EELA EUROPEAN EMPLOYMENT LAWYERS ASSOCIATION

SUMMARY

2018/42 No reduction of vacation pay for already accrued vacation entitlement in the case of a reduction of weekly working hours later on (GE)

According to German law, every employee is entitled to paid annual leave. The amount of pay is generally calculated based on the current salary (known as the "principle of loss of pay") but a reduction of working hours during the year does not lead to a reduction of entitlement to holiday pay for previously acquired holiday entitlements. If the entitlement was already acquired before the reduction of working time (which can happen because in Germany holiday entitlement is acquired at the beginning of the calendar year), pay during leave will be based on the salary agreed between the employer and employee when the holiday entitlement was acquired and thus, based on the 'old' salary.

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Facts

The plaintiff had been employed by the Ministry of Finance of Mecklenburg-Vorpommern since 2001. The collective agreement for public services within the Federal States (the 'TV-L') applied to the employment relationship. With regard to an employee's vacation entitlement Section 26 paragraph 1 of the TV-L stipulates:

"In each calendar year, employees are entitled to vacation with continued payment of remuneration (Section 21). In the event that the weekly working time is spread over five days in the calendar week, the vacation entitlement is 30 working days in each calendar year. [...] If the weekly working time is distributed differently from five days a week, the vacation entitlement shall be increased or decreased accordingly."

Further, Section 21(1) TV-L (assessment basis for continued remuneration) states:

"In cases of continued payment of remuneration in accordance with § 22(1), § 26 and § 27, the table remuneration (i.e. the monthly or hourly remuneration for the respective salary group as agreed in the collective agreement) and other remuneration components determined in monthly amounts shall continue to be paid."

The plaintiff changed to a part-time job in 2012 at 35 hours per week instead of 40. In August 2015 she reduced this further, to 20 hours per week.

The plaintiff then took several days of leave (a total of 47 days of leave, which had been accrued, among other things, because of long periods of illness). The leave entitlement derived from the period before the second reduction to her working hours. Under the TV-L, the federal state needed to calculate the holiday pay based on current agreed working time, thus based on half of the gross pay of a full-time employee.

The plaintiff asserted that she was entitled to vacation pay in line with her remuneration, as it had been until August 2015. She therefore asked her employer to calculate her vacation pay based on a working time of 35 hours per week. The employer refused, arguing that the collective agreement provided for calculation of vacation pay according to the 'principle of loss of pay' and thus based on current gross pay.

The Labour Court (*Arbeitsgericht*, the 'ArbG') rejected the action as unfounded. The Regional Labour Court (*Landesarbeitsgericht*, the 'LAG') altered the ruling of the ArbG and approved the claim for payment, for the most part. It justified its decision, essentially, by the fact that the

provisions of the TV-L concerning vacation pay should be interpreted in conformity with European law. According to the ECJ judgment in *Zentralbetriebsrat der Landeskrankenhäuser Tirols* of 22 April 2010 (C-486/08), entitlement to holiday pay is based on the income employees earn during the period in which the entitlement arises. As a result, the employer was obliged to pay vacation pay based on a working relationship of 35 hours per week until the employee received a new vacation entitlement under the new part-time quota.

The employer appealed against the decision of the LAG before the Federal Labour Court (*Bundesarbeitsgericht*, the 'BAG').

Legal background

The basic requirements of German vacation law are, for the most part, regulated in the Federal Leave Act (*Bundesurlaubsgesetz*, the 'BUrlG'). Employees are legally entitled to an annual minimum vacation of at least 24 working days (for a 6-day week) in accordance with Section 3 paragraph 1 of the BUrlG.

Full entitlement arises for the first time after six months of employment, according to Section 4 of the BUrlG. In the following years, vacation entitlement arises at the beginning of the calendar year and becomes payable at this point. At the same time, vacation entitlement exists in principle only for the duration of the calendar year, in accordance with Section 7 paragraph 3(1) of the BUrlG, and therefore expires at the end of the respective calendar year. Notwithstanding special arrangements in collective agreements, leave may also be taken in the first three months of the following calendar year if this is justified by urgent operational reasons or reasons attributable to the individual employee (Section 7 paragraph 3(2 and 3) of the BUrlG).

However, if the leave cannot be taken owing to illness, there are other rules. With reference to the case law of the ECJ, the BAG has decided that, contrary to the wording of Section 7 paragraph 3(3) of the BUrlG, vacation entitlement in the event of incapacity for work expires only 15 months after the end of the vacation year (BAG, judgment of 7 August 2012, 9 AZR 353/10). In its judgment in the case of *KHS* of 22 November 2011 (C-214/10), the ECJ had ruled that entitlement to paid annual leave in the event of long-term illness must not expire at the end of the calendar year (or transfer period), but neither could leave be accumulated indefinitely. Therefore, a period of 15 months can be considered lawful.

During leave, an employee has a right to continued payment of his or her remuneration ('holiday pay') in accordance with Section 1 of the BUrlG. The amount of the holiday pay is

calculated in accordance with Section 11 paragraph 1 of the BUrlG, either based on the fixed monthly salary or on average earnings over the thirteen weeks prior to the beginning of the vacation. According to previous case law of the BAG, this should also apply in the event of a change of working hours during the year. In other words, even where the hours have been reduced during a year, remuneration should be based on the principle of loss of pay.

Judgment

The appeal made by the employer was unsuccessful. The BAG confirmed the decision of the LAG that vacation pay should be determined based on the working time and remuneration agreed at the time the vacation entitlement accrued. This, however, with a different justification. Contrary to what was assumed by the LAG, the BAG was of the view that no EU-compliant interpretation of Section 21 (1) and Section 26 paragraph. 1 of the TV-L was possible in the present case. The BAG considered that the relevant provisions of the collective bargaining agreement were invalid.

The BAG mainly based its decision on the fact that the collective bargaining regulations, which provide for the calculation of vacation pay according to the principle of loss of pay (i.e. current salary), violate the prohibition of discrimination against part-time employees pursuant to Section 4(1) of the Part-time Employment Act (*Teilzeitbefristungsgesetz*, the 'TzBfG'). Section 4(1) of the TzBfG stipulates that:

"A part-time employee may not be treated worse due to his part-time work than a comparable fulltime employee unless there are objective grounds justifying different treatment. A part-time employee shall be remunerated for work or paid in kind at least to a degree corresponding to the proportion of his working time relative to the working time of a comparable fulltime employee."

There is unequal treatment if the length of working time is the criterion based on which vacation pay entitlement differs. However, if currently agreed working time during the period in which leave is taken is the decisive factor in determining vacation pay, the first point of reference is current pay, not working time.

The provisions Section 21 (1) and Section 26 paragraph. 1 of the TV-L do not directly relate to the length of the working time, but to the remuneration to which the employee would be entitled if he had performed his work. Because of that, the BAG had not made any objections to a calculation of holiday pay on this basis until now. However, in view of the settled case law of the ECJ in *Zentralbetriebsrat der Landeskrankenhäuser Tirols* of 22 April 2010 (C-486/08), this position could no longer be maintained and indirect unequal treatment had to be

presumed. According to the case law of the ECJ, Section 4(2) of the Framework Agreement on part-time work (annexed to Directive 97/81/EC), precludes a national provision which permits an adjustment of unused vacation at the employee's expense, if his or her working time is changed.

In addition, there cannot be any derogation from this by collective agreement, since the prohibition of discrimination regulated in Section 4 paragraph 1 TzBfG cannot be derogated from by the parties to the collective agreement.

Commentary

With this decision, the BAG has abandoned its long-standing case law concerning the entitlement to holiday pay and further developed its jurisprudence in compliance with European guidelines.

Whereas the principle of loss of pay previously applied under German vacation law and the payment of vacation pay was seen solely as an entitlement to paid leave from work, the BAG's new decision will mean that an economic consideration of each day of vacation is required based on the date on which the leave entitlement arose. The employer must now check what vacation pay the employee would be entitled to per vacation day at the time the leave entitlement arises and calculate the vacation pay thereafter.

The decision should not only create a new challenge for employers in Germany in terms of payroll, but may also require adjustments to various collective agreements in force in Germany.

Comment from other jurisdiction

Greece (Elena Schiza, KG Lawfirm): The issue of vacation entitlement has been regulated in the Greek jurisdiction since 1945 and has been amended by Greek law 3302/2004. In accordance with the respective Greek provisions, all employees under an employment agreement of fixed or indefinite term as well as part time employees are entitled to annual leave depending on the years of past service with the employer. The entitlement arises from the hiring date, including the 12-months of the probationary period, in the contrary to Section 4 of *Bundesurlaubsgesetz* (BUrlG), according to which the full entitlement arises for the first time after six months of employment, as mentioned in the case at hand. In such context, the employee is entitled to 2 vacation days per month as of the hiring date and up until the end of the calendar year. The days of annual leave cannot be transferred to the next calendar year, with no exceptions applicable to this rule. In case the employees do not receive the respective days of annual

leave they are entitled to, the employer is obliged to pay such annual leave days. The employer may be liable for the payment of the entitled annual days with an increase of 100%, only in case the employee has requested explicitly to receive the annual days and the employer has unjustifiably denied to authorize such request.

The employees receive as compensation during the days of annual leave the "usual remuneration" they would receive, had they provided normally work during those days. In that sense, remuneration during vacation is based on the salary agreed between the parties on the day the employee receives the days of annual leave. It is explicitly though determined by Greek law that part-time employees (i.e. these who provide their work for less than 8 hours per day and 40 hours per week on a 5-day working time) would be remunerated during the vacation on the basis of the respective lower salaries they have received due to actual less working time. The Greek Courts apply the above provisions without any deviation, given that issues arising from annual leave have been addressed many years ago both by Greek jurisprudence and laws and no different approaches have attempted to contest such established practice.

Subject: paid leave

Parties: [plaintiff] – v – federal state of Mecklenburg-Vorpommern

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