EELA EUROPEAN EMPLOYMENT LAWYERS ASSOCIATION

SUMMARY

2016/37 More days of leave for employees over 50 is unjustified unequal treatment (GE)

<p>If a collective agreement grants older employees a higher vacation claim solely because of their age, a younger employee is entitled to the same number of days of leave.</p>

Summary

If a collective agreement grants older employees a higher vacation claim solely because of their age, a younger employee is entitled to the same number of days of leave.

Facts

The plaintiff, born in 1959, was employed by a university hospital (the defendant). The employment relationship was governed by a collective agreement. Until 2008, the number of days of paid annual leave to which employees were entitled in any one year depended on the employees' age, according to the following table:

under 30 years
26 days

30-40
29 days

40-50
30 days

50 and over
33 days

In 2007, the collective agreement was amended with effect from 1 January 2008. The amount of paid annual leave for which employees were eligible no longer depended on age but on years of service, according to the following table:

1-3 years of employment
26 days

4-7 years
28 days

8 or more years
30 days

However, the collective agreement contained a 'grandfathering' clause (i.e. a transitional provision). Employees who, at the time the new agreement came into force, were entitled to a greater number of leave days continued to be entitled to that greater number. Accordingly, the plaintiff, who was aged between 40 and 50 at that time, was entitled to 30 and not 28 days of leave in 2007 and 2008.

In 2009, the plaintiff turned 50. He claimed entitlement to 33 days of leave per year. His employer refused to grant him more than 30 days. The same happened in 2010, 2011 and 2012.

The plaintiff sued the defendant for compensation for 4 x 3 = 12 extra days of leave, arguing that he was entitled to these on grounds of equal treatment, given that his older colleagues were still being granted 33 days of leave annually.

The defendant argued that the different treatment of employees according to the former collective agreement was to support the health of older employees as they have a greater need for recuperation.

Both the local Labour Court and the Regional Labour Court decided in favour of the defendant and dismissed the claim. The plaintiff appealed to the Federal Labour Court (Bundesarbeitsgericht, the 'BAG').

Judgment

The BAG held that the plaintiff was entitled to compensation for three extra holidays accrued in 2012. Entitlement for the years 2009-2011 had become time-barred because of a limitation period stipulated in the collective agreement.

In its decision, the BAG clarified that the age-related entitlement to leave stipulated in the former collective agreement constituted unjustified unequal treatment. Therefore, the plaintiff was entitled to the three extra days of leave.

Unequal treatment is found in cases where the employer treats an employee differently

compared to other employees only because of his or her age and no further justification is given. According to Section 10 of the German General Equal Treatment Act (Allgemeines Gleichbehandlungsgesetz, the 'AGG'), which is a transposition of Directive 2000/78/EC, unequal treatment can only be justified if an objective reason is given, the measure is reasonable and it is made in pursuit of a legitimate aim. A measure is reasonable and necessary if no less restrictive but equally effective measure exists. The employer bears the burden of showing justification.

In the present case, the higher leave entitlement for employees over 50 constituted unequal treatment. Moreover, the BAG held that the required justification was not found, as the employer did not provide a sufficient explanation as to why older employees required more leave. As a general principle, it is not correct to say that older employees necessarily require more time to recuperate than younger ones, and the employer needed to support this by giving more specific reasons as to why this was the case for older employees. Further, the employer would have needed to explain why such longer recuperation periods were necessary for all employees older than 50 years, irrespective of their working conditions. The employer failed to give the necessary detailed explanation.

Measures which constitute age discrimination are invalid by section 7(2) AGG. This section does not provide a legal consequence, but both the BAG and the ECJ have recognized that the usual outcome should be a levelling-up. Therefore, the plaintiff was given three more days of leave entitlement. The grandfathering clause had no effect on this: because of the unjustified unequal treatment, the plaintiff was already entitled to extra leave before the date given in the grandfathering clause.

Commentary

This decision of the BAG is in line with its recent case law and evolves it a little further with regard to the requirements for justification of different treatment of employees by reason of their age.

The BAG already held in the past that, in accordance with section 10(1) AGG, differential treatment of older employees may be permitted, especially with regard to the amount of leave entitlement. It might be reasonable to grant older employees a higher vacation entitlement to compensate a greater need for recuperation, where this is required. A precondition for this is the pursuit of a legitimate aim. This must be evident and/or explicitly described. Moreover, the measure must be reasonable.

What is meant by 'older employees' is not legally defined. The BAG ruled that an employee turning 30 or 40 is not 'older' (see case report of Schreiner/Hellenkemper; EELC 2012-3/37).

However, the BAG has acknowledged (by a decision of 21 October 2014 – case number 9 AZR 956/12) that employees over 58 may be 'older' and have a greater need for recuperation in the case of physically demanding work. Two extra days of leave for those employees was not regarded as unjust unequal treatment. However, in specific circumstances (especially with regard to the work required and the legal basis for the claim for leave) even employees over 50 may be regarded as older employees and may require a few more days of leave for recuperation (this, according to the Regional Court of Mecklenburg-Vorpommern, decision of 19 February 2015, case number 5 Sa 168/14).

With this decision, the BAG has specified the requirements for justifying differential treatment, especially with regard to an older employee's greater need for recuperation. The reasons must be presented in detail and must refer to the employee's work. In the present case, the employer did not provide this and accordingly, the court ruled that unjust unequal treatment was made out.

Comments from other jurisdictions

Greece (Elena Schiza, KG Law Firm): There is no doubt that the principle of equal treatment is applicable in Greece and should be taken into account throughout the whole term of the employment agreement. According to both the Greek Constitution and Law 3304/2005 (which transposed Directive 2000/78/EC in Greece), unequal treatment can only be justified if an objective reason exists, the applicable measure is reasonable and it pursues a legitimate purpose, i.e. the measures undertaken are appropriate, necessary and adequate to the aim pursued. Therefore, preferential treatment conditions included either in collective agreements or in individual employment contracts might be validly provided in order for 'certain special groups', for example, older or younger employees to be integrated or re-integrated in the labour market.

Greek case law complies with the requirements of the Directive and the Greek Constitution. The courts have ruled that discriminatory clauses included either in collective labour agreements or in individual employment contracts are not acceptable unless they are required for social or public interest reasons. In order to avoid claims related to unequal treatment, the 'legitimate purpose' of integrating young people into the labour market or to the protection of older employees should be strictly defined.

In the case at hand, the provision of three additional annual leave days to employees over 50 years old does not accord with a justified purpose, as described above, since the need for recuperation is not necessarily linked to one's age. Therefore, the Greek Courts would consider a situation in which two categories of employees are treated differently, yet they do

the same kind of work under the same conditions and in the same capacity, solely because of their age difference, in circumstances where this is not justified by general public or social interest reasons, as unlawful unequal treatment.

The Netherlands (Peter Vas Nunes, BarentsKrans): The issue of "senior employee schemes" was a hot topic in The Netherlands five to ten years ago. The issue seems to have subsided. This may be because granting older employees special benefits (extra days of paid leave, reduced working hours, early retirement, day shifts, etc.) has gone out of fashion, but the largely uniform approach taken by the Human Rights Commission and the courts may also have played a role.

Interestingly, the German collective agreement described above replaced a term of employment that was directly age-discriminatory (extra days of paid leave on the basis of age) by a term that was still discriminatory, but now only indirectly so (extra days on the basis of seniority). Indirect age discrimination is slightly easier to justify than direct age discrimination, given that, contrary to Article 6 of Directive 2000/78, Article 2(2)(b) does not require a social policy objective. Except for this, however, there is no difference. It would be interesting to know whether the parties who concluded the collective agreement at issue in this German case believed that, by replacing age with seniority, they were making their collective agreement compliant with the law on age discrimination.

Initially, the Dutch Human Rights Commission (at that time still the Equal Treatment Commission) took the view that senior employee schemes are unjustifiable. This caused a stir, as such schemes were widespread. In 2006, the Commission softened its position, introducing an "all circumstances" test. Briefly, the Commission now considers that extra benefits for older employees in collective agreements may be justified, on a case by case basis, if their objective is to allow older employees to stretch their working life by reducing the pressure of their job and this objective is supported by a broader policy that aligns work and age groups within the organisation. Examples of such a broader policy are measures in the field of medical examinations, social support, job rotation, task reduction, occupational training and hiring. This is a difficult test to pass.

An issue that comes up whenever a senior employee scheme is incompatible with the law on age discrimination, is what effect this has on the scheme. Does the incompatibility have a 'levelling up' or a 'levelling down' effect? Judging by the case reported above, the Bundesarbeitsgericht seems to take a levelling up approach. The case report does not make clear why this is the case, simply telling readers (i) that the age-related provision on paid leave in the collective agreement at issue constituted unjustified unequal treatment on grounds of age and (ii) that "therefore" the plaintiff was entitled to extra paid leave. In 2010, and again in

2013, a Dutch Court of Appeal allowed an employer to abolish extra paid leave for their senior employees, reasoning that no employer can be under an obligation to apply a collective agreement that violates the law and that, as the relevant provision in the collective agreement was unlawful, it was ineffective and must be deemed not to exist.

Subject: Discrimination; age

Parties: Unknown

Court: Bundesarbeitsgericht (Federal Labour Court)

Date: 12 April 2016

Case number: 9 AZR 659/14

Publication: http://juris.bundesarbeitsgericht.de/cgi-bin/rechtsprechung/document.py?Gericht=bag&Art=en&Datum=2016&nr=18685&linked=urt

---

Creator: Bundesarbeitsgericht (Federal Labour Court)
Verdict at: 2016-04-12
Case number: 9 AZR 659/14