SUMMARY

2015/37 Employer may not treat involuntary garden leave as paid leave unless the employee can be certain he will be paid during the leave before it begins (GE)

<p>If an employee is put on garden leave, his or her entitlement to annual leave can only be fulfilled by the employer by means, either of payment before the leave begins, or an unreserved promise of payment for all remaining leave.</p>

Facts

The plaintiff had been employed by the defendant since 1 October 1987. By a letter dated 19 May 2011, the defendant issued extraordinary notice of termination with immediate effect. The reason for this summary dismissal is not known; presumably the employee had behaved in a manner that his employer considered to constitute gross misconduct. Perhaps worrying that the employee might successfully challenge the dismissal as not having been for a sufficiently compelling reason, the employer also wrote that if the summary dismissal was unlawful, ordinary notice of termination was given under the statutory notice period, which meant that the contract of employment would end on 31 December 2011 in that event. The letter added that, in that event, the employee was released from performing further work for the company with immediate effect. In other words, he was put on (involuntary) “garden leave”. On the date of the dismissal, the employee had a remaining vacation entitlement of 15.5 days. In the letter, the employer took the position that those 15.5 days would be treated as taken within the notice period, so that there would be no payment in lieu (the “deduction

clause").

The employee brought legal proceedings. He claimed payment of the 15.5 days of paid leave that he had accrued but not taken. On 17 June 2011, in the course of the proceedings, the parties settled the dispute. The settlement agreement provided for: (i) termination of the employment relationship with effect from 30 June 2011; (ii) continuation of the garden leave with full remuneration until that date; (iii) payment of salary for the period 19 May to 30 June 2011 and (iv) full and final settlement of all mutual claims. The settlement did not provide a clause expressly dealing with the employee's remaining vacation entitlement.

Subsequently, the parties argued about whether the release of the plaintiff from his duties was effective or not and, in connection with this, whether the plaintiff still had a claim for payment of unused paid leave, as provided in section 7 of the German Federal Vacation Act (Bundesurlaubsgesetz, the 'BUrlG'). For a good understanding of this case it should be noted that traditional German doctrine allows an employer to place an employee on paid garden leave and determine that the employee is deemed to use up his accrued entitlement to paid leave during the garden leave.

Lower court rulings

The *Arbeitsgericht* held that the garden leave (which eventually lasted from 19 May to 30 June 2011) had enabled the plaintiff to take his 15.5 days of paid leave and that this, combined with the deduction clause in the termination letter meant that he had no claim for payment in lieu of paid leave.

The plaintiff appealed to the *Landesarbeitsgericht* ('LAG') of Hamm. The LAG, overturning the *Arbeitsgericht's* judgment, partly amended that judgment and ordered the defendant to pay the plaintiff compensation for the leave he had been unable to take. It held that the compensation claims of the plaintiff had not been fulfilled by means of the release combined with the deduction clause. Relying on the case law of the European Court of Justice on Article 7 of the Working Time Directive (2003/88/EC), the LAG reasoned that entitlement to annual leave and entitlement to payment during leave are two different aspects of one claim that has a unitary character. The LAG went on to reference Article 11 (2) BUrlG. It provides that the employee's salary covering the leave period must be paid before the leave begins, i.e. in advance. Clearly, unilaterally placing an employee on garden leave without pay is not compatible with this system in a situation, such as in this case, where the employer alleges that the employment has ceased and where the employee would therefore need to await a court's verdict on his employment status before being paid. Further, the LAG found that the wording of the settlement agreement did not include a grant of leave by means of paid garden

leave. The defendant then appealed to the *Bundesarbeitsgericht* (BAG).

Judgment

The BAG confirmed the decision of the LAG insofar as it held that the plaintiff's entitlement to vacation was not completely fulfilled by means of the part of the letter of dismissal regarding release from work in the alternative (i.e. in the event the dismissal needed to be treated as an ordinary dismissal with notice, effective as of 31 December 2011).

Applying section 1 BUrlG and Article 7 of the Working Time Directive, the BAG stated that to fulfil an employee's entitlement to paid vacation, the employee must be put in a situation during his vacation that is comparable to his work time. The employer is, in other words, obliged to pay the employee his usual remuneration during the employee's leave. The Court stated that a release from the duty to perform further work by the employer can only fulfil the employee's entitlement to vacation if the employee knows, before his leave begins, that he will be paid his full salary during the entire leave period. In the present case, the BAG held that the employee could not be sure that he would receive his full remuneration at the time he was dismissed, as it was not clear at that time whether the employment relationship was terminated by the extraordinary or the ordinary termination process. In regard to the ordinary notice of termination, the employee did not know until the settlement was agreed whether he would be paid for the time he was on leave. Moreover, on the date he was dismissed he could not know how many days of paid leave he would be entitled to, given that if his employment continued beyond 19 May 2011, he would continue to accrue paid leave, in which case his entitlement would be more than 15.5 days.

The BAG concluded from the above that an employer can only grant leave by means of a release of duties set out in a termination letter (combined with an deduction clause), if he pays the employee for his leave before the vacation starts or, alternatively, if he promises unreservedly to pay.

Nevertheless, in the final outcome, the BAG overruled the decision of the LAG and held that by the time of the termination of the employment relationship, the plaintiff's claim for paid vacation had already been fulfilled, as the parties had agreed by implication on a release of the plaintiff with deduction of leave entitlement in their court settlement. The BAG gathered from the settlement's clear reference to the termination letter that the parties agreed on compensation for leave by means of paid garden leave from the date of notice until the termination date of 30 June 2011.

Commentary

Until its present decision, the BAG had worked on the assumption that a precautionary (that is to say, conditional) grant of vacation by an employer (the condition being that the termination was invalid) was lawful, as the employer had a legitimate interest in avoiding the accumulation of claims for holiday pay, even if it was unclear whether the employer had to pay leave pending final judgment about termination.

In the decision at hand, the BAG modified this case law, holding that the purpose of annual leave is to give the employee the opportunity to recover from his work and this can only be achieved if the employee knows during his leave that he is being paid for it. Any later award of entitlement to paid leave through a court decision is not sufficient.

From a practical point of view, the judgment will increase the requirements on employers when they grant leave based on summary dismissal in combination with a deduction clause – a quite wellestablished procedure in German labour law. According to the BAG, an effective grant of leave that fulfills the employee's entitlement to annual leave requires – besides an irrevocable release from the duty to perform further work – payment for leave at the beginning of the release period - or at the very least, an unreserved promise of payment by the employer.

Comments from other jurisdictions

The Netherlands (Peter Vas Nunes): The outcome of this case would have been different under Dutch law, which provides that (barring some exceptions or an agreement to the contrary) it is the employee, not the employer, that determines when his or her leave begins and ends. A Dutch employer cannot unilaterally determine that any period (for example the notice period in the event of termination) constitutes vacation (i.e. paid leave). On the other hand, the final settlement clause would probably have been held to block the employee's claim.

Creator: Bundesarbeitsgericht (Federal Labour Court)
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Case number: 9 AZR 455/13