning nodig?’, *TRA* 2024, pp. 11-18.

law of the Court has not been fully implemented in Dutch annual leave law, this subject is a textbook example for illustrating the possibilities of enforcing European labour law. Examples are interpretation in conformity with the directive and the horizontal effect which the Charter gives to directives. The subject also shows, however, the stalemate that can arise if national actors do not agree with that European law and the case law. It also asks a good deal of the national court if it has to interpret national law in conformity with the directive or even *contra legem*. That is why enforcement is best achieved by a legislature that follows EU law closely. There are then also possibilities, within a correct implementation, of trying to tackle undesirable outcomes. Such meticulous implementation benefits legal certainty and is sometimes even more favourable to employers and employees.