SUMMARY

2020/25 |he Supreme Court in Plenary Session breaks away from its own established case law and rules that an employee is entitled to paid annual leave and annual leave allowance, even in a case where they were on long-term sick leave (GR)

The Greek Supreme Court in Plenary Session, in a long-awaited decision, has ruled that an employee who has not been able to exercise his right to annual leave due to long-term sick leave is still entitled to his paid annual leave as well as to annual leave allowance.

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Facts

The plaintiff had been hired as a driver/sales representative by the defendant in May 2004. In 2013 whilst driving on duty he had a road accident and was injured. Due to the injury he was granted several successive sick leaves up until May 2014 at which time he returned to work. The defendant then terminated his contract by paying the legal severance due, but not the annual leave, nor the annual leave allowance for the year 2014 as well as the penalty of 100% due for not having granted annual leave in 2014 to the employee.

Note: National law provides for the periods of short-term sick leave by reference to the years of past service as follows: where the employee has been employed for four years, they are entitled to one month short-term sick leave, where they have been employed for more than four and less than 10 years they are entitled to three months' sick leave, for those having up to 15 years of past service four months and finally for those having above 15 years, six months' sick leave.

So, it can be derived from this provision a contrario that in a case where the employee exceeds such short-term sick leave, then this is considered as long-term sick leave, unjustified and therefore such leave may be set-off against the annual leave they are entitled to and is not considered as employment time.

National law (mandatory Law 539/1945) also provides that any agreement between an employer and employee, including the waiver of the employee's right to annual leave, even if an increased compensation is provided, is considered void. The employer who refuses to grant to the employee the yearly legal paid annual leave is obliged at the end of the calendar year following official confirmation of such omission to pay the annual leave increased by 100% as a penalty.

Finally, employees in Greece are entitled to the so-called annual leave allowance, which is equal to half a month's salary.

Proceedings

The plaintiff filed a lawsuit claiming payment of his annual leave, his annual leave allowance, as well as the 100% penalty due to the illegal refusal of the defendant to grant his 2014 annual leave. The Magistrates' Court accepted his claim and awarded him the totality of the three amounts requested, by accepting that even though the plaintiff had lost his right to annual leave since his absence exceeded the short-term leave, he was still entitled to receive payment of his annual leave, as well as his annual leave allowance.

The company filed an appeal which was rejected by the First Instance Court on the basis that despite the fact that the plaintiff was not entitled to annual leave, since he was on long-term sick leave in 2014, he was still entitled to receive paid annual leave, as well as the annual leave allowance. Subsequently the defendant filed an appeal to the Supreme Court. The Supreme Court, by its decision no. 1050/2018, accepted the ground of appeal that the penalty of 100% had been wrongly awarded, since it had not been proved that the employee had indeed requested his annual leave and this had been refused by the employer. As far as the other ground of appeal was concerned – namely whether the employee's right to paid annual leave and annual leave allowance requires an existing right of the employee to receive in totality or

in part the annual leave in the calendar year at hand – the Supreme Court mentioned its previous case law and the criticism made by the legal theory. Since it considered this an extremely significant issue it referred this question to its Plenary Session.

Judgment

The Supreme Court Plenary Session by its decision 7/2019 decided finally on this issue of great interest, that the employee's right to annual leave remains active – despite the fact that he was prevented from exercising that right due to a long-term sick leave. The employee's absence was therefore justified and he was entitled to his paid annual leave, as well as the annual leave allowance, both entitlements having an ancillary character to the annual leave itself.

The Supreme Court expressly underlined the fact that no deviation at all is allowed from Article 7 of Directive 2003/88 and to such effect it made extensive reference to the ECJ case law namely:

to the 2018 Egenberger case (17 April 2018, ECLI:EU:C:2018:257), points 72, 73 and 79 ... the requirement to interpret national law in conformity with EU law includes the obligation for national courts to change their established case law, where necessary, if it is based on an interpretation of national law that is incompatible with the objectives of a directive ... a national court cannot validly consider that it is impossible for it to interpret a provision of national law in conformity with EU law merely because that provision has consistently been interpreted in a manner that is incompatible with EU law ... the national court would be required to ensure within its jurisdiction the judicial protection for individuals flowing from Articles 21 and 47 of the Charter, and to guarantee the full effectiveness of those articles by disapplying if need be any contrary provision of national law;
to the 2009 Schultz-Hoff case (20 January 2009, ECLI:EU:C:2009:18), point 62 ... Article 7(2) of Directive 2003/88 must be interpreted as precluding national legislation or practices which provide that, on termination of the employment relationship, no allowance in lieu of paid annual leave not taken is to be paid to a worker who has been on sick leave for the whole or part of the leave year and/or of a carry-over period, which was the reason why he could not exercise his right to paid annual leave ...;
to the 2006 Robinson-Steele case (16 March 2006, ECLI:EU:C:2006:177), point 48 ... the entitlement of every worker to paid annual leave must be regarded as a particularly important principle of Community social law from which there can be no derogations and whose implementation by the competent national authorities must be confined within the limits expressly laid down by the directive itself, and point 68 ... in the light of the mandatory nature

of the entitlement to annual leave and in order to ensure the practical effect of Article 7 of the directive, such set-off is excluded where there is no transparency or comprehensibility;
to the 2016 Maschek case (20 July 2016, ECLI:EU:C:2016:576), point 31 ... it must be recalled that Article 7(2) of Directive 2003/88 must be interpreted as precluding national legislation or practices which provide that on termination of the employment relationship no allowance in lieu of paid annual leave not taken is to be paid to a worker who has been on sick leave for the whole or part of the leave year and/or of a carry-over period, which was the reason why he could not exercise his right to paid annual leave ...;
and finally to the 2017 King case (29 November 2017, ECLI:EU:C:2017:489), point 65 ... Article 7 of Directive 2003/88 must be interpreted as precluding national provisions or practices that prevent a worker from carrying over and, where appropriate, accumulating, until termination of his employment relationship, paid annual leave rights not exercised in respect of several consecutive reference periods because his employer refused to remunerate that leave.

The Supreme Court concluded that the national legislator's will on short-term sick leave must be interpreted in the light of EU law, according to which an employee on sick leave which continued up until the end of his employment relationship and due to this reason he was not able to exercise his right to paid annual leave, even if such absence exceeds the limits of short-term sick leave, must not be deprived of such right. Therefore, provided that the employee has not exercised his right to annual leave in natura, this is converted into a monetary claim and the employee is entitled to paid annual leave as well as to the annual leave allowance due to their ancillary character.

Commentary

Such landmark decision rightly interprets at last the notion of the right to paid annual leave and the right to the annual leave allowance irrespective of the time the sickness leave has lasted in accordance with EU law and the ECJ case law.

Before the pronouncement of this decision, the Supreme Court's persistence – for many years after the issue of Directive 2003/88 and the uniform case law of the ECJ – on interpreting the applicable law on short-term sick leave a contrario in the sense that in the case of a long-term sick leave the annual leave is reduced accordingly – up until its total elimination, has been the object of serious criticism by many legal scholars.

Comments from other jurisdictions

Bulgaria (Rusalena Angelova, DGKV): The issue reported above would be unlikely to come up in my country because Bulgarian law explicitly entitles the employee to postpone the use of paid annual leave until the next calendar year when using other types of leave, including sick

leave, irrespective of its duration. In contrast to the Greek legislation, Bulgarian employers are not obliged to pay a penalty at the end of the calendar year in a case where the employee's annual leave is not used but rather they are obliged to ensure its use within six months from the end of the calendar year for which it is due. Moreover, when the paid annual leave is postponed due to sick leave, it remains active and the employee is entitled to use it within two years from the end of the year in which the reason preventing him/her from using it no longer exists.

Evident from the above, the conflict between the paid annual leave and the sick leave use is strictly regulated under Bulgarian law. Thus, national courts have been consistent in their practice on the matter and it is similar to the view of the Supreme Court of Greece adopted in its decision No. 7/2019.

p style="margin-right:-51px">*Germany (Nina Stephan, Luther Rechtsanwaltsgesellschaft mbH)*: First of all, the German legislation does not provide either an ('staggered') entitlement to sick leave, a statutory entitlement to leave allowance or a penalty for not granting annual leave. Instead, in accordance with Section 3 (1) sentence 1 of the Continued Remuneration Law (Entgeltfortzahlungsgesetz, "EFZG"), every employee is entitled to continued remuneration for a period of up to six weeks for each (new) illness. This means that an employer is obliged to continue to pay the employee his or her average salary for up to six weeks, if a doctor has attested that the employee is unable to work.

p style="margin-right:-51px">German law rather strictly differentiates between absence due to vacation and absence due to illness. In particular, any periods of sick leave shall not be counted towards leave entitlements. Sec. 9 of the Federal Leave Act (Bundesurlaubsgesetz, "BUrlG"), for example, stipulates explicitly:

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p style="margin-right:-51px">*"If an employee becomes ill during his vacation, the days of inability to work as evidenced by a physician's certificate shall not be applied toward annual vacation."*

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p style="margin-right:-51px">In principle, the employee must be granted his (annual) leave entitlement in the current calendar year. According to Sec. 7 BUrlG, the transfer to the next calendar year is only possible in exceptional cases and only for a period of three months. After these periods, leave entitlements lapse if the employee did not take leave though he was able to do so (which is legally impossible in case of long-term illness). Additionally and due to recent case law of the ECJ, this requires the employee to be fully informed by the employer as

to the consequences (6 November 2018, C-684/16).

p style="margin-right:-51px">Nevertheless, by referring to the decision of the ECJ in the Schulte case (22 November 2011, C214/10), the Federal Labor Court (Bundesarbeitsgericht, "BAG") has already decided in 2012 that leave entitlements lapse 15 months after the end of the calendar year. This even applies if the employee was unable to take leave due to long-term illness (BAG, decision of 7 August 2012, AZR 353/10). This has been settled case law ever since.

p style="margin-right:-51px">In general, these principles also apply if the employee is entitled to extra leave or leave allowance according to contractual or union agreement. But as – unlike in Greece – these additional entitlements are not mandatory by directive 2003/88, they may be regulated otherwise between the parties. This can certainly lead to a situation where any agreed entitlement is reduced to zero in case of long-term illness.

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Parties: Unknown

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