EELA EUROPEAN EMPLOYMENT LAWYERS ASSOCIATION

SUMMARY

2013/9 Under what conditions does Schultz- Hoff/Neidel not apply to extra-statutory paid leave? (GE)

<p>Provisions in a collective agreement that cause an employee to forfeit paid leave exceeding the statutory minimum in case of illness, are valid.</p>

Summary

Provisions in a collective agreement that cause an employee to forfeit paid leave exceeding the statutory minimum in case of illness, are valid.

Facts

The plaintiff was a full-time civil servant born in 1950. His terms of employment were determined by a collective agreement for civil servants, the TVöD (*Tarifvertrag für den öffentlichen Dienst*). This collective agreement entitled him to 30 days of paid leave per year. That is ten more than the German (and EU) minimum of 20 days. Article 26 TVöD provided that where the first day of paid leave ('vacation') is not taken before 31 March of the year following that in which the right to paid leave accrued, that right is automatically extinguished unless it was not possible to take the leave for operational reasons or because of sickness, in which case it is lost on 31 May of that year. Article 26 TVöD did not distinguish between statutory paid leave and the ten additional days of vacation per year.

The plaintiff was unable to work owing to sickness from 23 June 2007 until 7 October 2009. During his absence, the ECJ delivered its ruling in the well-known *Schultz-Hoff* case (ECJ 20 January 2009, case C-350/06). In that case, the ECJ held, essentially, that Directive 2003/88 prohibits national legislation that causes employees to lose paid leave that they were unable to use on account of sickness.

Upon his return to work in October 2009, the plaintiff was granted 20 days of paid leave for each of the years 2007 and 2008 in accordance with *Schultz-Hoff*[1], but not the ten extra days for those years. He brought a claim before the local Labour Court. Both that court and, on appeal, the Court of Appeal, dismissed his claim. He appealed for the Federal Labour Court (*Bundesarbeitsgericht* or 'BAG').

Judgment

The BAG referred to its case-law that statutory paid leave is not lost where an employee was unable to take it on account of sickness. However, this case law does not apply to additional (extra-statutory) paid leave over and above the 20 day minimum, given that Directive 2003/88 applies exclusively to this minimum, as ruled by the ECJ in *Neidel* (ECJ 3 May 2012, case C-337/10). In that case, which concerned a German civil servant who retired and claimed payment in lieu of paid leave untaken, the ECJ ruled that Directive 2003/88 does not preclude provisions of national law "*which do not provide for the payment of an allowance in lieu if a public servant who is retiring has been unable to use [that] additional leave because he was prevented from working because of sickness*".

However, in order for an employee to lose extra-statutory paid leave that he has been unable to use, it is necessary that the provision in question provides different rules regarding the extra-statutory portion. In the case at hand, the BAG found this distinction sufficiently clear, given that the TVöD provided different rules on the loss of paid leave from those contained in the Federal Leave Act ('BUrlG'):

-whereas Article 7(3) BUrlG provides that paid leave must be taken before 31 March of the following year, Article 26 TVöD provides that a civil servant's first day of paid leave must be before 31 March of that year;

-whereas the BUrlG causes paid leave to be lost in all cases where it is not taken before 31 March of the following year, Article 26 TVöD extends this period until 31 May in the event operational requirements or sickness prevent the leave from being taken before 31 March.

The BAG found these two differences to be sufficient to indicate that the parties to the TVöD had intended to establish different rules for the extinction of statutory leave and extra-statutory leave. Accordingly, the BAG ruled that Article 26 TVöD is not incompatible with EU law and that the plaintiff had lost his entitlement to extra-statutory leave for the years 2007 and 2008.

Commentary

Following the numerous decisions of the ECJ on statutory and extra- statutory leave days, section 26 TVöD has been the subject of a number of decisions by the German Federal Labour Court in the past year (see Commentary of *Schreiner/Hellenkemper*, EELC 2012-3/37). Questions surrounding leave days continue to be a hot topic.

In this case, the courts at three instances rejected the plaintiff's claim. However, the BAG's reasoning regarding the wording of the TVöD needs some explanation. The BAG addressed the question of whether or not the parties to the collective agreement had intended to provide specifically for the additional leave, although the clause itself did not distinguish between the statutory minimum and the additional leave. From the BAG´s point of view the answer had to be affirmative because at the time the TVöD came into force, there was no distinction between statutory minimum leave and additional leave. The issue only arose after the *Schultz-Hoff* decision, which caused a change in the interpretation of the German BUrlG regarding the forfeiture period. Therefore, at the time the TVöD was agreed, the possible invalidity of forfeiture periods in the BUrlG most likely did not even occur to the parties, yet it was clear that they wished to handle the situation differently from those regulations and come up with different rules. The rule that was established validly limits claims for additional leave.

However, the BAG clarified that the parties to a collective agreement have the right to regulate additional holidays granted in the agreement differently from the national provisions, as long as the statutory minimum of 20 days and the applicable laws on transfer and expiry remain untouched.

However, according to another decision of the BAG (9 August 2011 case No. 9 AZR 425/10) the plaintiff was not able to claim statutory leave for 2008, as the leave was also subject to an expiry period of 15 months.

Academic comment (Prof. Gregor Thüsing)

Unfortunately, the BAG erred in dismissing the claim of the plaintiff. It has over-expanded the wording of Art 26 TVöD by implying a distinction between statutory leave and extra-statutory leave. Yet such a distinction is not to be found even by the most extensive interpretation of the provision in question. Article 26 TVöD covers both statutory leave and extra-statutory leave - and thereby sets no legal time limit on the use of statutory leave.

Since the decision in *Schultz-Hoff* (ECJ 20 January 2009, case C-350/06) and the subsequent cases of KHS (ECJ 22 November 2011, case C-214/10) and Neidel (ECJ 3 May 2012, case C-337/10) national law on holiday leave has been turned upside-down and this caused - at least initially - considerable uncertainty about the leave entitlement. Since these cases, claims relating to annual leave have become a standard part of the repertoire of every employment

lawyer.

The abovementioned judgments have been important precedents for later cases. In *Schultz-Hoff* the ECJ ruled that a national provision that has the effect of invalidating leave entitlement infringes Art 7 (1) of the working-time directive 2003/88/EC and is therefore void if it does not exclude employees who were prevented from taking leave for factual reasons such as long term illness. In *KHS* the ECJ weakened the effects of the *Schultz-Hoff* judgment by deciding that leave entitlement does not have to remain exercisable for an indefinite term. An important function of leave is to allow employees to recover, but this can only happen if there is a certain temporal connection between working time and leave. Therefore, the ECJ allowed national provisions to limit the use of leave entitlement in time. If an employee did not take leave during the relevant year of the employment relation for whatever reason, the entitlement could expire after a certain time – i.e. when the leave could no longer fulfill the recovery function it was intended to provide. (In that case, the ECJ regarded a time limit of 18 months to be appropriate). Finally, in *Neidel* the Court decided that the *Schultz-Hoff* verdict could not be extended to additional extra-statutory paid leave. Therefore, a national provision which causes the expiry of annual leave after a certain time is valid, provided it only concerns, not the statutory minimum leave, but the additional extra-statutorypaid leave.

The case at hand concerned additional extra-statutory paid leave and not the statutory minimum leave. The question is therefore whether the BAG could, by reference to Neidel, deduce that the provision in the TVöD collective agreement was valid. The collective agreement in the case at hand is problematic in that it does not distinguish between the statutory minimum and additional leave. The wording of Article 26 of the collective agreement does not exclude the statutory minimum holiday, thus at first reading it appears to include both. If it did, the provision would be void, as mandatory paid leave (at least within a certain timeframe within the meaning of the *KHS* judgment, which is not respected by Article 26 of the collective agreement) cannot expire. However, the BAG used a purposive interpretation of Article 26 of the collective agreement. It argued that the parties to the collective agreement had intended to provide specifically for the additional holiday – even though the clause itself did not make that distinction.

If the parties to the collective agreement had anticipated the change in the interpretation of the BUrlG caused by the *Schultz-Hoff* decision, no doubt they would have wanted to handle the fate of statutory minimum holiday differently from that of additional leave. However, a hypothetical intention cannot overrule clear wording. Article 26 of the collective agreement is clearly formulated and leaves no room for interpretation. It does not indicate in any way that statutory minimum holiday should be treated differently from additional holiday. Because the provision is unambiguous, it also had to apply to statutory minimum leave. Yet if so, contrary

to the view of the BAG, Article 26 of the collective agreement would have to be regarded as void.

Footnote

1.The BAG's judgment does not confirm this; I deduce it from the fact that the plaintiff claimed 2 x 10 extra days but not 2 x 20 statutory days.

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