EELA EUROPEAN EMPLOYMENT LAWYERS ASSOCIATION

SUMMARY

2019/22 Supreme Court applies Max Planck and Kreuziger judgments (LV)

The Latvian Supreme Court recently used the ECJ Max Planck and Kreuziger judgments to explain how an employer can escape its obligation to compensate an employee for unused leave at the end of the employment relationship. The employer must prove that (a) it was possible for the employee to use the leave, and (b) the employer has in good time informed the employee that leave, if not used, might be lost and will not be compensated.

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Facts

Under Latvian Labour Law, in the case of an employee who has not used all days of annual paid leave upon termination of the employment relationship the employer has an obligation to pay compensation for the entire period for which the employee has not used their annual paid leave.

In this case, the employee was employed by the employer from 12 October 1998 to 30 June 2015. The employment agreement was terminated on the basis of a mutual employment termination agreement. Upon termination of the employment relationship the employer paid out to the employee compensation for the unused annual paid leave only for the period of the

last two years before the end of the employment. The employer referred to the general limitation period, which is two years. The employee claimed that they were entitled to receive compensation for all unused days (65 working days in total) of the leave. There were no dispute between the parties as to the fact that the employee had accumulated leave dates which had not been paid.

The court of first instance ruled in favour of the employee, while the appeal court dismissed the employee's claim.

Judgment

The Supreme Court firstly pointed out that the court of appeal had rejected the claim on the basis of an incorrect legal ground and had referred to an outdated court practice, since as of 1 January 2015 it is clearly stated in Latvian Labour Law that in the case of an employee who has not used all days of annual paid leave upon termination of the employment relationship the employer has an obligation to pay compensation for the entire period for which the employee has not used their annual paid leave. The 'entire period' means just that and, therefore, the law does not set any limits as to its possible length.

Secondly, the Supreme Court examined the circumstances under which the employer might be exempt from the obligation to compensate the employee for annual paid leave. The Supreme Court referred the ECJ judgment in the *Kreuziger* case, C-619/16, and repeated that any interpretation of Article 7 of Directive 2003/88 which is liable to encourage the worker to refrain deliberately from taking their paid annual leave during the applicable reference or authorised carry-over periods in order to increase their remuneration upon termination of the employment relationship is incompatible with the objectives pursued by the introduction of the right to paid annual leave (para 55 of the judgment in case C-619/16).

Further, the Supreme Court referred to the ECJ judgment in *Max-Planck-Gesellschaft zur Förderung der Wissenschaften e.V.*, C-684/16 (paras 45 to 57 of the judgment), and concluded that in order to be released from the obligation to compensate for the unused leave days the employer must prove that (a) it was possible for the employee to use the leave, and (b) the employer has in good time informed the employee that leave, if not used, might be lost and will not be compensated.

On the basis of this line of arguments, the Supreme Court cancelled the judgment of the court of appeal and sent it back to that court for repeat review.

Commentary

In Latvia, the issue regarding the period of time for which the employee should be paid compensation for unused annual paid leave upon employment termination has been the subject of hot debate and controversial court practice. On 1 January 2015 amendments to the Labour Law came into effect providing that the employee must receive compensation for all unused days of their annual paid leave. For example, if the employee has not used the leave for 15 years upon termination of employment the employer must pay out compensation for of all this period. It is still quite often the case that employees (especially managerial level employees) have quite big holiday accruals.

It is worth noting that Latvian Labour Law places a strict obligation on the employer upon employment termination to compensate for all unused vacation days without allowing the employer to rely on any exceptions not to pay the compensation. The Supreme Court interpreted the provisions of the Labour Law in the light of Article 7 of Directive 2003/88 and relevant case law of the ECJ. Thus, the Supreme Court has shown that Latvian employers irrespective of the fact that the matter is not regulated by the local law still have some defence against claims regarding compensation for unused days of annual paid leave.

Comments from other jurisdictions

Italy (Caterina Rucci, Katariina's Guild): As highlighted by the report, in Italy also cases like this are seen quite often for high level/senior executives, who accrue a lot of unused vacation leave. What strikes me a little bit is that the employment relationship was terminated by a mutual agreement which, apparently, did not rule on this aspect and in addition did not even block successive and additional claims related to the settlement itself. In Italy the practice is that basically every mutual agreement includes a clause which prevents any successive claims by the employee. In any case, and assuming that a case was brought before the Italian courts, these are the two possible 'solutions' to events like this one: on the one side, by obliging employers to pay social contributions on holidays by use of a strict term, Italian legislation has effectively pushed employers to find solutions to the issue of unused vacation leave. Solutions might be shorter working time on summer Fridays and/or collective holidays coinciding with specific periods such as Christmas time or the central week of August. Basically, anything that does not contravene the prohibition on assigning mandatory holidays for an excessive period of time.

In any case, senior executives have always been a problem, since apparently, they never go on holiday.

The practical solution has involved the principle that, if someone has no fixed working time as

a senior executive, and high level white collar workers normally do not, the assumption is that they are/were free to take their holidays whenever they wished, and that they did so. Only if specific company needs really and effectively prevented them from taking holidays, they might therefore bring a claim for unused holiday.

Greece (Effie Mitsopoulou, KG Law Firm): Under Greek law in a case where an employment agreement is terminated on the basis of a mutual separation agreement, such agreement provides specifically for any and all amounts due and includes specific releases for the benefit of the employer, i.e. the employee is fully satisfied and has no further claim.

Greek law does not allow the transfer of any non-used annual leave days to the following year: these must be exhausted during the course of the calendar year concerned and in a case where they are not taken due to the company's needs/fault, then these must be compensated in double to the employee. Under Greek law the statute of limitation for claims related to employment is five years. So in principle the employee would be entitled to receive the compensation for all of their non-used days covering a period of five years – which covers a case where they would have valid grounds to evidence this.

Given that the transfer of non-used days is not allowed, any compensation to such effect is made under the form of an amount voluntarily granted by the company to the employee.

Germany (Othmar K. Traber, Ahlers & Vogel): Subsequent to the quoted cases *Kreuziger* and *Max Planck* the German Federal Employment Court (*Bundesarbeitsgericht,* the 'BAG') amended its case law that had been established over decades and held that entitlement for paid leave only lapses at the end of the calendar year if the employer informs the employee in advance about their actual remaining entitlement and the time limits but the employee, nevertheless, has not taken the holiday voluntarily. The BAG asked the European Court of Justice in *Kreuziger* and *Max Planck* for a preliminary ruling concerning the interpretation of Article 7 of Directive 2003/88 EC of the European Parliament and of the Council of 4 November 2003 in terms of the lapse of the entitlement to paid leave. Section 7(3) of the Federal Law on annual leave (*Bundesurlaubsgesetz*) provides that statutory leave must be granted and taken in the course of the current calendar year. Furthermore, it is provided that the carrying-over of leave to the next calendar year shall be permitted only if justified on compelling operational grounds or for reasons personal to the employee. The European Court of Justice held, in contrast, that the automatic lapse of entitlement for paid leave infringes Article 7 of Directive 2003/88 as well as Article 31(2) of the Charter of Fundamental Rights of the European Union (´the Charter´). The employee cannot be deprived of their acquired right to paid annual leave if the employer is not able to show that it has exercised all diligence in

enabling the worker actually to take the paid annual leave to which they are entitled under EU law. National legislation has to be interpreted in conformity with EU law, to guarantee its effectiveness. In the event that it would be impossible to interpret national legislation such as in the case of *Kreuziger* and *Max Planck* in a manner compliant with Article 7 of Directive 2003/88 and Article 31(2) of the Charter, it follows from Article 31(2) that national legislation must be disapplied.

According to this, the ECJ derived in *Max Planck* a horizontal direct effect of Article 31(2) of the Charter between individuals and private entities. This is worth mentioning because, basically, the social rights in the fourth chapter of the Charter had been so far regarded as principles only. Now the ECJ has found that Article 31(2) of the Charter must be interpreted as a right and, therefore, applies directly between individuals (and again in the ECJ judgment of 6 November 2018, *Bauer*, C-569/16). In the case of *Max Planck* the Court also cited Article 45 TFEU in its reasoning to underpin the Court's view on Article 31(2) of the Charter and the direct horizontal effect of this particular Article.

For this reason, the jurisprudence of the BAG regarding the forfeiture of annual leave had to be changed fundamentally.

At the same time, the new jurisprudence of the ECJ of November 2018 represents, dramatically, a genuine paradigm shift, as the Court now gives the Charter constitutional significance in individual cases and derives direct rights of citizens from it even in their legal relations with other private individuals and not only vis-à-vis the state. In conclusion, the BAG has consequently realized the new legal guidelines of the ECJ. Employees will not be deprived of their acquired right for paid annual leave without being informed before about the legal consequences by their employer and can claim against their employers directly from Article 31(2) of the Charter which derogates from the national legislation to this extent.

Finland (Janne Nurminen, Roschier, Attorneys Ltd.): In Finland, there are no explicit rules in the Annual Holidays Act (162/2005, as amended, the 'Act') for a situation where the employee ends up not using their annual holiday. Under the Act, the timing of the annual holiday is determined by the employer, unless the parties agree on the timing (such agreement subject to limitations set forth in the Act). The employer can be deemed to have an obligation to ensure that the use of the employee's holiday is either determined or agreed each year. Further, according to Section 17 of the Act, at the expiry of the employment relationship, the employee is entitled to a holiday compensation for the time the employee has not used annual holiday.

When assessing an employee's right to claim compensation for several years' worth of annual

holiday at the expiry of the employment, the limitation period for bringing a claim needs to be taken into account. According to Section 34 Subsection 1 of the Act, the right to claim a receivable will expire if the claim, during the employment, has not been made within two years from the end of the calendar year during which the annual holiday should have been granted or the holiday compensation paid. Therefore, it is not possible to claim holiday compensation dating back more than two to three years because the receivables may have already expired during the employment relationship. After the expiry of the employment relationship, the claim concerning a receivable referred to in Subsection 1 must be made within two years from the expiry date. In the case at hand, a Finnish court would most likely have held that a part of the holiday had already expired and the employer would have been liable to pay compensation only for the unused holiday within the two year' limitation period.

However, the Act provides the employer and employee with the possibility of agreeing to save vacation days. Under Section 27, the parties can agree that the employee is entitled to save the vacation days that exceed 18 days and use these saved days during the following holiday season, or after that, as carried over holiday. If the employer has not determined the period for the employee's holiday, i.e. it has not granted the holiday, the employee could potentially argue that there is an (implied) agreement on saving the holiday. Naturally, in that case, the holiday would not expire and the employee would be entitled to receive compensation for all unused annual holiday. However, there is no case law on this type of a claim.

Subject: Paid Leave

Parties: Unknown

Court: *Latvijas Republikas Augstākās tiesas Senāta Civillietu departaments* (Supreme Court Senate of the Republic of Latvia, civil section)

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