SUMMARY

2020/51 Compensating untaken leave in case of termination without good cause – preliminary questions asked (AT)

The Austrian Supreme Court has asked preliminary questions about the lawfulness of Section 10(2) of the Austrian Law on Annual Leave which stipulates that an employee is not entitled to an allowance in lieu of annual leave in respect to the current (last) working year if they terminate the employment relationship prematurely without good cause.

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The Austrian Supreme Court has asked preliminary questions about the lawfulness of Section 10(2) of the Austrian Law on Annual Leave which stipulates that an employee is not entitled to an allowance in lieu of annual leave in respect to the current (last) working year if they terminate the employment relationship prematurely without good cause.

Legal background

Under Section 2(1) of the Law on Annual Leave (*Urlaubsgesetz*, 'UrlG'), an employee who has been in service for less than 25 years is entitled to uninterrupted paid leave of 30 working days for each year of service and 36 working days thereafter.

Section 10(1) of the Law on Annual Leave provides:

For the leave year in which the employment relationship ends, the employee is entitled to an allowance in lieu on the date that the employment relationship ends as compensation of the leave corresponding to the period of employment in that leave year compared to the full leave

year.

However, according to Section 10(1) UrlG, no allowance in lieu is payable if the employee unilaterally terminates ('withdraws from') the employment relationship with immediate effect without good cause (Section 10(2) UrlG).

The presented case concerns the question whether or not Section 10(2) UrlG is incompatible with Article 31(2) of the Charter of Fundamental Rights of the European Union ('CFR') and Article 7(2) of the Working Time Directive (2003/88/EC). Article 31 of the CFR regulates the right of every employee to paid annual leave. Article 7 of the Working Time Directive requires Member States to take the measures necessary to ensure that every worker is entitled to paid annual leave of at least four weeks in accordance with the conditions for entitlement to, and granting of, such leave laid down by national legislation and/or practice (Section 1). The minimum period of paid leave may not be replaced by an allowance in lieu, except where the employment relationship is terminated (Section 2).

Facts

The proceedings pending before the Austrian Supreme Court concern the action brought by an employee who terminated the employment relationship through unjustified early withdrawal. During the period of employment, the employee had acquired a holiday entitlement of 7,33 working days. Up to the termination of the employment relationship, the employee had taken 4 vacation days. Therefore, on the date that the employment relationship ended, the employee had 3,33 working days of remaining annual leave, which he could no longer use due to his (unjustified) early withdrawal. In the action brought by the employee, he sought compensation by an allowance in lieu for annual leave not taken on the date that the employment relationship ended (EUR 322,06 plus interest).

The employer – citing Section 10(2) UrlG – did not pay any allowance in lieu of annual leave to the employee.

The employee argued that the provision of Section 10(2) UrlG, under which no allowance in lieu (of annual leave) is payable if the worker withdraws from the employment relationship without cause ('unjustified withdrawal' or 'withdrawal without cause'), infringed Article 31(2) of the CFR and Article 7 of the Working Time Directive, and therefore did not apply.

Judgment

The Austrian Court of First Instance dismissed the employee's claim. It held that it could not

be inferred from Article 7(2) of the Working Time Directive that employees have a right to an allowance in lieu of annual leave irrespective of how the employment relationship ended. The opposite view would be disproportionate, as it would have an unreasonable adverse impact on the employer. In the event of unjustified early withdrawal on the part of the employee, it is no longer possible for the employer to grant the employee their right to annual leave, since the employment relationship ends immediately. Section 10(2) UrlG must be regarded as a customary practice adopted in the Austrian legal system within the meaning of Article 7(2) of the Working Time Directive.

The Appeal Court upheld this decision. It held that it cannot be inferred from the ECJ's case law that the loss of the right to an allowance in lieu of annual leave where the employment relationship is terminated through withdrawal on the part of the employee without cause would be contrary to Article 7(2) of the Working Time Directive or Article 31(2) CFR. Justifying its decision, the Court of Appeal referred to the decisions of the ECJ where it emphasised that Article 7(2) of the Working Time Directive does not lay down any other condition for the entitlement to an allowance in lieu than that the employment relationship has ended and that the employee has not taken all annual leave to which they were entitled on the date that the employment relationship ended (C-341/15, *Maschek – v – City of Vienna*). The Appeal Court also pointed out that the ECJ underlined that the reason that the employment relationship ended does not affect the right to an allowance in lieu.

But the Appeal Court also stated that the ECJ had not yet been faced with any cases in which the employment relationship was terminated through an unjustified early withdrawal on the part of the employee. According to the Appeal Court, the termination of the employment relationship with a right to remaining annual leave was not in fact the only prerequisite for the entitlement to compensation.

Subsequently, the Appeal Court pointed out that the ECJ had denied the right to compensation for the period during which the employee was released from work on full pay prior to their retirement. In the *Kreuziger* (C-619/16) and *Max-Planck-Gesellschaft* (C-684/16) cases, the ECJ expressly pointed out that it cannot be inferred from case law that the employee's entitlement to compensation must be maintained "irrespective of the circumstances underlying the worker's failure to take paid annual leave" (*Max-Planck*, paragraph 30). Article 7 of the Working Time Directive does not preclude "national legislation which lays down conditions for the loss of the entitlement, provided, however, that the employee who has lost his right to paid annual leave has actually had the opportunity to exercise the right conferred on him by that directive" (*Max-Planck*, paragraph 35).

The Supreme Court (*Oberster Gerichtshof*) allowed the employee's appeal and ruled that the question of the compatibility of Section 10(2) UrlG with European law needs to be clarified.

In the grounds of its decision, the Supreme Court referred to the case law of the ECJ, in particular to Case C-341/15 (*Maschek – v – City of Vienna*), Case C-619/16 (*Kreuziger – v – Land Berlin*) and Case C-684/16 (*Max-Planck-Gesellschaft*).

The Supreme Court referred to Max-Planck-Gesellschaft according to which any interpretation of Article 7 of the Working Time Directive which is liable to encourage the employee to refrain deliberately from taking their paid annual leave in order to increase their remuneration at the end of the employment relationship is incompatible with the objectives of the right to paid annual leave.

From the employer's perspective, the employment relationship ends suddenly and unexpectedly when the employee unilaterally terminates ('withdraws from') the employment relationship. In contrast to all other forms of termination, the employee themselves prevents the possibility of using up their annual leave in natura if they withdraw prematurely without justification. Before the end of the employment relationship, the employee is only entitled to (paid) leave *in natura*. The fact that the employee could acquire a claim to an allowance in lieu of annual leave by terminating the employment relationship through unjustified early withdrawal (breach of contract) would violate the general principle of law that no one should acquire a claim through unlawful action (*ex iniuria ius non oritur*). It would run counter to the objective of (paid) annual leave to maintain the health of the employee if the employee could obtain an allowance in lieu of their right to annual leave as a result of withdrawing without justification.

By its decision of 29 April 2020, the Supreme Court asked the ECJ to answer the following questions:

1. Is a provision of national law under which no allowance in lieu of annual leave is payable in respect of the current (last) working year, where the worker unilaterally terminates ('withdraws from') the employment relationship early without cause, compatible with Article 31(2) of the Charter of Fundamental Rights of the European Union (2010/C 83/02) and Article 7 of the Working Time Directive (Directive 2003/88/EC)?
2. If the answer to that question is in the negative:
2.1. Is it necessary to verify additionally if the employee was unable to use up his annual

leave?
2.2. If so, what are the criteria for that verification?

Meanwhile, the case has been assigned number C-233/20. The reference lodged has been translated into all EU languages.

Commentary

The grounds of the decision show that the Austrian Supreme Court considers Section 10(2) of the Law on Annual Leave – contrary to the view of the prevailing doctrine in Austria – to be compatible with European law (Article 31 CFR and Article 7 of the Working Time Directive).

The Supreme Court comes to the conclusion – based on the previous case law of the ECJ – that there are good grounds for considering Section 10(2) of the Law on Annual Leave to be in accordance with European law.

The Supreme Court rightly considered it relevant that the employee themselves prevented the possibility of using up their annual leave *in natura* by terminating the employment relationship through unjustified early withdrawal. The protective purpose of European law (in particular Article 31 of the CFR and Article 7 of the Working Time Directive) is to ensure that employees are granted a minimum period of paid leave during their current employment relationship. The only case in which the entitlement to paid annual leave may be replaced by an allowance in lieu is when the employment relationship is terminated. The mandatory financial compensation for unused annual leave supports the protective purpose of the regulation if the employer feels compelled to ensure that the holiday entitlement is consumed on an ongoing basis in order to avoid financial reserves for (high) outstanding holiday entitlements. In the case of unjustified early withdrawal from the employment relationship by the employee, it might not be apparent that the protective purpose of the European law provisions requires financial compensation, particularly since, on the one hand, the employee's failure to take leave is generally beyond the employer's control and, on the other hand, the employee's conduct in breach of contract could give rise to a claim to financial compensation.

It is also worth mentioning that the Directive only stipulates a four-week minimum holiday entitlement, while the entitlement under the Austrian Law on Annual Leave is five weeks. In my view, any possible incompatibility of Section 10(2) of the Law on Annual Leave with European law would have to be limited to the minimum claim of four weeks under European law (Article 7(1) of the Working Time Directive).

In addition to this case further proceedings are currently pending before the Supreme Court in which employees who left their employment unduly are claiming holiday compensation invoking the incompatibility with European law.

Comments from other jurisdictions

Bulgaria (Rusalena Angelove, DGKV): The issue reported above would be unlikely to come up in my country. Unlike Austrian legislation, Bulgarian labour law does not recognize 'unjustified' termination or termination 'without cause' since all termination grounds are exhaustively listed in the Bulgarian Labour Code and the employment relationship may be terminated only on one of the termination grounds indicated therein.

Furthermore, the Bulgarian Labour Code contains an express provision governing the rules for compensation in lieu of the unused paid annual leave days payable to the employee upon termination of the employment relationship. Pursuant to that provision, this compensation is payable by the employer upon termination on any of the termination grounds set out in the Labour Code, including in case of unilateral termination of the employment relationship by the employee, whether with or without prior notice.

Evident from the above, the termination grounds as well as the compensations due to the employee are strictly regulated under Bulgarian law. Case law of the Bulgarian courts has been consistent with regards to compensation in lieu of unused paid annual leave days.

Germany (Marcus Bertz, Luther Rechtsanwaltsgesellschaft mbH): Under German law entitlement to an allowance in lieu of annual leave is regulated in the Federal Leave Act (Bundesurlaubsgesetz, the 'BUrlG'). Section 7(4) BUrlG provides that the employee is entitled to an allowance in lieu of annual leave if the annual leave cannot be granted due to the termination of the employment. The reason for which the employment relationship was terminated is completely irrelevant. Even an employee who has been extraordinarily dismissed without notice is entitled to a compensation for leave entitlements previously gained.

Until 1974, German labour law foresaw a provision which was comparable to current Austrian law. The former Section 7(4) 2 BUrlG stated that an employee was not entitled to this leave compensation if the employment was terminated without notice by the employer for good reason or if the employee terminated the employment without good cause in breach of their duties. Since the abolition of this provision the entitlement to an allowance in lieu of annual leave is no longer restricted. Even though the Federal Labour Court ruled in a judgment in 1976 that there could be circumstances which may justify a forfeiture of the leave

compensation due to an abuse of law by the employee, it is very unlikely that a German Labour Court would dismiss an employee's action for allowance in lieu of annual leave regarding an abuse of rights.

The questions referred by the Austrian Supreme Court are thus not immediately relevant to German legislation and jurisprudence. However, the answers of the ECJ could show that other rules are conceivable and permissible under Union law, even if they differ from the very employee-friendly German legislation.

Hungary (Dr. Gábor T. Fodor, Ferencz, Fodor T., Kun & Partners): In my opinion the Austrian law in question is clearly contrary to European Union law. The fact that the employee terminated their employment unlawfully should not have any effect on their right to paid annual leave. The principle of *ex iniuria ius non oritur* does not apply here, since, regardless of the unlawful termination, the employee had a right to their paid annual leave. Of course, due to the employee's unlawful action, the provision of such paid annual leave in natura has become impossible, but this does not diminish the employee's right to be compensated for the paid annual leave – I draw attention to the fact that the annual leave is paid, so therefore the employer has not suffered any material damage with respect to the paid annual leave due to the employee's action – the employer should have to pay the same amount during the annual leave in natura for the employee, without receiving the benefit of work performance by the employee. Therefore, I read with certain wonderment that according to the Supreme Court of Austria the principle of ex iniuria ius non oritur would apply here. Rather, to the contrary, the employer would be unjustly enriched should it not pay the compensation.

In my opinion, Hungarian courts would agree with my view, also based on the fact that there is no similar provision as the one in question in Hungarian law.

The Netherlands (Jan-Pieter Vos, Erasmus University Rotterdam): This situation is unlikely to arise under Dutch law as Article 7:641 of the Dutch Civil Code stipulates that any leave which is untaken at the termination date of the employment agreement shall be replaced by an allowance in lieu.

That being said, it will be interesting to see how the ECJ will react. In *Bollacke* (C-118/13), paragraph 23, and *Bauer* (C-569/16 and 570/16), paragraph 44, the Court explicitly held that Article 7(2):

lays down no condition for entitlement to an allowance in lieu other than that relating to the fact, first, that the employment relationship has ended and, secondly, that the worker has not

taken all annual leave to which he was entitled on the date that that relationship ended.

In these cases, the Court also stressed the importance of an employee not being left behind with empty hands (no leave and no compensation). It is very well possible that the ECJ simply decides along these lines.

While this all sounds convincing, it should be stressed that Article 7(2) stipulates that an allowance in lieu may – and not shall – replace the minimum period of paid leave in case of termination of the employment relationship. As the Court has held many times (e.g. *Robinson-Steele*, C-131/04 and C-257/04, paragraph 60), this Article aims to ensure that employees actually take their leave and cannot replace it by an allowance in lieu. In the *Max-Planck* judgment (C-684/16), both the late Advocate General Bot (in paragraph 43-59) and the ECJ (in paragraph 30) emphasised that Article 7(2) does not grant a right to an allowance in lieu in all situations. Rather, it should be verified whether the employer had in fact enabled them to exercise their right to annual leave.

The ECJ thus has room to deny the employee an allowance in lieu, especially now – as the Court of Appeal rightly noted – it could be argued that in the present case the employee is largely responsible for not being able to take their outstanding leave. It would be interesting to see how that would work out, especially as the condition for denying the right to annual leave as brought forward in *Max-Planck* – encouraging the employee to take leave, provide them with sufficient information and informing them that their right to annual leave can lapse – seems difficult to apply to the case at hand. Perhaps a better option would be to return to its more general considerations from the past and determine whether the employee had been able to take their leave and decide from there.

If the ECJ's judgment will ultimately deny the employee an allowance in lieu, considerations along the lines above seem more likely than the *ex iniuria ius non oritur* arguments of the Supreme Court. Given the status of paid leave as a fundamental right, with the employee having accrued their right to annual leave and without there being a tangible disadvantage for the employer compared to the scenario that the employee would have taken, I highly doubt that the ECJ would deny an employee's right to annual leave on those grounds.

In any case, it will be interesting to see how the ECJ decides in this case.

Subject: Paid Leave

Parties: WD – job-medium GmbH (in liquidation)

EELA EUROPEAN EMPLOYMENT LAWYERS ASSOCIATION

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