

Presenteeism, Its Effects and Costs: A Discussion in a Labour Law Perspective

Kurt PÄRLI^{*}

The economic crisis and resulting restructurings, downsizings, financial worries and fears of dismissal due to absence from work are significantly influencing employees' decisions on whether to continue working despite ill health. Studies suggest that the economic costs of presenteeism (working while sick) far outweigh the costs of absence from work on the grounds of sickness. The level of sick pay regulation as well as weak protection against dismissal and a lack of privacy of health data are important drivers for the increase in presenteeism. Activation policies focusing on the sick or long-term sick may give rise to some significant risks for basic human labour rights such as the right to work, just and favourable working conditions, and the fundamental right to social security including paid sick leave and the right to privacy. As a result, a human-rights based approach to human resource management is needed. This is not just in the interest of employees, but is also the better option from a public health perspective.

1 INTRODUCTION

This article is concerned with employees who have medical problems, either due to an accident or illness, who from a medical point of view are unable to work, but continue to report for work. This phenomenon is labelled 'presenteeism'.¹ Presenteeism has many direct effects and side effects. When employees report for work while sick, this is often associated with a decrease in productivity. It may also give rise to more serious health problems in the longer term. There are some more technical legal questions that arise when it comes to presenteeism. One could ask, for example, whether an employee who continues to work despite being sick falls under the scope of protection against dismissal for those who are incapable of work. Another question which arises concerns the employer's obligation to take care of the employee's health and dignity. However, the problem of presenteeism is worthy of attention in a much broader context. The article will explore whether

^{*} Professor of social private law at the University of Basel, Switzerland. Email: kurt.parli@unibas.ch. The author wishes to thank Jasmin Vöggtli for her assistance.

¹ See for definitions V. Garrow, *Presenteeism, a Review of Current Thinking* 9, http://www.employment-studies.co.uk/system/files/resources/files/507_0.pdf (accessed 4 Dec. 2017); F. Henneberg & M. Gämperli, *Präsentismus: ein kurzer Überblick über die ökonomische Relevanz eines verbreiteten Phänomens*, 129 DP Universität St. Gallen 6 (2014).

and to what extent there is a need to recognize presenteeism as a problem and a challenge for labour law but also for the economy, public health, social policy, social insurance and human resource management. As a result, the issue is examined in a legal and regulatory perspective, while considering the implications in the economics, labour law, social and political science domains.

There is considerable evidence that the costs of ‘presenteeism’ are even higher than the costs of absence due to sickness. This argument will be examined in section 2 of the article, which will go on to address the question of who has to pay for the costs of presenteeism (insurance companies, the employer or the employee). In addition, the article seeks to identify why employees are engaging in presenteeism. There is no clear answer. However, studies in many countries demonstrate that there are explanations at different levels and from various scientific perspectives, and the last part of the second section will provide an overview of the current debates. Section 3 will place the presenteeism debate within the wider discourse related to the activating welfare state. Section 4 will turn its attention to the area of labour rights with a focus on the (human) right to paid sick leave. The final section will bring together the key points of the previous parts and provide a final conclusion.

2 PREVALENCE, COSTS AND CAUSES OF PRESENTEEISM

This section begins with a short overview of some recent studies about the prevalence of presenteeism. It will then consider the effects and consequences of presenteeism, taking a look at some research findings relating to the costs of presenteeism in general and then specifically in comparison to the costs arising from absenteeism. Finally, the question of why employees report for work despite sickness will be addressed.

Although this question has been the subject of research in various parts of the world, the most comprehensive data available on the prevalence of presenteeism can be found in the European Working Conditions Surveys (EWCS) carried out in 2010 and 2015, based on data collected from 40,000 respondents in thirty-four countries. The EWCS Survey asks the following questions: ‘Over the past 12 months did you work when you were sick?’ and ‘If yes, how many working days?’. Nearly 40% of all respondents answered with ‘Yes’. Of those, almost two-thirds had done so for fewer than six days over the past year, one-third for between six and twenty days, and 5% for over twenty days.²

² Eurofound, *Health and Wellbeing at Work: A Report Based on the Fifth European Working Conditions Survey* 2, <http://www.eurofound.europa.eu/pubdocs/2013/02/en/1/EF1302EN.pdf> (accessed 4 Dec. 2017).

Other studies such as those carried out by Ashby and Mahdon³ in the UK and the State Secretariat for the Economy (SECO)⁴ in Switzerland identified examples of an even higher prevalence of presenteeism, with around 50% of employees having engaged in presenteeism. Similar data has been obtained from researchers working in Australia⁵ and Denmark.⁶ In addition, the Swiss study found that in the case of a condition like a common cold, those with longstanding chronic health problems were more likely to engage in presenteeism than their colleagues.⁷

The studies mentioned above provide clear evidence of presenteeism so the focus now turns to the potential consequences, in particular, whether there is a cost effect, and for whom. On the surface, the fact that employees continue to work despite being sick does not appear to have serious repercussions for employers and insurers who save money in terms of sick pay. Numerous issues, however, have been identified mainly in terms of a loss of productivity, the spread of contagious diseases, and the fact that presenteeism can turn minor health problems into major ones. A further and so far under-researched subject is that in the 'Brave New Working World', boundaries between work and private life have become blurred with a knock-on effect on presenteeism.⁸

What appears to be something apparently minor such as an employee suffering from a headache can result in a more serious headache for an employer. First, if employees are not feeling 100% fit, their overall performance inevitably declines over time. *Presentees* may have a negative influence on the team dynamic and morale. Co-workers will often be unaware that their colleague is working during an illness and may interpret their lower performance as representing a lack of competence, motivation or even commitment to the team. It is evident that this could be detrimental to outcomes, in particular team performance.⁹ Further, the result of a simple lapse in concentration caused by a minor ailment can have potentially disastrous consequences, for example an employee driving a vehicle

³ K. Ashby & M. Mahdon, *Why Do Employees Come to Work When Ill? An Investigation Into Sickness Presence in the Workplace* 45, <http://www.istas.ccoo.es/descargas/FINAL%20Why%20do%20employees%20come%20to%20work%20when%20ill.pdf> (accessed 4 Dec. 2017).

⁴ Staatssekretariat für Wirtschaft (SECO), *Stress bei Schweizer Erwerbstätigen, Zusammenhänge zwischen Arbeitsbedingungen, Personenmerkmalen, Befinden und Gesundheit* 21, http://www.stressnostress.ch/fileadmin/user_upload/Dokumente_und_PDF-Files/2010_seco_stress_short.pdf (accessed 4 Dec. 2017).

⁵ See e.g. KPMG Econtech, *Sick at Work, The Cost of Presenteeism to Your Business and the Economy and Its Update, Economic Modelling of the Cost of Presenteeism in Australia* (2011), http://www.medibank.com.au/client/documents/pdfs/sick_at_work.pdf (accessed 4 Dec. 2017); Medibank Private & Econtech, *Economic Impact of Workplace Stress in Australia* 3 (2008), <https://www.medibank.com.au/Client/Documents/Pdfs/The-Cost-of-Workplace-Stress.pdf> (accessed 4 Dec. 2017).

⁶ C. D. Hansen & J. H. Andersen, *Going Ill to Work - What Personal Circumstances, Attitudes and Work-Related Factors Are Associated with Sickness Presenteeism?*, 67 *Soc. Sci. Med.* 956 (2008).

⁷ Staatssekretariat für Wirtschaft SECO, *supra* n. 4, at 21.

⁸ U. Beck, *The Brave New World of Work* (P. Camiller trans., 1st ed., Polity Press 2000).

⁹ G. Johns, *Presenteeism in the Workplace: A Review and Research Agenda*, 31 *J. Org. Behav.* 519, 533 (2010).

that causes an accident can lead to significant third party damages and costs. All in all, the loss of productivity resulting from presenteeism eats into profits.

Perhaps one of the most obvious areas where presenteeism can have negative effects is when employees attend work despite having contagious illnesses which are then passed on to others and thus a single instance of presenteeism may result in the absence from work of other workers. This can become a public health issue in large cities with mass transportation networks where, for example, a flu virus can be spread rapidly.¹⁰ While the option of staying at home and perhaps working from there has the potential to significantly lower transmission risks, it is still not the case that everyone with a contagious illness has this option, or would make use of it if it were available.

Finally, the third area where costs may be incurred is when presenteeism causes minor illnesses to develop into more serious ones. It is often better for employees to take time off and get better rather than continuing to work and getting worse. The short-term costs of paying a short period of sick leave and tolerating a temporary loss of productivity could be considered a good investment compared with the costs of a long-term absence from work.¹¹ The risk for third parties (e.g. co-workers) as a result of mistakes made by a contagious presentee is reduced. Many serious health conditions can be the result of minor illnesses that are not properly treated. In the case of employees with chronic diseases, it is essential for them to be properly managed. Some conditions, as in the case of an employee with relapsing-remitting multiple sclerosis, may not affect the ability to work for prolonged periods, perhaps even over a number of years. When symptoms do flare up, however, they need to be taken seriously and this may include a substantial period of recuperation. Presenteeism in such a context would have the potential for negative long-term effects leading to progressive health deterioration, resulting in a vicious circle of decreasing productivity, absence from work, and even potential disability.¹²

It has been argued that presenteeism has many cost-effects but how can they be quantified? There is so far neither a commonly accepted model counting the costs nor periodic surveys in different countries providing comparable and reliable data. However, several studies show that presenteeism is highly cost-intensive. A study on the situation in the US, based on a year-long telephone survey of 29,000 working adults, came to the conclusion that the cost in terms of loss of productivity due to health-related problems is more than USD 150 billion annually.¹³

¹⁰ J. Levin-Epstein, *Presenteeism and Paid Sick Days 2*, <http://www.clasp.org/resources-and-publications/files/0212.pdf> (accessed 4 Dec. 2017).

¹¹ C. D. Hansen & J. H. Andersen, *Sick at Work – A Risk Factor for Long-Term Sickness Absence at a Later Date?*, 63 J. Epidemiol. Community Health 397, 400 (2009).

¹² Johns, *supra* n. 9, at 533.

¹³ W. F. Stewart, J. A. Ricci, E. Chee & D. Morgenstein, *Lost Productive Work Time Costs from Health Conditions in the United States: Results from the American Productivity Audit*, 45 J. Occup. Environ. Med. 1234, 1243 (2003).

Similarly, it was found in an Australian study that the combined cost of stress-related presenteeism and absenteeism for the Australian economy amounted to AUD 14.81 billion a year.¹⁴ While this research considered the combined cost of absence due to sickness and presenteeism, numerous other studies have concluded that the costs of presenteeism massively outweigh those of absence due to sickness.¹⁵ Some researchers have found that the loss of productivity as a result of presenteeism is at least three times greater than that from absence due to sickness, with a decline in work quality, more errors made and deadlines not met.¹⁶ Another study considered a variety of health conditions and sought to assess and compare the costs resulting from absence from work and presenteeism. In all cases the costs of presenteeism were higher than the combined cost of treatment, absence from work and disability. To take one example, the study indicated that the costs of presenteeism of employees suffering from depression or mental illness were 71% higher.¹⁷ Likewise, a study of workers suffering from joint pain, spine problems and headaches demonstrated that the total cost of absence from work in the cases examined was USD 14 billion but this figure was dwarfed by the USD 47 billion resulting from presenteeism.¹⁸ A French study came to the conclusion that, for many of the reasons above such as a faster deterioration of health conditions, 'today's presenteeism leads to tomorrow's absences'.¹⁹

The costs of presenteeism have been well documented but it is not clear who is to pay for them. The first immediate cost for employers is the loss of productivity mentioned above. In addition, where presenteeism leads to absences, there are inevitable costs for both employers and the insurance sector in terms of sick pay. When it comes to contagious diseases, presenteeism may also give rise to costs for the society or the economy as a whole when it leads to public health issues. The consequences for individuals, while often neglected, are serious. Presenteeism means that workers subjugate their health and well-being to meet what they perceive to be the demands or requirements of the labour market. The potential costs are therefore enormous in terms of individuals sacrificing their health and even taking years off their own lives.

¹⁴ Private & Econtech, *supra* n. 5, at 6.

¹⁵ P. Hemp, *Presenteeism: At Work – But Out of It*, Oct. 2004 Issue HBR 49, 51 (2004); see also K. Pärli & J. Hug, *Arbeitsrechtliche Fragen bei Präsentismus (Arbeit trotz Krankheit)*, (1) ARV 1–15 (2012).

¹⁶ Stewart et al., *supra* n. 13, at 1237.

¹⁷ B. S. Schwartz, W. F. Stewart & R. B. Lipton, *Lost Work-Days and Decreased Work Effectiveness Associated with Headache in the Workplace*, 39 J. Occup. Environ. Med. 320–327 (1997).

¹⁸ W. F. Stewart, J. A. Ricci, E. Chee et al., *Lost Productive Time and Cost Due to Common Pain Conditions in the US Workforce*, 290(18) JAMA 2443, 2449, 2451 (2003); See for further references X. H. Hu, L. E. Markson, R. B. Lipton, W. F. Stewart & M. L. Berger, *Burden of Migraine in the United States: Disability and Economic Costs*, 159 Arch. Intern. Med. 813–818 (2001).

¹⁹ I. Bierla, B. Huver & S. Richard, *New Evidence on Absenteeism and Presenteeism*, 24(7) IJHRM 1536, 1548 (2013).

Having discussed the prevalence of presenteeism and its costs, the focus will now turn to the reasons underlying this phenomenon, taking into account factors such as legal frameworks, work environments and individual attitudes to work.

The *legal framework* plays a substantial role. If there is a lack of strong protection from dismissal in case of sickness, it is not surprising that employees tend to engage in presenteeism based on the fear of losing their job.²⁰ Research also shows the different effects of fixed-term contracts in comparison to open-ended contracts with regard to presenteeism. Employees on fixed-term or non-standard contracts are more afraid of losing their jobs than those on open-ended or standard contracts. There is a lot of evidence that job insecurity increases the risk of presenteeism.²¹

The level of *sick pay regulation*²² is another important aspect, often linked with attendance control systems. Without paid sick leave, employees may feel like they cannot afford to lose income by staying home to recuperate.²³ This is especially common in countries with limited or restricted paid sick leave schemes. For instance, at least 20 million Americans are reporting for at work because the consequences are too severe to do otherwise. In an American study, 11% of the participants reported having lost their jobs, while another 13% stated they had experienced threats of dismissal.²⁴ Presenteeism may also be stimulated by the fear of disciplinary sanctions as a result of being absent too often.²⁵ An appropriate sick pay scheme may have positive effects in terms of limiting the spread of contagious diseases, and this is backed up by a study from the Swiss Economic Institute showing that when paid sick leave becomes a right, the flu rates decrease significantly.²⁶

Another important factor of the legal framework with regard to presenteeism is the level of legal obligations for the employer to make reasonable adjustments for

²⁰ K. Zok, *Personalabbau, Arbeitsplatzunsicherheit und Gesundheit - Ergebnisse einer repräsentativen Umfrage* Ch. 7, 152 (B. Badura, H. Schellschmidt & C. Vetter, Springer 2005); see further K. Zok, *Gesundheitsprobleme von Arbeitnehmern und ihr Verhalten im Krankheitsfall, Ergebnisse aus zwei Repräsentativumfragen unter GKV-Mitgliedern* 3, http://wido.de/fileadmin/wido/downloads/pdf_wido_monitor/wido_mon_ausg1-2008_0608.pdf (accessed 4 Dec. 2017).

²¹ J. Y. Kim, J. Lee, C. Muntaner et al., *Who Is Working While Sick? Nonstandard Employment and Its Association with Absenteeism and Presenteeism in South Korea*, 89 *Int. Arch. Occup. Environ. Health* 1095, 1100 (2016).

²² See for more details in the legal regulation of sick pay 4.2, at 14.

²³ G. Johns, *supra* n. 10, at 525–526; see also other studies e.g. M. Chatterji & C. J. Tilley, *Sickness, Absenteeism, Presenteeism and Sick Pay*, 54 *Oxford Econ. Papers* 669–687 (2002); V. Lovell, *No Time to be Sick: Why Everyone Suffers When Workers Don't Have Paid Sick Leave* (Institute for Women's Health Policy Research 2004).

²⁴ T. Smith, *Paid Sick Days: A Basic Labor Standard for the 21st Century*, 37 Washington D.C. Public Welfare Foundation (2008).

²⁵ F. Munir, S. Leka & A. Griffiths, *Dealing with Self-Management of Chronic Illness at Work: Predictors for Self-Disclosure*, 60 *Soc. Sci. Med.* 1397, 1404 (2005).

²⁶ S. Pichler & N. R. Ziebarth, *The Pros and Cons of Sick Pay Schemes: A Method to Test for Contagious Presenteeism and Shirking Behavior*, 8850 *IZA DP* 39 (2015), <https://ssrn.com/abstract=2568046> (accessed 4 Dec. 2017).

employees with health conditions and/or disabilities. Vulnerable employees should be supported and receive reasonable support in order to avoid absenteeism and prevent unhealthy presenteeism.

The impact of the *work environment* on presenteeism is obvious. These days employees are often burdened with heavy workloads and pressing deadlines, making it more difficult for sick employees to take time off to recover. Inadequate substitution in case of absence due to sickness reinforces this phenomenon. Furthermore, employees may feel responsibility towards their already overworked colleagues.²⁷ Presenteeism may also be provoked by rigorous management of sickness absence.²⁸ It was further highlighted that in some companies taking time off for illness is a sign of under-performance.²⁹ Perfect attendance is seen as a sign of loyalty and commitment to the organization.³⁰

There are also many signs that *individual attitudes* are key points in explaining presenteeism. Researchers found that some employees may find their circumstances at home even more stressful than their working conditions, and they therefore prefer to report for work despite the fact that they are sick, rather than staying at home.³¹ Some employees also perceive themselves as being needed and irreplaceable, which has been shown to lead to presenteeism.

3 PRESENTEEISM IN THE CONTEXT OF THE ACTIVATING WELFARE STATE

The rise of presenteeism should be discussed in connection with the paradigm change in social security systems from welfare to workfare.³²

The welfare state originated in the nineteenth century and was closely linked to the process of industrialization, the social question and the fight of the labour movement for better working conditions. In response, social insurance institutions were founded in the early twentieth century and built up in many countries by both liberal and conservative political parties. They had two main reasons for such initiatives. On the one hand,

²⁷ FlourishAniway, <https://toughnickel.com/business/Presenteeism-Dont-Drag-Your-Sick-Self-To-Work> (accessed 14 May 2016).

²⁸ C. A. M. Roelen & J. W. Groothoff, *Rigorous Management of Sickness Absence Provokes Sickness Presenteeism*, 60(4) *Occup. Med.* 244, 245 (2010).

²⁹ D. Baker-McClearn, K. Greasley, J. Dale & F. Griffith, *Absence Management and Presenteeism: The Pressures on Employees to Attend Work and the Impact of Attendance on Performance*, 20(3) *HRMJ* 311, 323 (2010).

³⁰ Hansen & Andersen, *supra* n. 6, at 958.

³¹ T. Kristensen, *Sickness Absence and Work Strain Among Danish Slaughterhouse Workers: An Analysis of Absence from Work Regarded as Coping Behaviour*, 32 *Soc. Sci. Med.* 15–27 (1991).

³² See for further references K. Pärli, *Der Kampf ums Recht – Akteure und Interessen im Blick der interdisziplinären Rechtsforschung – Beiträge zum zweiten Kongress der deutschsprachigen Rechtssoziologischen Vereinigungen, Aktivierung von gesundheitlich beeinträchtigten Arbeitnehmenden- Auswirkungen auf Soziale Rechte* 293–311 (J. Estermann ed., 1st ed., 2012).

revolutionary political ideas introduced by labour and socialist movements were seen as a threat to the capitalist system, thus giving rise to the need for adequate responses to the social question. On the other hand, social insurance coverage for the financial risks of accident, sickness, retirement and even unemployment also reflected liberal aims, as social democratic and labour parties began to win elections in a number of European states in the interwar years. This process continued after the Second World War with social insurance programmes starting to dominate national budgets.³³

Social insurance systems were created as a safety net. Welfare states were seen as a solution to social problems caused by the unlimited free market economy, in which individuals face permanent pressure to adapt to the roles demanded by the market. This phenomenon has been termed 'commodification'. Income support schemes in the case of accident, sickness and unemployment reduced that pressure on individuals.³⁴ Social scientists describe and analyse such effects as 'de-commodification'. This term goes back to Karl Polanyi, who explained the rise of factory laws, unemployment insurance and the institutionalization of trade union power within the labour law system.³⁵ For Polanyi, the intervention of the state for the purposes of welfare protection are crucial for the stability of markets, they are even deemed essential for the functioning of capitalist society itself. Later on, Esping Andersen extended the concept by arguing that social insurance schemes would strengthen workers' bargaining power. He further defined de-commodification as 'the degree to which individuals, or families, can uphold a socially accepted standard of living independently of market participation'.³⁶

By the end of the twentieth century, however, the welfare state was no longer seen in the light of its problem-solving capacities, but rather as a problem itself. It seemed that the golden age of welfare was over.³⁷ Economies had been fundamentally altered by the liberalization of the flow of capital and goods and the traditional welfare state had become problematic in the face of a social, financial and political crisis. Social rights protecting the individual from the forces of the market, which were one of the main achievements of the welfare state, were now seen as a problem.³⁸ Proponents of the free market argued that, due to globalization, labour markets needed to be more flexible³⁹ and issues such as high minimum

³³ R. D Congleton. & F. Bose, *The Rise of the Modern Welfare State, Ideology, Institutions and Income Security: Analysis and Evidence*, 144 Pub. Choice 535, 537, 538 (2010).

³⁴ O. De Schutter, *Welfare State Reform and Social Rights*, 33(2) NQHR 123, 127 (2015).

³⁵ I. Greer, *Welfare Reform, Precarity and the Re-Commodification of Labour*, *Work, Employ. & Soc.* 162, 166 (2016); K. Polanyi, *The Great Transformation* (2d ed., Boston MA: Beacon Press 2001).

³⁶ E. Andersen, *The Three Worlds of Welfare Capitalism* 37 (Cambridge: Polity Press 1990).

³⁷ E. Andersen, *After the Golden Age? Welfare State Dilemmas in a Global Economy* 1–31, in *Welfare States in Transition: National Adaption in Global Economies* (E. Andersen ed., London: SAGE Publications 1996).

³⁸ De Schutter, *supra* n. 34, at 127.

³⁹ For a critical analysis of 'the dogma of flexibility' see G. Rodgers, *Labour Market Flexibility and Decent Work*, Department of Economic and Social Affairs United Nations, Working Paper no. 47 (2007).

wages, insufficient incentives for the unemployed to seek employment, and a culture of dependency needed to be addressed.⁴⁰

Since the mid-1980s, many European states have recorded a significant increase in the number of people leaving the labour market, with a rise in mental illness and undefined disease patterns.⁴¹ The increases in social welfare and incapacity benefit claims have been viewed negatively in some academic and political circles, while popular opinion has also hardened on this issue. Criticism is based on moral-hazard theories whereby offering financial benefits gives rise to the wrong incentives thus encouraging people to take unnecessary sick leave.⁴² It is further argued that if sick leave is paid by the social security system, this could give rise to a moral hazard problem for firms, leading to the inefficient monitoring of absences or to a lack for investment to prevent them.⁴³

New ideas for reforming the welfare state were sought.⁴⁴ If the benefits of the social insurance and other welfare institutions were eliminated or reduced, this would be a stimulus for individuals to prioritize hard work. According to such thinking, the goal of the welfare state should not be to free individuals from the market, but rather to bring them back into the market. Furthermore, the purpose of the welfare state is not protection against the new risks associated with globalization and the rapid development of the information society.⁴⁵ With a social policy of ‘workfare’ instead of ‘welfare’, a reduction of benefits as well as better integration or re-integration into the labour market should be possible.

The concept of ‘activation’ is central to the policy of workfare. However, what does activation mean? The goal of every activation policy is to encourage individuals to undertake more self-generated initiatives, while the recipients of social benefits are supposed to make positive efforts towards reintegration. Social benefits are no longer just given, but rather must be earned in some way by the beneficiaries.⁴⁶ Mandatory participation in occupational programmes for the unemployed is an important part of

⁴⁰ For an overview of this development from welfare to workfare in different Western countries see B. Vis, *States of Welfare or States of Workfare? Welfare State Restructuring in 16 Capitalist Democracies 1985–2002*, 35(1) Pol’y & Pol. 105–122 (2007).

⁴¹ In Switzerland between 1986 and 2006 the number of people who were granted an invalidity pension as the result of a ‘psychogenic or reactive disorder’ increased ninefold, see the analysis in N. Baer, U. Frick & T. Fasel, *Dossieranalyse der Invalidisierungen aus psychischen Gründen. Typologisierung der Personen, ihrer Erkrankungen, Belastungen und Berentungsverläufe*, 6(9) Forschungsbericht Bundesamt für Sozialversicherungen BSV (2009). The problem of mental illness and work is recognized worldwide and an important issue for science and policymakers, see e.g. OECD, *Fit Mind, Fit Job: From Evidence to Practice in Mental Health and Work*, Mental Health and Work (Paris: OECD Publishing 2015).

⁴² L. Söderström, *Moral Hazard in the Welfare State*, in *Reforming the Welfare State* (H. Giersch ed., Berlin, Heidelberg: Springer 1997).

⁴³ R. Böheim & T. Leoni, *Firm’s Moral Hazard in Sickness Absences*, 6005 IZA, at 1, 8, 10, 16, 23 (2011).

⁴⁴ See e.g. US Personal Responsibility and Work Opportunity Reconciliation Act (Welfare Reform Act) (22 Aug. 1996).

⁴⁵ De Schutter, *supra* n. 34, at 129.

⁴⁶ *Ibid.*, at 125.

such a policy. If the recipient attends the programme, they can be rewarded with a small increase in their level of benefits. On the other hand, if they are unwilling to take part, they must expect a cut in benefits.

Activation policies are not just widespread in connection with unemployment. Employees with health problems and incapacity to work for medical reasons are also an important group in the activation discourse. Generally, guidelines on activation measures for employees with impaired health are based on the understanding that in case of an incapacity for work lasting more than a few days, the person concerned should be offered assistance as soon as possible. Systems of absence and health management aim at keeping sick and injured employees in the labour market and/or re-integrating them. Some national legislations have created systems of 'early identification and intervention', offering support measures to the employee as well to the respective employer.⁴⁷ Early intervention seems to be important to prevent people losing contact with the labour market.⁴⁸ However, such support is intertwined with constraints and is provided under penalty of sanction. In many states, activation includes disciplinary measures against sick employees. This is often seen as part of a comprehensive policy based on the premise that work has positive effects for societal integration. The assumption is that any employment, even if it is in the context of a highly subsidized occupational programme, is better than no employment.⁴⁹ Such offers of assistance are regularly combined with constraints and sanctions in the case of non-attendance. A common theme which emerges is that while the focus on health management and prevention appears laudable on the surface, it may entail negative side-effects.

Social scientists describe the development towards an active welfare state and its effects as *re-commodification*.⁵⁰ While the social insurance benefits in the classic welfare-state had the previously described 'decommodification-effect', the active welfare state leads to a roll-back towards an enforced market dependency of individuals and a lack of security. Today's employment market requires flexible, adaptable and innovative employees. Entitlements to social insurance benefits may be seen as a hindrance to adaptation to the realities of the market. The reorganization of social insurance benefits is not the only source of 're-commodification'. Labour law reforms tend to work towards the same aims.⁵¹ Relaxed rules on dismissals and increased duties of loyalty for the employees based on legislative

⁴⁷ See especially the situation in the Netherlands analysed in I. Zeitzer, ISSA Research Programme, *Who Returns to Work and Why, Evidence and Policy Implications from a New Disability and Work Reintegration Study – A Summary* 28 (2001).

⁴⁸ European Commission, *Joint Report on Social Inclusion 2002*, 35; European Commission, *Joint Report on Social Inclusion* 45–52 (2004).

⁴⁹ Greer, *supra* n. 35, at 163.

⁵⁰ C. Brütt, *Neoliberalismus im aktivierenden Sozialstaat* 265–266 (M. Candeais & F. Deppe eds., 2001).

⁵¹ Greer, *supra* n. 35, at 165.

changes and more employer-friendly case law are also having a ‘recommodification-effect’. The same can be said of new management techniques such as ‘management by objectives’ and the promotion of concepts such as ‘the employee as entrepreneur’.⁵² Recently, digitalization and changes in labour market legislation have driven new forms of employment such as ‘crowd-working’, ‘zero-hours contracts’ and ‘false self-employment’ bringing new attacks on the traditional form of labour law and labour protection.⁵³ The massive use of digital technology has contributed towards the blurring of boundaries between the place of work and working time on the one hand, and the place of residence and free time on the other.⁵⁴ As a result, the issue of presenteeism is no longer confined to the physical workplace, but also needs to take account of the fact that employees can be either online or offline in any location.

The recommodification process is thus not limited to unemployed or social welfare recipients: it also comprises sick and disabled people. The message is clear: no-one, not even those who are sick or disabled, should consider themselves to have an adequate and secure living standard or at least a minimal existence based on social insurance. Pension benefits are more and more replaced by financial support, limited in time and linked to the obligation to return to the labour market despite health impairments. Responsibility for successful reintegration is however mainly assigned to the individual: meanwhile, other factors such as the employment market and workplace are disregarded.⁵⁵ According to constructivist social science theories, both health and sickness are the result of societal attribution processes.⁵⁶ More recent studies, based on ‘governmentality’⁵⁷ (following Michel Foucault) point out that state interventions, based on responsibility and activation of sick employees, and those who are still healthy, lead to a perception of health as being more and more simply a question of will.⁵⁸ This development finds its expression in the increasingly widespread use of attendance bonuses and insurances securing

⁵² A. Krause, C. Dorsewagen & K. Peters, *Interessierte Selbstgefährdung: Was ist das und wie geht man damit um?*, HR Today (4), <https://www.hrtoday.ch/de/article/interessierte-selbstgefahrdung-was-%E2%80%A8ist-das-und-wie-geht-man-damit-um> (accessed 1 Apr. 2010).

⁵³ M. Otto, *The Right to Privacy in Employment, A Comparative Analysis* (1st ed., Hart 2016).

⁵⁴ See also M. Otto, *The Right to Privacy in Employment, in Search of the European Model of Protection*, 6(4) ELLJ 343–363 (2015).

⁵⁵ See for further informations the presentation at the International conference 15–16 May 2008 in Nurnberg, Germany: A. Hetzler, *Labor Market Activation Policies For the Long-Term Ill – A Sick Idea?*, http://213.241.152.197/veranstaltungen/2008/activation_2008_hetzler.pdf (accessed 4 Dec. 2017).

⁵⁶ J. Bauch, *Krankheit und Gesundheit als gesellschaftliche Konstruktion*; Gesundheits- und medizinsoziologische Schriften 1997–2003 (2003).

⁵⁷ M. Foucault, *Governmentality*, in *The Foucault Effect* Ch. 7, 87–104 (Graham Burchell, Colin Gordon & Peter Miller, The University of Chicago Press 1991). (Lecture at the Collège de France 1974–1975).

⁵⁸ R. Eickelpasch, C. Rademacher & P. R. Lobato, *Diskursverschiebung der Kapitalismuskritik? Eine Einführung* 13 (GWV Fachverlage GmbH, 1st ed., 2008).

sick pay.⁵⁹ The judicial and legislative tendency to classify certain diseases as not relevant for disability insurance purposes is another expression of this development.⁶⁰

Activation policies focusing on sick or long-term sick employees may have positive effects,⁶¹ and early intervention strategies for a return to work seem to be successful.⁶² However, the reflections above show that ‘activation therapy’ can be accompanied by some dangerous side effects.

4 ARE THERE ANY LABOUR RIGHTS INVOLVED?

Moving on from the political and economic themes discussed above, this section will now look at the phenomenon of presenteeism from a perspective of labour (human) rights. The section will identify and discuss three core rights that have a strong link to presenteeism:

- the right to be protected against dismissal during and due to sickness as part of the right to work;
- the right to paid sick leave;
- the right to privacy protection.

4.1 PROTECTION AGAINST DISMISSAL ON THE GROUND OF SICKNESS – PART OF THE RIGHT TO WORK?

The Universal Declaration of Human Rights (UDHR)⁶³ states in Article 23 that everyone has the right to work, which includes a right to just and favourable conditions of work and to protection against unemployment. The right to work is also part of many other international human rights instruments.⁶⁴ It is broadly

⁵⁹ See to these problems Baker-McCleary et al., *supra* n. 29, at 324.

⁶⁰ The Swiss social security system excludes de facto people suffering from chronic pain from obtaining disability pensions; see U. Schwegler, C. Peter, J. Anner & B. Trezzini, *Toward Standardized Documentation in Psychiatric Evaluations: Identifying Functioning Aspects and Contextual Factors in Psychiatric Reports of Swiss Disability Claimants with Chronic Widespread Pain*, 144 *Swiss Med. Wkly.* 14008 (2014).

⁶¹ F. Bloch & R. Prins, *Who Returns to Work & Why: A Six-Country Study on Work Incapacity & Reintegration* (New Brunswick: Transaction Publishers 2001); see especially 173 where the results and conclusions are summarized; see further C. Hepburn, R. L. Franche & L. Francis, *Successful Return to Work: The Role of Fairness and Workplace-Based Strategies*, 1(3) *Int. J. Workplace Health Manag.* 7–24 (2010).

⁶² However, interventions at an even earlier stage are obviously even more promising. See in particular the study S. Vargas-Prada, E. Laloo, I. Avila-Palencia et al., *Effectiveness of Very Early Workplace Interventions to Reduce Sickness Absence: A Systematic Review of the Literature and Meta-Analysis*, 42(4) *Scan. J. Work. Environ. Health* 261–272 (2016).

⁶³ UN General Assembly, *Universal Declaration of Human Rights (UDHR)* (adopted by the General Assembly Resolution 217 A(III) 10 Dec. 1948).

⁶⁴ Art. 1(1)(a) Convention of the Elimination of all Forms of Discrimination against Women (CEDAW); Art. 5(f) Convention on the Elimination of all Forms of Racial Discrimination (CERD); Art. 23.1(1)

accepted that protection against unemployment includes the obligation on the part of Member States to take legislative measures against unjustified dismissals.⁶⁵ Particularly noteworthy is the International Covenant on Economic, Social and Cultural Rights (ICESCR)⁶⁶ which proclaims the right to work in a general sense (Article 6). The individual dimension of the right of work is explicitly developed through the recognition of the right of everyone to the enjoyment of just and favourable conditions of work (Article 7 ICESCR), in particular the right to safe and healthy working conditions (lit. b) and the right to rest, leisure and reasonable limitation of working hours and periodic holidays with pay, as well as remuneration for public holidays (lit. d). Although there is no explicit mention of the prohibition on dismissal during or due to sickness in the ICESCR, it is evident that a lack of protection in case of sickness would undermine the right to just and favourable conditions of work.

The level of protection for employees with health impairments is much higher when an employee is classified as ‘disabled’. The UN Disability Convention⁶⁷ provides a strong protection against discrimination on the grounds of a disability. Article 27 of the Disability Convention guarantees specific rights for disabled employees, including the obligation on the part of the employer and/or the social security authorities to provide reasonable accommodation. Dismissal on the grounds of a disability therefore needs strong justification. European Union Directive 2000/78/EC⁶⁸ prohibits discrimination on the grounds of a disability which includes the obligation for reasonable accommodation. Article 5 of Directive 2000/78/EC requires appropriate measures on the part of the employers to enable access or advancement to employment for persons with a disability.⁶⁹ There are many discussions and disputes on whether chronic diseases should also fall under the legal instruments that protect against discrimination on the grounds of disability.⁷⁰ It is beyond the scope of this article, however, to discuss this issue in

of the UDHR; Art. 6(1) of the International Covenant on Economic, Social and Cultural (ICESCR) Rights Part III; Art. 15 African Charter of Human and Peoples’ Rights (‘Banjul Charter’).

⁶⁵ H. Collins, *Is There a Human Right to Work*, in *The Right to Work, Legal and Philosophical Perspectives* 23 (V. Mantouvalou ed., 1st ed., Oxford/Portland/Oregon, 2015); See as well ICESCR, *General Comment no. 18: The Right to Work (Art. 6 of the Covenant)*, E/C.12/GC/18 (6 Feb. 2006).

⁶⁶ UN General Assembly, *International Covenant on Economic, Social and Cultural Rights (ICESCR)* (adopted by the General Assembly on 16 Dec. 1966, entry into force on 3 Jan. 1976).

⁶⁷ UN General Assembly, *Convention on the Rights of Persons with Disabilities (CPRD)*, A/RES/61/106 (adopted by the General Assembly on 13 Dec. 2006, entry into force on 3 May 2008).

⁶⁸ Council Directive 2000/78/EC of 27 Nov. 2000 establishing a general framework for equal treatment in employment and occupation OJ 2000 L 303/16.

⁶⁹ F. Hendrickx, *Disability and Reintegration in Work: Interplay Between EU Non-discrimination Law and Labour Law*, in *Reasonable Accommodation in the Modern Workplace—Potential and Limits of the Integrative Logics of Labour Law*, 93 BCLR 61–72 (2016).

⁷⁰ See in particular K. Pärli & T. Naguib, *Protection Against Discrimination on Grounds of Chronic Diseases*, <http://www.antidiskriminierungsstelle.de/SharedDocs/Downloads/DE/publikationen/Factsheets/>

more detail here. Nevertheless, in summary it can be noted that presenteeism should be avoided for employees with a disability and/or chronic diseases and effective protection against dismissals on those grounds is needed.⁷¹

International Labour Organization (ILO) Convention No. 158 concerning termination of employment⁷² defines the lawfulness of dismissal (Article 4) and in particular imposes the obligation to provide valid grounds for dismissal, as well as the right to legal and other redress in the case of unjustified dismissal. The crucial point is whether and under what circumstances a termination of contract by the employer justified with sickness or sickness-related incapacity to work is lawful or not. Article 5(e) of ILO Convention 158 provides, inter alia, that absence from work during maternity leave is not a valid reason for termination. Article 6 of ILO Convention 158 provides that 'temporary absence from work because of illness or injury shall not constitute a valid reason for termination'. However, ILO Convention 158 plays a minor role in reality because the ratification rate is so low (only thirty-six states have ratified this convention). Regardless of a rather weak anchorage in the International Human Labour Rights Instruments, many states protect sick employees at least for a certain period at national level. Obviously legal protection against unlawful dismissal on the grounds of sickness should be discussed together with the question of paid sick leave and this point will be picked up again later.⁷³

A survey carried out from the employers' perspective revealed the average cost for an employer dismissing workers.⁷⁴ Among the participating European countries, many differences influencing the cost incurred by the employer as well as remedies and protections for the employee were taken into account. One important finding was that even though many differences in employment protection legislation were investigated, the countries were in accordance with the need for job protection and maintaining job security. This view was reflected in the fact that all the participating countries adopt employment protection legislation.

An effective tool to guarantee protection is the justification for dismissal. Reasons to terminate an employment relationship have to be fair and objective and should be substantiated. Different remedies are provided if a dismissal has been enacted without valid reason. In all countries in the survey, an indemnity is

factsheet_engl_Schutz_vor_Benachteiligung_aufgrund_chronischer_Krankheit.pdf?__blob=publicationFile (accessed 4 Dec. 2017).

⁷¹ Hendrickx, *supra* n. 69. at 62.

⁷² ILO Convention concerning Termination of Employment at the Initiative of the Employer (ILO Convention 158) (Entry into force 23 Nov. 1985).

⁷³ See s. 4.2.

⁷⁴ Deloitte, Deloitte Legal Perspectives, *International Dismissal Survey 2015*, https://www2.deloitte.com/content/dam/Deloitte/de/Documents/legal/Deloitte_Legal_Dismissal_Survey_final.pdf (accessed 4 Dec. 2017).

required to be paid whereas in some countries it is possible for the court to order reinstatement. The cost for the employer varies considerably, and it may consist of severance payment, payment in lieu of notice or other legal remedies. Legislation in the countries in the survey differs to a great extent even though the basic concepts of dismissal are similar. Overall, the cost of dismissal with or without a valid reason is highest in Italy, Sweden, Belgium, Ireland, Luxembourg and France. In the case of unlawful dismissal, the costs are on average almost twice as high as when the dismissal was based on an objective reason. However, in the case of legislation with no distinction between lawful and unlawful dismissal, as in Greece or Portugal, the cost of dismissal remains the same for the employer with or without an objective reason. Interestingly, in Belgium, Switzerland, Denmark and Luxembourg reinstatement by order of the court is not possible, whereas it is envisaged in Germany, Austria, Italy, Spain and Sweden. The main finding of the survey was that in general Western European countries face higher dismissal costs compared to Central and Eastern European countries.⁷⁵

There are at least two strong links between the right to work associated with protection against unfair dismissal and presenteeism. A working environment with strong incentives for not taking sick leave can result in unfavourable working conditions for sick employees according to the meaning of Article 7 of the ICESCR. The lack of protection against dismissal in the case of sickness – at least for a limited period – is also a violation of the right to work. The right to work is defined in a ‘general and non-exhaustive manner’ specifying that it should be *decent* work. Decent work respects the fundamental rights of the person as well as the rights of the worker in terms of health and safety conditions and remuneration. According to the ICESCR, the right to work is an essential element of daily life especially in realizing other human rights.⁷⁶ The question therefore arises as to whether work is still ‘decent’ when mere absence on the ground of sickness increases the risk of dismissal. The inclusion of paid sick leave within the right to work as stated in Article 7 of the ICESCR is therefore necessary, especially since the right to work is strongly linked to the realization of other human rights.

From an economic perspective, it can be observed that the restrictions on dismissal laid down in the main points of the Convention 158 promote better conditions of employment and income security for workers. This results in more secure employment and in employers being more likely to look for internal reserves and to invest in human resources. Furthermore, employment protection

⁷⁵ *Ibid.*, at 7.

⁷⁶ ICESCR, *General Comment no. 18: The Right to Work (Art. 6 of the Covenant)*, E/C.12/GC/18 (6 Feb. 2006).

legislation tends to mitigate discrimination against vulnerable categories of employees such as older workers and persons with disabilities.⁷⁷

As shown in section 2,⁷⁸ a lack of protection from dismissal and presenteeism clearly go hand-in-hand. The effective protection against unlawful dismissal on the grounds of sickness-related absence is one of the main measures for combating presenteeism. While the effectiveness of dismissal protection is clearly the main consideration, the prevention of presenteeism cannot rely solely on this factor. Further approaches should also be taken into account. It is of equal importance to assert that it is in the employers' interests to provide certain provisions. Providing a supportive work environment for employees suffering from sickness and/or chronic diseases is a great help in enabling speedy reintegration into the workplace. With that goal in mind, it is of great importance to respect the employees' overall health without putting too much pressure on the enforcement of such provisions that may not be suitable for each individual person.

This approach of the employers' implementation is integrated into Directive 2000/78/EC which addresses the employers' duties to accommodate work and the workplace to the worker's situation. It has been well documented how employment discrimination law is helping to shape the accommodated workplace.⁷⁹ Since it is within the Member States' scope of decision-making, they may be inclined to widen the concept of disability to situations that tend to be referred to as illness.⁸⁰

4.2 THE RIGHT TO PAID SICK LEAVE

The right to paid sick leave has its origins in labour as well as in social rights. The right is seen as part of the right to just and favourable working conditions in Article 7 of the ICESCR.⁸¹ Article 11 of the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) explicitly provides the right to paid leave. Employees should also be allowed to take time off from work to care for sick family members.⁸²

Paid sick leave is also an important element of the right to social security as formulated in Articles 11 and 25 of the UDHR and in Article 9 of the ICESCR.

⁷⁷ ILO, Note on Convention No. 158 and Recommendation no. 166 concerning termination for employment, at 22.

⁷⁸ See s. 2.

⁷⁹ Hendrickx, *supra* n. 69. at 63.

⁸⁰ See *Ibid.*, at 70; see especially the Belgian case where the distinction between disability and work incapacity due to an illness becomes rather fuzzy: Labour Tribunal Leuven 10 Dec. 2013, AR nr. 12/1064/A, NB Arbeidsrecht 2013/10 (Summary S. De Groof).

⁸¹ ICESCR, *General Comment no. 23: The Right to Just and Favourable Conditions of Work (Art. 7 of the Covenant)*, E/C.12/GC/23 (26 Apr. 2016).

⁸² See Committee on the Elimination of Discrimination Against Women (CEDAW), *Final Report 25th session, Part II (2–20 July 2001)*; para. 70, see also CEDAW, *Final Report 34th session (16 Jan.–3 Feb. 2006)*.

The right to social security implies continuity of salary payments or income support for periods of sickness.⁸³ Sick leave and related income support constitute a key component of the ILO Social Security Convention. Articles 14–18 of this convention provide that sickness benefits should cover incapacity to work resulting from a terminal condition and involving suspension of earnings.⁸⁴ The ILO Decent Work Agenda is also worth mentioning since ‘decent work’ is now an integral part of the 2030 Agenda for Sustainable Development.⁸⁵ This document defines work as ‘decent’ if basic security is provided, including income in case of inability to work due to sickness. The key rationale for paid sick leave is that work should not jeopardize health, and ill health should not lead to loss of income and work. Paid sick leave will pay off in terms of health and economic gains for employers, workers and the economy as a whole. It is therefore considered to contribute to higher productivity in the interests of the entire economy.

The implementation of the human rights requirement for paid sick leave tends to differ from state to state because each country has different legal regulations and benefit schedules for paid sick leave. A study comparing the coverage of paid sick leave for workers recovering from the flu and for those undertaking a fifty-day cancer treatment in twenty-two countries highlighted significant differences. The Scandinavian countries as well as Luxembourg and Belgium provide cover for five days for workers recovering from the flu. Norway and Luxembourg guarantee payment for the entire cancer treatment of 50 days. Among the continental European countries Germany, the Netherlands and Austria are close to the standards provided in Scandinavia in both categories, whereas in Spain, Italy and France only around one day is covered for workers taking leave to recover from the flu. Switzerland, Iceland and Australia are located somewhere in between these two groups, providing five days of sick leave due to the flu and between ten and eighteen days for cancer treatment. The UK and Ireland differ from the rest of Europe to a great extent. The limited coverage is clearly closer to regulations in Canada, Japan and the US.⁸⁶ Another study, in this case by the World Health Organization, compared the number of days lost due to sickness in selected countries. The highest rates of sickness-related absence are found in the Czech Republic and Sweden, while the UK and France have the lowest rates. The study puts forward several possible explanations but casts light on factors such as the

⁸³ ILO Convention concerning Social Security (Minimum Standards) (adopted 8 June 1952, entry into force 27 Apr. 1955).

⁸⁴ ICESCR, *General Comment no. 19: The Right to Social Security (Art. 9 of the Covenant)*, E/C.12/GC/19 (4 Feb. 2008).

⁸⁵ United Nations (UN), *Transforming Our World: The 2030 Agenda for Sustainable Development*, A/RES/70/1 (Resolution adopted by the General Assembly on 15 Sept. 2015).

⁸⁶ J. Heymann, H. J. Rho, J. Schmitt & A. Earle, *Contagion Nation: A Comparison of Paid Sick Day Policies in 22 Countries*, Ctr. Econ. & Pol’y Res. 10 (2009).

requirement of medical certificates after a certain number of sick days and the amount of income replacement.⁸⁷ The study concludes that the countries with the most complete benefit schemes and highest income replacements such as Austria, Luxembourg and Germany are in the group with average rates of sickness-related absence. It is furthermore evident that countries with no or limited benefits report the lowest number of days lost due to sickness.⁸⁸ The US is among the countries without any national programme for paid sick leave. Relying solely on voluntary employer policies for short-term illness leaves approximately 40% of the private-sector workforce in the US without paid sickness or leave.⁸⁹

According to an EU report on sick pay and sickness benefit schemes, it is essential to realize that recovery differs for each type of disease or disability. In order to deal effectively with the emerging challenges, this needs to be considered carefully. The importance of analysing each group and developing programmes addressing the specific problems accordingly is therefore crucial. The launch of various programmes tackling the prevention of stress-related mental disorders and the reintegration of workers leaving the labour market because of such concerns has been successful for instance in Germany.⁹⁰ Both paid sick leave and rehabilitation programmes are therefore necessary to ensure recovery from sickness in order to enable the employee to resume work as soon as possible. Due to the different nature of various diseases, the individual combination of these two factors may be a solution in the process of recovery respecting the interests of both employers and employees.⁹¹

The human right to paid sick leave is of great importance to avoid unhealthy presenteeism. It was and still is often argued that overly generous benefits in case of sick-related inability to work may give rise to incentives for excessive absences.⁹² It cannot be dismissed out of hand that there is such a risk. However, these days, income support in the case of sickness is paid with severe restrictions. This is an effective way to prevent abuse but may lead to presenteeism if employees are afraid of being sanctioned by the employer and/or the insurance company when claiming for benefits. Employers and insurance companies should respect the employee's privacy when dealing with sickness absences and salary compensation.

⁸⁷ X. Scheil-Adlung & L. Sandner, *The Case for Paid Sick Leave*, *World Health Report Background Paper no. 9, 10* (2010).

⁸⁸ *Ibid.*, at 13; Heymann et al., *supra* n. 86, at 8.

⁸⁹ Heymann et al., *supra* n. 86, at 1, 16.

⁹⁰ Work Programme 2013–2018, *Protection and Strengthening of Health in the Case of Work-Related Mental Load*, <http://www.gda-portal.de/en/Workprogrammes/Workprogrammes.html> (accessed 4 Dec. 2017).

⁹¹ European Commission, *Sick Pay and Sickness Benefit Schemes in the European Union*, Background report for the Social Protection Committee's 27 (17 Oct. 2016).

⁹² Scheil-Adlung et al., *supra* n. 87, at 4.

4.3 THE RIGHT TO PRIVACY OF EMPLOYEES

The relation between the right to privacy of employees and presenteeism might not be apparent at first glance. However, if one shifts the perspective from the narrow relationship between employer and employee to a broader one, it becomes evident that there are other parties involved. Information about the employees' health is a highly sensitive matter. In situations where employees are not reporting for work due to sickness, the relevant information is dealt with by the employer and it is likely that third parties such as insurance companies are provided with the same data as well. Moreover, it is common for companies to have specific and detailed statistics about the absence of their workers. The inherent danger of such statistics is the accumulation of excessive information and the gradual build-up to a comprehensive collection of personal data on the health status of each employee.⁹³ This danger is further exacerbated by massive and ever increasing digitalization in the world of work which tends to facilitate the loss of boundaries between work and private life and between where we work and where we live. This creates new opportunities for greater autonomy on the part of employees.⁹⁴ However, it also poses a serious risk to employee health and the right to privacy. Digital technology enables new forms of employee surveillance, including surveillance of their health status.⁹⁵ As a result, it has never been easier for employers to collect, save and process the personal data of their staff, even data about health.

Privacy protection of employees is not just a question of contractual agreements between the employer and the employee, nor is it simply part of the employer's prerogative to decide where the line has to be drawn between the company's interests for surveillance and the employee's wish to protect their privacy. These issues have a human rights dimension.

Article 12 of the UDHR (1948) guarantees a right to privacy:

No-one shall be subjected to arbitrary interference with his privacy, family, home or correspondence, nor to attacks upon his honor and reputation. Everyone has the right to the protection of the law against such interference or attacks.

Article 17 of the International Covenant on Civil and Political Rights (ICCPR)⁹⁶ lays down the same right. But neither the workplace nor worker privacy are mentioned in

⁹³ The danger of these absence management systems is well known and addressed by applying strict security requirements, see e.g. the Dutch Data Protection Authority, ICT Law Newsletter no. 52, 10 (2015), <https://www.stibbe.com/~media/03%20news/newsletters/brussels/benelux%20ict%20law%20newsleter%20-%20n52%20-%20dec%202015.pdf>, as in Switzerland: Préposé fédéral à la protection des données et à la transparence (FPD), *Contrôle de santé pour les collaborateurs de la Poste*, <https://www.edoeb.admin.ch/dokumentation/00153/00215/00256/index.html?lang=fr> (accessed 4 Dec. 2014).

⁹⁴ T. Maruyama, P. G. Hopkinson & P. W. James, *A Multivariate Analysis of Work-Life Balance Outcomes from a Large-Scale Telework Programme*, 24(1) NTWE 76, 77 (2009).

⁹⁵ S. Wallach, *The Medusa Stare: Surveillance and Monitoring of Employees and the Right to Privacy*, 27(2) Intl. J. Comp. Lab. L. & Indus. Rel. 189, 191 (2011).

⁹⁶ UN, International Covenant on Civil and Political Rights (entry into force 23 Mar. 1976).

these conventions and there is a lack of relevant jurisprudence in the case law of the Human Rights Committee for the surveillance of the ICCPR. The ICESCR does not mention a specific right to privacy. However, the above-mentioned Article 7 of the ICESCR guarantees a right to the enjoyment of just and favourable conditions of work ensuring ‘rest, leisure and reasonable limitation of working hours and periodic holidays with pay, as well as remuneration for public holidays’.

In Europe, privacy protection has its foundation in the Charter of Fundamental Rights of the European Union (EU Charter),⁹⁷ the recently adopted EU directive on data-protection regulation,⁹⁸ in the European Convention on Human Rights (ECHR), Convention 108 of the European Council⁹⁹ and national legislation at constitutional and statutory level. For a long time, the European Court of Human Rights (ECtHR) in Strasbourg paid scant attention to the potential of the ECHR for the protection of workers’ rights in general. The right to privacy is part of the right to protection of family and private life pursuant to Article 8 of the ECHR. On a first reading of this article, there is hardly any obvious link to forms of privacy infringements regarding employment. However, based on the ‘living instrument method’ and ‘the doctrine of positive obligations’ the Court has moved to a more labour-rights friendly approach by interpreting the ECHR in the light of labour rights anchored in ILO conventions, the CESC, the Civil and Political Rights and the European Social Charter.¹⁰⁰ The ECtHR held in its pathbreaking judgment in *Niemietz v. Germany* that work-related issues are part of protected private life under Article 8 ECHR.¹⁰¹ Employees do not give up their privacy rights just because they are employees. According to the Court, it must be considered that ‘it is not always possible to distinguish clearly which of an individual’s activities form part of his professional or business life and which do not’. The clear endorsement of the idea that the right to privacy and the right to work are complementary found its way into numerous subsequent judgments.¹⁰²

The courts have to balance the legitimate interests of the employer on the one hand and the right to privacy of the employees on the other. Information about

⁹⁷ Charter of Fundamental Rights of the European Union (EU Charter) (ratified 7 Dec. 2000).

⁹⁸ Directive 95/46/EC of the European Parliament and of the Council of 24 Oct. 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data, OJ L 281, at 31–50 (23 Nov. 1995).

⁹⁹ Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data ETS No.108, Strasbourg (entry into force 1 Oct. 1985).

¹⁰⁰ Eur. Court HR, *Demir and Baykara v. Turkey*, judgment of 12 Nov. 2008, Application no. 34503/97.

¹⁰¹ Eur. Court HR, *Niemietz v. Germany*, judgment of the 16 Dec. 1992, Application no. 13710/88.

¹⁰² See especially Eur. Court HR, *Barbulescu v. Romania*, judgment of 5 Sept. 2017, Application no. 61496/08; in the landmark decision the court has recently confirmed that the monitoring of an employee’s electronic communications is violating Art. 8 of the ECHR; see further Eur. Court HR, *Sidabras v. Lithuania*, judgment of 27 July 2004, Application no. 55480/00; Eur. Court HR, *Kosiek v. Germany*, judgment of 28 Aug. 1986, Application no. 9704/82; Eur. Court HR, *Karov v. Bulgaria*, judgment of 16 Nov. 2006, Application no. 45964/99.

health status is an important part of the right to privacy. In *L.H. v. Latvia*¹⁰³ the applicant alleged that the collection of her personal medical data by a state agency – the Inspectorate of Quality Control for Medical Care and Fitness for Work – without her consent had violated her right to respect for private life. In this judgment the court made reference to the importance of the protection of medical data to a person’s enjoyment of the right to respect for private life. It held that there had been a violation of Article 8 of the ECHR. The applicable law had failed to indicate with sufficient clarity the scope of discretion conferred on the competent authorities and the manner of its exercise. In *Surikov v. Ukraine*¹⁰⁴ the Court argued that the use of mental health data by an employer for rejecting the application of an employee for promotion was a violation of Article 8 of the ECHR. The main problem in this case was that the applicable national law, as interpreted and applied by the domestic courts in the case, permitted storage of the applicant’s health-related data for a very long-term and allowed its disclosure and use for purposes unrelated to the original purpose of its collection.

Along with the development of new information and communications technologies, more threats and challenges regarding the protection of employees’ right to privacy in the workplace are arising. Even though it is a long-standing practice for employers to gather information for various reasons (e.g. suitability), the nature of data processing has significantly changed due to computers. It is an established and practical method for surveillance of employees not only while at work but also outside of work. In particular, information about an employee’s off-duty activities may give rise to an issue concerning the employee’s right to privacy.¹⁰⁵ ‘Bring your own device’ policies as well as monitoring of home and remote working are now widespread. As a result, no special skills are necessary for an employer to check the speed and accuracy with which each employee is working, or the amount of time during the day spent on breaks.¹⁰⁶

A particularly sensitive aspect of the issues mentioned above is the collection and processing of personal data, especially regarding health. It is becoming more and more common among employers to distribute wearable devices to monitor the health and activity of their employees. The heart rate, the number of steps, blood sugar levels, sleeping patterns to mention just a few are among the types of information collected with such devices and often only accessible to the employer or to the third party processing the data.¹⁰⁷ Due to an awareness that constant

¹⁰³ Eur. Court HR, *L.H. v. Latvia*, judgment of 29 July 2014, Application no. 52019/07.

¹⁰⁴ Eur. Court HR, *Surikov v. Ukraine*, judgment of 26 Jan. 2017, Application no. 42788/06.

¹⁰⁵ D. G. Ford & M. Ludlum, *Employee Privacy Outside the Workplace*, 322 (XXVI) S.L.J. 321, 337 (2016).

¹⁰⁶ S. Wallach, *Who’s Info Is It Anyway? Employees’ Rights to Privacy and Protection of Personal Data in the Workplace*, 23(2) Intl. J. Comp. Lab. L. & Indus. Rel. 195, 201 (2007).

¹⁰⁷ Art. 29 Data Protection working party, 17/EN WP 249, Opinion 2/2017 on data processing at work, at 18 (adopted on 8 June 2017).

surveillance can be carried out, the employee is more likely to aim for a perfect attendance record and report for work while sick.

Even though such a scenario still seems something in the future, this acquired data will allow medical and genetic profiling and is likely to influence decisions about hiring, promotion or dismissing employees.¹⁰⁸ In some cases, companies are offering discounts if employees wear a wristband that enables the tracking of exercise and health data. The notification of the successful reduction of healthcare costs for employers is putting more and more pressure on employees to agree to participate and share their data.¹⁰⁹

There is a clear link between the right to privacy and the problem of presenteeism. If working conditions are not just and favourable, and if there are no strict working time regulations to protect employees from excessive workloads, the risk of employees continuing to work despite sickness arises. Furthermore, the use of the data on sick employees by the employer should respect data protection rules and privacy rights. Otherwise employees will hesitate to take sick leave when it is necessary from a medical point of view, despite sick pay provisions. The importance of addressing the problems of presenteeism is arguably of great urgency since chronic diseases will increase in the future because of the constantly rising pressure related to work.¹¹⁰

5 SUMMARY AND CONCLUSIONS

Presenteeism is a relatively new phenomenon in the workplace which affects the employer, the employee, but also the social security system, and it can pose a serious threat to public health. This is the case when employees with contagious diseases are reporting for work which obviously increases the risk of transmission.

The impact of presenteeism should not be underestimated. There are a number of studies showing that presenteeism is widespread in different parts of the world. Regarding costs, there is evidence that the costs of presenteeism are higher than for absenteeism. The costs comprise the loss of productivity, the medium- to long-term risk of more serious health problems, the increased risk of inability to work of the employee, and the medium- to long-term expenses for social security and social welfare institutions.

¹⁰⁸ Wallach, *supra* n. 95, at 204.

¹⁰⁹ A. Kunz & M. Fabricius, *Lassen Sie sich überwachen – und sparen Sie Geld*, <https://www.welt.de/finanzen/versicherungen/article138205966/Lassen-Sie-sich-ueberwachen-und-sparen-Sie-Geld.html> (accessed 9 Mar. 2015); Neue Zürcher Zeitung & G. V. Müller, *Der vernetzte Mitarbeiter*, <https://www.nzz.ch/wirtschaft/der-vernetzte-mitarbeiter-1.18510128> (accessed 26 Mar. 2015).

¹¹⁰ Henneberg et al., *supra* n. 1, at 40.

There are many different reasons why employees are reporting for work despite bad health. There is evidence that the lack of effective legal protection from dismissal due to sickness and the lack of paid sick leave are important drivers for the rise of presenteeism. Abuse of sensitive personal data about health by employers can also encourage employees to conceal health problems and continue to work against medical advice. There are also organizational factors influencing presenteeism. A work-culture in which taking sick leave is perceived to be a weakness or lack of a replacement in the case of the absence of an employee are other reasons for presenteeism. Finally, individual attitudes on how to deal with health and sickness in general also play a role when it comes to presenteeism.

Neither the regulatory and organizational nor the individual aspects of presenteeism are 'a law of nature', 'god given' or simply destiny. The ongoing challenge from the classic to the active welfare state has considerable importance for the way the state regulates the protection of employees including paid sick leave and the way employers and insurance companies manage absence from work and promote health in the workplace. It is obvious that individual attitudes to health are also influenced by legal regulations and organizational structures within companies. More than ever, employees are coming under pressure from market commodification and there are serious risks for basic human labour rights, such as the right to work as well as the right to just and favourable working conditions, the fundamental right to social security including paid sick leave, and the right to privacy.

It is therefore necessary to recognize the presence of sick employees in the workplace and take action aimed at reducing this phenomenon. Protection against dismissal while sick and due to sickness, reasonable accommodation for workers who are sick, paid sick leave and privacy protection are all important at a regulatory level. A working environment favourable to health and a human rights-based approach to human resource management are not just in the interest of employees, but also the best options from a public health perspective.

