EELA EUROPEAN EMPLOYMENT LAWYERS ASSOCIATION

SUMMARY

2019/49 Expiration of leave only with prior information from the employer (GE)

The Federal Labour Court (Bundesarbeitsgericht – BAG) has decided that the entitlement to paid annual leave only expires at the end of the calendar year or at the end of a carry-over period if the employer has previously put the employee in a position to take his leave and yet the employee has not taken the leave out of his own free will. The court held that the employer must cooperate in granting the leave. He has to encourage the employee to take his – concrete numbered – leave and inform him accurately and in good time, that the entitlement to paid leave would otherwise expire.

Background

In Germany, every employee acquires their paid annual leave according to Sections 1 and 3 of the Federal Leave Law (*Bundesurlaubsgesetz* – BUrlG) at the beginning of the calendar year. Every employee has at least four weeks of paid annual leave. The employer decides whether and when to grant the employee leave. But in determining the dates on which leave may be taken the employer has to consider the wishes of the employee: Section 7(1) BUrlG.

According to Section 7(3) BUrlG, the leave must be granted and taken in the current calendar year. The carrying-over of leave to the next calendar year shall be permitted only if justified on compelling operational grounds or for personal reasons of the employee. According to the previous case law of the BAG, the reasons stated by law in Section 7(3) BUrlG were the only exceptions that prevented the leave from expiring. Even in cases in which the employee had applied for leave and the employer had not granted it, the entitlement to leave expired.

Instead, the employee acquired a claim for damages, which was identical to the entitlement to annual leave.

Pursuant to Section 7(4) BUrlG, an allowance shall be paid in lieu if the leave can no longer be granted because of the termination of the employment relationship.

Facts

The plaintiff had been employed by the defendant as a cashier since 2009 on the basis of a written employment contract. He worked on Saturdays and Sundays only. The plaintiff's leave entitlement was not regulated in the employment contract. In 2012 and 2013, the defendant did not grant the plaintiff any paid leave. However, the plaintiff had not applied for his annual leave either.

After the plaintiff terminated his employment contract in 2015, he claimed his entitlements to paid annual leave for 2012 and 2013 in the amount of eight days for each year. He wanted to take the leave from 2013 in March 2015 and the leave from 2012 to be paid in lieu. The defendant rejected the plaintiff's request.

As a result, the employee sued first before the labour court (*Arbeitsgericht*) and then before the regional labour court (*Landesarbeitsgericht* – LAG) for compensation for the total of 16 days of leave. Both courts rejected the plaintiff's request.

Judgment

The BAG granted the plaintiff's appeal and remitted the legal dispute back to the LAG. The LAG had assumed that the entitlement to paid annual leave had expired at the end of the particular calendar year in accordance with Section 7(3) sentence 1 BUrlG. The BAG disagreed with the LAG's interpretation, although it had followed the BAG's previous case law.

The BAG stated that the previous case law could not be upheld because of the decision of the ECJ of 6 November 2018 (C-684/16, *Max-Planck*). Following a referral for a preliminary ruling by the BAG, the ECJ had ruled that Article 7 of the Working Time Directive 2003/88/EC and Article 31(2) of the Charter of Fundamental Rights of the European Union precluded a national provision under which an employee automatically loses their entitlement to paid annual leave at the end of the reference period if they had not applied for leave. The ECJ clarified that the employer can only rely on the absence of the employee's application for leave if it has previously taken concrete and fully transparent steps to ensure that the employee was actually in a position to take their paid annual leave. The employer must encourage the employee,

formally if necessary, to take their leave and inform them clearly and in good time that, if they do not take it, the leave will expire at the end of the reference period or in the carry-over period, if applicable.

The BAG stated that the national courts are obliged under Article 288(3) of the Treaty on the Functioning of the European Union to interpret national law in accordance with European law. In this regard, they must take into account the case law of the ECJ since, according to Article 267 of that Treaty, the ECJ is responsible for the binding interpretation of contracts. However, an interpretation in conformity with European law should only be possible to the extent that it does not violate established national interpretation methods.

According to the BAG, an interpretation of Section 7 BUrlG in conformity with the ECJ's decision is possible. The Court held that Section 7 BUrlG does not regulate which modalities apply for the use and granting of the leave and which requirements apply for the expiration of the leave. Therefore, Section 7(1) BUrlG could be interpreted as meaning that the employer has an obligation to cooperate in the realization of the leave entitlement. Only if it fulfils its obligations, the leave could expire in accordance with Section 7(3) BUrlG.

According to the BAG, this interpretation also corresponds with the purpose of Section 7 BUrlG. The expiration of the entitlement to paid leave serves to protect the employee's health. The employee should be encouraged to claim their leave during the leave year and thus regularly receive a certain amount of time for rest and relaxation. The BAG acknowledged that the provision also serves to protect the employer from the risk that employees' leave could accumulate indefinitely. However, the employer shall only be worthy of protection if it acts in accordance with Article 7 of Directive 2003/88/EC.

The BAG also discussed whether the employer can rely on the doctrine of legitimate expectations, which is guaranteed in the German constitution. However, within the scope of application of European law, the protection of legitimate expectations shall only be possible to a limited extent. The BAG pointed out that the decisions of the ECJ have an *ex tunc* effect and it is for the Court of Justice to define temporal exceptions. Since the ECJ had not defined exceptions in its *Max Planck* judgment, the BAG could not grant the employer protection of legitimate expectations here.

Finally, the BAG remitted the legal dispute back to the LAG. It could not decide the case, because the LAG had not investigated whether the employer had correctly informed the employee. In order for the LAG to be able to determine this, the BAG specified the

requirements for the employer's duty to provide information. According to the BAG, the employer must refer to a concrete leave entitlement of a certain year and satisfy the requirements of complete transparency. For example, it should be sufficient to inform the employee in text form at the beginning of the calendar year how many days of leave they are entitled to, to ask them to take the leave in good time and to inform them that the leave will expire at the end of the year if the employee does not apply for it. Abstract information, for example in the employment contract, would not be sufficient.

Commentary

With this decision, the BAG has departed from its long-standing case law. This is not surprising after the ECJ's decision in *Max Planck*, in which the ECJ had made it clear that the BAG's previous interpretation of Section 7 BUrlG was not compatible with Article 7 of Directive 2003/88/EC and Article 31(2) of the Charter of Fundamental Rights of the European Union. It was only questionable how the BAG would integrate the decision of the ECJ into German law.

Convincingly, the BAG assumed that Section 7 BUrlG can be interpreted in accordance with European law. The wording of the provision does not contradict this, nor does it contradict the purpose of German leave law. In addition, the employer already controls the procedure for granting leave. To impose certain obligations on the employer is only consequent.

A positive aspect of the BAG's decision is that the Court specified the requirements for the employer's obligations to cooperate. Following the ruling of the ECJ, it was only certain that employers must ensure that their employees are in a position to exercise their right to paid annual leave, in particular through the provision of sufficient information. With the now issued decision of the BAG employers have some reliability on how to fulfil their obligation to cooperate, especially how to inform their employees.

As a result, most employers will have to change their current information policy. Probably only very few companies provide sufficient information to their employees. Nevertheless, the adjustments should not overburden employers, as already a one-time information at the beginning of the year is enough. However, it should be noted that, according to the BAG, it is always an overall consideration whether the employee was in a position to exercise their entitlement to paid annual leave. Therefore, employers must not create any other incentives that could discourage employees from taking leave.

Not to be underestimated is the BAG's clarification that in the scope of application of

European law it is usually not possible to rely on the constitutional protection of legitimate expectations. Until 2014, the BAG had decided otherwise, but then the German Federal Constitutional Court (*Bundesverfassungsgericht*) made it very clear that it was up to the ECJ alone to define temporal exceptions to the application of European law. In this respect, the protection of legitimate expectations does not apply even in long-standing case law.

Comments from other jurisdictions

Italy (Caterina Rucci, Katariina's Guild): The long-standing problem of getting employees to enjoy their holidays and correspondingly having employers cooperating with them for this purpose has been a serious one in Italy where, on the one side, there is a general prohibition to pay instead of taking holiday leave – at least the annual mandatory four weeks.

This issue has been almost completely solved in Italy by a law which imposes on the employer – whether employees have or have not asked for and enjoyed the holiday accrued in one year by the 18th month of accrual – the duty to pay in any case the corresponding social contribution for a fixed term.

Since paying contributions for great quantities of (long) accrued and untaken paid leave would also affect balance sheets, there is now more cooperation by employers in order to get the paid leave requested in a timely manner and enjoyed. Additionally, case law has now established that senior executives and/or high level employees, who are basically not subject to working time control, will be 'presumed' to have enjoyed their holidays in a timely manner, unless they can provide evidence this did not happen due to the employer's organization of work making it actually impossible to take leave.

Besides the other ways to get personnel to take holidays and other paid leave in a timely manner, we can also consider the so-called 'collective holidays', such as mandatory non-working Fridays generally in summer, and up to two weeks of mandatory collective holidays for everybody generally during the month of August, once traditionally a full closure month for manufacturing activity due to technical reasons in sectors such as stainless steel production and in any other sector where production cannot easily be stopped. The above closures are usually ruled by the applicable CBA. Today, even if this kind of industry is increasingly rare, weather and temperature reasons suggest for some collective stopping of activity, generally limited to two months. A number of collective agreements now also provide for holiday accrual for employees whose families live far apart and who therefore only travel to see them maybe once every two years, while they are happy to accrue holidays working when the majority are on leave.

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