EELA EUROPEAN EMPLOYMENT LAWYERS ASSOCIATION

SUMMARY

2020/26 Entitlement to allowance in lieu of untaken paid annual leave had lapsed because of garden leave (NL)

Applying the ECJ's Maschek judgment, the Zutphen subdistrict court has found that an employee was not entitled to an allowance in lieu of untaken paid annual leave at the end of the employment relationship, as she had already received special leave. Moreover, the obligation to inform the employee concerning the right to (exercise) paid annual leave did not rest upon the employer.

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Facts

p style="margin-right:-10px">The employee (the claimant) had worked as a manager for a healthcare institution for several years. On 1 July 2017, she was made redundant and put on 'special leave', or garden leave in common parlance, based on the applicable collective agreement covering workers providing disability care (*cao Gehandicaptenzorg*).[1] The employer informed her that there was no longer a workplace available for her at the employer's premises, that she could no longer be present at her former place of work, that she would no longer have an account on the employer's network and that she had to hand in her keys to the employer's premises.

p style="margin-right:-10px">The employee was incapacitated for work due to sickness from 26 October 2017 until 5 April 2019. On 11 February 2019, a subdistrict court – it seems to be the same court as the case at issue – terminated her employment contract as of 1 July 2019.

p style="margin-right:-10px">At some point, the employee asserted that she had accrued fifty-five untaken days of annual leave until termination of her employment contract and claimed compensation. Of those fifty-five days, forty had been accrued during her special leave; the remaining fifteen days had been accrued before she was put on that leave. She asserted that she had been incapacitated for work due to sickness for about a year and a half after she had been declared redundant. As her employer denied the claim, she went to the subdistrict court (hereinafter: the Court).

Legal background

p style="margin-right:-10px">Article 7 of Directive 2003/88/EC aims to ensure that every worker is entitled to paid annual leave of at least four weeks with the aim of effectively protecting his/her safety and health by being able to rest from his/her work.[2] Dutch law has implemented Article 7 into Articles 7:634-645 of the Dutch Civil Code (DCC). Two articles must be noted in particular. Article 7:641 of the DCC implements the payment of an allowance in lieu upon termination of the employment contract (Article 7(2) of the Directive). According to Article 7:640a DCC (hereinafter: Article 640a), the right to paid annual leave lapses six months after the last day of the calendar year in which the entitlement was acquired, unless the employee has not been reasonably able to take vacation up to that time.

Judgment

p style="margin-right:-10px">First, the Court noted that Article 640a was included after the ECJ's *Schultz-Hoff* judgment (20 January 2009, ECLI:EU:C:2009:18), in which it held that Directive 2003/88 must be interpreted as precluding national legislation which provides that no allowance in lieu of paid annual leave not taken is to be paid to a worker who could not exercise their right to paid annual leave, as they were on sick leave. [Authors' note: the Court's explanation of *Schultz-Hoff* seems somewhat simplified.]

p style="margin-right:-10px">The Court then went on to note that the ECJ held in *Maschek* (20 July 2016, ECLI:EU:C:2016:576) that the position is different if it concerns a period in which annual leave has no useful effect, as it is not necessary to give an employee the opportunity to rest from work and to enjoy a period of relaxation and leisure. According to the Court, it follows from that judgment that this is the case if an employee is not required to report to their place of work during a specified period and they continue to receive their salary. [Authors' note: again, this seems to be the Court's interpretation of the judgment rather than copying its

exact words.]

p style="margin-right:-10px">The Court then referred to the ECJ's judgments in *Max-Planck* (ECLI:EU:C:2018:874) and *Kreuziger* (ECLI:EU:C:2018:872) of 6 November 2018. According to the Court, the ECJ held that the employer must enable an employee to exercise their right to annual leave, in particular through the provision of sufficient information, as otherwise the right cannot lapse. Last but not least, it noted the horizontal direct effect of Article 31(2) of the Charter of Fundamental Rights of the European Union.

p style="margin-right:-10px">According to the Court, the period of 'special leave' qualified as a period in which annual leave has no useful effect, as referred to in *Maschek*. Consequently, the lapse of annual leave rights would not be contrary to Article 7 of Directive 2003/88.

p style="margin-right:-10px">The Court further dismissed the employee's assertion that the employee had been sick from October 2017 until April 2019, as she had not rebutted the employer's assertion that the employee's incapacity for work had been 'situational' rather than medical. [Authors' note: see the commentary for an explanation].

p style="margin-right:-10px">As regards the employer's duty of disclosure following the *Max Planck* and *Kreuziger* judgments, the Court held that this duty is intended to safeguard an employee's right to enjoy a period of relaxation and leisure. However, as the period of special leave qualified as a period in which annual leave had no useful effect, the duty of disclosure did not apply in this case.

p style="margin-right:-10px">The Court concluded that the employee's right to receive a cash benefit in lieu of untaken paid annual leave at the end of the employment relationship had lapsed, as the employee had not submitted – other than her assertion that she had been sick – any other facts of circumstances on the basis of which it could be established that she was reasonably unable to take annual leave. It therefore dismissed her claim.

Commentary

p style="margin-right:-10px">While the outcome perhaps seems not too surprising, the Court actually had to navigate carefully to arrive at its conclusion.

p style="margin-right:-10px">The most efficient way to deny the employee's right to annual leave would have been to take the straightforward approach that the ECJ had favoured in *Dicu* (4 October 2018, ECLI:EU:C:2018:799), in which it held that Article 7 of Directive 2003/88 does not preclude a provision which, for the purpose of calculating a worker's entitlement to paid annual leave, did not consider time spent on parental leave as a period of actual work. The

Court then only would have had to justify treating the non-statutory 'special leave' in a similar way as the EU-law based 'parental leave'. However, this was not an option in this case, as Article 7:634 of the DCC grants the accrual of the right to paid leave as long as an employee receives salary. While this requirement is considered to be in violation of the ECJ's *BECTU* judgment (26 June 2001, ECLI:EU:C:2001:356) as an illegitimate condition put on the right to annual leave, in this case it actually did not stop the employee from accruing her right to annual leave when she was put on 'special leave', because she still received her salary.

p style="margin-right:-10px">Instead, the Court now had to justify why Article 640a led to a lapse of the accrued rights of leave, ultimately denying the employee an allowance in lieu. Its interpretation of the *Maschek* judgment was pivotal in reaching its conclusion. The Court held that, during the period of 'special leave', the allowance in lieu of paid annual leave not taken had no useful effect given its purpose to enable the employee to rest from a period of work and to enjoy a period of relaxation and leisure, while the employee was not required to report to their place of work whilst still receiving a salary (compare to *Maschek*, paragraph 35).

p style="margin-right:-10px">The ECJ had also held in *Maschek* that the employee would still be entitled to an allowance in lieu if they had not been able to take that leave due to illness. Indeed, in the case at hand, the employee held that this was the case. However, the Court dismissed this argument as the illness was 'situational', which – in short – means that the employee cannot perform his/her work tasks as a result of a conflict, but not for medical reasons.

p style="margin-right:-10px">The last hurdle was to dismiss the duty of disclosure as introduced in *Max-Planck* and *Kreuziger*. The Court preferred to repeat the argument that the right to annual leave had no useful effect in this situation and therefore held that the duty of disclosure did not apply in the present case. The judgments themselves do not contain a similar reference to *Maschek*. However, the Court's choice is not totally illogical given the fact that forty out of fifty-five vacation days had been accrued during the period of 'special leave'. In this way, the Court overcame all possible hurdles.

p style="margin-right:-10px">Nevertheless, the case demonstrates the complexities and inconsistencies in the ECJ's case law on the matter. *Dicu* appears to give Member States the possibility to deny employees the right to annual leave at all, if the ECJ's considerations in that judgment are met, most notably that there should be work to rest from (paragraph 28). In other words, *Dicu* limits the scope of Article 7(1) of the Directive. *Maschek* concerns Article 7(2) of the Directive, so only concerns the allowance in lieu of untaken leave. The ECJ's consideration in paragraph 35 that an employee is not entitled to this allowance if they were not required to work whilst receiving salary seems both logical and consistent with *Dicu*, if not

for the fact that employees are still entitled to the allowance in lieu if they could not take their leave because of illness. Apparently, in case of illness it is not relevant whether the right to an allowance in lieu has any useful effect.

p style="margin-right:-10px">For these reasons, *Maschek* and *Dicu* seem to be at least somewhat at odds with each other. While it is imaginable that these differences can be explained by the different facts of the cases, more guidance on this issue would be welcome. Also, it would be good to know whether the duty of disclosure as introduced in *Max-Planck* and *Kreuziger* is relevant in such situations.

Comment from other jurisdiction

p style="margin-right:-33px">*Finland (Janne Nurminen, Roschier, Attorneys Ltd)*: In Finland, the Annual Holidays Act (162/2005, as amended) is based on the idea of the earnings principle. The Act contains provisions regarding the accrual of holidays and determines when the vacation days are accrued. According to the Act, any period of absence for which the employer is by law obliged to pay the employee's salary is considered to be a period equivalent to time at work. If an employer orders an employee on a 'garden leave' which in practice means that the employee is still paid salary but is exempted from the obligation to perform work, the employee will still accrue annual holiday. The employer is responsible for ordering the employee to take their vacation. Before the employer determines the timing of the holiday, the employee must be given the opportunity to voice their opinion. The timing of the holiday must be communicated to the employee as a starting point at least one month before the commencement of the holiday. If this is not possible, the communication must take place at the latest two weeks before the holiday begins. It can be *agreed* that the holidays are 'saved' for later, but this does not mean that the employee loses their right to annual holiday or the substitutive compensation. If the vacation days accrued have not been used before the expiry of the employment the employee is entitled to receive holiday compensation. Therefore, the employee would at least have been entitled to holiday compensation for the vacation accrued and not yet taken. In Finland, garden leave is typically used during the notice period if the employee's work input is no longer needed. There is thus a clear end date for the garden leave (and the employment) which is not more than six months ahead. Since the employee continues to accrue holiday during the notice period, there is in practice always some holiday compensation to be paid at the end of the notice period (as this holiday is accrued for the next holiday season).

p style="margin-right:-33px">*Germany (Martina Ziffels, Luther Rechtsanwaltsgesellschaft mbH)*: The ruling discussed above deals with different principles of holiday law most of which have been raised by the judgments of the ECJ. While the German Federal Labour Court

(*Bundesarbeitsgericht*, "BAG") seems to follow the same principles referred to by the Dutch Court regarding the judgment in the case *Dicu* – the same applies for *Maschek* – the principles introduced in *Max-Planck* and *Kreuziger* – both cases were brought to the ECJ by German labour courts – put much stricter requirements on the employer than introduced by the Dutch Court.

p style="margin-right:-33px">The central regulations of German holiday law are stipulated in Sec. 7 paras. 3 and 4 of the Federal Holiday Act (*Bundesurlaubsgesetz*, "BUrlG"). According to Sec. 7 para. 3 the holiday must be taken during the calendar year. The holiday entitlement is only carried over to the following calendar year if the holiday could not be taken on time for urgent operational or personal reasons, in which case it must be taken by 31 March of the following year at the latest, otherwise the entitlement expires. If the leave cannot be taken in whole or in part due to termination of the employment relationship, it must be compensated (Sec. 7 para. 4). Following the ECJ's *Schultz-Hoff* judgment, the BAG makes an exception to this rule in the case of long-term illness of the employee which lasts beyond the end of the calendar year or beyond 31 March of the following year respectively. In this case, the holiday entitlement expires 15 months after the end of the calendar year.

p style="margin-right:-33px">In a more recent judgment (19 March 2019) the BAG also ruled that the holiday entitlement pursuant to the Federal Holiday Act presupposes only the existence of the employment relationship. Its scope is to be calculated in accordance with Sec. 3 of the Federal Vacation Act. If the duty to work is not, as assumed in Sec. 3 BUrlG, spread over six days of the calendar week but over fewer or more days of the week the holiday entitlement shall be reduced or increased accordingly. Any period of special leave is to be taken into account when calculating the leave entitlement with 'zero' working days. There is therefore normally no holiday entitlement for the period of special leave whereas special leave in this case means a special leave granted on the employee's request or by agreement of the parties respectively. But, the BAG also decided in this ruling of 19 March 2019 that, taking into account the case law of the ECJ (*Dicu* – C-12/17), the national regulation on the calculation of the holiday entitlement is to be interpreted to the effect that a reduction of the holiday entitlement is excluded if the suspension of the employment relationship is due to the fact that the employee is unable to fulfil their obligation to perform their work for health reasons. This is (also) the case if the employee receives a reduced earning capacity pension. Also, the BAG had no reason to comment on leave entitlement during maternity and parental leave as these cases are regulated positively by law.

p style="margin-right:-33px">However, the main difference between German law and Dutch law is the employer's obligation to inform the employee about the holiday entitlement and its possible expiry. The BAG has so far viewed the question of the employer's obligation to work

towards the employee's taking up of the leave as a mere formality. The respective law does not provide for an employer's obligation to grant leave on its own initiative. In this respect, an employee's claim for damages for the granting of substitute leave or compensation for leave could be considered if the leave entitlement were to lapse on the basis of Sec. 7 of the Federal Vacation Act; however, this would require a delay on the part of the employer, which would normally only occur after a reminder in the form of an application for leave.

p style="margin-right:-33px">However, after several state labour courts had challenged this legislation in recent years, the case was finally brought to the ECJ with *Max-Planck* and *Kreuziger*. What the respective rulings of the ECJ meant for German law was stated by the BAG in its two decisions from February 2019 (19 February 2019 – 9 AZR 541/15 and 19 February 2019 – 9 AZR 423/16). According to this, the employer fulfils its so-called obligations to cooperate in the realisation of the holiday entitlement only by requesting the employee to take their holiday and by informing them clearly and in good time that the holiday expires at the end of the calendar year or carry-over period if it is not requested by the employee. According to the reasons for the decision, employers can only invoke the absence of an application for leave by the employee if the employer has previously ensured in a concrete and completely transparent manner that the employee could have taken their leave. To this end, the employee must be informed that any leave not taken is forfeited. The burden of proof that the obligations to cooperate have been fulfilled lies with the employer. The 'concreteness' of the reference required by the court presupposes that it refers to a precisely defined holiday entitlement. General information in the employment contract, an information sheet or a collective agreement is too abstract and therefore not sufficient.

p style="margin-right:-33px">Employers are therefore recommended to draw attention to the existing holiday entitlement at the beginning of each year, e.g. by e-mail or by sending the annual income statement. The employee must also be asked to work towards taking their holiday entitlement by submitting the application. An indication of the otherwise impending expiry must be given. In order to meet the requirement of concreteness, it is advisable to quantify the leave entitlement precisely. Employees who still have a large holiday account in the middle of the year should be reminded again. For precautionary reasons, this should then also be done with return receipt in order to be able to meet the burden of proof in any later proceedings.

p style="margin-right:-10px">**Subject**: Paid Leave

p style="margin-right:-10px">**Parties**: [Employee] – v – Stichting De Lichtenvoorde

p style="margin-right:-10px">**Court**: Zutphen subdistrict court

p style="margin-right:-10px">**Date**: 28 March 2020

p style="margin-right:-10px">**Case number**: 8091904 \ CV EXPL 19-4729

p style="margin-right:-10px">**Internet publication**:
https://uitspraken.rechtspraak.nl/inziendocument?id=ECLI:NL:RBGEL:2020:1361

[1] Article 8:17 of the then applicable collective agreement covering workers providing disability care (*cao Gehandicaptenzorg*) contained: "*the employer can, at its own discretion, grant paid or unpaid leave to the employee in connection with other special events not mentioned in the collective agreement.*"

[2] The right to paid annual leave is binding and is laid down in Article 31(2) of the Charter of Fundamental Rights of the European Union. See ECJ 6 November 2018, joined cases C-569/16 and C-570/16, ECLI:EU:C:2018:871 (*Bauer*).

Verdict at: 2020-02-26
Case number: 8091904 \ CV EXPL 19-4729