EELA EUROPEAN EMPLOYMENT LAWYERS ASSOCIATION

SUMMARY

2014/66 Effects of changes in working time on annual paid leave (AT)

<p>What happens to accumulated paid leave when a worker moves from full-time to part-time? The ECJ ruled on this question twice, in 2010 and again in 2013. The Austrian Supreme Court is taking a position that, according to some, is at odds with those rulings.</p>

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Facts

The plaintiff in this case was a works council. It entered into an agreement with the employer as a result of which the normal working time of full-time employees dropped from 38.5 hours to 34.4 hours per week. The working time reduction started on a certain date (the "Effective Date"), which was less than two weeks following the conclusion of the agreement. The agreement regulated the conditions applying to the working time reduction, with one exception: the parties failed to specify how annual paid leave acquired before the Effective Date ("Old leave") was to be treated. In the organisation in question, the employees were entitled by law to 30 business days of annual leave as stipulated in the Act on Annual Leave (*Urlaubsgesetz*). Paid leave was as a rule taken in the form of continuous periods of one or more weeks, and rarely in the form of single days off.

Not long after the Effective Date, the employer reduced the amount of Old leave. The works council took the position that what the employer did was unlawful, particularly as the period between the conclusion of the agreement and its entry into force was so short that most

employees were not capable of using up Old leave before the working time reduction began. The works council argued that an acquired right (including the right to payment in lieu upon termination of the employment relationship) had been unilaterally reduced and that this was discriminatory within the meaning of Directives 97/81 (part-time) and 2003/88 (working time).

The defendant employer argued that the Austrian Act on Annual Leave is based on a "calendric" notion. This means that paid leave automatically goes up or down with working time. For example, someone who had acquired two weeks of paid leave before the Effective Date (each week reflecting 38.5 hours worked) but takes that leave afterwards, still gets two weeks of leave (each week now reflecting 34.4 hours).

The *Landesgericht Steyr* found in favour of the employer. On appeal, the *Oberlandesgericht Linz* found partly in favour of the works council. Both parties appealed to the Supreme Court.

Judgment

The Supreme Court did not ask the ECJ for a preliminary ruling as it considered the legal situation clear. The Act on Annual Leave, although it states that every worker is entitled to a minimum of 30 business-days of leave annually, is based on the notion of "calendaric" leave. This means that the leave is actually calculated and to be taken in weeks and not based on singular days or hours as it was the case in the rulings C-486/08 (*Zentralbetriebsrat der Landeskrankenhäuser Tirols*) and C 415/12 (*Brandes*). In those rulings, it was not surprising that the ECJ considered a reduction of annual leave acquired during full time employment not permissible. In the opinion of the Austrian Supreme Court, this does not mean that it would be prohibited by EU law to construe an entitlement to leave that is independent of the amount of working time of the worker. As the court considered the Austrian legal entitlement to be calculated and used in weeks (and not in days or even hours actually worked), the changes in working time do not change anything about the amount of annual leave. As the aspect of rest is to be considered the primary aim of annual leave the factor that the continued pay is less if the worker is on leave during part time work has less weight.

The Supreme Court also pointed out that the entitlement to annual leave in Austria is at least 30 business days (Monday to Saturday excluding national holidays) regardless of the days actually worked by a worker during these days. Therefore taking into account the national holidays during the week, workers are entitled to more than five weeks of annual leave, which is more than the minimum provided in the Working Time Directive 2003/88/EC and therefore in line with it anyway.

On the other hand, the court upheld the ruling that for the financial compensation of unused

leave the remuneration has to be taken into account the employee would have earned had he/she taken the leave at the end of the employment relationship.

Commentary

Unfortunately, the judgments in this case are silent on specifics. This is because the works council asked the court to rule on an abstract question of law, a procedure that is possible in Austria. Let me try to clarify the issue by giving the fictional example of a full-time(5 days x 8 hours = 40 hours per week) worker who reduces his or – more likely – her workload to 3 days x 8 = 24 hours per week. Let us suppose that this worker had accumulated 20 days of unused paid leave on the last day before the working time reduction.

In Zentralbetriebsrat, the ECJ held (at § 32):

"… a change, and in particular a reduction, of working hours when moving from full-time to part-time employment cannot reduce the right to annual leave that the worker has accumulated during the period of full-time employment."

Nevertheless, such a reduction is allowable in certain circumstances, but only when the worker has actually had the opportunity to exercise her right to take the paid leave accumulated before the working time reduction (at § 34).

In *Brandes*, the ECJ repeated this finding for a legal framework (the German *Bundesurlaubsgesetz*) that calculates the entitlement of annual leave and its use in working days. However, in that case, the employer argued that "*the entitlement to annual leave previously accumulated by Ms Brandes would not suffer any reduction since, expressed in terms of weeks of leave, it would remain identical before and after her move to part-time work*". Transposed to the fictional example above, this would mean that:

| if the worker had continued to work 5 days per week, she could have taken four weeks (4 x 5 = 20 days) off;

| now that she works 3 days per week she can still take four weeks (the accumulated 20 days) off.

The ECJ rejected this argument, noting (at § 38-39):

"… the fact that a part-time worker who normally works three days per week is, during a particular week, absent from work, does not in any way imply […] that the worker would thus obtain the equivalent of five days of leave which, having been accumulated when he worked full-time, must clearly be understood as five complete days during which the worker is

relieved of being under the obligation to work, in the absence of such leave. In having one "week" of leave recognised, in the context of his now part- time work, represented by three full days of work per week, it is clear that the worker is being released from his obligation to work to the extent only of three full days."

An additional argument, which the ECJ did not use but which the Austrian Supreme Court took into account, is that annual leave is two things: it is time off work, and it is also paid time. A part-time worker who takes off one week is paid less for that week than a full-time worker in similar circumstances.

This decision definitely will spark some discussion in the legal circles as the conclusion of the Supreme Court that annual leave is to be calculated and used in weeks though the Act provides for an amount of business-days is not unanimously consented. A preliminary ruling of the ECJ might have added some guidance especially how to deal with the prevailing practice in Austria that annual leave is nearly always calculated based on the days actually worked and used in single days and not weeks. The court did not say anything about this practice but only that the worker may – not very realistically – claim annual leave in two parts that together amount to at least 30 business days. According to its facts in the case at hand, longer continuous periods of leave were the usual practice and under these circumstances the solution of the Court is at least arguable.

Subject: Working time

Parties: Works Council of ***** GmbH - v - ***** GmbH

Court: Oberster Gerichtshof (Supreme Court)

Date: 22 July 2014

Case number: 9 Ob A 20/14b

Internetpublication:http://ris.bka.gv.at/Jus>Geschäftszahl>case number

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Creator: Oberster Gerichtshof (Austrian Supreme Court)
Verdict at: 2014-07-22
Case number: 9 Ob A 20/14b