

SUMMARY

## **2011/61: Forfeiture of holiday claims (GER)**

***&lt;p&gt;The German Federal Labour Court (the &amp;lsquo;BAG&rsquo;) recently decided two cases regarding the forfeiture of entitlement to paid leave and to compensation in lieu of paid leave. Claims for compensation in lieu of paid leave, accrued in the course of long-lasting disability, may be subject to a forfeiture clause. Limitations on an employee&rsquo;s ability to transfer holiday entitlement to the following calendar year also apply to claims for paid leave accrued in previous years.&lt;/p&gt;***

### **Summary**

The German Federal Labour Court (the 'BAG') recently decided two cases regarding the forfeiture of entitlement to paid leave and to compensation in lieu of paid leave. Claims for compensation in lieu of paid leave, accrued in the course of long-lasting disability, may be subject to a forfeiture clause. Limitations on an employee's ability to transfer holiday entitlement to the following calendar year also apply to claims for paid leave accrued in previous years.

### **I. BAG case 9 AZR 352/10 (forfeiture clauses)**

#### **Facts**

A nurse was completely unable to work owing to illness from October 2006 until the termination of her employment relationship at the end of March 2008. In February 2009, eleven months after she had left, she claimed compensation for unused paid leave for the years 2007 and 2008 from her former employer.

The employer invoked Section 37(1) of the applicable collective agreement (the 'TV-L'). It

provided that employment-related claims expire if they are not asserted in writing within six months of the due date of the claim.

### **Judgment**

The Federal Labour Court held that the plaintiff's claim for compensation in lieu of paid leave had expired pursuant to Section 37(1) TV-L because the plaintiff had failed to assert his claim within the prescribed time-limit. According to the Federal Vacation Act (*Bundesurlaubsgesetz*, the 'BUrlG')<sup>1</sup> a claim for compensation in lieu of paid leave becomes due when the employment relationship terminates. In this case the claim therefore became due at the end of March 2008 and needed to be made before the end of September 2008. A claim for compensation in lieu of paid leave is not a substitute for holiday entitlement but rather a simple claim for financial compensation. Contrary to claims for paid leave as such, a claim for financial compensation can be waived and is subject to the forfeiture clause in the relevant collective agreement. This applies both to claims for compensation for the statutory minimum holiday entitlement and to claims for contractual additional holiday entitlements, if any.

## **II. BAG case 9 AZR 425/10 (expiration in the event of inability to work)**

### **Facts**

The plaintiff had worked for the employer since 1991. He was entitled to 30 days of paid leave per calendar year. Between 11 January 2005 and 6 June 2008 the plaintiff was permanently unable to work owing to illness. After his recovery he came back to work in 2008, 145 working days before the end of the year. Within the course of that year the employer granted the plaintiff 30 holidays (i.e. his complete annual holiday entitlement for 2008). The plaintiff applied for a declaratory judgment that he had not lost his entitlement to 90 days of paid leave for the years 2005, 2006 and 2007 (i.e. 3 x 30 days).

### **Judgment**

The plaintiff's claim was denied. According to the law<sup>2</sup> annual leave generally needs to be granted and taken within the current calendar year, and a transfer of leave days to the following calendar year is only possible for urgent business or personal reasons<sup>3</sup>. In the event of such a transfer, the leave must be granted and taken before 31 March of the following calendar year<sup>4</sup>.

In the view of the Federal Labour Court, the plaintiff's claim in respect of the paid leave that had accrued in the years 2005-2007 expired on 31 December 31 2008. In the absence of an individual agreement or a provision in a collective agreement to the contrary, leave that is not

taken before the end of the leave year (31 December) expires if there is no reason for it to transfer. This applied to the transferred holiday entitlements from 2005-2007.

If an employee recovers within the calendar year, including the subsequent transfer period, he must take his leave if he wants to avoid losing it.

### **Commentary**

Employees who are unable to work for reasons of sickness are entitled to compensation for their holidays, as they are unable to take them because of their illness (cf. *Schultz-Hoff* decision of the ECJ, 1 January 2009, case C-350/06; Federal Labour Court of Germany, 3 March 2009, case 9 AZR 983/07). In the case of a termination of the employment relationship the former holiday entitlement transforms into a claim for compensation under §7(4) of the BUrlG. Such claims may have a significant financial impact on employers.

Following *Schultz-Hoff*, the BAG decided two cases relating to holiday entitlement and corresponding claims for compensation in a way that went against the earlier, more employee-friendly stance. According to the earlier BAG case law, forfeiture clauses that apply more generally, do not apply to holiday compensation claims. The reason for this was that the application of a forfeiture clause was considered to violate §13 of the BUrlG, which prohibits contractual provisions that deprive an employee of his statutory right to paid leave. By contrast, the BUrlG only requires the employee to claim leave within the calendar year, and therefore, a shorter forfeiture period was invalid and void.

Until now, the BAG has not ruled on whether claims for holiday compensation are also subject to contractual forfeiture clauses. In our view, it would be logical to apply contractual forfeiture clauses in claims for holiday compensation.

The second decision of the BAG appears to be sound: if the employee did not wish to lose his holiday entitlement he should have taken his accrued leave before the end of 2008. This would also apply in the case of termination of the employment relationship, in which case all accrued leave should be taken before the termination date, even if this means not performing any work for the remainder of the year.

In essence, both decisions achieve the aim of integrating the new case law of the ECJ into the German legal practice and are useful in that sense.

It is likely that statute and/or collective bargaining agreements relating to long-term illness and holiday entitlement will develop in future: On 22 November 2011 the ECJ (case C-214/10, 'KHS') delivered another judgment on the limitation of holiday entitlements in the case of

long-lasting incapacity to work. The judgment concerned national legislation and national practice, such as is contained in collective bargaining agreements, that restrict the accumulation of holidays. The court held that these national rules may, within certain limits, stipulate a limitation in the accrual of holidays during illness. If the leave is not taken within the time the entitlement to it expires, even if the employee was unable to make use of the holidays due to illness the employee will have forfeited his right to it. According to the ECJ, as stated in this judgment, such rules are compatible with the applicable holiday entitlement directive. It remains to be seen whether a provision to that effect will be incorporated into the BUrlG, but it is likely that the relevant provisions will be found in collective bargaining agreements.

**Footnotes**

<sup>1</sup> Section 7(4) of the Federal Vacation Act (Bundesurlaubsgesetz, the 'BUrlG'): "If the holiday cannot be granted in its entirety or in part on account of termination of the employment relationship, appropriate holiday compensation must be granted."

<sup>2</sup> Section 7(3)(1) BUrlG: "Holiday must be granted and taken within the current calendar year."

<sup>3</sup> Section 7(3)(2) BUrlG.

<sup>4</sup> Section 7(3)(3) BUrlG.

**Subject:** paid leave

**Parties:** not known

**Court:** Bundesarbeitsgericht (Federal Labour Court)

**Date:** 9 August 2011

**Case numbers:** 9 AZR 425/10 and 9 AZR 352/10

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**Creator:** Bundesarbeitsgericht (Federal Labour Court)

**Verdict at:** 2011-08-09

**Case number:** 9 AZR 425/10 and 9 AZR 352/10