OPINION OF ADVOCATE GENERAL KOKOTT

delivered on 12 January 2006 [1]

I — Introduction

1. In this case the Federatie Nederlandse Vakbeweging ('the FNV'), a federation of Netherlands trade unions, disagrees with the Netherlands State over whether financial compensation in respect of the minimum period of annual leave is compatible with the relevant provisions of Community law, if that leave has not been taken but has instead been carried over to the following year.

II — Legal context

A — *Community law*

2. 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 [2] ('the Working Time Directive') replaced Council Directive 93/104/EC of 23 November 1993 concerning certain aspects of the organisation of working time [3] with effect from 4 August 2004. In so far as is here relevant, the two directives correspond. [4]

3. Article 7 of the Working Time Directive contains minimum provisions on annual leave:

'1. Member States shall take the measures necessary to ensure that every worker is entitled to paid annual leave of at least four weeks in accordance with the conditions for entitlement to, and granting of, such leave laid down by national legislation and/or practice.

1 — Original language: German.

2 — OJ 2003 L 299, p. 9.

3 — OJ 1993 L 307, p. 18.

4 — Directive 2000/34/EC of the European Parliament and of the Council of 22 June 2000 amending Council Directive 93/104/EC concerning certain aspects of the organisation of working time to cover sectors and activities excluded from that directive (OJ 2000 L 195, p. 41) is of no significance for the present case.

2. The minimum period of paid annual leave may not be replaced by an allowance in lieu, except where the employment relationship is terminated.'

4. According to the fourth recital in the preamble to the Working Time Directive, the improvement of workers' safety, hygiene and health at work is an objective which should not be subordinated to purely economic considerations.

5. The fifth recital in the preamble states that Community workers must be granted minimum daily, weekly and annual periods of rest and adequate breaks.

6. Article 17 lays down the conditions under which Member States may derogate from various provisions of the directive. However, no possibility of derogation from Article 7 is provided for.

B — *Netherlands law*

7. According to the information provided by the national court, the Working Time Directive has been transposed into Netherlands law by the following provisions. So far as is here germane, the Netherlands Burgerlijk Wetboek (Civil Code) has provided as follows since 1 February 2001:

Article 7:634:

'1. An employee shall acquire, for every year in which he was entitled to pay during the full agreed duration of work, entitlement to holiday leave of at least four times the agreed duration of weekly work or, if the agreed duration of work is expressed in terms of hours per year, of at least one equivalent period.

2. An employee who has been entitled to receive pay over a portion of one year shall acquire, in respect of that portion, entitlement to holiday leave which is proportionate to that to which he would have been entitled had he been entitled throughout the entire year to pay for the full agreed duration of work.

3. ...'

Article 7:638:

'1. An employer shall be required to enable his employee to take the leave each year to which the employee is entitled, as a minimum, under Article 634.

2. In so far as no provision is made for leave by way of written agreement or by or pursuant to a collective works agreement or regulation adopted by or on behalf of an administrative body with appropriate authorisation, or by legislation, an employer shall determine the starting and finishing dates of the leave in accordance with the wishes of the employee, unless there are overriding reasons for not doing so. ...

...

6. An employer shall be required to grant the employee the remaining entitlement to leave in days or hours, unless there are overriding reasons for not doing so.

...'

Article 7:640:

'1. So long as his contract of employment is in force, an employee cannot waive his entitlement to leave in return for compensation.

2. If entitlement to leave is acquired which exceeds the minimum period referred to in Article 634, a derogation from paragraph 1 may be effected by written agreement to the extent to which that entitlement exceeds that minimum.'

III — Facts

8. The dispute concerns an information brochure published by the Ministerie van Sociale Zaken en Werkgelegenheid (the Netherlands Ministry of Social Affairs and Employment) entitled 'New legislation on holiday leave: greater scope for made-to-measure leave', B 089, February 2001, ('the brochure'). That brochure explains, inter alia, that employees can save up leave days and carry them over to subsequent years, in order to take a longer holiday. Furthermore, an employee may waive his leave entitlement in return for compensation, thereby 'selling' his entitlement, so to speak. That applies in the relevant year to all leave days which have been carried over from previous years, and to leave days from the relevant year which exceed the minimum leave of four weeks.

9. It is also clear from comments made by the Netherlands Government during the parliamentary debates on the relevant Netherlands legislation that employees may also carry over portions of the statutory minimum leave to the following year and then waive their entitlement in return for compensation. Legislation aimed at preventing that possibility was rejected during the legislative passage.

10. The FNV takes the view that the Netherlands law, as interpreted by the Netherlands Government, is not compatible with Article 7(2) of the Working Time Directive. It therefore sought a judicial ruling to that effect.

IV — Reference for a preliminary ruling

11. The Gerechtshof takes the view that, on the basis of the process by which it came into existence, and in the light of the brochure, the Netherlands law allows employees to carry over portions of their minimum leave to the following year and to waive their entitlement in return for compensation.

12. However, the Gerechtshof is unsure whether that interpretation of the Netherlands law is consistent with the Working Time Directive and therefore refers the following question to the Court of Justice:

'Is it compatible with Community law, and in particular with Article 7(2) of Council Directive 93/104/EC of 23 November 1993, for a legislative provision of a Member State to provide for the possibility of a written agreement during a contract of employment to the effect that an employee who has, in one year, not taken his minimum annual leave, or has not taken that minimum leave in full, may receive financial compensation in respect of that leave in a subsequent year?

The question is based on the premiss that the compensation is not given in respect of the employee's entitlement to minimum leave in the current year or in the years following thereon.'

V — Submissions of the parties to the proceedings

13. The Netherlands Government states that the implementation of the Working Time

Directive in principle ensures that employees may take leave in accordance with their wishes, where there are no overriding reasons for not allowing them to do so. Article 7 of the Working Time Directive does not require Member States to force employees to actually take their minimum period of annual leave.

14. The Netherlands Government therefore takes the view that it is compatible with Article 7(2) of the Working Time Directive not to use up portions of the minimum period of annual leave, to carry them over to the following year and then to waive the entitlement to that leave in return for compensation. The portions of minimum leave carried over from the previous year no longer form part of the minimum period of annual leave. A rule to that effect forms part of the framework for granting the minimum period of annual leave, which the Member States were able to establish after the *BECTU* judgment. [5]

15. By contrast, the FNV fears that the interpretation of the Working Time Directive by the Netherlands Government exposes employees to the risk that they may be put under pressure by employers not to use up the minimum leave. At the very least, that interpretation makes it possible that employees will not use up their minimum leave and will convert it the following year into compensation.

16. However, the purpose of Article 7(2) of the Working Time Directive is to ensure that minimum leave is actually used up — not only in the interest of the worker, but also in the general interest. [6] The latter is also affected if employees are unfit for work because they have not rested sufficiently.

17. The Commission submits that the Member States are free only in relation to the manner in which they implement the Working Time Directive. By contrast, they have no discretion in relation to the result to be attained.

18. The Working Time Directive is designed to protect the health and safety of workers. Relying on the Opinion of Advocate General Mischo in *Merino Gómez*, [7] the Commission therefore takes the view that the minimum period of annual leave is an absolute right to a real and effective rest period, so that the worker can physically recover. Consequently, carrying over portions of the minimum

5 — Case C-173/99 [2001] ECR I-4881.

6 — See also, to that effect, the Opinion delivered by Advocate General Stix-Hackl on 27 October 2005 in Joined Cases C-131/04 and C-257/04 *Robinson-Steele and Others*, point 79.

7 — Opinion in Case C-342/01 [2004] ECR I-2605, points 32 and 33.

period of annual leave already runs counter, in principle, to the objectives of Article 7 of the Working Time Directive. Only in exceptional cases will it be acceptable to carry over leave entitlement for overriding reasons.

19. Unlike minimum leave, the Commission continues, the situation might be otherwise in the case of additional leave days. The Netherlands Government fails, however, to recognise the different nature of the two leave entitlements. Whilst additional leave days are often the subject of an agreement between employers and employees, the minimum period of annual leave cannot be the subject of an agreement.

20. Even if carrying over leave entitlement runs counter to the Working Time Directive, the Commission is none the less of the opinion that such leave entitlement should remain effective. Employees would be adversely affected by the permanent loss of the leave carried over and their ability to recover would be further diminished.

21. The Commission then turns to the question of how portions of the minimum period of annual leave that an employee — whether for acceptable or unacceptable reasons — has not taken within the relevant year should be dealt with.

22. It is true that the required minimum leave can no longer be made up after the end of the year as such. However, using up leave days carried over in addition to the minimum period of annual leave of the following year would also have a positive influence on health and safety at work. That is not the case if an employee waives the portions of the minimum period of annual leave carried over in return for compensation.

23. Finally, the Commission emphasises that the interpretation of the Netherlands Government would give rise to the danger of systematic abuse. Employers could, with the voluntary or forced agreement of employees, ensure that each year only a portion of the minimum period of annual leave is used up and then pay compensation the following year.

VI — Assessment

24. This reference for a preliminary ruling relates exclusively to the question whether the payment of compensation in respect of portions of the minimum period of annual leave is permissible, after those portions have been carried over to the following year.

25. The Commission contends, however, that the Court should first address the

question of the extent to which carrying over portions of the minimum period of annual leave is compatible at all with the Working Time Directive. That far-reaching question may, however, be left open in the present case. Not only does that question go beyond the framework of this reference, as the FNV, the Netherlands and United Kingdom Governments, appearing for the first time, stated during the oral procedure but, according to the Commission's own submission, also has no bearing whatsoever on the answer to the question referred. The Commission takes the view that leave entitlement carried over remains effective even if the carrying over of that leave were found to be incompatible with the Working Time Directive. That view must be concurred with to the extent that the Working Time Directive clearly cannot be interpreted in such a way that it precludes the minimum period of annual leave being effectively carried over to the following year in *every* conceivable case. [8]

26. It must therefore be resolved whether financial compensation in respect of the minimum period of annual leave carried over is compatible with the Working Time Directive.

27. According to Article 7(1) of the Working Time Directive every worker is entitled to paid annual leave of at least four weeks. As with the directive as a whole, the provisions on the minimum period of annual leave are intended, in accordance with Article 137 EC, to improve living and working conditions as well as safety at work and protection of workers' health. [9] In accordance with its description, the minimum period of annual leave constitutes the minimum period of time, which, in the opinion of the Community legislature, must actually be taken as leave each year, in order to guarantee an adequate annual rest period for the purposes of the fifth recital in the preamble to the Working Time Directive. [10]

28. Contrary to the view of the Netherlands Government, if the minimum period of annual leave is carried over to the following year, such leave cannot be regarded as *additional* leave entitlement, in respect of which financial compensation may be paid. Certainly it is no longer possible, where the minimum period of annual leave has been carried over in full or in part, for that leave to be taken in full within the year from which it originates. However, that leave — as the Commission correctly submits — can still contribute to the required recovery of employees if they take it at a later stage.

29. Under Article 7(2), that minimum period of paid annual leave may not,

8 — Should the Court none the less express a view on whether the carrying-over of leave is permissible, in accordance with the sixth recital in the preamble to the Working Time Directive, Convention No 132 of the International Labour Organisation offers guidance on paid annual leave. That convention, drawn up in Geneva in 1970, has been ratified by, inter alia, 14 Member States of the Community. According to Article 9 thereof, the carrying-over of leave is in principle possible, although at least a portion of the minimum leave should be taken soon after the end of the year giving rise to the entitlement.

9 — *BECTU* (cited in footnote 5), paragraph 37 et seq.

10 — See also *BECTU* (cited in footnote 5), paragraph 44.

inprinciple, be replaced by an allowance in lieu. The only exception provided for concerns leave entitlement existing when the employment relationship is terminated. [11] In particular, the possible derogations provided for by Article 17 of the Working Time Directive do not apply to the minimum period of annual leave under Article 7. [12]

30. As the FNV, the Commission and the United Kingdom Government submitted during the oral procedure, the view expressed by the Netherlands Government amounts, in practice, to circumventing that prohibition. The minimum period of annual leave would not necessarily be taken, but could be substituted by — delayed — financial compensation. It is precisely that result which Article 7(2) of the Working Time Directive provides should not occur.

31. I must also agree with the Commission and the FNV that the possibility of financial compensation in respect of the minimum period of annual leave carried over would create incentives not to take leave or to compel employees not to do so which are incompatible with the objectives of the Working Time Directive. [13]

32. By contrast, incentives arise, at least in the case of long-term employment relationships, to comply with the objectives of Article 7 of the Working Time Directive if financial compensation cannot be paid in respect of the minimum period of annual leave carried over. Without the possibility of compensation, it will be in the fundamental interest of employees and employers to carry over the minimum period of annual leave only within certain limits so that use can be made of it to a large extent within the relevant year or shortly thereafter, in accordance with its function. Excessive accumulation of leave entitlement may for instance lead to practical problems when it comes to being used up. In particular, if long periods of leave are taken outside the normal holiday period, holiday cover can often be provided only with difficulty. Although this problem primarily affects employers, employees must also reckon with it working to their disadvantage.

33. Consequently, it is incompatible with Article 7 of the Working Time Directive to grant an employee, who has, in one year, not taken his minimum annual leave, or has not taken that minimum leave in full, financial compensation in a subsequent year in respect of that leave.

11 — *BECTU* (cited in footnote 5), paragraph 44, and *Merino Gómez* (cited in footnote 7), paragraph 30.

12 — *BECTU* (cited in footnote 5), paragraphs 40 and 41.

13 — Regarding the danger of abuse as a point of view from which to interpret the Working Time Directive, see *BECTU* (cited in footnote 5), paragraph 51, and, as regards incentives for employees not to take leave, the Opinion of Advocate General Stix-Hackl in Joined Cases *Robinson-Steele and Others* (cited in footnote 6), points 78 and 79.

VII — Conclusion

34. I therefore propose that the Court should reply as follows to the reference for a preliminary ruling:

It is incompatible with Article 7(2) 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 to grant an employee who has, in one year, not taken his minimum annual leave, or has not taken that minimum leave in full, financial compensation in a subsequent year in respect of that leave.