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CHALLENGES IN EXERCISING THE RIGHT TO ANNUAL LEAVE FOR WORKERS ON LONG-TERM SICK LEAVE IN THE REPUBLIC OF CROATIA[**]

Abstract: *The right to paid annual leave is one of the fundamental rights in the employment relationship. As such, it is incorporated in a number of legal acts, both at the international and regional, as well as at the national levels. The purpose of this right is to enable the workers to rest from physical and/or mental work, to enable them to enjoy relaxation and leisure in order to restore their working abilities. In accordance with the case law of the Court of Justice of the European Union (CJEU), the right to paid annual leave is a particularly important principle of the Community social law; thus, it must be granted to every worker regardless of his/her health status. However, in the Republic of Croatia, the workers who have been on long-term sick leave may face significant difficulties in exercising their right to paid annual leave after returning to work. Pursuant to Article 84 of the applicable Croatian Labour Act, on carrying over the annual leave to the next calendar year, a worker who, due to illness, does not use annual leave in full or in part in the calendar year in which it was earned, is entitled to use it upon returning to work, but no later than 30 June of the following calendar year. The question arises how a worker who has spent two, three or more years on long-term sick leave will fit into this provision. Will this legal solution deprive the worker of the right to paid*

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annual leave? The aim of the paper is to analyse the relevant provisions of the Croatian positive law concerning the right to paid annual leave and the possibility of transfer it to it to the next calendar year over, to correlation them with the relevant European directives and judgments of the Court of Justice of the EU, to draw conclusions on their compliance with EU law, and discuss their impact on the position of workers and employers in the Republic of Croatia.

Keywords: *right to annual leave, long-term sick leave, Croatian Labor Act, Court of Justice EU.*

1. Introductory considerations

The right to paid annual leave is one of the basic rights in the employment relationship, and its use is beneficial for the employee and the employer alike. Research shows that taking annual leave increases workers' productivity by up to 40%, while at the same time reducing the risk of sick leave by 28% (EURES, 2022).[1] Annual leave allows the worker to take a break from the stress and workplace demands. Studies show that the maximum effort that a worker invests in the workplace for a long time exposes the worker to a greater risk of serious health problems, such as heart attack and stroke, for which reason the use of annual leave is considered necessary to safeguard workers' health (EURES, 2022). Moreover, the use of annual leave can have a positive effect on keeping balance between professional and personal life. Conducted research also shows that, during the annual leave, the worker's health and well-being improve, the level of tension decreases, and at the same time the level of energy and satisfaction increases (De Bloom, Geurts, Taris, Sonnentag, De Weerth, Kompier, 2010:196). Annual leave has a positive effect on creating psychological resilience to future stressors (De Bloom, Geurts, Kompier, 2012:630). The absence of annual leave can be associated with premature mortality (Gump, Matthews, 2000:608-612).

The right to paid annual leave is laid down in Article 31 (2) of the EU Charter of Fundamental Rights(2000)[2], which states that "Every worker has the right to limitation of maximum working hours, to daily and weekly rest periods and to an annual period of paid leave." According to the position expressed by the Court of Justice of the EU (CJEU) in its judgment in case C-684/16[3], the

1 EURES/EURopean Employment Services (2022). *Why you should always use your annual leave*, 6 Sept. 2022, https://eures.europa.eu/why-you-should-always-use-your-annual-leave-2022-09-16_en (accessed 15 July 2024).

2 Charter of Fundamental Rights of the European Union, *Official Journal of the EC,* C 364/01, 2000

3 Case C-684/16 *Max Planck-Gesellschaft zur Förderung der Wissenschaften* [2018], paragraph 74

aforementioned provision of the Charter suffices granting workers the right that they can invoke in disputes against the employer. Furthermore, pursuant to Article 7 of Directive 2003/88/EC[4], member states must guarantee workers at least four weeks of paid annual leave. The aforementioned provision has been implemented in the Croatian Labour Act; thus, the employer's failure to ensure the employee's use and enjoyment of paid annual leave shall result in employer's misdemeanour liability. Despite this, the provisions on carrying over periods of unused paid annual leave to the next calendar year pose a special issue in the labour law legislation of the Republic of Croatia. In particular, this refers to workers in the Croatia who spent several uninterrupted years on sick leave and who, after returning to work, wish to use their annual leave that they could not use due to sick leave.

2. Legal sources of the right to paid vacation

The right to paid annual leave is incorporated in a number of legal acts at the international, regional and national levels. The paper focuses only on particular sources: one international specialized source, one European secondary source, and two national (Croatian) sources of law.

In the context of international specialized sources of law, the analysis covers the provisions of the ILO Convention C132 - Holidays with Pay Convention (Revised).[5] Article 9 of the ILO Convention is considered crucial when it comes to the annual leave carry-over institute. Pursuant to Article 9, "the uninterrupted part of the annual holiday with pay of two uninterrupted working weeks[6] shall be granted and taken no later than one year, and the remainder of the annual holiday with pay no later than eighteen months, from the end of the year in respect of which the holiday entitlement has arisen".[7] Therefore, as a rule, the unused part of annual leave can be carried over and used no later than eighteen months from the end of the year in which the right to annual leave was acquired. The above applies only if there is no employee's consent to extend the

4 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, *Official Gazette*, 299/2003

5 ILO Convention No 132: Holidays with Pay Convention (Revised), 1970/ Konvencija 132 - Konvencija o plaćenom godišnjem odmoru (revidirana), *Narodne novine,* 3/2002

6 Pursuant to Article 8 of the ILO Convention No.132, "The division of the annual holiday with pay into parts may be authorised by the competent authority or through the appropriate machinery in each country. Unless otherwise provided in an agreement applicable to the employer and the employed person concerned, and on condition that the length of service of the person concerned entitles him to such a period, one of the parts shall consist of at least two uninterrupted working weeks."

7 Articles 8 and 9, ILO Convention No 132- Holidays with Pay Convention (Revised), *Narodne novine,* 3/2002

use of the unused part of annual leave even after the expiry of 18 months from the end of the year in which the right to annual leave was exercised.[8]

In the context of the European secondary sources of law, we will analyze the provisions 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 (2003).[9] As regards annual leave, the Directive emphasizes the right of every worker to a paid annual leave of at least four weeks, whereby the conditions for acquiring the right and for granting annual leave are determined by national regulations and/or practice (Article 7(1) of the Directive 2003/88/EC). Furthermore, the same Directive eliminated the possibility of replacing the shortest annual leave with monetary compensation. However, the possibility of paying an appropriate monetary compensation instead of annual leave is provided only in case of termination of the employment relationship (Article 7(1) of the Directive 2003/88/EC). The analysis of the provisions of Directive 2003/88/EC shows that there are no special provisions on the institute of annual leave carry-over to the next year. Thus, it does not follow from the text of the Directive that "the Union legislator intended to regulate the carry-over periods".[10] However, it should be noted the Article 6 of the Directive sets out that "the principles of the International Labour Organisation should be taken into account regarding the organisation of working time, including the principles relating to night work."

In reference to national sources of labour law, the author analyses the provisions of the Constitution of the Republic of Croatia[11] and the provisions of the current Labour Act of the Republic of Croatia.[12] The Constitution, as the fundamental legal act of the Republic of Croatia, sets out the right of every employee to weekly and paid annual leave, highlighting it as a right that cannot be waived (Article 3§3 of the Constitution). It should be emphasized that this provision of the Constitution is also the only provision concerning the issue of annual leave. As anticipated, the Croatian Labour Act includes more detailed

8 In this sense, Article 9(2) of the Convention states: "Any part of the annual holiday which exceeds a stated minimum may be postponed, with the consent of the employed person concerned, beyond the period specified in paragraph 1 of this Article and up to a further specified time limit."

9 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, *Official Journal*, 299/2003

10 Opinion of Advocate General Tamara Ćapeta delivered in the joined cases C-271/22 to C-275/22 *XT (C-271/22), KH (C-272/22), BX (C-273/22), FH (C- 274/22), NW (275/22) v Keolis Agen SARL* [2023], paragraph 39.

11 Constitution of the Republic of Croatia, *Narodne novine,* 56/90, 135/97, 08/98, 113/00, 124/00, 28/01, 41/01, 55/01, 76/10, 85/10, 05/14

12 Labour Act, *Narodne novine*, 93/14, 127/17, 98/19, 151/22, 46/23, 64/23

provisions on annual leave, as well as the possibility of carrying over a part of it into the next calendar year. Taking into account that the focus of this paper is on challenges and difficulties that workers on long-term sick leave face while attempting to exercise their right to paid annual leave, the subsequent parts of the paper analyze the Labour Act provisions related to the possibility of carrying over the use of the paid annual leave, which was not used due to illness, into the next year. In this sense, Article 84 § 4 of the Labour Act is of great importance as it provides that: "A worker has the right to use annual leave or part of it that was interrupted or not used in the calendar year in which it was granted due to illness and the use of the right to maternal, parental, and adoption leave, and leave for the care of a child with severe disabilities, upon returning to work, no later than 30 June of the following calendar year." According to the cited provision, the use of annual leave for a worker on long-term sick leave is possible only until 30 June of the next calendar year. This is clearly confirmed by the Opinion on the implementation of the Labour Act, more specifically on the implementation of the provisions of Article 84 § 4, issued by the Ministry of Labour, Pension System, Family and Social Policy, the authority in charge of preparing the general labour regulations. The Ministry states on its official website: "Pursuant to Article 84 § 4 of the Labour Act (Official Gazette, No. 93/14, 127/17, 98/19 and 151/22) on the carry-over of annual leave that was interrupted or was not used in the calendar year in which it was acquired due to illness, the worker is allowed to use it upon returning to work, no later than 30 June of the next calendar year. This mandatory provision protects the worker from possible delays and interruptions in the timely exercise of the right to paid annual leave, in such a way that the Act lays down the possibility to carry over the annual leave and determines the deadline by which the employer shall ensure the employee's use of the corresponding annual leave. In accordance with the cited legal provision, an employee who, after being on sick leave (temporary incapacity to work due to illness) returned to work in mid-June of the current year and who, due to illness, did not take annual leave for the previous calendar year, would have the right to carry-over the accrued annual leave from the previous year and use it until 30 June of the current year. After that date, the annual leave from the previous calendar year could no longer be used. In other words, in the event that the employee's temporary incapacity for work due to illness ends during the month of June of the current year, as a result of which, after returning to work, the employee would not "have time" to fully use the annual leave from the previous calendar year that began, the employer would not be obliged to ensure that the worker can use annual leave for the previous calendar year after 30 June, nor could he suffer adverse consequences therefor. An employer who, in such a hypothetical case, agreed with the employee that the annual leave acquired in the previous year should be used

without interruption after 30 June, until it expires in its entirety, could for that reason, upon inspection, still be subject to misdemeanour liability, despite the fact that the very nature of such an agreement reached at the worker's request would not point to the intention of abusing the worker's right protected by a mandatory norm. This point of view is expressed in the recent case law of the High Misdemeanour Court" (Ministry of Labour, Pension System, Family and Social Policy, 2023).[13] Thus, after 30 June of the next calendar year, the employer has no obligation to allow the employee to use the paid annual leave that was not taken before due to illness, nor can he be sanctioned for not doing so. On the contrary, sanctions could be imposed on an employer who allows an employee to use unused annual leave after 30 June of the next calendar year, which is confirmed in the recent decisions of the High Misdemeanour Court of the Republic of Croatia?! The following questions are justifiably posed in this regard:

1) How will workers who have been on sick leave uninterrupted for two or more years fit into the aforesaid provisions of the Labour Act and their interpretations?

2) To what extent can the aforesaid Opinion of the Ministry of Labour, Pension System, Family and Social Policy, with the power of its authority, influence the Croatian (municipal) courts before which requests are made for the recognition of the right to paid annual leave (or the payment of appropriate monetary compensation) of workers on long-term sick leave?

3) Is the provision of Article 84 § 4 of the Labour Act in accordance with the applicable European directives and case law of the Court of Justice of the EU?

The following sections of the paper will seek to provide answers to these questions.

3. Carry-over of paid annual leave of workers on long-term sick leave in judgments of the Court of Justice of the European Union

It should be noted that the Court of Justice of the EU (CJEU), as part of its functions, gives opinions on the interpretation and implementation of EU law, and national courts address it in order to eliminate errors made during the implementation of the European *acquis* in the national legislation, and when national law and the EU law are not in conformity (European Parliament, 2024). This section of the paper analyses a number of judgments delivered by the CJEU in cases concerning the possibility to carry over the annual leave of workers on long-term sick leave, i.e. the judgments that are binding for all, including the

13 Ministarstvo rada, mirovinskoga sustava, obitelji i socijalne politike (2023). *Prenošenje godišnjeg odmora u slijedeću kalendarsku godinu - bolest*, 4.1.2023, https://uznr.mrms.hr/prenosenje-godisnjeg-odmora-u-slijedecu-kalendarsku-godinu-bolest/ (accessed on 15 June 2024)

courts of the Republic of Croatia. For each of the analysed cases, the author provides the case facts, questions referred to the CJEU by national courts and the judgments of the Court of Justice of the EU.

3.1. Judgments in joined cases C-350/06[14] and C-520/06[15] (Schultz-Hoff and Others)

3.1.1. Statement of facts C-350/06

Mr Schultz-Hoff spent a year on sick leave, after which his employment was terminated on 30 September 2005 (*Schultz-Hoff and Others*, para. 11). However, on 13 May 2005, Schultz-Hoff asked the employer to allow him to take paid annual leave from 2004 as of 1 June 2005, but the employer refused this request with the explanation that the competent medical service needed to determine whether Schultz-Hoff was able to work. In September 2005, Schultz-Hoff was found unfit for work, thus he became entitled to a pension applied retroactively from 1 March 2005 (*Schultz-Hoff and Others*, para. 12). Subsequently, Schultz-Hoff brought an action seeking monetary compensation for unused paid annual leave in years 2004 and 2005. The employer responded that Schultz-Hoff had not used the paid annual leave for leave-related reasons, as a result of which the right to annual leave expired, which also reflected to the right to compensation for unused paid annual leave, which was also invalid. The Labour Court dismissed Schultz-Hoff's claim. Upon his appealed, the Higher Labour Court stopped the proceedings and referred the questions to the Court of Justice of the EU for a preliminary ruling (*Schultz-Hoff and Others*, paras.13, 14, 15 and 17).

3.1.2. Questions referred for a preliminary ruling

The Higher Labour Court referred the following questions to the CJEU for a preliminary ruling on the issues related to the interpretation of Article 7 of Directive 2003/88/EC:

1) Should Article 7(1) of the Directive be interpreted so that it excludes national legislation or practices stipulating that paid annual leave ends at the end of the leave year and/or period of carry-over established by national law, if the worker was on sick leave for all or part of the year and if his incapacity for work lasted until the termination of the employment relationship (*Schultz-Hoff and Others,* para. 33)?,

2) Should Article 7(2) of Directive be interpreted so that it excludes national legislation or practices stipulating that an employee who has spent part or

14 Case C-350/06 *Gerhard Schultz-Hoff v Deutsche Rentenversicherung Bund* [2009]

15 Case C-520/06 *Stringer and Others v Her Majesty's Revenue and Customs* [2009]

all of the leave year and/or carry-over period on sick leave shall be not entitled to compensation for unused paid annual leave? (*Schultz-Hoff and Others,* para. 53)?

3.1.3. Decision of the Court of Justice of the EU

In response to the first question, the Court decided that Article 7(1) of Directive 2003/88 must be interpreted in such a way as to exclude national legislation or practices stipulating that the right to paid annual leave ends at the end of the leave year and/or the carry-over period established by national law, even if the worker was on sick leave during all or part of the leave year and if his incapacity to work lasted until the termination of the employment relationship, which is why he did not have the possibility or opportunity to take paid annual leave (*Schultz-Hoff and Others,* para. 63, point 2). Therefore, following the above, it could be concluded that Article 7(1) of Directive, as a rule, does not exclude national legislation or practices regulating the conditions for exercising the right to paid annual leave, including the loss of the right to paid annual leave at the end of the leave year and/or carry-over period, but only on the condition that the worker had the opportunity to take paid annual leave but did not use this opportunity.

In response to the second question, the Court decided that Article 7(2) of Directive 2003/88 must be interpreted in such a way as to exclude national legislation or practices according to which, after the termination of the employment relationship, the right to compensation in lieu of unused annual leave does not exist for an employee who was on sick leave during all or part of the leave year and/or carry-over period, and as a result he did not even have the possibility of using paid annual leave (*Schultz-Hoff and Others,* para. 63, point 3). Therefore, it can be concluded that the Directive treats the right to paid annual leave and the right to compensation in lieu of unused annual leave in relation to a worker who could not use paid annual leave for reasons beyond his control as two aspects of one right. The Court decision in the joined cases *Schultz-Hoff and Others* is of exceptional significance since the Court emphasized that the right to paid annual leave must be considered a particularly important principle of Community law, which is why it should be recognized for every worker, regardless of their health conditions (*Schultz-Hoff and Others,* para. 54). This position of the Court will be emphasized in its later judgments. The Court's position is that the Directive does not distinguish between workers who were on sick leave (short-term or long-term) and those who worked during the leave year (Schultz-Hoff and Others, para. 40) with regard to the right to paid annual leave. This position will be emphasized by the Court in its later judgment delivered in 2020 in joined cases C–762/18[16] and C–37/19.[17]

16 Case C-762/18 *QH v Vrhoven kasacionen sad na Republika Bulgaria* [2020]

17 Case C-37/19 *CV v Iccrea Banca SpA Istituto Centrale del Credito Cooperativo* [2020]

The cases analyzed in the subsequent subsections of the paper are of exceptional significance in the context of the carry-over period determined for the right to paid annual leave.

3.2. Case C-337/10[18] (*Neidel*)

3.2.1. Statement of facts

In 1970, Mr Neidel started working as a firefighter with the public services of the city of Frankfurt am Main and had the status of a public servant (*Neidel,* para. 13). However, as of 12 June 2007, Neidel was found unfit for service due to health reasons, and he retired in 2009, at the age of 60 (*Neidel,* para. 14). Mr Neidel was entitled to 31 days of paid annual leave in 2007, 35 days in 2008, and 34 days of paid annual leave in 2009. Since he took 14 days of annual leave in 2007, a total of 86 days of paid annual leave remained unused, which is equivalent to EUR 16,821.60 gross (*Neide*l, para. 16). Thus, Mr Neidel submitted a request to be paid monetary compensation in the stated amount instead of the unused days of paid annual leave. However, the employer refused such a request, pointing out that Article 7(2) of Directive 2003/88 did not apply to civil and public servants, and that retirement does not constitute a situation in which the employment relationship ends in the sense of Article 7(2) of the Directive (*Neidel*, para. 17). Thereafter, Neidel brought an action before the Administrative Court in Frankfurt am Main, which stopped the proceedings and referred questions to the Court of Justice of the EU for preliminary ruling (*Neidel,* para. 18).

3.2.2. Questions referred for a preliminary ruling

The Administrative Court referred the following questions to the CJEU for a preliminary ruling concerning the interpretation of Article 7 of the Directive 2003/88:

1) Can a retired public servant ground his right to paid annual leave directly on Article 7(2) of Directive 2003/88 ... if he was prevented from working due to illness and therefore could not take leave in form of absence from work? (*Neidel*, para. 18 point 4), and

2) Can the right to monetary compensation in lieu of unused paid annual leave be at least partially prevented by the premature loss of entitlement to annual leave stipulated by national law? (*Neidel*, para. 18, point 5).

18 Case C-337/10 *Georg Neidel v Stadt Frankfurt am Main* [2012]

3.2.3. Decision of the Court of Justice of the EU

In response to the first question, the Court repeated its interpretation given in the previously analysed *Schultz-Hoff and Others* case. The Court reiterated that upon termination of the employment relationship, the worker can no longer utilize the right to paid annual leave, and in order to prevent the worker from entitlement loss as a result, Article 7(2) of the Directive stipulates that in this case the worker has the right to compensation (*Neidel,* para. 29). Furthermore, the Court reiterated that Article 7(2) of the Directive must be interpreted so as to exclude national legislation or practices stipulating that after the termination of the employment relationship, the compensation may not be paid in lieu of unused paid annual leave to the worker who spent part of the time on sick leave or a full year of leave and/or carry-over period and because of which he was not even able to exercise his right to paid annual leave (*Neidel*, para. 30).

In response to the second question referred to the Court, it should be made clear that the mentioned question indicates the interest of the national court in whether Article 7(2) of the Directive excludes the provision of national law limiting the right of a public servant, who retires, to cumulate benefits instead of the paid annual leave that was not used because of the illness and that in a way stipulates a carry-over period of 9 months, at the end of which the right to paid annual leave ends? In this sense, referring to the position taken in case C-214/10[19], the CJEU points out that in view of the carry-over period, after which the right to paid annual leave may end if the annual leave rights are cumulated, it is necessary to assess whether it is about the period after which the paid annual leave ceases to have a positive effect on the worker in terms of the vacation period (*Neidel*, para. 39). Each carry-over period must take into account the specific circumstances of a worker who was on a sick leave for several consecutive reference periods. The carry-over period must ensure that the worker has, if necessary, rest periods that may be available in the longer term and must be significantly longer than the reference period (*Neidel*, para. 41). In the specific case, the carry-over period amounts to 9 months and is shorter than the reference period, which is why the Court decided that Article 7(2) of the Directive must be interpreted in such a way as to exclude the provision of national law that limits the right of a retiring public servant, to accumulation of benefits in lieu of paid annual leave that was not used due to illness, prescribing a carry-over period of 9 months, at the end of which the right to paid annual leave ceases (*Neidel,* para. 43). The Court's decision in the analysed case has exceptional significance in the context of determining the limit point for the

19 Case C- 214/10 *KHS AG v Winifried Schulte* [2011]

carry-over of annual leave since the Court decided that the carry-over period limited to 9 months should be considered too short.

In the *Neidel* case, the Court of Justice of the EU declared the carry-over limited to 9 months too short but the KHS case, which will be analysed in subsequent sections of the paper, will show the limit point for the carry-over of the right to paid annual leave that the Court of Justice of the EU holds acceptable.

3.3. Case C-214/10[20] **(KHS)**

3.3.1. Statement of facts

Mr Schulte was employed with KHS AG and its successor company since 1964. According to the provisions of applicable collective agreement, Mr Schulte was entitled to paid annual leave amounting to 30 days (*KHS,* para. 14). However, in January 2002, Mr Schulte suffered a heart attack and was declared unfit for work. Since October 2003, Mr Schulte received a pension due to total loss of working capacity, and his employment ended on 31 August 2008. In March 2009, Mr Schulte brought an action before the Labour Court in Dortmund seeking compensation in lieu of paid annual leave that he had not taken during the reference periods corresponding to the calendar years 2006, 2007 and 2008 (*KHS,* para. 16). The Court in Dortmund partially accepted the action, or rather accepted it in reference to the mentioned three years, whereby it recognized the right to a compensation payment but only in relation to the minimum duration of paid annual leave under European Union law, i.e. for the duration of 20 working days increased by five days for each year, which people with severe disabilities are entitled to according to German law (*KHS,* para. 17). The employer filed an appeal with the Higher Labour Court against this decision, pointing out that entitlement to paid annual leave for years 2006 and 2007 had expired because the carry-over period stipulated by the collective agreement had expired. The Higher Labour Court considered that, under the national legislation and the provisions of the collective agreement, the entitlements to paid annual leave for years 2007 and 2008 still existed at the time of termination of the employment contract, while the entitlement to paid annual leave for 2006 had expired because the carry-over period amounting to 15 months had expired (*KHS*, para. 19). However, this court did not exclude the possibility that the loss of the right to paid annual leave for 2006, resulting from national regulations, was in violation of Article 7(1) of Directive 2003/88. In this regard, the Higher Labour Court stopped the proceedings and referred the questions to the Court of Justice of the EU for a preliminary ruling (*KHS*, para. 21).

20 Case C- 214/10 *KHS AG v Winifried Schulte* [2011]

3.3.2. Questions referred for a preliminary ruling

The Higher Labour Court referred these questions to the CJEU for preliminary ruling:

1) Should Article 7(1) of Directive 2003/88 be interpreted so as to preclude national legislation and/or practices (e.g. a collective agreement) according to which the right to paid annual leave expires at the end of the reference period and/or the carry-over period, even in the event that the worker was unfit to work for a prolonged period (and this longer period of incapacity for work would lead to accumulation of the entitlements to annual leave for several years i.e. for a minimum duration, but only if the possibility to carry-over these rights had not been limited in time) (*KHS*, para. 21)?

2) In case the answer to the first question is negative, must there be a possibility of carrying over paid annual leave entitlement for at least 18 months (*KHS,* para. 21)?

3.3.3. Decisions of the Court of Justice of the EU

It should be noted that with its first question, the national court inquired whether Article 7(1) of the Directive should be interpreted so as to exclude national legislation or practices such as a collective agreement that limit the right of a worker, who has spent several consecutive reference periods on sick leave, to cumulate the right to paid annual leave by stipulating 15 month carry-over periods at the end of which the right to annual leave lapses. Here, again, the Court, as in a number of previous cases, emphasizes that the right of every worker to paid annual leave must be regarded as a particularly important principle of EU social law. Furthermore, the Court emphasizes that case law speaks in favour of the fact that the national rule stipulating a carry-over period cannot foresee the lapse of a worker's right to paid annual leave if he actually did not have the opportunity to exercise that right. However, such a conclusion must take the particular circumstances of each case into account. If this were not the case, the worker who spent several consecutive reference periods on sick leave would have the right to cumulate, without any restrictions, the rights to paid annual leave that he acquired during his sick leave (*KHS*, paras. 28 and 29). Here, the question of the real purpose of the right to paid annual leave is particularly important, i.e. the question of how consistent with the stated purpose is the right to unlimited accumulation of entitlements to annual leave. Namely, the Court emphasizes again by repeating its position from the judgment in *Schultz-Hoff and Other*s that the right to paid annual leave, in accordance with Article 31 (2) of the Charter of Fundamental Rights of the EU and with Article 7 of Directive 2003/88 has dual purpose. It enables the worker to rest from the work that he is required to perform according to the employment con-

tract, on the one hand, and to enjoy relaxation and leisure period, on the other hand (*KHS*, para. 31). Furthermore, the right to paid annual leave acquired by a worker who has spent several consecutive reference periods on sick leave can fulfil both purposes of annual leave, but only if the carry-over period does not exceed a certain time limitation. Consequently, beyond this limit, annual leave does not have a positive effect on the worker in terms of a period of rest and is only a period of relaxation and leisure (*KHS,* para. 33), which implies that the right to paid annual leave could not be cumulated without limitation. In the specific case, the CJEU had to assess whether a carry-over period of 15 months can be considered as the reasonable period after which the annual leave ceases to have a positive effect on the worker in terms of the leave period. On the one hand, it should be noted that the carry-over period should be significantly longer than the reference period; on the other hand, it should be such that it protects the employer from the risk that the worker will accumulate too long periods of absence, which can adversely affect the organisation of employer's work. The Court points out that, under the provisions of the collective agreement, the carry-over period amounts to 15 months, which is longer than the reference period to which it relates, and the precisely stated carry-over period of 15 months makes difference compared to the *Schultz-Hoff and Others* case, in which the carry-over period was only six months (*KHS,* para. 40).

At this point, it should be highlighted again that Directive 2003/88 takes into account the principles of the International Labour Organisation regarding the working time organisation. Therefore, in the context of the carry-over period, the provisions of Article 9 (1) of Convention No.132 on paid annual leave (Revised) should be taken into consideration, which provides for an 18-month carry-over period from the end of the year for which the right to paid annual leave has arisen. In view of the above, the Court of Justice of the EU holds that a 15-month carry-over period of the right to paid annual leave does not contradict the purpose of the right to paid annual leave because it enables the paid annual leave to maintain a positive effect on the worker as a period of rest (*KHS,* para. 43). Therefore, in response to the question raised, the Court holds that Article 7(1) of the Directive must be interpreted so as not to exclude national provisions or practices, such as the collective agreement that limit the accumulation of entitlements to paid annual leave to workers who spent time on sick leave for several consecutive reference periods, stipulating a 15 month carry-over period, after which the right to paid annual leave lapses (*KHS*, para. 44). In the analysed case, the Court found the cut-off point of 15 months to be acceptable in the sense of Article 7(1) of Directive 2003/88.

It is necessary to refer to the views of the Court of Justice of the EU taken in its recent decision made in the joined cases C-271/22 to C-275/22[21], which, in the context of the carry-over period of the entitlement to paid annual leave, point out that the CJEU does not have the authority to determine the length of the carry-over period because it is an issue that is within the competence of the Member State concerned. The Court jurisdiction in these cases would be limited only to its obligation to examine, in the context of Article 7 of Directive 2003/88, whether the carry-over period determined by the Member State concerned may violate the right to paid annual leave (*Keolis Agen and Others*, para. 32). Therefore, the decision on whether or not to set a carry-over period of the right to paid annual leave rests with the Member States; but, if the states decide to stipulate the specified period, it must be set in a way that does not jeopardize the right to paid annual leave. In conclusion, a Member State's decision not to set a limitation for the carry-over period of unused paid annual leave would not be contrary to Directive 2003/88 since the latter does not even require from Member States to limit the carry-over period (Opinion of Advocate General Tamara Ćapeta delivered in the joined cases *Keolis Agen and Others,* para. 45).

4. Carrying over of paid annual leave of workers on long-term sick leave in decisions of the Croatian courts

This section of the paper provides an analysis of the decision rendered by a municipal (first-instance) court in the Republic of Croatia regarding the plaintiff's compensation claim for the damage suffered as a result of the fact that his employer, i.e. the Republic of Croatia, did not allow him to use the remaining part of his paid annual leave for years 2018 and 2019, which remained unused due to his long-term sick leave that lasted from August 2018 to May 2020 (Decision in case 7: Pr- 598/21). The author will also analyze the decision of a county court in the Republic of Croatia, as a court of appeal, rendered on the plaintiff's appeal against the first-instance decision. The analysis of these decisions will be conducted for two reasons:

1) to answer the question to what extent the Opinion of the Ministry of Labour, Pension System, Family and Social Policy, which was previously discussed in the paper, affects the courts in the Republic of Croatia, and

2) to show to what extent the courts of the Republic of Croatia apply the decisions of the Court of Justice of the EU rendered in cases concerning the possibility of carrying over the annual leave of workers on long-term sick leave, which are binding for everyone, including the courts of the Republic of Croatia.

21 Case C- 271/22 to C-275/22 XT (C-271/22), KH (C-272/22), BX (C-273/22), FH (C-274/22), NW (275/22) v *Keolis Agen SARL* [2023]

4.1. Decision of the first-instance (municipal) court

As already indicated, the decision of the municipal court concerned the claim for compensation for damage suffered due to the unused part of the paid annual leave that the plaintiff did not use because of his long-term sick leave. In his claim, the plaintiff refers to the applicable provisions of the ILO Convention No. 132 (Decision in case 7:Pr-598/21, paras. 2 and 3). In its response to the claim, the defendant (Republic of Croatia) contested the plaintiff's claim in its entirety. The defendant further pointed out that labour relations in Croatia are governed by the Labour Act and the provisions of the relevant collective agreement, and proposed that the Court dismiss the claim (Decision in case 7:Pr-598/21, paras 4 and 5). After analyzing all the presented evidence and the results of the entire hearing, the first-instance court declared the plaintiff's claim unfounded in its entirety (Decision in case 7:Pr-598/21, para. 13).

In its reasoning, the first-instance court referred to Article 84 § 4 of the Labour Act of the Republic of Croatia, stating that it applied to the specific case because "the plaintiff was on long-term sick leave, which is why he did not use the remaining days of his unused annual leave for either 2018 or 2019. Therefore, when it comes to sick leave, the worker can use the unused part of the annual leave from the previous year only until 30 June of the following year" (Decision in case 7:Pr-598/21, para.39). In its decision, the first-instance court referred to the Opinion of the Ministry of Labour, Pension System, Family and Social Policy stating that the employer is not obliged to grant the employee the use of annual leave for the previous calendar year after 30 June of the following year, nor could he, as a result thereof, suffer harmful consequences (Decision in case 7:Pr-598/21, para.41). Furthermore, the first-instance court decision refers to the decision of the High Misdemeanour Court of the Republic of Croatia according to which: "no agreement between the employee and the employer on the use of the second part of annual leave after 30 June of the following year is possible, regardless of whether it was at the express request of the employee" (Decision in case 7:Pr-598/21, para. 42) and provisions of the relevant collective agreement (Decision in case 7:Pr-598/21, para. 46). In relation to the provisions of Convention No 132 of the International Labour Organisation, the Court deemed them "protective and instructive in nature" and the Article 84 of the Labour Act not contradicting Article 9 of the Convention (Decision in case 7:Pr-598/21, para. 54). The first-instance court's position is that the plaintiff had to take the unused part of annual leave from the previous year no later than 30 June of the following year. In the specific case, the Court considered that "the plaintiff's right to use the old annual leave from 2018 lapsed because he returned to work only on 1 June 2020, after his sick leave and not the following calendar year after he acquired the right to annual leave for 2018" (Decision in case 7:Pr.-598/21,

para.58). Regarding the annual leave for 2019, the first-instance court emphasizes that the defendant enabled the plaintiff to use the said annual leave until 30 June 2020, after which the use of the annual leave was "properly terminated" (Decision in case 7:Pr.-598/21, paras. 58 and 59). Therefore, regarding the unused annual leave, the Court's standpoint is that the employer i.e. defendant is not at fault; thus, after 30 June 2020, the plaintiff cannot claim compensation for damages from the defendant, since the defendant did not in any way curtail the plaintiff's rights as an employee (Decision in case 7:Pr-598/21, para. 58).

In the presented decision, it is evident that the first-instance court did not refer to or take into account either relevant European directives or decisions of the Court of Justice of the EU, which are binding for courts in the Republic of Croatia. In this sense, it should be noted that the courts of the Republic of Croatia have the obligation to interpret the provisions of the Labour Act in accordance with case law of the Court of Justice of the EU If this is not possible, they are obliged to exempt the provisions of the Labour Act that are not in accordance with EU law from application and instead apply the provisions of the applicable Directive (Turkalj, Turkalj, 2022:98).

The plaintiff, as expected, filed an appeal against the aforesaid first-instance judgment for incorrect application of substantive law.

4.2. Decision of the second-instance (county) court

When deciding on an appeal, a county court in the Republic of Croatia deemed it well-founded, considering the incorrect application of substantive law raised in the appeal; therefore, it annulled the first-instance judgment and remitted the case to the same court for reconsideration (Decision in case 37 Gž. R-2131/2021). In its decision, the county court points out, among other things, that "directives are one of the sources of internal EU law and are binding for the Republic of Croatia", noting that "once the directive is incorporated into national legislation, courts are obliged to interpret national law in compliance with the purpose of the specific directive" (Decision in case 37 Gž R-2131/2021, para. 17). The appellate court also points out that "a further source of EU law comprises case law of the European Court, i.e. judgments which, among other things, interpret the norms of the EU legislation and which are binding for everyone" (Decision in case 37 Gž R-2131/2021, para.18). It should be noted that in the context of the disputed issue of accumulation of the entitlements to paid annual leave of a worker who is on long-term sick leave, the county court refers to the judgments of the Court of Justice of the EU in cases C-214/16[22], C-214/10[23]

22 Case C-214/16 *Conley King v The Sash Window Workshop Ltd and Richard Dollar* [2017]

23 Case C- 214/10 *KHS AG v Winifried Schulte* [2011]

and C-337/10[24] (Decision in case 37 Gž R-2131/2021, paras.22, 23, and 24). The position of the county court is that the first-instance court, "due to wrong legal interpretation, did not take into account the binding position of the European Court regarding the direct legal effect of the Directive on an individual's case against the state", and for this reason "the essential facts, which determine the length of the period for carrying over the right to use the annual leave and accumulating the right to such leave in a situation where it could not be used due to illness, were not established" (Decision in case 37 Gž R-2131/2021, para. 27). Due to all the above, the appellate court annulled the first-instance decision and returned the case for reconsideration. However, it is particularly important to emphasize that the appellate court directed the first-instance court to take into account the "binding interpretative positions of the EU Court" when rendering a new decision (Decision in case 37 Gž R- 2131/2021, para. 28), which speaks in favour of the willingness of this court to ensure that all sources of law binding for the Republic of Croatia are respected.

5. Croatian Labour Act (non) compliance

The focus of this paper is clearly on the question of carrying over the right to paid annual leave of workers on long-term sick leave. In this regard, this section of the paper will correlate the relevant provisions of the Labour Act of the Republic of Croatia with the provisions of the ILO Convention No. 132 - Holidays with Pay Convention (Revised), the provisions of Directive 2003/88/EC, as well as with the decisions of the Court of Justice of the EU concerning the aforesaid issue in order to draw a conclusion on their compliance.

The carry-over period of the right to paid annual leave as indicated in the said Convention amounts to 18 months from the end of the year in which the right to annual leave was acquired.[25] Taking into account that the Republic of Croatia has ratified it, the Convention is incorporated into the national law taking precedence over the national law.[26] However, certain doubts are raised in reference to the question of compliance of the provisions of the Labour Act and the Convention. Thus, some authors believe that the provision of Article 84 § 4 of the Labour Act is not in accordance with Article 9 of the Convention "because it does not consider illness as an objective reason for which the worker could not take annual leave until 30 June of the following year" (Frntić, Gović Penić, Hanzalek, Milković, Novaković, Rožman, Zovko, 2023:531). On the other hand,

24 Case C-337/10 *Georg Neidel v Stadt Frankfurt am Main* [2012]

25 Art. 9 of the Ilo Convention No 132-Holidays with Pay Convention (Revised) - Konvencija 132 - Konvencija o plaćenom godišnjem odmoru (revidirana), *Narodne novine*, 3/2002

26 Art. 134 of the Constitution of the Republic of Croatia, *Narodne novine*, 56/90, 135/97, 08/98, 113/00, 124/00, 28/01, 41/01, 55/01, 76/10, 85/10, 05 /14

there are authors who believe that such non-compliance does not exist, more precisely that the provision of Article 84 § 4 of the Labour Act is not contrary to the provisions of Article 9 of the Convention. In this regard, Subotić believes that "the norm of the Convention aims at setting the maximum carry-over period whereas the minimum has not been fixed. In national legislation, the deadline for using the remaining annual leave ranges from 0 to 18 months from the end of the year in which the right is acquired" (Subotić, 2021:5).

In the context of compliance of the provisions of Article 84 § 4 of the Labour Act and Directive 2003/88/EC, it should be noted that the said Directive does not comprise special provisions on the institute of carrying over of annual leave to the following year. However, the absence of such standardization in the Directive was replaced by the extensive case law of the Court of Justice of the EU. Some authors believe that "the provision of Article 84 § 4 of the Labour Act is not in accordance with Directive 2003/88/EC, that is, with the interpretation of that Directive by the Court of Justice of the EU" (Frntić et al., 2023:532). In this regard, Gović Penić points out: "The provisions of the Labour Act limiting the carry-over period of annual leave from one year (only) until 30 June of the following year, especially in cases when the worker was on long-term sick leave and did not have the opportunity to use the remaining annual leave, are not in accordance with the EU acquis" (Gović Penić, 2024:8-9). Other authors also consider that the length of carry-over period of the annual leave as governed by the Croatian Labour Act is "disputable from the position of the EU law" (Potočnjak, Grgić, Čatipović, 2014:186). These authors point out that, according to the interpretations of the Court of Justice of the EU in the case of sick leave, the carry-over period must be significantly longer than the reference period (which in Croatian law is fixed to one calendar year); therefore, neither the six-month carry-over period nor that one of 12 months can be considered long enough (Potočnjak et. al., 2014:186). This is confirmed by the decisions of the Court of Justice of the EU in the cases analysed in the paper which constitute a mandatory source of law for all EU member states. This paper points out only the most important views of the Court of Justice of the EU in the analysed cases. In its decision in the joined cases of *Schultz-Hoff and Others*, the CJEU emphasizes that the right to paid annual leave must be considered a particularly important principle of Community law, which is why it should be granted to every worker, regardless of their health condition (*Schultz-Hoff and Others*, para. 54). In the *KHS* case, the Court expressed the view that a 15-month carry-over period is not contrary to Directive 2003/88/EC, whereas in the *Neidel* case, it assessed a 9-month carry-over period as being contrary to the provisions of the Directive.

In view of the above, it could be concluded that the provision of Article 84 § 4 of the Labour Act of the Republic of Croatia, which limits the carry-

over period of unused annual leave due to illness to only six months, is not in accordance with Directive 2003/88/EC, i.e. with the decisions of the Court of Justice of the EU interpreting the said Directive.

It is also important to refer to the views of the Court of Justice of the EU in the recent decision rendered in the joined cases *Keolis Agen and Others* where, in the context of the period of carrying over the right to paid annual leave, the Court does not have authority to determine how long the carry-over period will last but to examine whether the right to paid annual leave may be infringed by the carry-over period as determined by the Member State (*Keolis Agen and Others,* para. 32). Consequently, the carry-over period of the right to annual leave in the Republic of Croatia should be longer than 9 months, and the decision on how much longer it will really be is the responsibility of the Member State concerned. Some authors believe that the carry-over period in Croatia should not exceed 15 months from the end of the year for which the right to paid annual leave was exercised (Potočnjak et al., 2014:186) while others see the solution in the "analogy in the Convention" and the interpretation that this period should amount to 18 months (Frntić et al., 2023:532). Therefore, it is evident that the previously cited provisions of the positive law of the Republic of Croatia are inconsistent with the relevant provisions of ILO Convention No.132 - Holidays with Pay Convention (Revised), the provisions of Directive 2003/88/EC, and the decisions of the Court of Justice of the EU. Such legal non-compliance has a negative effect on the position of both workers and employers in the Republic of Croatia.

6. Concluding considerations

The right to paid annual leave is one of the fundamental rights from the employment relationship, having a dual purpose: to enable workers to take a break from work they are obliged to perform according to the employment contract, and to enjoy time for relaxation and leisure. According to the case law of the Court of Justice of the EU (CJEU), which is a binding source of law for all EU member states, the right to paid annual leave must be considered a particularly important principle of Community law. As such, it should be granted to every worker, regardless of one's health condition. However, in Croatia, the exercise of the right to paid annual leave for workers who have been on long-term sick leave is linked with significant difficulties.

In the Republic of Croatia, the main problem lies in the provisions of Article 84 § 4 of the Croatian Labour Act, which concern the duration of the carry-over period of paid annual leave that has not been used due to illness. According to the provisions of the Labour Act, the carry-over period amounts to six months from the end of the calendar year for which the right to paid

annual leave was acquired; in this sense, as previous comparisons have shown, there is a mismatch between the aforesaid provisions of the Labour Act and the applicable provisions of the ILO Convention No.132 (Revised), the provisions of Directive 2003/88/EC, and the CJEU decisions interpreting the said Directive. Such inconsistency of the provisions of the Labour Act has negative consequences for the position of both workers and employers in the Republic of Croatia. Namely, in accordance with the provisions of Article 84 § 4 of the Labour Act and under the influence of the opinion of the competent Ministry on the interpretation of the said provision, as well as in fear of misdemeanour sanctions, employers in Croatia will not allow workers who have been on long-term sick leave to use annual leave after 30 June in the next calendar year. If the worker, in such circumstances, decided to bring the case to court, the success of such action before the first-instance court could be questionable, as shown in the paper analysed in the decision of a municipal court in the Republic of Croatia, which refers to the opinion of the competent Ministry, but at the same time does not take into account the abundance of case law of the Court of Justice of the EU on the said issue. If the first-instance court's misinterpretation of the law is corrected by the second-instance court, i.e. appellate court (as in the provided analysis of the decision rendered by the county court in the Republic of Croatia) by annulment of such a decision and returning the case to the first-instance court for reconsideration, there may be several years until the judgment is final. The excessive length of court proceedings is related to high costs, which are eventually borne by the losing party to the dispute. Furthermore, in the Republic of Croatia, the length of court proceedings and high costs of the proceedings result in the reluctance of workers who have been on long-term sick leave to seek judicial protection in case of violated rights, and they are often denied the right to paid annual leave after 30 June of the following year.

Therefore, it is necessary to harmonize the provisions of Article 84 § 4 of the Labour Act, and it is up to the Croatian legislator to assess the length of the carry-over period, accepting the fact that this period must not jeopardize the right to paid annual leave and that it must not be shorter than 9 months. Furthermore, due to the excessive length of the carry-over period, the annual leave may lose its positive effect on the worker in terms of the rest period but it may also create difficulties for the employer in the context of work organisation. In resolving this issue, the Croatian legislator could be guided by the 15-month carry-over period, which is considered to be compliant with the Directive, as well as the 18-month carry-over period stipulated by Convention No.132 of the International Labour Organisations.

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IZAZOVI U OSTVARIVANJU PRAVA NA GODIŠNJI ODMOR RADNIKA NA DUGOTRAJNOM BOLOVANJU U REPUBLICI HRVATSKOJ

Rezime

Pravo na plaćeni godišnji odmor jedno je od temeljnih prava iz radnog odnosa i kao takvo inkorporirano u niz pravnih akata, kako na međunarodnoj i regionalnoj, tako i na nacionalnoj razini. Svrha ovoga prava je omogućiti radniku odmor od fizičkog i/ili psihičkog rada, omogućiti mu uživanje u opuštanju i razonodi, kako bi se njegove radne sposobnosti obnovile. Pravo na plaćeni godišnji odmor, sukladno praksi Suda pravde EU, smatra se posebno važnim načelom socijalnog prava Zajednice, zbog čega se mora priznati svakom radniku, neovisno o njegovom zdravstvenom stanju. Ipak, u Republici Hrvatskoj, za radnike koji su bili na dugotrajnom bolovanju, ostvarivanje prava na plaćeni godišnji odmor nakon povratka na rad praćeno je značajnim poteškoćama. Aktualni hrvatski Zakon o radu, u kontekstu instituta prenošenja godišnjeg odmora u sljedeću kalendarsku godinu, odredbama čl.84. navodi da radnik koji, zbog bolesti, godišnji odmor ne iskoristi u cijelosti ili djelomično u onoj kalendarskoj godini u kojoj ga je stekao ima pravo iskoristiti ga po povratku na rad, a najkasnije do 30. lipnja sljedeće kalendarske godine. Postavlja se pitanje kako će se u navedenu odredbu uklopiti radnik koji je na dugotrajnom bolovanju proveo dvije, tri ili više godina? Hoće li ga ovakvo zakonsko rješenje lišiti prava na plaćeni godišnji odmor? Cilj rada je analizirati relevantne odredbe hrvatskog pozitivnog prava koje se tiču prava na plaćeni godišnji odmor i mogućnosti njegovog prenošenja, staviti ih u korelaciju s relevantnim europskim direktivama i odlukama Suda pravde EU, te zaključiti o njihovoj usklađenosti i utjecaju na položaj radnika i poslodavaca u Republici Hrvatskoj.

Ključne riječi*: pravo na godišnji odmor, dugotrajno bolovanje, hrvatski Zakon o radu, Sud pravde EU.*