

SUMMARY

2021/11 Expiration of leave only with prior information from the employer, even if the employee was not able to take the leave due to illness, a reduction of work capacity or an incapacity for work? (GE)

According to German law, leave entitlements of an employee shall in principle expire at the end of the calendar year or a permissible carryover period. However, based on the case law of the ECJ, this shall only apply if the employer has previously enabled and summoned the employee to take leave and the employee has nevertheless not taken it. But what happens if an employee is incapacitated for work for a longer period of time and therefore is unable to take his or her annual leave? Does the employer also have to inform this employee about their leave entitlement? The Federal Labour Court (Bundesarbeitsgericht, 'BAG') recently had to deal with this question in two cases and now the ECJ will have to address this matter. This is because the BAG has asked the ECJ to decide whether and when an employee's entitlement to paid leave can expire if an employee loses their ability to work during the course of the leave year, while the employee could have taken at least part of the annual leave before becoming incapacitated for work, but the employee was not properly informed by the employer about their leave entitlement.

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Legal background

According to Section 1 of the Federal Leave Act (*Bundesurlaubsgesetz*, 'BUrIG'):

Each employee has a claim to paid recreational vacation in every calendar.

Furthermore, Section 7(3) BUrIG states:

The vacation shall be granted and taken in the current calendar year. Carryover of vacation to the next calendar year is only permissible if compelling operational reasons or reasons personal to the employee justify it. In the case of a carryover, the vacation must be granted and taken within the first three months of the succeeding calendar year. [...]

This means that under German law – unless otherwise agreed between employee and employer – the statutory vacation entitlement expires on 31 March of the following year.

Since 2010, however, it has been settled case law that leave – which cannot be taken in the leave year or during the carryover period (until 31 March of the following year) due to illness or incapacity for work – does not expire in this period, but at the latest 15 months after the end of the leave year. The settled case law is based on a ruling of the

ECJ of 22 November 2011 (*KHS*, C-214/10).

Aside from this, since the *Max-Planck* decision of the ECJ of 6 November 2018 (C-684/16) it has been settled case law that the entitlement to the statutory minimum leave only expires at the end of the calendar year or within the permissible carryover period if the employer has enabled the employee to take leave and the employee nevertheless did not take the leave of their own free will (see also BAG 19 February 2019, 9 AZR 541/15). Such requirements shall now only be met if the employer informs the employee about the existence of remaining leave entitlements well before the (imminent) expiry of the leave and encourages the employee to take their remaining leave. If the employer does not comply with this obligation, the leave entitlement shall not expire at the end of the calendar year or at the end of the carryover period.

The decision of the ECJ of 6 November 2018 has caused a lot of confusion and uncertainty in Germany. Among other things, it has led to the question whether this could also have an impact on the expiration of leave entitlements in the case of long-term illness or incapacity for work. Hence, it is not surprising that the BAG recently had to deal with this question in two cases.

Facts

The first case (case number: 9 AZR 245/19 (A)) concerned a severely disabled employee who received a full-rate reduced earning capacity pension for a period of slightly more than 4.5 years.

The severely disabled employee had been employed by the employer since 2000. From December 2014 to August 2019, the employee was granted a limited pension on account of fully reduced earning capacity. After that, the employee claimed that he was still entitled to 34 days of leave from 2014. He argued that his leave entitlements had not expired because the employer had not informed him of the (imminent) expiry of his leave entitlement. The employer was of the opinion that any potential remaining leave entitlements from 2014 had expired at the latest at the end of 31 March 2016. According to settled case law in Germany, leave entitlements that cannot be taken due to illness and/or incapacity for work would expire at the latest 15 months after the end of the leave year. This would be the case irrespective of whether or not the employer had complied with its obligation to inform the employee. Consequently, the employee claimed before the labour courts.

The Labour Court of Frankfurt am Main (judgment of 13 December 2016, case number: 3 Ca 8481/15) dismissed the claim. The appeal before the

Regional Labour Court of Hessen (judgment of 7 March 2019, case number 9 Sa 145/17) remained unsuccessful. Both Courts found that any remaining leave entitlements from the years 2010, 2011 and 2014 had expired no later than 15 months after the end of the calendar year 2014 and thus on 31 March 2016. The entitlement to a limited pension for full reduction in earning capacity would have similar consequences as a long-term illness. In this respect, there would be no reason to deviate from the settled case law concerning the expiration of leave entitlements in the case of long-term illness.

In the second case (case number: 9 AZR 401/19 (A)) an employee claimed the continued existence of leave entitlements for the year 2017, which she was unable to take due to an illness that started in 2017.

The employee had been employed by the employer since 2010. In the course of 2017, the employee became sick and had been continuously unable to work since then. Due to her illness, she was not able to take her entire leave entitlement for 2017 in that same year. With her action, the employee wanted to ensure the continuation of the remaining 14 days of vacation from the calendar year 2017. She was of the opinion that her leave entitlement did not expire because the employer had not informed her in time about the (imminent) expiry of the leave entitlement for 2017. The employer asserted that the leave entitlement from 2017 expired on 31 March 2019 at the latest.

Also in this case, the first and second instance courts – the Labour Court of Paderborn (4 April 2019, 2 Ca 1602/18) and the Regional Labour Court of Hamm (24 July 2019, 5 Sa 676/19) – dismissed the claim arguing that in case of long-term illness leave entitlements would expire at the latest 15 months after the leave year. This was irrespective of whether the employee had been informed about this or not. The obligation to inform the employee would apply again after his or her recovery and then with regard to the specific holiday entitlements of the employee.

In both cases the employees appealed against the decision to the BAG.

Judgment

The BAG suspended the proceedings and asked the ECJ for assistance in both cases. Firstly, it asked the ECJ to clarify whether EU law permits the expiry of the leave entitlement after 15 months after the end of the leave year or a longer period in the event of a long-term illness/incapacity for work, in case the employer did not inform the employee about the imminent expiration in the leave year and the employee would have been able to take at least part of the leave before the incapacity for work occurred. Secondly, it

asked the ECJ to clarify whether and under what conditions the entitlement to paid annual leave of an employee who was granted a limited full-rate reduced earning capacity pension in the course of the leave year can expire 15 months after the end of the leave year or possibly at a later point in time. According to the BAG, the ECJ had not yet made completely clear whether and under what conditions the entitlement to paid annual leave of employees who are incapacitated for work in the course of the leave year can expire 15 months after the end of the leave year if the employer had failed to comply with its obligations to request the employee to take leave and to inform the employee about the consequences of not taking leave.

In this context, the BAG first clarified that with a view to the case law of the ECJ, leave entitlements in general only expire according to Section 7(3) BUrlG if the employer previously requested the employee to take leave and informed the employee about the legal consequences of not taking the leave – namely expiry. At the same time, however, it pointed out that based on the case law of the ECJ, in its opinion, leave entitlements that cannot be taken due to continuous illness or the receipt of a pension for reduced earning capacity can expire after 15 months. This might also be the case even if the employer has not complied with its obligation to inform the employee. At least in years in which the employee was continuously incapacitated to work and therefore could not take any leave at all, this should also apply irrespective of whether the employee was informed.

From the Court's point of view it was not clear how to deal with remaining leave entitlements from the leave year in which the employee got sick or in which s/he was granted a pension for reduced earning capacity and was not informed by the employer, but could have taken at least some of their leave if the employer had properly complied with its obligations. In principle, it would be possible to oblige the employer to inform the employee in this year as well. At the same time, however, the question arises if the purpose of the duty to inform could be fulfilled in this respect. This is because the obligation to inform can only fulfil its purpose – taking leave – as long as the employee is capable of working. In this respect, however, the notification would (always) have to be given at the beginning of the leave year. In addition, according to the current case law of the ECJ, the entitlement to paid annual leave based on Article 31(2) of the Charter of Fundamental Rights of the European Union and Article 7 of Directive 2003/88/EC has a dual purpose. On the one hand, the employee should be given the opportunity to recover from his or her obligation to work for the employer. On the other hand, the time is meant for relaxation and leisure of the employee. But the possibility of an unlimited accumulation of entitlements to paid leave from several periods acquired before or/and during an incapacity for work would not serve these purposes.

Commentary

It remains to be seen whether or to what extent the ECJ will consider the employer's information requirement to be applicable to employees subject to long-term illness or incapacity for work and to what should be the preconditions for the expiration of leave entitlements in the case of long-term illness or incapacity for work.

However, in conclusion, it can be assumed that the ECJ's decision on the questions will not have much more far-reaching consequences than those already resulting from the *Max-Planck* decision in 2018, which really caused a stir and created uncertainty in Germany. For if at all, the affirmation that employees with long-term illnesses must also be informed about their leave entitlements only leads to the fact that the employer would have to inform every employee if it wants to ensure the expiration of leave and may not leave out some employees. It is to be hoped that the ECJ's decisions will provide a little more clarity on how to deal with leave entitlements without making leave law even more complicated for employers and employees.

Meanwhile, the ECJ has assigned German Case 9 AZR 245/19 (the first case) with case number C-518/20. It appears that the second case has not yet been assigned.

Comment from other jurisdiction

Greece (Effie Mitsopoulou, Effie Mitsopoulou Law Office):
According to Greek law, an employee is entitled to take their vacation, even if they have not requested it, during the calendar year in which it must be granted. After the lapse of the last day of the calendar year, the claim for the vacation, if not granted, is converted into a claim for allowance in lieu, since Greek law does not allow the carryover of the annual leave, in total or in part, to the succeeding calendar year – even following the employee's consent.

Such a prohibition is absolute, in the sense that the carryover of the annual leave to the next calendar year is not allowed, even in cases where the employee has not used their vacation without their fault (for instance in case they were on sickness leave).

Therefore, unlike in Germany, where carryover of vacation to the next calendar year is only permissible if compelling operational reasons or reasons personal to the employee justify it, in which case the vacation must be granted and taken *within the first three months of the succeeding calendar year*, or Bulgaria, where the employee, when annual leave is postponed due to sickness, is entitled to use it *within two years* from the end of the year in which the reason preventing them no longer exists, Greek provisions do not allow carryover of vacation at all, but only payment of allowance in lieu, as penalty.

However, according to Article 7 of Directive 2003/88/EC, the minimum period of paid annual leave may not be replaced by an allowance in lieu, *except where the employment relationship is terminated.*

You can read case report **2020/25** on the recent Greek Supreme Court's (Plenary Session) interesting judgment on this issue.

Parties: Unknown

Court: *Bundesarbeitsgericht* (Federal Labour Court)

Date: 7 July 2020

Case numbers: 9 AZR 401/19 (A); 9 AZR 245/19 (A)

Internet publications: <http://juris.bundesarbeitsgericht.de/cgi-bin/rechtsprechung/document.py?Gericht=bag&Art=en&nr=24551>; Reference to the ECJ: <http://curia.europa.eu/juris/showPdf.jsf?text=vakantie&docid=234585&pageIndex=o&doclang=EN&mode=req&dir=&occ=first&part=1&cid=19893281>;

<http://juris.bundesarbeitsgericht.de/cgi-bin/rechtsprechung/document.py?Gericht=bag&Art=en&nr=24545>

Creator: Bundesarbeitsgericht (Federal Labour Court of Germany)

Verdict at: 2020-07-07

Case number: 9 AZR 401/19 (A); 9 AZR 245/19 (A)