SUMMARY

2012/57 Paid leave does not accrue during parental leave (AT)

<p>Under Austrian law, no entitlement to paid annual leave accrues during (unpaid) parental leave. The Supreme Court applies this law strictly, unfortunately without addressing potential friction with EU law.</p>

Summary

Under Austrian law, no entitlement to paid annual leave accrues during (unpaid) parental leave. The Supreme Court applies this law strictly, unfortunately without addressing potential friction with EU law.

Facts

The plaintiff in this case was a civil servant employed by the municipality of Vienna. He applied for full-time parental leave for the duration of one year. His request was granted on 12 January 2009. His parental leave lasted from 14 April 2009 to 13 April 2010. In accordance with the applicable regulations, the parental leave was unpaid and the plaintiff accrued no annual paid leave during said period of 12 months. Given that he was entitled to 29 days of paid annual leave, he accrued:

Despite the fact that he was entitled to no more than nine days of paid leave in 2009, he took 21 days off in the period between 12 January and 14 April 2009, i.e. 12 days more than the number of days to which he was entitled. Upon his return to work in April 2010, he was informed of the fact that for the remainder of 2010 he was entitled to no more than nine days, calculated as follows:

accural in 2010 (8.5 months)

excess taken in 2009

remainder for 2010

The plaintiff objected, arguing that the applicable provisions of law did not allow the deduction of 12 days. He brought legal proceedings.

The court of first instance dismissed his claim. On appeal, this judgment was overturned. The Court of Appeal found that the municipality, by allowing the plaintiff to take 21 days off knowing that he was not eligible to more than nine days, had lost its right to deduct the balance of 12 days. The municipality appealed to the Supreme Court.

Judgment

The municipality's action proved successful: the Supreme Court overturned the second instance judgment and re-established the conclusions of the judge of first instance. It held that the law clearly envisages a reduction pro rata temporis of the annual leave entitlement in a year in which the employee is temporarily absent for reasons of childcare. In the case at hand, the Court could see no indication that the public employer intended, contrary to the applicable law, to deviate from this rule. Even in the absence of an explicit agreement on an advance of annual leave, the employee must have been aware that this was precisely the intention of the employer when agreeing to grant extra leave.

Commentary

The Supreme Court's ruling does not contain any reference to provisions of EU law. And indeed, the question whether the behaviour of the parties must be seen as a tacit agreement to allow an advance on leave entitlement to be accrued in later years, does not seem to touch on European law. Arguably, an advance on future leave entitlement can lead to a situation in which the employee does not dispose of the minimum of four weeks of annual leave, as required by Article 7 of the Working Time Directive, in the year that follows. However, provided that this happens only at the explicit request of the employee, that constellation seems similar to others which the ECJ has already confirmed to be permissible, e.g. that the employee may carry over leave entitlement and use it at a later date[1], or may even decide (voluntarily) to take annual leave during a period of sickness.[2]

Having said that, the judgment reported above was rendered on 28 February 2012, about one month after the ECJ had delivered its decision in the Dominguez case[3]. That judgment provides an interpretation of the Working Time Directive regarding the accrual of annual leave entitlement, which seems to raise questions on the compatibility of the Austrian provisions on which the Supreme Court's decision was based with EU law. In Dominguez, the ECJ issued a clear statement on the accrual of annual leave entitlement for a period of sick

leave: in line with the principles the Court had already established in the Schultz- Hoff case[4], the ECJ found that new entitlements to annual leave must accrue during the entire leave period, as if the employee had been working during that time. This finding was not compromised by the fact that sickness had triggered the employee's absence for over one year, during which her entitlement to pay from the employer stopped.

In fact, the ECJ had already issued a similar statement in relation to maternity leave in the case of Boyle[5]: statutory periods of maternity leave must be taken into account in calculating the employee's annual leave entitlement. The special feature of sick leave, however, is that there is currently no provision in European law comparable to Article 11 of the Maternity Directive, on which the Boyle judgment was based, that would prescribe any financial or other entitlements of the employee during sickness-related absence. Rather, the decision in Dominguez was based exclusively on the Working Time Directive, and on the ECJ's laconic reasoning that "the right to paid annual leave conferred by that directive on all workers cannot be made subject by a Member State to a condition that the worker has actually worked during the reference period laid down by that State". This was complemented by a reference to earlier case law, which established that annual leave already acquired before a sick spell must not be lost even after sickness absence for more than one year, because "the purpose of the entitlement to paid annual leave is to enable the worker to rest and to enjoy a period of relaxation and leisure. The purpose of the entitlement to sick leave is different. It is given to the worker so that he can recover from being ill."[6]

In November 2012, the ECJ softened its stance on the prohibition of any condition that the worker has actually worked during a given period for accruing annual leave entitlement. In the Heimann case, it stated that a redundant employee who is simply exempt from his duty to work, but allowed to retain his employed status for one more year in order to receive social benefits, need not acquire rights to annual leave during that year. The ECJ stressed that, contrary to sick leave, the period at issue was foreseeable for the employee and "the latter [was] free to rest or to devote himself to recreational and leisure activities".[7] Hence, this decision clarifies that the decisive question for determining whether or not annual leave entitlements must accrue over a specific period ultimately does not depend on whether its purpose is different from that of annual leave, but whether it realistically enables the employee to use it for relaxation and leisure.

What are the implications of Heinemann on the Austrian judgment reported above, in which the Supreme Court has shown that it will not readily accept exceptions to the rule preventing accrual of annual leave during parental leave? Needless to say, opinions will diverge on the question just how relaxing or recreational the activity of caring for small children is in practice. On the other hand, arguably, it could hardly be disputed that, for a parent, childcare

should be precisely the activity to which they are most likely to devote their ordinary annual leave.

An argument against simply equating parental leave with times that are at the employee's free disposal could be deduced from the ECJ's ruling in the Zentralbetriebsrat der LKH Tirols case, rendered in 2010.[8] In that case, the employees concerned had acquired annual leave entitlement before taking parental leave for the maximum period of two years. The ECJ held that Austrian legislation violated the Parental Leave Directive by providing that these "old" rights were lost during parental leave.[9] Although no reference was made to the Working Time Directive, this indicates that, in the Court's view, even long periods spent on childcare cannot be seen as a substitute for annual leave by reason of their value in terms of relaxation and leisure. Conversely, an argument in favour of considering the non-accrual of leave entitlement in line with European law could be derived from the decision in Heimann, in which the ECJ ascribes importance to the fact that "the employer's obligation to pay for paid annual leave during the period of the formal extension, for purely social reasons, of the employment contract, would be liable to make the employer reluctant to agree to such a social plan".[10] Mutatis mutandis, mandatory accrual of annual leave during parental leave would naturally have the potential to make employers less inclined to voluntarily grant it for a period exceeding the legally prescribed minimum. In my opinion, there is a certain likelihood that the ECJ would rely precisely on this kind of reasoning in order to declare a rule such as the Austrian rule to be admissible in the end – since it would avoid sensitive statements implying that the judges in Luxembourg view caring for children as "mere recreation". Obviously, much uncertainty remains.

One final aspect of importance to be found in the Dominguez judgment is that the ECJ expressly declared it admissible to establish additional conditions for annual leave entitlement in excess of the four-week minimum period established by the Directive – providing for the exceeding part to accrue only during periods of work or specifically enumerated forms of leave.[11] This implies that the Austrian rule may breach European law only insofar as it results in reducing the entitlement for one year to less than 20 days (as was the case for the employee at issue in the year 2009).

At any rate, it is regrettable that the Supreme Court did not use the opportunity to confront the ECJ with a preliminary request in the case reported here. It thereby denied the Court of Justice the opportunity to shed some light on a question which may be of relevance for a number of Member States that currently regulate parental leave in a similar way as does Austria.

Comments from other jurisdictions

Germany (Dagmar Hellenkemper): In Germany, the employee would retain her right to paid holidays during maternity protection since, under German law, the employee is not allowed to work. During the period of parental leave (mother or father) however, the work relationship between employer and employee becomes inactive. The law on parental allowance and parental leave (the 'BEEG') provides in section 17 that the employee has a right to paid holiday even during parental leave.

However, the employer has the right to reduce the annual paid leave by 1/12 for every month the employee is on parental leave.

Annual leave that the employee accrued before his parental leave must be granted to him when he returns to work. If the employment relationship ends before the employee can take his paid leave, he must be compensated for this.

The Netherlands (Peter Vas Nunes): Apparently, Austrian law makes the accrual of paid leave conditional on the employee having worked. Dutch law makes it conditional on having been entitled to salary. Barring very limited exceptions, an employee who earns no salary, for example because he is on unpaid leave, accrues no paid leave. On the other hand, an employee who is paid salary accrues paid leave even if he does not work, for example because he is on garden leave (which can last many months). Is this compatible with Directive 2003/88 as interpreted (in its previous form, as Directive 93/104) in BECTU? In that ruling (C- 173/99), the ECJ had interpreted the Directive "as precluding Member States from unilaterally limiting the entitlement to paid annual leave [...] by applying a precondition for such entitlement [...]". In Dominquez the ECJ reiterated this finding, adding that "Although Member States are free to lay down, in their domestic legislation, conditions for the exercise and implementation of the right to paid leave, they are not entitled to make the very existence of that right subject to any preconditions whatsoever" [emphasis added, PVN]. At first glance, this would bring into question the validity of the Austrian law (no work, no paid leave) and the Dutch law (no salary, no paid leave). However, as Ms Hießl points out in her commentary above, the ECJ's recent Heimann ruling (summarised in the ECJ Court Watch section of this issue) allows national legislation or practice that provides for no accrual of paid leave during periods where the employee does not work and is not paid salary. The ECJ's principal reason for distinguishing such a period from sickness is that the employee is able to rest and relax. Would this mean that, for example, an employee on involuntary garden leave accrues no paid leave? I doubt it, even though such an employee is able to rest and relax during his garden leave. Conversely, an employee who does not work because he is in prison, should not, I feel, accrue paid leave while doing time. I would argue that any involuntary absence from work that is outside the employee's sphere of responsibility should accrue paid leave.

Footnotes

1 For example, Case Federatie Nederlandse Vakbeweging (ECJ, 6 April 2006, Case C-124/05), par. 30 et seq.

2 Case Stringer (ECJ, 20 January 2009, Case Joined Cases C-350/06 and C-520/06.), par. 31.

3 ECJ, 24 January 2012, Case C-282/10, par. 15 et seq.

4 ECJ, 20 January 2009, Case Joined Cases C-350/06 and C-520/06, par. 41.

5 ECJ, 27 October 1998, Case C-411/96, par. 67 et seq.

6 See par. 25 of the judgment in Schultz-Hoff/Stringer.

7 ECJ, 8 November 2012, Joined Cases C-229/11 and C-230/11, par. 29.

8 ECJ, 22 April 2010, Case C-486/08, par. 48 et seq.

9 It needs to be stressed that the Parental Leave Directive could not be invoked in the present case, because it only provides for the maintenance of "rights acquired or in the process of being acquired", and remains silent about the accrual of new rights during parental leave.

10 Paragraph 30 of the judgment.

11 See paragraph 45 et seq of the judgment.

Subject: Paid leave

Parties: F.B. (civil servant) v Municipality of Vienna

Court: Oberster Gerichtshof (Supreme Court)

Date: 28 February 2012

Case Number: 8ObA79/11t

Internet publication: https://www.ris.bka.gv.at " Judikatur " Justiz(OGH) and tick Entscheidungstexte " case number

---

Creator: Oberster Gerichtshof (Austrian Supreme Court)
Verdict at: 2012-02-28
Case number: 8ObA79/11t