SUMMARY

# 2020/41 Holiday pay during sickness: preliminary questions asked (NL)

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**Summary**

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**Facts**

The employee, a civil servant, had been sick since 24 November 2015. During the first year of sickness, he continued to receive his normal salary. In accordance with the applicable regulations, after one year his pay was reduced to 70% of his normal salary for his sick hours, whilst he continued to receive his full salary for the hours that he worked. When he took his holiday, his holiday pay was calculated on the same basis.

The employee disagreed with the calculation of his holiday pay. He started proceedings before the administrative law sector of the Court of Overijssel (the 'Court'). He claimed that he was entitled to his normal (100%) salary for all his holiday hours that he took during his second year of sickness.

**Legal background**

The applicable General Civil Service Regulations stipulate that an employee is entitled to their normal salary during the first year of sickness. In the second year of their sickness, they are entitled to 70% of their salary, although the employee continues to receive their normal salary

for the hours during which they worked.

In the Netherlands, an employee can take holidays whilst they are sick. During the holidays, according to Article 22, civil servants are entitled to 'full pay'.

Civil servants' pay is regulated in the Civil Servants Pay Decree. This decree defines 'salary' as:

p style="margin-left:40px">"the amount determined for the official, in accordance with the provisions of that Decree, on the basis of one of the annexes [which contain the salary grids, JRV], multiplied by the hours of work applicable to the official concerned."

**Judgment**

According to the Court, 'full pay' within the meaning of Article 22 should in principle be interpreted as the salary to which the employee was entitled at the beginning of and during the holiday period, i.e. 70% of their salary for their sick hours and 100% of salary for the hours that they worked.

The Court then noted that Directive 2003/88 only guarantees four weeks of leave, also during sickness, but that the Directive is silent on the amount of holiday pay.

Subsequently, the Court referred to the *Schultz-Stringer* case (20 January 2009, C-350/06 and C-520/06). In that case, said the Court, the ECJ – referring to its judgment in *Robinson-Steele* (16 March 2006, C-131/04 and C-257/04) – held that workers must receive their normal remuneration during their holidays. During their holiday, the worker should be put in a position which is, as regards remuneration, comparable to periods of work. Applying this to the case at issue, the Court held that the claimant would in principle be entitled to a salary amounting to 70% for their sick hours and 100% for the hours that they worked.

However, the Court held that the definition 'full salary' in Article 22 of the General Civil Service Regulations perhaps implied that it could not be understood as 70% of the salary, as it follows from the definition of salary in the Civil Servants Pay Decree that this can never be the 'full salary': after all, it is less than the salary stipulated by the Civil Servants Pay Decree. In that regard, said the Court, the ECJ in Schultz-Stringer (paragraph 25) held that the purpose of paid annual leave is to enable the worker to rest and enjoy a period of relaxation and leisure, which is different from the purpose of sick leave, i.e. to recover from being ill. The Court doubted whether this distinction in purpose justified 'the difference' [presumably: the difference in pay, JRV].

Lastly, the Court mentioned Article 31(2) of the Charter of Fundamental Rights of the European Union, according to which workers are entitled to a yearly holiday with pay.

In light of its considerations, the Court decided to stay proceedings and to ask the following three questions to the European Court of Justice:

"Must Article 17(1) [it appears that Article 7 is intended, JRV] of Directive 2003/88/EC of the European Parliament and of the Council of 4 November 2003 concerning certain aspects of the organisation of working time be interpreted as meaning that a worker does not lose his remuneration, or part thereof, because he exercises his right to annual leave? Or should that provision be interpreted as meaning that a worker retains his remuneration while exercising his right to annual leave, irrespective of the reason for not working during the leave period?"
"Must Article 7(1) of Directive 2003/88/EC of the European Parliament and of the Council of 4 November 2003 concerning certain aspects of the organisation of working time be interpreted as precluding national provisions and practices whereby a worker who is incapacitated for work due to illness, when taking his annual leave, retains his remuneration at the level it was immediately prior to his taking annual leave, even if, on account of the long duration of his incapacity for work, that remuneration is lower than that paid in the event of full fitness for work?"
"Must the entitlement of every worker to paid annual leave under Article 7 of Directive 2003/88/EC and the European Parliament and under settled EU case-law be interpreted as meaning that reducing that remuneration during leave taken during incapacity for work runs counter to that entitlement?"

**Information on the preliminary questions**

Number C-217/20 has been assigned to the case. The request for the preliminary ruling, including a seemingly literal translation of the judgment, can be found at: http://curia.europa.eu/juris/showPdf.jsf?text=&docid=228561&pageIndex=0&doclang=en&mode=req&dir=&occ=first&part=1&cid=11411515.

**Commentary**

The Court's reasoning seems peculiar in certain places. For instance, the decision lacks a very obvious reference to the *Williams and Others – v – British Airways* judgment (15 September 2011, C-155/10), in which the ECJ held (in paragraph 21) that:

p style="margin-left:40px">"remuneration paid in respect of annual leave must, in principle, be determined in such a way as to correspond to the normal remuneration received by the

worker. It also follows that an allowance, the amount of which is just sufficient to ensure that there is no serious risk that the worker will not take his leave, will not satisfy the requirements of EU law."

Also, the relevance of the Civil Servants Pay Decree is not immediately apparent, as the hierarchy between this Decree and the General Civil Service Regulations is a matter of national law and therefore not relevant for the decision to ask preliminary questions.

The impact on Dutch employment law as a whole is likely to be marginal for various reasons. Firstly, since 1 January 2020, most civil servants have become subject to 'regular' (private-law based) employment law. This limits the scope of application of the ECJ judgment. Moreover, in 'regular' employment law, it is widely accepted that it already follows from national law that holiday pay during sickness should be the regular pay rather than the sick pay. A more cautious EU law approach would not affect the national approach as the latter is more favourable to employees. This is of course permitted by Article 15 of Directive 2003/88. That being said, it could disprove the prevailing opinion in Dutch literature and case law according to which it already would follow from ECJ case law that regular pay trumps sick pay in these matters.

The case seems more interesting for those interested in EU employment law, as the existing case law is not unambiguous. On the one hand, we have the case law on holiday pay, most notably *Robinson-Steele* and *Williams and Others – v – British Airways*, which require holiday pay to be comparable to regular pay. If the holiday pay would be the lower sick pay, the employee would have an incentive not to take his/her leave. Of course, it follows from the Schultz-Stringer judgment that the right to annual leave cannot lapse in these situations: an employee is not obliged to take their holiday in these situations.

However, in *Greenfield – v – The Care Bureau* (11 November 2015, C-219/14), the ECJ suggested that a specific analysis is necessary if the remuneration has changed over time (paragraph 55). This could imply that the level of holiday pay must correspond with the employee's salary at the moment of accrual of the holiday. A drawback of this approach could be that, in these situations, there can be an incentive not to take holiday in some situations: one could think of the situation where an employee has recovered and is earning their full salary again, but then would be hesitant to take leave, as this would be against sick pay.

Last but not least, the ECJ has always firmly protected workers on sick leave. So far, the ECJ's judgments in these situations have been about the right to annual leave itself. Nevertheless, it wouldn't come as a total surprise if the ECJ extends this protection to the amount of holiday

pay as well. We have seen something similar in the past. For instance, workers who are sick seem to enjoy additional protection when they want to effectuate their right to an allowance in lieu when they have been put on garden leave. L.J.T. de Vries and J.R. Vos, 'Entitlement to allowance in lieu of untaken paid annual leave had lapsed because of garden leave (NL)', *EELC* 2020/28. In any case, the ECJ's decision will be anticipated with great interest.

**Comments from other jurisdictions**

*Austria (Hans Georg Laimer and Lukas Wieser, Zeiler Floyd Zadkovich):* Under Austrian law, a vacation agreement for periods of sickness of the employee is null and void (Austrian Vacation Act Subsection 4(2)). Such periods do not count as vacation. Moreover, employees who get sick during a vacation may withdraw from the vacation agreement in a case where the sickness lasts for more than three calendar days (Austrian Vacation Act Subsection 5(1)). However, if the employee does not withdraw such periods count as vacation and the remuneration is calculated as stated below.

It is one of the principles of Austrian vacation law that a periodical remuneration must not be reduced during vacation periods (Austrian Vacation Act Subsection 6(2)). Further regular remuneration (for example overtime pay, premiums, etc) also must be paid during the vacation period as it would have accrued in a case where the employee worked this period (Austrian Vacation Act Subsection 6(3)). For this calculation past reference periods are considered. Periods during which the employee earned less because of sickness may extend such calculation periods accordingly.

Austrian law does not allow for the taking of vacation and sick leave at the same time. Even in the case where an employee gets sick during the vacation and does not withdraw from the vacation agreement a vacation remuneration entitlement is given and not a continued remuneration entitlement due to the sickness. Thus, under Austrian law employees are entitled to their full remuneration during periods of vacation, which is in our view also in line with EU law.

*Germany (Martina Ziffels, Luther Rechtsanwaltsgesellschaft mbH):* A situation comparable to the case which is subject of the decision of the Dutch court is not very likely to arise under German law. One reason is that German law provides statutory regulations on payment during sickness and holiday which cannot, as a general rule, be changed to the disadvantage of the employee. But, the main reason is that sickness and holiday cannot take place simultaneously under German law.

If an employee is prevented from performing work due to sickness through no fault of their

own the employee is entitled to continued payment of remuneration by the employer in the event of illness (Entgeltfortzahlung im Krankheitsfall) for a period of up to six weeks (Continued Remuneration Act paragraph 3(1) (Entgeltfortzahlungsgesetz)). In order to determine the continued payment of remuneration it must be taken into account which remuneration the employee would have earned if they had not been prevented from work due to sickness. There are also statutory provisions regulating the handling of irregular and uneven remuneration components. Often, such regulations may also be found in union agreements if such agreements are applicable to the respective employment relationship.

Holiday pay is calculated differently. According to paragraph 11 of the Federal Holiday Act (Bundesurlaubsgesetz) holiday pay must be calculated taking into account the average remuneration which the employee earned during the last 13 weeks before the beginning of their holiday. The calculation of holiday pay is also often the subject of specific regulations in union agreements.

As regards the above-mentioned judgment which raises the question about the level of holiday pay during sickness this situation cannot happen in Germany. As stated above, in the Netherlands an employee can take holiday whilst they are sick. In Germany, however, holiday and sickness are mutually exclusive. An employee who is sick cannot take holiday during the period of sickness. If the employee becomes sick during their holiday the sickness is not counted towards the holiday entitlement if the employee provides sufficient evidence of the sickness. The remuneration can therefore be paid either as continued remuneration in case of sickness or as vacation pay. There can be no overlap here so that the case law of the ECJ (Schultz-Hoff, 20 January 2009 – C-350/06 and C-520/06 and KHS, 22 November 2011 – C-214/10) is of much relevance in Germany because the holiday entitlement continues to accrue in cases of sickness-related hindrance to work and cannot be taken during this period.

**Subject**: Paid Leave

**Parties**: [Employee] – v – State Secretary for Finance

**Court**: Administrative law sector of the Court of Overijssel

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**Verdict at**: 2020-05-20
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