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In Sickness and in Health? Illness and EU Employment Law

Mark Bell*

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1. Introduction

Few people will be fortunate enough not to encounter an illness that, at some point, interferes with their ability to work. In many cases, illnesses are transitory events that have no lasting impact on working life. Yet it is not unusual for some workers to experience prolonged absence from work or longer-term effects on working capacity due to ill-health. The 2007 EU Labour Force Survey found that 8.6% of respondents reported a work-related health problem. Of these persons, 62% had been absent from work for more than one day in the past year, while 27% had been absent from work for more than one month.[1] The impact of sickness absence on the rights and duties flowing from the employment relationship is complex and differs according to national law. If the worker is no longer performing any work, then the obligation on the employer to provide remuneration is likely to cease eventually, possibly replaced by sick pay for a certain period of time. While the cessation of payment may be the most visible sign that sickness absence changes contractual duties, it is also true that other forms of employment protection are likely to endure. It may be lawful for the employer ultimately to dismiss an employee due to incapacity, but this will typically be subject to compliance with national legislation protecting the worker from unjust dismissal.[2]

Although the management of ill-health, and the role that law plays in circumscribing this, is a key issue in the workplace, it is one where the EU has traditionally had limited impact. Looking at the competences conferred by the Treaty on the Functioning of the European Union (TFEU), the closest connection lies in

* Professor, University of Leicester. I am grateful for comments received from the Labour Law Cluster, Centre for European Law and Internationalisation, University of Leicester on an early draft of this paper.

[1] A Venema, S van den Heuvel and G Geuskens, 'Health and Safety at Work. Results of the Labour Force Survey 2007 ad hoc module on accidents at work and work-related health problems' (TNO 2009) 56-57. Data do not include France.

[2] This is also required by international labour standards: M Ventegodt Liisberg, *Disability and Employment: A Contemporary Disability Human Rights Approach Applied to Danish, Swedish and EU Law and Policy* (Intersentia 2011) 237-238.

Article 153(1), which provides that the Union shall 'support and complement the activities of the Members States' in various aspects of employment, including 'improvement in particular of the working environment to protect workers' heath and safety'. This has been the foundation for the extensive harmonization of law relating to occupational safety and health. This is primarily oriented towards to protecting workers from risks to their health, rather than dealing with the consequences of those risks materializing. For example, EU law imposes duties on employers to conduct risk assessments and to inform and consult workers' representatives about safety within the enterprise.[3] It steers clear of addressing the consequences for the employment relationship of sickness absence. Moreover, EU health and safety law is focused on preventing *occupational* causes of ill-health, whereas managing sickness at work embraces all forms of ill-health regardless of their cause.

It follows that EU law does not explicitly regulate a broad range of issues relating to ill-health and work. The Court of Justice of the EU (CJEU) has pointed out that 'the right to sick leave and the conditions for exercise of that right are not, as Community law now stands, governed by that law.'[4] There are no duties in EU law for an employer to provide occupational sick pay, nor has EU law normally been involved with procedures for the dismissal of those who are incapable of returning to work. Nevertheless, recent CJEU case-law has shown that other aspects of EU employment law are having effects that spillover into the regulation of sickness absence. This paper considers two such examples: the right to paid annual leave under the Working Time Directive, and the protection from disability discrimination under the Employment Equality Directive. The paper seeks to identify the justifications that the Court has adopted for intervening and whether the cases reveal a coherent narrative about the role that (EU) law should play in responding to illness and work. Before delving into the detail of the case studies, the next section provides some context on the experience of ill-health amongst workers in the EU.

2. Illness and Work in Europe

[3] See further, B Valdés de la Vega, 'Occupational Health and Safety: an EU Law Perspective' in E Ales (ed), *Health and Safety at Work: European and Comparative Perspective* (Wolters Kluwer 2013) 1, 15.

[4] Joined Cases C-350/06, *Schultz-Hoff v. Deutsche Rentenversicherung Bund* and C-520/06, *Stringer v. Her Majesty's Revenue and Customs,* [2010] ECR I-179, para. 27.

The 2007 EU Labour Force Survey provides the most recent detailed analysis of the picture of ill-health and work in Europe. This is, however, only a partial view of workers' experiences as it focused on *work-related* health problems; obviously many illnesses that affect working life are caused by factors unrelated to work. Therefore, the prevalence of health problems will be higher than those covered by the survey. As mentioned in the introduction, 8.6% of respondents experienced a work-related health problem.[5] Within this group, the survey identified two dominant types of problem. First, there were musculoskeletal disorders. Bone, joint or muscle problems that mainly affected the back were reported by 28.4% of respondents, while the figures were lower for similar problems affecting the hands (18.8%), or hips, legs or feet (12.6%).[6] Secondly, stress, depression, or anxiety were reported by 13.7% of respondents.[7] It is notable that sharp differences are evident in national results; while only 2.6% of Czech respondents cited work-related health problems due to stress, depression or anxiety, the figure was 29.4% in the UK. It is also clear that the experience of these problems varies within the workforce. Stress, depression or anxiety had a significantly elevated rate of prevalence amongst those with a higher level of education, while back problems were more common amongst those with low or medium levels of education.[8] 32.2% of those with stress, depression or anxiety had been off work for over one month in the past year, while the figure was 25.3% for those with back problems.[9]

The survey also disclosed a high rate of exposure to factors at work that affect mental well-being and/or physical health. 27.9% reported that they had been exposed at work to factors affecting their mental well-being in the past 12 months. Of these, 82.5% cited time pressure or overload of work as a main factor, with lower figures for harassment or bullying (9.7%) and violence or threat of violence (7.8%).[10] 40.7% reported that they had been exposed at work to factors affecting their physical health in the past 12 months. Of these, the most commonly cited factor was 'difficult work postures, work movements or handling of heavy loads' (40.9%).[11]

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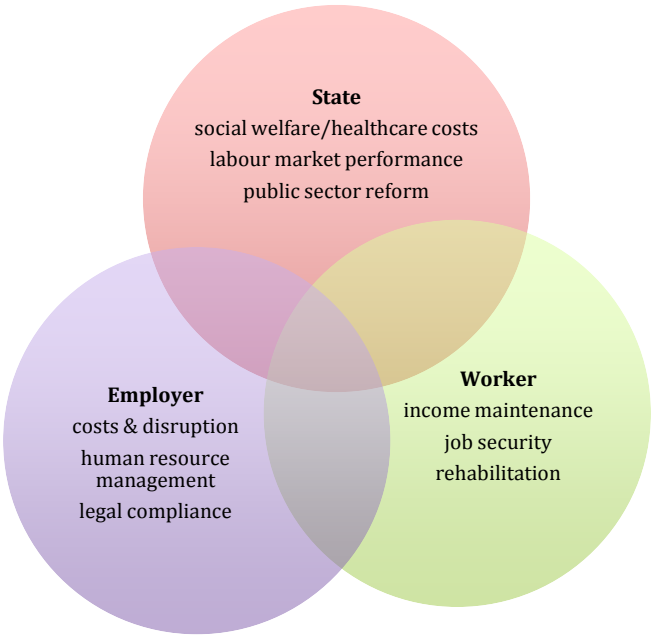
[5] Venema et al (n 1 above) 56. All data exclude France.
[6] ibid 60.
[7] ibid.
[8] ibid 66.
[9] ibid.
[10] ibid 82.
[11] ibid 85.

Statistics reveal that sickness absence is a common phenomenon and a frequent feature of working life. The OECD found that in many European states between 1% and 5% of full-time employees have been absent for at least one day during a working week due to sickness or temporary disability.[12] This is an issue of consequence for the individual workers and employers who are affected, but also for the state. Figure 1 summarizes the key issues that arise from sickness absence.

Figure 1: Implications of Sickness Absence



For the individual *worker*, the most immediate issue will be the consequences for income: whether this will continue and, if so, for how long and at what level. Typically, this will be intertwined with the social security system and a possible transition from company sick pay into payments from social insurance, or general state welfare assistance. In the longer-term, issues of job security arise with the threat of dismissal due to incapacity. More optimistically, where the worker can return to work, questions arise regarding support for rehabilitation, and temporary or permanent adaptations to working practices.

From the perspective of the *employer*, sickness absence presents challenges in terms of costs. There may be direct costs incurred where the employer needs to hire a replacement, yet may be continuing to provide some level of payment to the absent

[12] OECD, 'Sickness, Disability and Work: Breaking the Barriers. A Synthesis of Findings Across OECD Countries' (OECD 2010) 63.

worker. Indirect costs may arise from the consequences of the worker's absence on the functioning of the business. It may disrupt other workers who have to cover temporarily, coupled with the uncertainty about the duration of such arrangements. The absence of key individuals may have wider consequences on the firm's ability to function, such as delay to projects or missed commercial opportunities. At an organizational level, sickness absence is a core feature of human resource management. The employer needs to comply with legal duties, such as protecting the health and safety of workers or providing reasonable accommodation for disabled workers. Many employers engage the assistance of occupational health services in order to gauge the prognosis for the worker and to identify any steps to facilitate return to work. Ultimately, businesses have an interest in ensuring the retention of trained members of staff, but lengthy periods of sickness absence will often consume resources, not least in terms of management time.

Most issues in the workplace involve a balancing act between the interests of workers and employers. In relation to ill-health, it is important to recognize that the way in which it is handled will also have significant consequences for the *state*. Individuals who are off work for a lengthy period, or who lose their job due to ill-health, will often fall back on the state social security system for income maintenance. The OECD found that the majority of individuals who take up disability welfare benefits had previously received sickness benefits.[13] If employers are ineffective in supporting the return to work of individuals following a period of sickness absence, then this will increase the burden on the state. Moreover, the transition from active employment to disability benefits appears very difficult to reverse. In 2010, the OECD reached the stark conclusion that 'once a benefit is awarded, the probability of return to work is close to nil'.[14] Therefore, the state has a vested interest in ensuring that the labour market is socially-inclusive; that is, it can provide continued opportunities for work for those whose capacity may be reduced or modified following a period of sickness absence. Achieving high levels of labour market participation has been a cornerstone of EU employment policies since the 1990s.[15] At the same time, the state needs to consider the appropriate level of regulatory intervention in order to sustain the competitiveness of the labour market. If the state

[13] ibid.
[14] ibid 67.
[15] D Ashiagbor, *The European Employment Strategy – Labour Market Regulation and New Governance* (OUP 2005).

makes it very difficult to dismiss someone due to incapacity, then this might be one way to reduce the transition to disability benefits. Yet this could impact negatively on the functioning of the economy due to the consequences for employers in terms of cost and disruption. Employment law imposes constraints on how employers respond to ill-health, so the state needs to strive for the optimal balance between, on the one hand, ensuring that employers handle sickness absence in a manner that promotes successful return to work, and, on the other, providing employers with the flexibility to manage this effectively. In some states, this has become a key issue with regard to the functioning of public sector organizations if high levels of sickness absence are imposing significant costs at a time of shrinking public spending. For example, in Ireland, reforms designed to cut the cost of public sector sick leave have been an integral part of the measures taken in response to the financial crisis.[16]

Once the link is recognized between the management of sickness absence and broader macroeconomic issues, such as labour market performance or the sustainability of public finances, it is, perhaps, surprising that EU law and policy have not been more active in this sphere. This paper will focus on examples of change stemming from areas of EU employment law that, although ostensibly dealing with other matters, are stretching into the regulation of sickness absence. The first case to be considered is the right to paid annual leave and the Working Time Directive.

3. The Right to Paid Annual Leave and the Working Time Directive

The Working Time Directive 'lays down minimum safety and health requirements for the organization of working time'.[17] These address a range of issues, such as daily and weekly rest breaks, night working, and (notoriously) maximum weekly working time. Article 7 provides 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'. The Directive does not make any reference to sick leave (paid or unpaid) and it is not apparent that Member States anticipated that it could have consequences in this area. Although the Directive was

[16] See further: Department of Public Expenditure and Reform, 'Arrangements for Paid Sick Leave', Circular 6/2014, <http://hr.per.gov.ie/files/2014/03/DPER-Circular-6-2014.pdf> accessed 13 August 2014; '€430m sick leave bill in public sector "unsustainable"', *Irish Times*, 7 August 2014.
[17] Art 1(1), Directive 2003/88/EC concerning certain aspects of the organization of working time [2003] OJ L299/9. This codified and replaced the original Directive, adopted in 1993 (93/104/EC, [1993] OJ L307/18).

adopted in 1993, it was only in 2009 that the CJEU issued its first decision on the relationship between paid annual leave and sick leave.

a. An Approach Based on Protecting Fundamental Rights

The core issue that has challenged the CJEU since 2009 is the effect on the right to paid annual leave where a worker is absent from work due to sick leave. The former is a right guaranteed to 'every worker' by EU law, whereas national law and/or the contract of employment regulate the latter. The difficulties that arise were crystallized in several cases from the UK and Germany, which were considered together by the Court.[18] In *Schultz-Hoff*, the claimant had been off work for 12 months with a long-standing back problem. During the course of his sick leave, he had requested permission to take annual leave, but this was deferred by the employer pending an assessment of his capacity to return to work. In fact, he did not return to work as he was granted an invalidity pension due to permanently reduced working capacity at the end of the 12 month period.[19] He subsequently brought legal proceedings claiming an allowance of EUR 14,094.78 in lieu of the annual leave that he was unable to take prior to the end of his employment. In *Stringer and others*, claims were brought by various employees of HMRC relating to two circumstances:

(i) an employee off sick for several months and who was refused permission to take annual leave during her sick leave;

(ii) employees who were absent on long-term sick leave that extended across an entire leave year, and who, on the termination of the employment relationship, claimed an allowance for the annual leave that they were unable to take during their extended sick leave.[20]

The core of the reasoning adopted by the Advocate-General and the Court focused upon the fundamental nature of the right to paid annual leave. Advocate-General Trstenjak drew attention to the inclusion of this right within Article 31(2) of the EU Charter of Fundamental Rights, describing this as 'a human right available to all'.[21] The Court reiterated the position that it has consistently held; the right to paid

[18] *Schultz-Hoff* (n 4 above).
[19] Opinion of AG Trstenjak, 24 January 2008, Case C-350/06, *Schultz-Hoff v Deutsche Rentenversicherung Bund* [2009] ECR I-179, para. 11.
[20] Opinion of AG Trstenjak, 24 January 2008, Case C-520/06, *Stringer and others v Her Majesty's Revenue and Customs* [2009] ECR I-179, paras 11-12.
[21] Opinion of AG Trstenjak, *Schultz-Hoff* (n 19 above) para. 39.

annual leave is 'a particularly important principle of Community social law'.[22] Both the Advocate-General and the Court argued that the purposes of annual leave and sick leave are distinct. While annual leave is aimed at providing 'relaxation and leisure', sick leave is designed to allow the worker to 'recover from being ill'.[23] This implied that being granted sick leave could not extinguish the right to annual leave. With regard to the possibility of taking annual leave *during* a period of sick leave, the Court adopted a 'permissive' model;[24] Member States may choose whether to permit or preclude this. If, however, a worker has not had an opportunity to exercise the right to paid annual leave due to sickness absence, then it must be possible for the annual leave to be carried over and taken at a later point in time following a return to work.[25] With regard to the latter, the Court underscored the link between the Directive and international labour standards. Recital 6 in the preamble of the Directive provides that 'account should be taken of the principles of the International Labour Organisation' (ILO). The Court noted that Article 5(4) of ILO Convention 132 concerning annual holidays with pay provides that sickness absence 'shall be counted as part of the period of service' with regard to calculating entitlement to paid annual holidays'.[26] This is given considerable weight, including in subsequent judgments, even though the Member States' commitment to Convention 132 remains rather mixed. At the time of writing, 15 out of 28 Member States have ratified this Convention, even though it was adopted in 1970.[27]

The possibility to take annual leave after a period of sick leave does not, of course, address the situation of workers (like *Schultz-Hoff*) who leave employment after an extended sickness absence. In such cases, the Court confirmed that Article 7(2) of the Directive could be relied upon. This exceptionally permits paid annual leave to be replaced by an allowance where the employment relationship is terminated. If a worker has not been able 'for reasons beyond his control' to take annual leave prior to the termination of employment, then the worker is entitled to an

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[22] *Schultz-Hoff* (n 4 above) para. 22. This stems originally from the Court's decision in Case C-173/99, *R v Secretary of State for Trade and Industry, ex parte Broadcasting, Entertainment, Cinematogaphic and Theatre Union (BECTU)* [2001] ECR I-4881, para. 43.
[23] ibid para. 25.
[24] A Bogg, 'Of Holidays, Work and Humanisation: A Missed Opportunity?' (2009) 34 *European Law Review* 738, 741.
[25] *Schultz-Hoff* (n 4 above) para. 43.
[26] ibid para. 38.
[27] 'Ratifications of C132 - Holidays with Pay Convention (Revised), 1970 (No. 132)': <http://www.ilo.org/dyn/normlex/en/f?p=1000:11300:0::NO:11300:P11300_INSTRUMENT_ID:312277> accessed 18 August 2014.

allowance in order to reflect what she would have received had the annual leave been taken.[28]

b. Labour Market Regulation: Balancing the Rights of Workers with the Interests of Employers

The decision in *Schultz-Hoff* had obvious economic ramifications for employers and, unsurprisingly, this generated some critical reaction to the direction taken by the Court. It focused on the seemingly open-ended possibility for those on long-term sick leave to accumulate paid annual leave. Some authors argued that this could create an incentive for employers to dismiss more swiftly those on sick leave.[29] Riesenhuber queried the foundation for the Court's intervention in a field that is otherwise a matter of national regulation.[30] He contended that it was insufficient simply for the Court to invoke the broad language of social rights as a basis for stepping into the complex value judgments bound up in the management of long-term sick leave.[31] In his view, this failed to give sufficient weight to the counter-veiling interests of employers.[32] Even the Commission had second thoughts about the wisdom of *Schultz-Hoff*. When one of its own members of staff sought to carry-over annual leave following a period of sick leave, it argued that this should not be permitted because of the economic costs that it would entail.[33]

Initially, the Court took several opportunities to reiterate the principle established in *Schultz-Hoff*.[34] The case of *KHS AG v Schulte*[35] proved, however, more challenging to the principle set forth in *Schultz-Hoff*. Mr. Schulte had a heart attack in 2002 and did not return to work afterwards due to severe disability. He was receiving a limited duration pension entitlement from 2003, but the employment relationship was not terminated until 2008. He later brought a claim for payment in lieu of the annual leave that he did not use in each leave year since 2006. At first instance, he

[28] *Schultz-Hoff* (n 4 above) para. 61.
[29] See the sources reviewed by AG Trstenjak, Opinion of 7 July 2011, Case C-214/10, *KHS AG v Schulte*, footnotes 30 and 35.
[30] K Riesenhuber, Case Comment [2009] 46 *Common Market Law Review* 2107, 2113.
[31] ibid 2113, 2115.
[32] ibid 2113.
[33] para. 70, Opinion of AG Kokott, 11 June 2013, Case C-579/12, *Commission v Strack*.
[34] Case C-277/08, *Pereda v Madrid Movilidad SA* [2009] ECR I-8405; Case C-282/10, *Dominguez v Centre informatique du Centre Ouest Atlantique, Préfet de la region Centre*, judgment of 24 January 2012; Case C-78/11, *ANGED v FASGA and others*, judgment of 21 June 2012.
[35] Case C-214/10, *KHS AG v Schulte*, judgment of 22 November 2011.

was awarded EUR 6,544.50.[36] While in *Schultz-Hoff* the Court had rejected the argument that the fundamental right to paid annual leave could be extinguished by the occurrence of sick leave, the scenario in *KHS* presented a dilemma where sick leave endures over a very extended period of time.

The reasoning of Advocate-General Trstenjak struck a remarkably different tone to that found in *Schultz-Hoff.* In the former case, her analysis started from an identification of the fundamental right to paid annual leave and proceeded on the basis that this needed to be guaranteed for every worker. In *KHS*, the reasoning is less prosaic; focusing instead on the practical implications of permitting sick workers to accumulate unlimited entitlements to paid annual leave. The Advocate-General suggested that accumulating annual leave could hinder the reintegration of the worker because a lengthy spell of sick leave would then be followed by extensive annual leave. She pointed out the risk that this incentivized firms to dismiss those on long-term sick leave, which would be 'undesirable from the point of view of social and human resources policy'.[37] The Advocate-General also stressed the need to consider the interests of employers. Here, she drew attention to Article 153(2) TFEU: '… Directives shall avoid imposing administrative, financial and legal constraints in a way which would hold back the creation and development of small and medium-sized undertakings'.[38] This was interpreted as a duty to take into account the 'economic effects' of social policy Directives and, consequently, 'the Court is obliged to interpret Article 7 of Directive 2003/88 in such a way that an appropriate relationship is established between the interests of workers and employers'.[39] Finally, she returned to the underpinning health and safety rationale for the Working Time Directive. She concluded that the unlimited accumulation of entitlement to payments in lieu of annual leave did not meet the 'statutory purpose' of the Directive and amounted to an unjustified burden on the employer.[40]

Characteristically, the Court's judgment was terser, but closely aligned with the reasoning of the Advocate-General. For the first time, the Court links the right to paid annual leave in the Directive with Article 31(2) of the Charter of Fundamental

[36] ibid Opinion of AG Trstenjak, para. 16.
[37] ibid para. 82.
[38] Ex- Art 137(2) EC.
[39] para. 64, Opinion of AG Trstenjak, *KHS* (n 29 above).
[40] ibid para. 69.

Rights.[41] Nevertheless, this must be balanced against the need to 'protect the employer from the risk that a worker will accumulate periods of absence of too great a length, and from the difficulties for the organization of work which such periods might entail'.[42] On the facts, Mr. Schulte could have carried-over his annual leave entitlement for a period of up to 15 months after the end of the leave year (beyond which his entitlement to annual leave expired). The Court noted that ILO Convention 132 prescribes a maximum carry-over period of 18 months and, taking this into account, it deemed a period of 15 months to be compatible with the Directive.[43] In contrast, it decided that the carry-over period must be longer than the original duration of the reference period for the leave (typically 12 months for many workers). In the later case of *Neidel*, which also concerned long-term sickness absence, it held that a maximum carry-over period of nine months was contrary to the Directive.[44]

c. Unravelling the Sick Leave/Annual Leave Case-Law

There is little to suggest that the Working Time Directive was intended to have a significant impact on the regulation of sickness absence, yet the effect of the case-law since *Schultz-Hoff* has been to draw the EU into this aspect of employment law. For workers who are experiencing long-term sickness absence, the right to paid annual leave has emerged as a crucial monetary benefit. If normal remuneration has ceased due to the length of absence, then this may be the only element of pay that endures. Furthermore, the ability to accrue annual leave beyond the normal reference period provides an instrument that may be particularly helpful to workers with disabilities. They might, for example, use the accumulation of annual leave as a way to stagger the initial return to work. Annual leave can also be a means of managing work-related stress for those with mental health problems.[45]

Returning to the original rationale (and Treaty base) for the Working Time Directive, this was focused on 'the improvement of the working environment to protect workers' health and safety'.[46] This has exercised some influence on the

[41] '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'.
[42] para. 39, *KHS* (n 35 above).
[43] ibid paras 41-43.
[44] Case C-337/10, *Neidel v Stadt Frankfurt am Main*, judgment of 3 May 2012.
[45] Mind, 'How to be mentally healthy at work': available at <http://www.mind.org.uk/information-support/tips-for-everyday-living/work/work-and-stress> accessed 8 August 2014.
[46] Recital 2, Directive 2003/88 (n 17 above).

direction of the case-law, in particular the Court's argument that a worker who lost their annual leave due to illness would thereby miss the 'relaxation' function of annual leave, as distinct from the 'recovery' function of sick leave. While this has a superficial simplicity, it elides the everyday reality that annual leave is not automatically a period of relaxation for all workers. Annual leave provides the worker with an *opportunity* for relaxation, but whether this is actually the worker's experience will depend on individual circumstances. It is more troublesome to identify the health and safety rationale for granting an allowance in lieu of annual leave where sick leave culminates in the termination of employment. In several of the cases under consideration, long-term sick leave gave way to ill-health retirement. In these circumstances, it is certainly a valuable benefit for the worker to receive an allowance in lieu of the annual leave that they were unable to take, but the worker's exit from the labour market also vitiates the health and safety rationale for such payments. This is even more vivid in the recent case of *Bollacke*,[47] where it was held that the duty to provide payment in lieu of annual leave applied where the worker died following several periods of sick leave.

The cases reveal other narratives that shape the Court's intervention in this field. In *Schultz-Hoff*, the outcome is guided by a focus on the fundamental rights of workers and this is taken to include those absent from work due to ill-health. Rights-based reasoning offers one vision of how to direct the law's response to sickness and employment. Its strength, from the perspective of the worker, is that it leaves relatively little space for counter-arguments based on economic cost.[48] In *Strack*,[49] for example, the Court rejected concerns raised by the Commission about the cost of allowing its staff to carry-over leave: 'the need to protect the financial interests of the Union … cannot, in any event, be relied on to justify an adverse effect on that right to paid annual leave'.[50]

In *KHS*, however, the Court retreats from a strict adherence to rights-based reasoning. In this case, there is an explicit trade-off between the rights of workers and the economic costs to employers. This suggests an alternative, more traditional, outlook on how the law approaches illness and work. The law is seeking to strike a

[47] Case C-118/13, *Bollacke v K + K Klaas & Kock BV & Co KG*, judgment of 12 June 2014.
[48] H Collins, 'Theories of Rights as Justifications for Labour Law' in G Davidov and B Langille (eds), *The Idea of Labour Law* (OUP 2011) 137, 139.
[49] Case C-579/12, *Commission v Strack*, judgment of 19 September 2013.
[50] para. 55.

balance between fairness to the worker on the one hand, and efficiency considerations on the other. Bearing in mind the competing sets of interests discussed in section 2, the Court has to decide at what point on the pendulum the interests of workers in accruing more entitlement to paid annual leave give way to the interests of employers in minimising the economic costs attached to long-term sickness absence. Unlike the set of interests represented in Figure 1, the case-law characteristics this as a binary of worker/employer, rendering invisible the interest of the state in how sickness absence is managed.

While this case study confirms a growing connection between EU employment law and regulating sickness absence, it does not provide a settled vision of the rationale that underpins that intervention.

4. Disability Discrimination and the Employment Equality Directive

The 2000 Employment Equality Directive[51] includes a prohibition on discrimination based on disability in employment and vocational training. It does not provide any definition of 'disability', but evidently there is an intersection between sickness and disability.[52] What starts out as a temporary illness may evolve into a long-term impairment, thus raising the question of whether the worker is disabled for the purposes of the Directive. The Court was initially very cautious when confronting this question, but recent case-law has illustrated the potential of the Directive to have a significant impact on how sickness is managed.

a. Treading Carefully: Chacón Navas

The first case of alleged disability discrimination that reached the Court under the Directive was focused on the sickness/disability intersection. In *Chacón Navas*,[53] the claimant had been off work for eight months on sick leave while waiting for an operation. At this point, her employer dismissed her; a subsequent health assessment found that there was no short-term prospect of her return to work.[54] She argued that

[51] Directive 2000/78/EC establishing a general framework for equal treatment in employment and occupation [2000] OJ L303/16.
[52] V Perju, 'Impairment, Discrimination, and the Legal Construction of Disability in the European Union and the United States' (2011) 44 *Cornell International Law Journal* 279, 309.
[53] Case C-13/05, *Chacón Navas v Eurest Colectividades SA* [2006] ECR I-6467.
[54] para 22, Opinion of AG Geelhoed, 16 March 2006. The reference from the national court did not provide any detail on the nature of her sickness.

her dismissal constituted discrimination, which led the Spanish court to ask the CJEU whether the prohibition of disability discrimination applied to the situation of a worker dismissed 'solely because she is sick'.[55] The tenor of the Court's judgment reflects a dichotomy between 'sickness' and 'disability'. It noted that sickness was not mentioned in the Treaty, so there was no legal basis for the Union to take measures concerning discrimination based on sickness.[56] Furthermore:

> there is nothing in Directive 2000/78 to suggest that workers are protected by the prohibition of discrimination on grounds of disability as soon as they develop any type of sickness. It follows from the above considerations that a person who has been dismissed by his employer solely on account of sickness does not fall within the general framework laid down for combating discrimination on grounds of disability by Directive 2000/78.[57]

The Court portrays an image of a neat world, where decisions to dismiss can be clearly distinguished between those due to sickness and those due to disability. The former fall outside the scope of the Directive, whereas the latter would be subject to its provisions. In reality, such distinctions are difficult to draw.[58] In the case of Ms Chacón Navas, all that is known is that she had been unfit for work for a period extending over a year (by the time of her medical assessment), and she was waiting for an operation. It is possible that the operation had the potential to restore her to full health, but that can rarely be a guaranteed outcome. This suggests that she was, at least, experiencing a temporary disability, which impacted on her capacity for work. The Court's caution might be linked to the factors considered relevant by the Advocate-General. Using evocative language, he argued that: 'the implementation of the prohibitions of discrimination of relevance here always requires that the legislature make painful, if not tragic, choices when weighing up the interests in question, such as the rights of disabled or older workers versus the flexible operation of the labour market …'.[59] Bearing in mind the discussion in the previous section, this outlook is far removed from rights-based reasoning and instead advocates for a fairness/efficiency trade-off when regulating the labour market. Although the Court's judgment in *Chacón Navas* tends also to lean in this direction (by virtue of its

[55] para. 25, *Chacón Navas* (n 53 above).
[56] ibid para. 55.
[57] ibid para. 46.
[58] L Waddington, 'Case C-13/05, Chacón Navas v. Eurest Colectividades SA' (2007) 44 *Common Market Law Review* 487, 493.
[59] para. 55, Opinion of AG Geelhoed (n 54 above).

cautious reading of the legislation), more recent case-law suggests a gradual shift towards an approach rooted more in the protection of fundamental rights.

b. Changing the Paradigm: the Impact of the UN Convention on the Rights of Persons with Disabilities

The decision in *Chacón Navas* was issued in July 2006, but in December of that year the UN Convention on the Right of Persons with Disabilities (CRPD) was adopted. It was signed by the European Union in 2007 and ratified in 2010.[60] The Convention does not contain an exhaustive definition of disability,[61] but Article 1 states:

> Persons with disabilities include those who have long-term physical, mental, intellectual or sensory impairments which in interaction with various barriers may hinder their full and effective participation in society on an equal basis with others.

In 2013, the Court had a fresh opportunity to consider the definition of disability and it accepted that, following EU ratification of the CRPD, the Employment Equality Directive 'must, as far as possible, be interpreted in a manner consistent with that Convention'.[62] The cases before the Court concerned two claimants who were dismissed following a period of sick leave. Ms Ring had been off work for six months with constant lumber pain, while Ms Skouboe Werge had been off work for around 5 months across a 15 month period following whiplash injuries in a road traffic accident. Notably, in both cases, the total period of sickness absence was less than that which triggered the dismissal of Ms. Chacón Navas. Both the Advocate-General and the Court used the CRPD as a reason for shifting from the approach taken in *Chacón Navas.* The Court accepted that 'it does not appear that Directive 2000/78 is intended to cover only disabilities that are congenital or result from accidents, to the

[60] Convention and Optional Protocol Signatures and Ratifications, available at: <http://www.un.org/disabilities/countries.asp?id=166> accessed 12 August 2014.
[61] See further, P Bartlett, 'The United Nations Convention on the Rights of Persons with Disabilities and Mental Health Law' [2012] 75 *Modern Law Review* 752, 758; E Flynn, 'Ireland's Compliance with the Convention on the Rights of Persons with Disabilities: Towards a Rights-Based Approach for Legal Reform?' (2009) 31 *Dublin University Law Journal* 357; L Waddington, 'Equal to the Task? Re-Examining EU Equality Law in Light of the United Nations Convention on the Rights of Persons with Disabilities' in L Waddington, G Quinn & E Flynn (eds), *European Yearbook of Disability Law. Volume 4* (Intersentia 2013) 169.
[62] para. 32, Joined Cases C-335/11 and 337/11, *HK Danmark v Dansk almennyttigt Boligselskab, HK Danmark v Dansk Arbejdsgiverforening*, 11 April 2013. See also, N Betsch, 'The *Ring and Skouboe Werge* case: a reluctant acceptance of the social approach of disability' (2013) 4 *European Labour Law Journal* 135.

exclusion of those caused by illness.'[63] It adapted the partial definition of disability found in the CRPD and provided the following:

> … the concept of 'disability' must be understood as referring to a limitation which results in particular from physical, mental or psychological impairments which in interaction with various barriers may hinder the full and effective participation of the persons concerned in professional life on an equal basis with other workers.
>
> In addition, it follows from the second paragraph of Article 1 of the UN Convention that the physical, mental or psychological impairments must be 'long-term'.[64]

Furthermore, the Court recognised that this can entail a 'curable or incurable illness' if the limitations that result from the illness meet the above definition.[65] This approach is strikingly different in tone to that in *Chacón Navas*, as it acknowledges the complex relationship between sickness and disability. Although the Court leaves it to the national court to apply its definition to the facts of the individual cases, the judgment arguably implies that the claimants' circumstances did meet the definition of disability. Ms. Ring's case illustrates the potential application of the Directive to back pain; as noted earlier, this is one of the most common reasons for work-related health problems.

Although the judgment opens the door to a wider understanding of disability, many unanswered questions remain. It is not evident how the Court will approach fluctuating conditions or those with uncertain prognosis. As discussed at the outset of this paper, stress, anxiety and depression are amongst the leading causes of sickness absence in Europe. These are, though, conditions where the exact diagnosis may be contested and their duration may be difficult to predict.[66] While there have been a number of subsequent cases on the definition of disability, these have not yet concerned mental health problems.[67]

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[63] ibid para. 40.
[64] ibid paras 38-39.
[65] ibid para. 41.
[66] F Callard, N Sartorius, J Arboleda-Flórez, P Bartlett, H Helmchen, H Stuart, J Taborda and G Thornicroft, *Mental Illness, Discrimination and the Law: Fighting for Social Justice* (John Wiley & Sons 2012) 16; S Fraser Butlin, 'The UN Convention on the Rights of Persons with Disabilities: Does the Equality Act 2010 Measure up to UK International Commitments? (2011) 40 *Industrial Law Journal* 428, 433.
[67] Case C-363/12, *Z v A Government Department, The Board of Management of a Community School*, judgment of 18 March 2014 (inability to give birth due to absence of uterus was not a disability); Case C-356/12, *Glatzel v Freistaat Bayern*, judgment of 22 May 2014 (no determination by the Court on whether the claimant's visual impairment was a disability); Case C-354/13, *FOA, acting on behalf of*

c. Applying the Employment Equality Directive to Sickness Absence

The significance of the Court recognising that sickness can, in some circumstances, constitute a disability for the purposes of the Directive lies in the potential consequences for how employers manage sickness absence. Space does not permit an exhaustive analysis of all the implications of the Directive, but two examples arise from the *HK Danmark* cases. Article 5 of the Directive places employers under a duty to provide reasonable accommodation for persons with disabilities.[68] In the case of Ms. Ring, the evidence was that although her back pain prevented her working full-time, she could work part-time. The Court confirmed that adjustments to working patterns constituted an accommodation that should be considered, subject to the requirement that such measures would not create a disproportionate burden for the employer.[69] From the perspective of managing sickness absence, this indicates that employers need to consider whether the sick worker may be disabled for the purposes of the Directive. If so, then the duty to provide reasonable accommodation will be triggered and the employer will need to consider if there are changes to working practices that could facilitate a return to work. It will not be sufficient, as in *HK Danmark*, for the employer simply to dismiss the worker because she cannot perform the job in exactly the same manner as that prior to the sick leave.

The *HK Danmark* cases also illustrated the potential application of the Directive to capability procedures. Danish law permitted employees to be dismissed with one month's notice if they had received 120 days of paid sick leave in any period of 12 consecutive months.[70] The Court held that this provision potentially constituted indirect discrimination based on disability. It adopted the reasoning of Advocate-General Kokott that workers with disabilities faced the risk of additional sickness absence due to the combination of absences for reasons unrelated to their disability (which affect all workers), *plus* absences for reasons related to their disability (which

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Kaltoft v Kommunernes Landsforening, acting on behalf of the Municipality of Billund, Opinion of AG Jääskinen, 17 July 2014 (severe obesity can be a disability).

[68] 'This means that employers shall take appropriate measures, where needed in a particular case, to enable a person with a disability to have access to, participate in, or advance in employment, or to undergo training, unless such measures would impose a disproportionate burden on the employer'; Art 5, Directive 2000/78.

[69] para. 64, *HK Danmark* (n 62 above).

[70] ibid para. 13. For more detailed analysis of the situation in Danish law, see Ventegodt Liisberg (n 2 above) 242.

do not affect those without disabilities).[71] As workers with disabilities risk having a higher level of sickness absence, then the provision in Danish law placed disabled workers at a particular disadvantage.[72] The prohibition of indirect discrimination includes the possibility for objective justification of practices that otherwise create a disadvantage for disabled persons.[73] The Danish government argued that this provision was part of its overall approach to labour market regulation, reflecting 'a combination of flexibility and freedom of contract, on the one hand, and the protection of workers, on the other'.[74] The Court treads diplomatically in its judgment, leaving it to the national court to make the final determination of whether the provision was a proportionate means of achieving a legitimate aim. It provided a strong indication, however, that the specific needs of disabled persons must not be overlooked and the national court had to satisfy itself that it is proportionate to apply the dismissal provision after 120 days of paid sick leave 'where those absences are the consequence of his disability'.[75]

This element of the judgment demonstrates the broad reach of the Directive. Capability procedures are an aspect of national employment law that hitherto were largely unaffected by EU legislation. While the Court does not bring into question the basic premise that individuals can be dismissed due to sickness absence, the judgment implies that a distinction needs to be drawn between situations where sickness absence is connected to disability, and those where it is not. This could have significant consequences for human resource management practices. It raises the issue of whether workplace systems for recording sickness absence need to have a process for separating disability and non-disability absences. More broadly, dismissal due to sickness absence will typically take place where either there is an extended period of absence, or recurrent shorter absences. Both scenarios suggest that the worker is encountering long-term health problems, which in turn makes it likely that the worker may be disabled for the purposes of the Directive. Unless the employer is dismissing a worker for a short-term, temporary illness, then a cautious approach would be to assume that the duties under the Directive might apply.

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[71] para. 67, Opinion of AG Kokott (n **Error! Bookmark not defined.** above).
[72] para. 76, *HK Danmark*.
[73] Art 2(2)(b), Directive 2000/78.
[74] para. 79, *HK Danmark.*
[75] ibid paras 91-92.

5. Regulating for Illness and Work

The case studies examined in this paper reveal that EU employment law is having an increasing impact on the regulation of illness and work. It is not evident that there was any intention on the part of the EU's political institutions to spread their wings into this branch of employment law, yet decisions of the Court are having this effect. This is, of course, characteristic of the EU integration process. The lack of a conscious direction means, however, that it is hard to divine a coherent rationale for how EU law responds to illness and work. The lack of a firm theoretical foundation may explain why the Court's case-law has tended to oscillate between restrictive and expansive readings. In the Working Time Directive case study, the Court curtailed the breadth of its initial decision, whereas in the Employment Equality Directive case study, the Court softened the rigidity of its first judgment. Broadly speaking, the case studies indicated two alternative approaches to justifying the role played by EU employment law: one based in fundamental rights, and one based in labour market regulation.[76]

a. Fundamental Rights

One rationale for legal intervention is the protection of the fundamental rights of workers who encounter illness. Where a worker has to cease performance of the contract of employment due to ill-health, then they are in a particularly vulnerable situation. Guaranteeing the fundamental rights of such workers holds the potential to identify a minimum level of protection that endures even when the worker is unable to meet her contractual obligations due to sickness. This outlook tends to be consistent with the universalistic scope of fundamental rights, which typically attach to 'every worker'. Once it is accepted that an individual on sick leave retains their status as a 'worker', it follows that they should continue to enjoy the fundamental rights of workers. This logic underpinned the Court's initial approach to the right to paid annual leave. As this is a fundamental right found in Article 31(2) of the Charter of Fundamental Rights, a worker could not be deprived of this right merely because of the incidence of sick leave. The Charter also gives particular prominence to equality

[76] See also, S Fredman, 'Discrimination Law in the EU: Labour Market Regulation or Fundamental Social Rights' in H Collins, P Davies and R Rideout (eds), *Legal Regulation of the Employment Relation* (Kluwer Law International, 2000) 183.

rights and the *HK Danmark* cases illustrate the potential role that these can play in shaping the treatment of workers who experience ill-health.

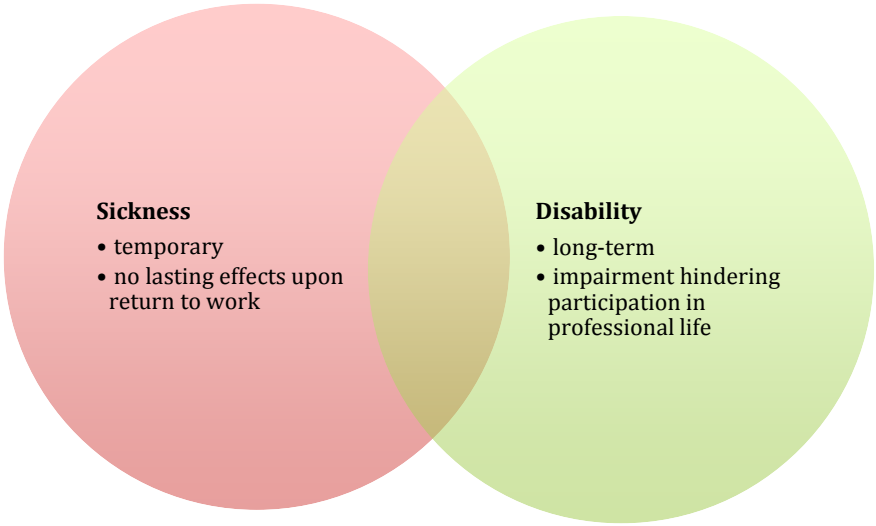
An approach based on protecting fundamental rights may be attractive, at least from the perspective of the worker. There are, though, shortcomings. Some commentators have criticised the tendency to try to elevate every employment right to the status of a 'fundamental' right.[77] While this may be a strategy to resist the downward pressures on labour standards that flow from neoliberalism and globalisation,[78] it risks obscuring the complex economic and social choices that arise in labour market regulation. Section 2 of this paper provided an outline of the competing interests that arise when considering how to respond to sickness absence. Trying to resolve this by a blunt invocation of 'rights' failed to be a productive strategy for the Court in its handling of the Working Time Directive cases. The sweeping protection extended in *Schultz-Hoff* gave way when the Court encountered the full implications of an untrammelled right to paid annual leave in *KHS*. This was deemed to be unreasonably costly to employers, yet fundamental rights discourse tends to resist the idea that rights should be constrained primarily due to financial cost.[79]

The Court's interpretation of the fundamental right to non-discrimination is aided by detailed secondary legislation, such as the Employment Equality Directive. This is helpful insofar as it provides a more detailed framework for the implementation of this right, which includes elements of flexibility. The duty to provide accommodation measures is only applicable if these are 'reasonable' and do not create a 'disproportionate burden'.[80] Measures that constitute potential indirect discrimination, such as the capability procedures in *HK Danmark*, are subject to the possibility for objective justification. It could be argued that, from a fundamental rights perspective, equality law offers a well-fashioned point of reference when trying to guide the response of law to illness and work. Yet the definition of disability indicates that it can only offer a partial regulatory framework. While the Court has

[77] Collins (n 48 above) 140; Riesenhuber (n 30 above).
[78] J Fudge, 'Constitutionalizing Labour Rights in Europe' in T Campbell and K Ewing (eds.), *The Legal Protection of Human Rights: Sceptical Essays* (OUP 2011) 244.
[79] V Mantouvalou, 'Human Rights for Precarious Workers: the Legislative Precariousness of Domestic Labour' (2012) 33 *Comparative Labor Law and Policy Journal* 133.
[80] See further, L Waddington, 'Reasonable Accommodation' in D Schiek, L Waddington and M Bell (eds), *Cases, Materials and Text on National, Supranational and International Non-Discrimination Law* (Hart Publishing 2007) 629.

broadened its understanding of disability following the CRPD, it still maintains that sickness and disability are not coterminous. There will remain a group of workers who experience sickness, but who do not meet the definition of disability (Figure 2).

Figure 2: Sickness and Disability



Regulating illness and work ultimately demands a response to the situation of all workers experiencing sickness, so although EU equality law makes an important contribution to fleshing out the regulatory framework, it does not provide a comprehensive solution. For example, while a disabled worker dismissed due to sickness absence could challenge the fairness of the dismissal procedure in the light of the Employment Equality Directive, a non-disabled worker dismissed under the same procedure would be unable to bring such a claim. There is, also, a risk that conflating the categories of sickness and disability reinforces a stereotype that workers with disabilities will have a poor attendance record at work. Waddington points out that some disabilities cannot be equated to illnesses (e.g. absence of a limb), and there is no reason to assume that workers with those disabilities are more likely to have recourse to sick leave.[81]

b. Labour Market Regulation

[81] L Waddington, '*HK Danmark (Ring and Skouboe Werge)*: Interpreting EU Equality Law in Light of the UN Convention on the Rights of Persons with Disabilities' (2013) 17 *European Anti-Discrimination Law Review* 13, 22.

'Labour market regulation' is a broad phrase that encompasses a variety of approaches to employment law.[82] It captures the idea that law does not start from a premise of favouring either workers or employers but, in a loose sense, seeks to strike a balance between their competing interests. In this regard, it is conceptually distinct from an approach based on fundamental rights, where those claims recognised as rights should generally override competing interests. Classically, the role for law has been portrayed as correcting inequalities of bargaining power, which otherwise unduly favour the interests of the employer.[83] The openness of this approach suggests the equilibrium can be renegotiated over time according to changes in social and economic circumstances. This outlook is captured in the Opinion of Advocate-General Trstenjak in one of the cases on the right to paid annual leave:

> … society's view of what is to be considered 'social' or 'socially just' can change over the course of time and is often based on compromise. Nor should one disregard the fact that implementation of the concept of a social state depends upon the particular economic situation appertaining in the European Union and its Member States. It is therefore necessary to avoid encasing social standards in cement without any regard for economic and social reality.[84]

The malleability of this vision of employment law means that it can engage in pragmatic trade-offs, such as when to draw the line on the accumulation of annual leave entitlement, or what duration of sick leave the employer should tolerate before being able to dismiss the worker for incapacity. If the law's search for the 'socially just' solution is a matter of compromise, this begs the question whether the courts are the appropriate institution for striking these bargains. Regulating the labour market is not a value-free process of merely finding a point equidistant between the interests of workers and employers. Moreover, as highlighted in section 2, the regulation of sickness absence has a major impact on the interests of the state, which can be neglected if this is viewed purely as a worker/employer bargain.

In recent years, arguably the *leitmotiv* of EU employment law has been flexicurity.[85] The EU Council has provided the following definition:

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[82] Collins distinguishes justifications for labour law based on the pursuit of social justice from those aimed at maximizing efficiency (n 48 above) 137-138.
[83] H Collins, 'Justifications and Techniques of Legal Regulation of the Employment Relation' in H Collins, P Davies, and R Rideout (eds), *Legal Regulation of the Employment Relation* (Kluwer Law International 2000) 3, 6.
[84] para. 158, Opinion of 8 September 2011, *Dominguez* (n 34 above).
[85] T Wilthagen and F Tros, 'The Concept of 'Flexicurity': a New Approach to Regulating Employment and Labour Markets' (2004) 10 *Transfer: European Review of Labour and Research* 166.

> Flexicurity involves the deliberate combination of flexible and reliable contractual arrangements, comprehensive lifelong learning strategies, effective labour market policies, and modern, adequate and sustainable social protection systems.[86]

Flexicurity might be viewed as a suitable template for shaping the law's response to illness and work, not least because it moves beyond a narrow view of 'workers versus employers' and visualises a role for the state in facilitating labour market transitions. Put bluntly, greater freedom for employers to dismiss workers is compensated by stronger public mechanisms to support workers in making the transition to a new occupation. Denmark is often identified as one of the founding examples of flexicurity policies and it is notable that this philosophy was invoked in the *HK Danmark* cases as the justification for employers' freedom to dismiss workers after 120 days of paid sick leave.[87] A recurrent concern, though, is the fear that flexicurity becomes reduced to mere flexibility, with efficiency considerations overwhelming fairness claims.[88] The *HK Danmark* cases provide such an illustration: a swift path to dismissal liberates employers from the 'burden' of sick workers, but this downplays the disproportionate impact of such dismissals on those with disabilities. There is widespread evidence that persons with disabilities encounter obstacles to participation in the labour market.[89] Therefore, losing a job may impose a greater penalty on disabled workers compared to non-disabled workers, given the barriers they face when seeking a new form of employment.

c. Final Remarks

This paper has illustrated that, despite the absence of a conscious policy choice, the EU has drifted into the regulation of illness and work. Many people on long-term sick leave are likely to meet the European definition of disability, so it can only be anticipated that there will be further interrogation of whether the treatment of these persons in national law or human resource practice is compatible with the

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[86] Council, 'Towards Common Principles of Flexicurity – Council Conclusions', 16201/07, SOC 523, 6 December 2007, p.5.
[87] para. 79, *HK Danmark* (n 62 above).
[88] A Supiot, 'Towards a European Policy on Work' in N Countouris and M Freedland (eds), *Resocialising Europe in a Time of Crisis* (Cambridge University Press 2013) 19, 27.
[89] S Grammenos, 'European comparative data on Europe 2020 & People with disabilities', p. 29: <http://www.disability-europe.net/theme/statistical-indicators> accessed 18 August 2014; Commission, 'European Disability Strategy 2010-2020: A Renewed Commitment to a Barrier-Free Europe' COM (2010) 636, 7.

Employment Equality Directive. Questions abound, such as whether employers should be obliged to permit a phased return to work; whether sick pay schemes should be more generous for those with additional absences due to disability; or whether recruiters should be permitted to take into account sickness absence records when deciding who to hire. The examination of the two case studies indicates that, at present, the Court lacks sure theoretical footing for its interventions in a domain that hitherto was relatively secluded from the reforming tide of EU law.