SUMMARY

2019/23 A reintegrated employee is entitled to compensation for untaken leave following prior unjustified dismissal (SI)

Reintegration of a formerly dismissed employee does not mean that the employment relationship had not been terminated earlier. Consequently, the employee is entitled to an allowance in lieu of the untaken leave at the time of the dismissal.

Summary

According to the Supreme Court of the Republic of Slovenia (*Vrhovno sodišče Republike Slovenije*) (Supreme Court), reintegration of a formerly dismissed employee does not mean that the employment relationship had not been terminated earlier. Consequently, the employee is entitled to an allowance in lieu of the untaken leave at the time of the dismissal.

Facts

A worker was served notice of extraordinary termination of their employment contract in March 2013. Prior to termination the worker did not expect the sudden cessation of the employment relationship and, in addition, the worker was on sick leave. The worker filed a lawsuit for unlawful termination, following which they were granted both reintegration and reparation (salary compensation for the period when the worker was not employed and compensation in lieu of unused annual leave). The court of second instance partially disagreed with the first instance judgment and rejected the payment of compensation in lieu of unused annual leave. The worker filed for a revision procedure at the Supreme Court and succeeded: the latter concurred with the first instance court, providing additional clarification on the definition of reintegration into the working environment and explaining why the

worker was entitled to exercise the right to annual leave in pecuniary form. This last issue will be the focus of this case report.

At the time of termination, the employee had not used his annual leave for the current year due to illness. The worker sued the employer, claiming unlawful termination and, in relation to that, retroactive compensation of all salaries, as if he had been working, as well as pecuniary compensation for the annual leave which the worker was not able to use.

Following the aim of the EU Directive on working hours, Slovenian national legislation does not grant workers the right to claim pecuniary compensation in lieu of unused annual leave during the existence of an employment relationship. Workers have the right to claim compensation instead under the Employment Relationship Act (*Zakon o delovnih razmerih*) (ERA-1) at the end of the employment relationship. Article 164 provides that the employer and the worker *may agree* on pecuniary compensation in lieu of the unused annual leave only when the employment relationship comes to an end. Despite Article 164 not being entirely precise (it may be read as if the parties must always *agree* on compensation in lieu of remaining annual leave), this is, however, not an absolute right (nor is it the aim or purpose of the Directive on working hours). The right of a worker to request *agreement* on pecuniary compensation applies only to instances where the worker either *tried* to exercise the right to annual leave but was not able to do so (for example the employer did not allow it) or when the worker had no chance of using it due to unexpected circumstances. This said, it is crucial that the worker was *not able to foresee* the cause, because of which he/she was not able to make use of the annual leave. In all other instances, the employer is not obliged to *agree on* (and thereafter grant) pecuniary compensation in lieu of the annual leave. The courts will therefore make an assessment as to whether the worker actually had the possibility to make use of their annual leave entitlement (and tried to exercise it) or whether the worker lost such right due to foreseeable circumstances.

Article 162 of ERA-1 describes the manner of annual leave use (*izraba letnega dopusta*). Under the latter, *inter alia*, an employer is obliged to ensure that a worker who was not able to use the annual leave within the current calendar year or until 30 June of the following year (because of parental or sick leave) has until 31 December of the following year to use it. The extended deadline should cover instances when the worker is on parental leave or sick leave for a longer period of time, respectively for the entire reference period.

Judgment

The court of first instance found the worker's claim justified and thus reintegrated the employer back into the employment relationship, granting him the right to all salary

compensation as if he had been working since the termination date until the date of the court judgment. In addition, the court of first instance granted him compensation for the unused annual leave. The court held that the purpose of the use of annual leave cannot be deemed equal to the fact that the worker had an unemployment status and was therefore at home.

The court of second instance (High Court) overruled the judgment of the court of first instance in part in relation to the award of compensation for the unused annual leave. The court concluded that the worker's employment relationship (due to acknowledged reintegration) *had never ceased*, therefore the worker could not claim compensation for the unused annual leave. The court reasoned that due to reintegration the worker had the right to come back to work, to obtain salaries retroactively and the right to acknowledgement of all rights under the terminated employment contract. Interestingly, it did not specify what 'acknowledgement of all rights' meant, in particular what it meant in relation to 'the rights' to annual leave use. It only rejected the pecuniary payment in lieu of the annual leave (stating also that "*the worker cannot claim double-payment, since the worker was already granted salaries retroactively*"), leaving the worker with no conclusive interpretation as to what happens with the unused annual leave.

The Supreme Court held that the decision of the High Court was, in relation to rejecting compensation in lieu of annual leave, incorrect. The Supreme Court stressed that the worker can be entitled to compensation in lieu of annual leave if the employment relationship ceased, which it did, for a certain period of time. The Supreme Court further held that with the reintegration, the court only establishes the employment relationship (and rights related thereto) retroactively, ending the unlawful situation, *as if the employment relationship had never ceased* – which still means that the employment relationship *de facto* ceased in between. Thus, retroactive establishment gives grounds for pecuniary compensation in lieu of the use of annual leave. The stance of the High Court that it was not possible to grant the worker double compensation (salaries for the period after the cessation of the employment relationship until the date of the court decision as well as compensation in lieu of the annual leave), was also wrong.

Commentary

In light of Article 169 of the Civil Code (*Obligacijski zakonik*) and the principle of 'full reparation', the economic status of a worker whose employment contract has been unlawfully terminated should be the same, as if the worker was working. During annual leave, the worker has the right to receive payment. If the worker is not able to make use of annual leave due to objective reasons, the worker may claim pecuniary compensation at the end of the employment relationship. But this represents an exception. If it were a rule, permitted anytime

during the employment relationship, workers would frequently waive their right to annual leave and in lieu obtain pecuniary compensation, which would prevent them actually balancing and neutralising their work – 'free time environment'. It is necessary for the Supreme Court to establish this principle with clear case law, that compensation in lieu of annual leave should be awarded on rare occasions, only when the worker – due to objective reasons – is not able to exercise the right to annual leave, and only when the employment relationship ceases. In other instances, the employer has to strive to provide an environment where the worker indeed uses the annual leave, distinguishing such rest from instances when the worker is jobless. The Supreme Court did just that.

The High Court's stance in the case at hand was surprising, as it rejected the right to compensation in lieu of annual leave and envisioned the retroactive granting of 'all rights' arising from the employment relationship, as if the worker had worked. But *de facto* this meant nothing in relation to the annual leave. Bearing in mind the deadlines for 'delayed' annual leave use from Article 162 of ERA-1 (until 31 December of the year following the year when the right to annual leave occurred), the worker would not be able to make use of the remaining annual leave, since the deadlines for usage would be long gone.

The stance of the High Court, preventing 'double payment' was also surprising, since the retroactive compensation of salaries and the retroactive compensation in lieu of annual leave do not share the same purpose (and could hardly be considered as payment of the same kind). The right to (paid) annual leave is one of the fundamental social rights of the worker: on annual leave, the worker is supposed to enjoy security of an existent employment relationship and should be able to fully withdraw from working obligations and relax, whereby maintaining the right to be paid. If this fundamental right cannot be exercised, pecuniary compensation at the end of the employment relationship should be granted. The High Court thus failed to consider the clear 'full reparation' principle.

The interpretation of the Supreme Court was of key importance, resolving the dilemma in the case at hand whether integration into the employment relationship indeed gives ground for the (exceptional) payment of compensation in lieu of annual leave. It was also necessary to understand that the worker, due to illness, was not able to exercise their right to annual leave sooner, nor could the worker anticipate that an extraordinary termination was pending (amounting to objective reasons why compensation in lieu of annual leave could be granted).

Comments from other jurisdictions

Italy (Caterina Rucci, Katariina's Guild): Under Italian law the conclusion would be the same as that of the Supreme Court: if reintegrated – a remedy that has been progressively restricted in

Italy from its introduction in 1970 to today's legislation – the employee will be entitled to everything they would have had a right to if not terminated, and therefore also payment in lieu of annual leave.

Germany (Andre Schuettauf, Luther Rechtsanwaltsgesellschaft mbH): In Germany, an employee who thinks their dismissal is unlawful will phrase their claim in such a way that the court shall find the employment relationship has never ended on the grounds of the specific dismissal. If the court does so, it is clear that there has been a valid employment contract; also for the period between the end of the notice period and the court's decision.

Unlike in Slovenia, there is no need to reintegrate the employee as the employment relationship has never been terminated.

Regarding a successful claim against dismissal, the employee is entitled to all rights related to the employment relationship.

As in Slovenia, employees can only claim leave compensation successfully at a time when the employment relationship has ceased. According to the wording of the law (Section 7(4) of the Federal Leave Act), compensation in money is conditional upon (1) the employee still being entitled to leave at the end of the employment relationship, and (2) the employee no longer being able to take leave due to the cessation of the employment relationship.

Leave compensation must also be paid if the employee is on sick leave at the time of cessation of the employment relationship.

Subject: Paid Leave

Parties: Unknown

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