

**Hitting employers where it hurts : Gülay Bollacke v Kock**

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### Hitting Employers Where it Hurts: *Gülay Bollacke v Kock*

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#### ABSTRACT

This case note relates to the recent decision of the Court of Justice of the European Union (Court of Justice) in *Gülay Bollacke v K + K Klaas & Kock B.V. & Co. KG* [\[2\]](#) on the interpretation of the Working Time Directive (and national implementing measures and their interpretation) when the individual is unable to access the right to paid annual leave when ill, and who subsequently dies being owed this accrued leave. Ultimately, the individual (or perhaps more accurately his/her beneficiaries) [\[3\]](#) is entitled to receive payment for the leave untaken and national law, as exemplified in Germany in the case before the Court of Justice, must be interpreted accordingly. This case follows on from a series of judgments of the Court of Justice relating to the application of the Working Time Directive and demonstrates how the Court is steadily dismantling the barriers erected by Member States in preventing the complete and correct application of the law. Employers are also reminded of the requirement that they should follow the EU law where inconsistencies exist with national law or face the prospect of legal action, associated costs, and awards being issued against them.

#### 1. FACTS

Mr Bollacke began work for K + K Klaas & Kock B.V. & Co. KG in 1998 until his health deteriorated some ten years later. In 2009, he took a period of eight months' sick leave, in 2010 he also had to take periods of leave, and later in 2010 whilst still on sick leave, he died. He left a wife as his sole beneficiary and she (Mrs Bollacke) contacted the employer claiming owed pay [\[4\]](#) in relation to the leave her late husband had been unable to take. Mrs Bollacke referred to the employer's customary practice of enabling employees who had been unable to take leave due to the pressures of work to have this accumulate and carry over to the following year. Whilst Mrs Bollacke initially presented this argument (on the basis that the employer had under-employed the required number of staff), it was discovered that Mr Bollacke had not taken his entitlement to leave for several years and this amounted to 140.5 days' of unused and unpaid leave.

K + K Klaas & Kock B.V. & Co. KG argued, in denying the payment for the unused annual leave, that payment was not owed to Mr Bollacke and even if it were, they expressed uncertainty as to whether such a payment could be inherited by the deceased person's estate. The Bocholt tribunal held that German law suggested that an employee's contract of employment was terminated on

his/her death and any right to untaken holiday leave (and therefore pay) essentially died with the employee - a dead employee cannot take holiday leave whether entitled to it or not. [5] Further, an employer could not replace untaken holiday leave with payment in lieu because their death had extinguished the right to a holiday - it was not, as in previous case law, a situation where the employee's contract of employment had been terminated.

The Landesarbeitsgericht, on appeal, had concerns with the tribunal's interpretation of the Working Time Directive and made an application to the Court of Justice for a preliminary reference of the interpretation of national law with its EU parent.

## 2. ANNUAL LEAVE - A BRIEF HISTORY (OF TIME AND PAY)

The right to paid [6] annual leave was introduced by the EU through the Working Time Directive [7] (WTD) as a measure to give effect to Article 118A and the protection of the health and safety of workers, along with the ILO Convention No. 132 of 1970 which is referred to in the Directive. The Directive provides:

- Article 7(1): "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" and
- Article 7(2): "The minimum period of paid annual leave may not be replaced by an allowance in lieu, except where the employment relationship is terminated".

Prior to enactment of the WTD, employers and their employees [8] were largely free [9] to determine working hours and holiday leave according to their own discussions, subject to the employer's duty to protect the health and safety of his/her workers. [10] The original WTD provided qualifying workers with the right to four weeks' paid holiday a year. [11] The Working Time (Amendment) Regulations 2007, SI 2007/2079 provided workers who were engaged full time (e.g. five days per week) with an additional 1.6 weeks' leave [12] - thereby providing the right to 28 days' leave per year (although this largely left full-time workers who had previously been granted the bank/public holidays as paid leave in the same practical position - the four weeks' holiday PLUS the bank / public holidays (usually eight per year)). However, this is a domestic increase in the paid leave and not the legal requirement of four weeks' leave as provided by the WTD. The domestic transposing legislation - the Working Time Regulations (WTR) 1998 further provided for the provision of the paid leave to carry over into the following year where leave could not be taken in the year to which any claim relates (reg. 26A(1)(b) and reg. 13A(7)). [13]

The WTD provides that the leave 'may only be taken in the leave year in respect of which it is due.' [14] A worker wishing to take a period of paid annual leave is required to give the employer at least twice as much notice as the period of holiday he or she intends to take, [15] and the employer consequently has half that period of time to object and to refuse permission for a holiday to be taken at the time requested. [16] The important requirement in relation to this case note is an employer's ability to require/force the worker to take the holiday leave to

which he/she is entitled. [17] Given the worker's right to waive his/her entitlement to paid holiday leave at a particular time and, instead, take leave in lieu, an employer who wishes to decline a worker's request to time off work when requested, or who wishes to compel the worker to take a period of paid leave may, by issuing the worker with at least twice the period of notice compared with the leave to be taken, 'force' the worker to take the paid holiday leave. [18] Significantly given that the WTD was enacted as a health and safety measure rather than a social policy instrument, albeit with the discretionary right of the Member State to include a 'waiver / opt-out' into the domestic transposing law so as not to compel workers to take annual leave, the EU ensured that for the protection of workers, they could not swap the right to (untaken) paid holiday leave for payment/cash. [19] This position is changed where the worker in question is unable to take the leave entitled to. Where the worker's employment is terminated, either through action taken by the employer or the worker's own resignation, a pro-rata right to leave may have accrued to which it is impossible for the worker to receive. Where the worker has been ill and thus cannot take the leave was a very contentious issue and led to the prolonged and protracted trail of cases and arguments to the Court of Justice by all interested parties (workers, employers and Member States).

### 3. WTD AND SICK WORKERS

In the UK, there has been, articulated in *Coleman v Attridge Law and Steve Law (No.2)* [2008] IRLR 722 and *Larner v NHS Leeds* [2012] IRLR 824, a recognised obligation to interpret the domestic WTR in conformity with Article 7 of the WTD and where this is not possible, Article 7 has been held to be directly effective. [20] The road to clarification as to how the WTR apply to workers who suffer illness during their employment and are unable to take paid annual leave has been a long one. Workers are entitled to a period of paid annual leave as part of their general wellbeing, but the contentious issue has been what happens to the leave where the worker fails to take it? Employers can force workers to take leave, but they don't have to, and likewise, workers may take all of their paid annual leave each year (many do) whilst some never/rarely take their entitlement to leave. The EU legislated to prevent workers from being paid in lieu when not taking the annual leave due to the potential for abuse of this system and to ensure, as far as it could, that workers did actually have time away from work to rest and have some period of leisure time. However, when a worker is ill and is away from work on sick leave, what happens to the annual leave entitlement?

Beginning with the case of *Stringer and ors v HMRC* [2009] (Cases C-350/06 and C-520/06), the Court of Justice held that workers who had been unable to exercise their right to paid annual leave due to sickness did not lose the right to later exercise that (owed) right to leave. Where the affected worker returns to work following the bout of illness which has led to him/her being unable to take leave in the particular holiday year, rather than being paid in lieu (which, we remember, is contrary to the WTD and incorporated into the WTR) [21] he/she may take the holiday following the return to work - the period of paid leave does not get lost, but is merely 'held' until the worker returns and may take advantage of it. However, where the worker is unable to take that owed leave due to the termination of his/her contract, the employer may make arrangements for the

owed period(s) of leave to be paid for in lieu. Domestically, the House of Lords gave effect to the *Stringer* ruling in *Inland Revenue Commissioners v Ainsworth* [2009] UKHL 31.

Having established that workers did not lose the right to paid annual leave to which they were unable to access due to illness, in *Pereda v Madrid Movilidad SA* (Case C-227/08) [2009] IRLR 959 (ECJ), the Court of Justice considered what happened where a worker had arranged a period of leave but was unable to take the leave due to illness in that holiday year. Here the claimant was ill and absent from work during the summer (where he had arranged annual leave). On his return to work he requested to take the leave he was unable to enjoy during the summer, but his employer refused this request. The Court of Justice held that workers who are ill and do not wish to take annual leave during this period must be granted permission by the employer to take that owed leave at a later date on their return to work.

*KHS AG v Schulte* (Case C-214/10) [2012] ICR D19 (ECJ) involved Mr Schulte, who was employed as a locksmith from 1964 by KHS AG, a German company, until in 2002 when, suffering a heart attack, he was unable to continue work. Between 2003 and 2008 Schulte received an invalidity pension, and after this period of time his employment relationship was terminated. Schulte's contract included a collective agreement provision in which workers on long-term sick leave would have any leave accrued and carried over into the following year for a period of 15 months from the end of the relevant holiday/leave year. Schulte brought his claim for payment in lieu of untaken annual leave for the years 2006 to 2008. The German courts held that Schulte's case was out of time due to the 15-month carryover period which had expired. Reference was made to the Court of Justice on the basis of the compatibility of the 15-month limitation provision and its compatibility with the WTD art. 7. [22] The Court of Justice referred to *Stringer* and *Schultz-Hoff* [23] (which limited the carry-over period to a period of six-months), both of which were authority for the right of Member States to determine whether or not to enable workers to a carryover period of leave, albeit in these cases that provision was only applicable where a worker had the opportunity to exercise his or her right to paid annual leave and this leave was untaken (such as was the case in the Employment Appeal Tribunal's decision in *Fraser v Southwest London St George's Mental Health Trust* [2012] IRLR 100 EAT). The Court of Justice appeared uneasy about establishing a right for the unlimited accumulation of paid annual leave even when acquired during a worker's long-term sick leave. The Court of Justice also recognised the balancing act between enabling workers to a period of leave as part of their general health and safety, whilst also protecting employers from the situation where a sick worker would accumulate substantial periods of annual leave that were simply too long. Ultimately the Court of Justice held that the carryover period must be 'substantially longer' than the reference period (the holiday year) and, in this case, the 15-month carryover period was not contrary to the right to paid annual leave as provided in the national provision. *Neidel v Stadt Frankfurt* affirmed the approach taken in *Stringer*, *Pereda v Madrid Movilidad SA* (Case C-227/08) [2009] IRLR 959 (ECJ) and *Schultz*, although in relation to Mr Neidel the carry over period of nine months was held to be too short, but importantly, the ruling restricted the right of the carryover period to the minimum of four weeks holiday

pay as prescribed in the WTD. If national law wished to provide such a measure to allow any additional paid leave, that was at its discretion. The consequence for employers is to ensure that the contracts of employment are specific as to how contractual holiday leave and pay are identified, along with any specific rights for a worker on long-term sick leave. The previous 'use it or lose it' approach to holiday leave for workers on sick leave, adopted by some employers, is demonstrably unworkable.

Having established the right to paid leave being carried-over for the worker to enjoy on his/her return to work, and establishing guidance of the reasonableness of the reference period of the application of this leave, in *Dominguez v Centre informatique du Centre Ouest Atlantique* (Case C-282/10) 1 ICR D23 [2012] (ECJ) the Court of Justice had to determine whether the worker was obliged to have carried out any 'work' for the employer in order to avail him/herself of the right to annual leave. Essentially, if the worker had not worked, could he/she still expect to be granted paid annual leave to facilitate the rest and leisure the WTD had established? Here the claimant had worked for the Social Security agency until she sustained an accident on her way to work and had been on sick leave for a period of 14 months. The collective agreement referred to in her contract identified that annual leave entitlement would not be given in a particular year in respect of illness or prolonged illness that resulted in a break in work of 12 consecutive months or more. However, the Code de Travail provided that where the contract of employment is suspended owing to a work-related accident or occupational disease, this shall be treated as a period of actual work (the national law requiring work of a minimum of 10 days per year necessary to qualify for the right of paid annual leave entitlement). The claimant argued that an accident on the way to work should be considered as a workplace accident for the purposes of the interpretation of the Code. The Court of Justice held that the requirement to interpret domestic law in relation to Article 7 was fundamental and further, if the national court could not interpret its Code accordingly, WTD Art. 7 was directly effective. The Member State was not entitled to make entitlement to paid leave conditional on a worker having worked a minimum of 10 days for the employer in the same year, although it was open for national law to establish other facts as to the interpretation and application of the law (such as what constituted as 'work' for the purposes of a work-related accident).

The previous cases had considered issues relating to leave and the unavailability (and associated consequences) of workers when falling ill. However, in *ANGED v FASGA & Ors* (Case C-78/11) [2012] (Judgment 21 June) the Court of Justice articulated in very clear terms the very important distinction between paid holiday leave and sick pay/leave. The reference to the Court of Justice was made following collective negotiations by the Spanish unions for shop workers. The national position was that 'workers affected by a temporary incapacity for work before starting a pre-arranged period of leave, or who are thus affected during that period of leave, are not entitled to take leave at a later date, after the period during which they were unfit for work has ended, except in situations expressly provided for in the collective agreement.' The Court of Justice held that the right to paid annual leave was to enable the worker to a period of rest, relaxation and leisure which was fundamentally different from a worker being away from work recovering / recuperating from a period of illness. The Court referred to *Pereda*

where it was settled law that a worker who was sick during a period of pre-arranged annual leave was entitled to defer that leave (essentially to rearrange it) until a later date (even if this was not in the current holiday year) - when he/she had recovered and could thereby enjoy the benefits of the period of leave: 'It follows... in particular from the purpose of entitlement to paid annual leave that a worker who is on sick leave during a period of previously scheduled annual leave has the right, at his request and in order that he may actually use his annual leave, to take that leave during a period which does not coincide with the period of sick leave.' [24]

Finally, in *NHS Leeds v Larner* [2012] EWCA Civ 1034 CA, the Court of Appeal held that an NHS worker was entitled to accrued holiday pay on the termination of her employment even though she had been absent for the whole of the holiday year and she had not submitted any formal request for holiday leave. At para 91, the Court held

'Where a worker's employment is terminated and on the termination date he remains entitled to leave in respect of any previous leave year which carried over under reg 13(9)(a) because of sick leave, the employer shall make him a payment in lieu equal to the sum due under reg 16 for the period of untaken leave.'

That is where the law currently stood on the application of the WTD on paid holiday leave throughout the EU. Questions relating to important points of law had been addressed and confirmed by the Court of Justice, but in none of the cases previously heard had the worker actually died whilst on sick leave, and having not accessed his/her paid annual leave, what consequences did this have for the dead person's estate and the obligations on the employer?

#### 4. THE CJEU

In addressing the query by the parties as to the interpretation of national law with the WTD, the Landesarbeitsgericht Hamm (the court to whom the matter was referred following the tribunal's initial finding against Mrs Bollacke) referred the following questions to the Court of Justice related to the interpretation of WTD art. 7:

1. Is Article 7(1) of Directive 2003/88/EC to be interpreted as precluding national legislation or practice according to which the entitlement to a minimum period of paid annual leave is lost in its entirety on the death of the worker, namely not only the entitlement to release from the obligation to work, which can no longer be implemented, but also the entitlement to payment of remuneration in respect of annual leave?
2. Is Article 7(2) of Directive 2003/88 to be interpreted as meaning that the entitlement to an allowance in lieu of a minimum period of paid annual leave on termination of the employment relationship attaches to the person of the worker in such a way that that entitlement accrues only to him, in order to enable him to realise at a later date the purposes of rest and leisure associated with the granting of paid annual leave?
3. Is Article 7 (1) of Directive 2003/88 to be interpreted as meaning that, having regard to the protection of the safety and health of workers, the employer is obliged, when organising working time, actually to grant the



worker leave by the end of the calendar year or, at the latest, by the end of a carry over period applicable to the employment relationship, regardless of whether or not the worker has submitted an application for leave? [25]

The Court of Justice considered the questions as a whole and began by articulating the basis of the WTD and its roots in the protection of workers' health and safety and progressing through the case law identified above. Turning to the issue of a worker's death and the accrual of paid holiday leave, the Court held that the significant aspect of the WTD Art. 7 was in fact the expression 'paid holiday leave' which of itself maintained that the worker was to receive his/her remuneration during the periods of leave. [26] This being a fundamental right, the Court could not 'make a restrictive interpretation of the WTD at the expense of the rights that workers derive from it.' [27]

Further, in ruling that the WTD cannot be interpreted as meaning that the entitlement to (untaken) paid annual leave is lost when the worker dies, the Court held:

'... if the obligation to pay annual leave were to cease with the end of the employment relationship because of the worker's death, the consequence of that circumstance would be an unintended occurrence, beyond the control of both the worker and the employer, retroactively leading to a total loss of the entitlement to paid annual leave itself, as affirmed in Article 7 of Directive 2003/88.' [28]

In its observations in the case, the Hungarian government argued that Art. 7(2) of the WTD established no condition for entitlement to an allowance in lieu other than the fact that the employment relationship had ended, and that the worker had not taken all the annual leave to which he/she was entitled on the date that the relationship ended. [29] In agreement, the Court of justice held that Mr Bollacke was entitled to payment in lieu of his untaken holiday leave, and that this sum was recoverable by his estate (Mrs Bollacke).

## 5. CONCLUSIONS

The WTD has substantially affected workers' rights and placed obligations on employers with regards to paying holiday pay and regulating maximum working hours. It is to be remembered, and the reason why the UK lost its argument in 1996 against the Commission [30] that the enactment of the Directive was contrary to the powers of the institution, that the Directive is a health and safety measure. In *ANGED* the Court of Justice ruled that holiday leave and sick leave were fundamentally different, had different aims and objectives, and could not replace each other (despite what an employer might think). The Court of Justice also established that a worker who was taking sick leave from his or her employment was unable to take annual holiday leave concurrently or in a replacement of that period of leave.

In holding that the right to paid annual leave continued to be owed even on the worker's death, the Court of Justice remarked:

'first... Article 7 of Directive 2003/88 is not to be interpreted as meaning that the death of a worker that ends the employment relationship relieves the deceased



worker's employer of payment of the allowance in lieu to which that worker would ordinarily have been entitled by way of paid annual leave outstanding, and, secondly... receipt of such an allowance cannot be made subject to the existence of a prior application for that purpose.' [\[31\]](#)

These cases enshrine the WTD as an essential principle of EU social law and that employers are, through this ruling and the previous case law established by the Court of Justice, being given less room to manoeuvre in avoiding providing workers with their EU right to entitlement to paid leave. Whilst the UK does not have to compel employers to provide paid leave in these circumstances beyond the four weeks' of leave as required by the WTD, it is required to ensure that these minimum standards are applied in national law. What is significant in *Bollacke* is the right to the owed 140.5 days' paid leave for the worker / his estate. Given that workers who work excessive hours without periods of rest may become ill, or where a worker has, like Mr Bollacke, worked for many years without formally taking (paid) leave, if the worker becomes ill and subsequently never returns to work, the payment in lieu owed to the worker may be substantial. Obliging workers to take paid leave may be necessary (perhaps through a system of line management) to avoid future consequences as experienced by *K + K Klaas & Kock B.V. & Co. KG*. This ruling, further assisted by the EU's latest endeavours which intend for the opt-out (waiver of rights) for individuals to be removed from the WTD and the domestic transposing laws, increasingly move holidays and paid leave to the forefront of workers' rights.

The Court of Justice's case law on the application of the WTD for sick workers ultimately has determined the following obligations for the parties:

A worker is not obliged to have requested leave to have the right to this (untaken) leave carried over into the following year;

Where a worker is ill for the entire year and consequently takes no paid holiday leave, this leave carries over into the following year (on the application of WTR regs 13A(7) and 26A(1)(b));

Where a worker has arranged paid holiday leave, and becomes ill during that holiday period, he/she may inform the employer and have the right to rearrange the owed and untaken leave at a later date (the period of paid leave being replaced by sick leave/pay for the relevant dates);

Where a worker is ill for the entire year and thereby takes no paid holiday leave; the carry over period is limited to the four-week period articulated in the WTD unless national law / the contract provides for an extension of this into the (1.6 weeks') additional leave;

Where the worker is ill for more than one year (perhaps several years) and thereby takes no paid holiday leave in that time; a minimum of the four weeks' leave carries over for a period of up to 15/18-months (per *KHS AG v Schulte* and the application of the ILO);

Where the worker is ill (including perhaps for more than one year / several years) and thereby takes no paid holiday leave in that time (or indeed perhaps in the years prior to the illness) and dies, the dead worker's

beneficiaries will be able to claim the owed leave as payment in lieu (but significantly not subject to the 15/18 months carry-over rule).

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[2] *Gülşay Bollacke v K + K Klaas & Kock B.V. & Co. KG* [2014] Case C-118/13 (judgment of 12 June).

[3] Paragraph 1922(1) of the German Civil Code (Bürgerliches Gesetzbuch).

[4] Payment received for the purpose of paid annual leave must include any commission normally received in addition to basic salary where there is an intrinsic link between 'the commission received each month... and the performance of the tasks he is required to carry out under his contract of employment.' (*Lock v British Gas Trading Ltd* [2014] EUECJ C-539/12 (22 May 2014), para 32). This calculation of pay being made over the reference period applicable in national law (*Lock*, para 34).

[5] Mrs Bollacke's claim was rejected because, under case law of the Bundesarbeitsgericht (the Federal Labour Court), entitlement to an allowance in lieu of paid annual leave outstanding at the end of the employment relationship does not arise where that relationship is terminated by the death of the employee (para 12).

[6] Per para 16 'Article 7 of Directive 2003/88... treats entitlement to annual leave and to a payment on that account as being two aspects of a single right.'

[7] Council Directive 93/104/EC of 23 November 1993 concerning certain aspects of the organisation of working time (OJ 1993 L 307) consolidated in 2003/88/EC.

[8] However, the WTR apply to those with the employment status of 'worker' and are not restricted to employees, see WTR 1998 reg. 2(1).

[9] Certain groups of worker were protected before the commencement of the WTD and restrictions were imposed on employers with regards to maximum working hours e.g. young persons, lorry drivers etc.

[10] See *Johnstone v Bloomsbury Health Authority* [1991] ICR 269 (CA).

[11] WTR 1998, reg. 13.

[12] WTR 1998, reg. 13A, or contractually through reg. 26A(1).

[13] Although for an assessment of the express and implied right and application of reg. 26 see *Morley v Heritage Plc* (1993) IRLR 400.

[14] Reg. 13(9).

[15] WTR 1998, reg. 15(1) and (4)(a).

[16] WTR 1998, reg. 15(4)(b).

[17] WTR 1998, reg. 15(2)(a).

[18] WTR 1998, reg. 15(4)(a).

[19] *Federatie Nederlandse Vakbeweging v Staat der Nederlanden* (Case C-124/05 [2006] ECR I-3423 (ECJ)).

[20] Although vertically only - *Dominguez v Centre informatique du Centre Ouest Atlantique* (Case C-282/10) 1 ICR D23 [2012] (ECJ).

[21] WTR 1998 reg. 13(9).

[22] It is also worth noting that the ILO Convention No.132, Art. 9(1) provides for a one year/18 months' carry over provision.

[23] *Gerhard Schultz-Hoff v Deutsche Rentenversicherung Bund* (Case C-350/06) [2009] ECR I-179.

[24] Para 22.

[25] Para 13.

[26] See - *Robinson-Steele v R. D. Retail Services Ltd* (Cases C-131/04 and C-257/04) [2006] IRLR 386, para 50; *Schultz-Hoff*, para 58; and *Lock*, C-539/12, para 16.

[27] Para 22.

[28] Para 25.

[29] Para 23.

[30] The Court of Justice rejected the UK's argument that the WTD could not be enacted through the use of qualified majority voting (as required for health and safety laws - Article 118a of the EC Treaty), and should have been subject to a different article requiring a vote of unanimity due to the WTD being a social policy measure (12 November 1996).

[31] Para 29.