EELA EUROPEAN EMPLOYMENT LAWYERS ASSOCIATION

SUMMARY

2021/12 Expiry of untaken annual leave and entitlement to compensation (SI)

Following ECJ case law, the Supreme Court of the Republic of Slovenia has ruled that a worker is entitled to compensation for unused annual leave in the event that the termination of employment has occurred 15 months after the end of the transfer period (i.e. the period for the transfer of the right to use annual leave) provided for in national legislation. The relevant transposition period is therefore three months longer than the transposition period set out in the Slovenian law.

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Facts

p style="margin-right:-31px">An employee had been continuously absent from work due to an injury at work from 24 December 2013 until 6 June 2017 when his employment relationship was terminated due to disability. Upon termination of employment, he had 17 days of unused annual leave for the year 2014 and 32 days for the year 2015. The employer paid the employee monetary compensation for the unused annual leave which had been accrued in 2016 and 2017. The employee filed a lawsuit and sought monetary compensation for the unused annual leave of 2014 and 2015.

Legal background

p style="margin-right:-31px">The Slovenian Employment Relationships Act (ERA-1) Article 162 stipulates that annual leave may be used in several parts, with one part lasting at least two weeks. The employer may require the employee to plan the use of at least two weeks of annual leave in the current calendar year and is also obliged to enable the employee to take (all) their annual leave in the current calendar year. Above the two weeks, the employee may use at least two weeks in agreement with the employer by 30 June of the following year or 31 December, respectively. Therefore, if the employee has not used the full annual leave in the current calendar year, they may have until 30 June of the following year to use it, and in case of absence due to illness or injury, maternity leave or childcare leave, they may have until 31 December of the following year to use it. The main principle remains that annual leave is in any case used taking into account the needs of the work process and the possibilities for rest and recreation of the worker and taking into account their family obligations (Article 163(1) of the ERA-1).

p style="margin-right:-31px">In accordance with Article 162(4) of the ERA-1, the reference period for annual leave usage is the current calendar year, and the period for the transfer of the right to paid annual leave is the first six months of the following year, or in case of absence due to illness, injury, maternity leave or childcare leave, the period for transfer is prolonged, until 31 December of the following year (i.e. 12 months).

p style="margin-right:-31px">Article 164 of the ERA-1 provides that a statement by which the employee would waive their right to annual leave is invalid and void. It is also not possible to agree on monetary compensation for the unused annual leave during the time the employment relationship still exists. However, such an agreement is possible upon termination of employment. The right of the worker to request (respectively demand) an agreement on pecuniary compensation upon termination of employment applies only in instances where the worker either tried to exercise the right to annual leave but was unable to do so (for example the employer did not allow it) or when the worker had no chance of using it due to unexpected circumstances. That being said, it is crucial that the worker was not able to foresee the cause due to which they were not able to make use of the annual leave. In all other instances, the employer is not obliged to agree on (and thereafter grant) pecuniary compensation in lieu of the annual leave. The courts will therefore make an assessment of whether the worker actually had the possibility of making use of their annual leave entitlement (and tried to exercise it) or whether the worker lost such right due to foreseeable occurrences.

Judgment

p style="margin-right:-31px">The court of first instance found the worker's claim was well-founded and ordered the defendant to pay the plaintiff compensation for unused annual leave for 2014 and 2015. The decision was based on the finding that the plaintiff had been continuously on sick leave due to injury at work from 24 December 2013 until termination of employment on 6 June 2017, as a result of which he was objectively unable to use the right to annual leave for 17 days in 2014 and 32 days in 2015. The court held that the plaintiff's right to the paid annual leave did not expire, as the reference period and the transfer period had not expired, thus he was entitled to compensation for unused days of annual leave for those years.

p style="margin-right:-31px">The court of second instance (High Court) upheld the judgment of the court of first instance. It agreed with the factual findings and legal positions of the court of first instance.

p style="margin-right:-31px">The Supreme Court of the Republic of Slovenia (*Vrhovno sodišče Republike Slovenije*, the 'Supreme Court') held that the decisions of the courts of first and second instance were, in respect of awarding compensation in lieu of annual leave, incorrect. The Supreme Court pointed out that the only exception to Article 164 of the ERA-1, under which an agreement by which an employee and an employer could agree on monetary compensation for unused annual leave, is the event of termination of the employment contract. The Court added that it was clear from ECJ case law that the provisions of Article 7(2) of Directive 2003/88/EC laid down only two conditions for the entitlement to monetary benefits, which are (i) that the employee's employment relationship has been terminated, and (ii) that the employee had not used all of the paid annual leave, to which they were entitled on the date of termination of their employment relationship. It concluded that with the termination of the employment relationship the employee lost the right to the monetary compensation for unused annual leave for the years 2014 and 2015 because the termination of employment occurred more than 15 months after the end of the period for the transfer of annual leave for those years. That is the period after which, according to the ECJ's position in the judgment C-214/10 (*KHS*), paid annual leave as a rest period no longer has a positive effect on the worker and therefore national legislation providing for the loss of the right to annual leave and the consequent loss of the right to monetary compensation for unused leave in such a case is not contrary to Article 7 of Directive 2003/88.

Commentary

p style="margin-right:-31px">In its judgment the Supreme Court referred to the case law of the ECJ which stipulates that the period of transfer of the right to paid annual leave must exceed the duration of the reference period for which it is determined. Hence, in judgment *KHS*, C-214/10, the ECJ concluded that the 15-month transposition period complied with the

provisions of Article 7(1) of Directive 2003/88. In the judgment under consideration, the Supreme Court used the 15-month transfer period mentioned by the ECJ case law as a criterion in justifying the employee's ineligibility to monetary compensation for unused annual leave for 2014 and 2015.

p style="margin-right:-31px">The Supreme Court raised a very important question, namely that in the ERA-1 the transfer period is not actually longer than the reference period, as it should be (based on EU law). When adopting the provisions of Article 162 of the ERA-1, the National Assembly of the Republic of Slovenia considered that the above-mentioned case law of the EU Court was duly taken into account in drafting Article 162(4) of the ERA-1. As the Supreme Court pointed out, the transposition period lasts (only) 12 months (until 31 December of the following year at the very latest), so it is actually not longer than the reference period of 12 months. The National Assembly's argumentation lies in the fact that the transposition period under the 'new' ERA-1 is, compared to the previous law (the ERA) longer than before, because the ERA only comprised of provisions containing a six-month transfer period (the transfer period therefore being shorter than the reference period). Court practice with its case law will be the one in the future to determine whether the transposition period will be strictly limited to the 12 months based on Article 162 ERA-1 or whether the courts consistently follow the Supreme Court's stance, that the transfer period up to 15 months should be deemed reasonable for making use of the right to transfer annual leave (or for lawfully claiming monetary compensation, in case the employment relationship ends). All this bearing in mind also the satisfaction of the requirement in the judgments of the ECJ (*KHS*, C-214/10 and *Neidel*, C-337/10), that the transposition period should indeed be longer than the reference period.

p style="margin-right:-31px">A couple of months later the Higher Labour and Social Court of the Republic of Slovenia also drew attention in its judgment PDP 217/2020 to the possible dispute over the 12-month transposition period in question, however the issue of compliance with ECJ case law remained open, since in this particular case the worker was absent from work for 18 months.

p style="margin-right:-31px">The interpretation of the Supreme Court is important as it draws attention to the case law of the ECJ and the possible non-compliance of Article 162(4) of the ERA-1 with such case law, stating that the transfer period must be longer than the reference period, and in that it also took into account the 15-month transfer period of the right to paid leave, which is said to correspond to the dual purpose of that right.

Comments from other jurisdictions

p style="margin-right:-31px">*Germany (Nina Stephan, Luther Rechtsanwaltsgesellschaft mbH)*: German and Slovenian vacation law are very similar in many respects. As mentioned in the case report **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)’ and there in particular under the ‘Legal background’ it also applies under German law that:

The vacation year is the calendar year.
Vacation shall be granted and taken in the current calendar year.
Vacation may only be carried over to the following year if there are compelling operational reasons or personal reasons on the part of the employee that justify it. However, unless otherwise agreed between the employee and the employer, the carryover is limited to the first quarter of the following year. This means that remaining vacation entitlements must generally be taken in the first three months of the following year.
Moreover, financial compensation for vacation entitlements during the course of the employment relationship is also excluded under German law.

p style="margin-right:-31px">Having said this, since 2010 it has been settled case law – based on a ruling of the ECJ of 22 November 2011 (*KHS*, C-214/10) – that vacation which cannot be taken in the leave year or during the carryover period (until March 31 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 vacation year. Based on this, it is likely that the German courts so far would have also refused a compensation for the remaining vacation entitlements for the years 2014 and 2015, because these would have expired on 31 March 2016 and 2017 respectively.

p style="margin-right:-31px">However, with a view to the *Max Planck* decision of the ECJ of 6 November 2018 (C-684/16), the question arises whether this will still be the case in the future. This especially if employees have not been informed in advance of the (potential) forfeiture of their vacation entitlement. The German Federal Labour Court (BAG) currently assumes that the *Max Planck* decision – if at all – may only have an influence on the remaining vacation entitlement from the year in which the employee fell ill (in this case 2013). However, it remains to be seen what the ECJ will decide on the question referred by the BAG.

p style="margin-right:-31px">**Subject**: Paid Leave

p style="margin-right:-31px">**Parties**: Unknown

p style="margin-right:-31px">**Court**: *Vrhovno sodišče* (Supreme Court); *Delovno-socialni oddelek* (Employment/social department)

p style="margin-right:-31px">**Date**: 14 January 2020

p style="margin-right:-31px">**Case number**: VIII Ips 83/2019

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