SUMMARY

# 2021/40 School director and loss of right to leave due to non-fulfilment of duties (RO)

***The claimant in the case at hand was acting as the director of a public school, and it was her task to schedule the annual leave of all school teachers, to submit the annual appointments made within the deadlines prescribed, including her own right to annual leave, as well as the requests for its granting.***
***The Dolj Tribunal (the 'Court') established that the former director did not make any leave appointments for herself or for the other school teachers during her mandate as school director, nor did she file any requests to take her annual leave, although she acknowledged she took a small number of days from her annual leave entitlement during the relevant period.***
***As no evidence was provided to the Court in respect of the performance of tasks concerning the scheduling of annual leave, the request of the former director to receive compensation for the untaken annual leave was rejected.***
***The Court applied the findings of ECJ Case C-619/16 (Sebastian W. Kreuziger – v – Land Berlin) and the conditions required for the loss of the right to annual leave or for its compensation to apply.***

## Legal background

According to national provisions applicable within the public education system the duration of annual leave awarded to teachers is 62 working days to be taken during school holidays.

The scheduling of leave is performed in the first two months of the school year by the board of directors of the school. Annual leave is then granted based on the decision of the school director.

In the specific case of school directors, the request for annual leave must be granted through decisions of the school inspectorate which acts as a supervising authority for public schools.

These rules are supplemented by the provisions of the Labour Code which provide that the annual leave must be taken within the year it was granted. If the employee, for justified reasons, cannot take in whole or in part the leave to which they were entitled in the respective calendar year, the employer is obliged to grant the rest of untaken leave within a period of 18 months starting with the year following the one in which the right to annual leave was granted.

Compensation for untaken annual leave is allowed only in case of termination of the individual employment contract.

**Facts**

Mrs. A.D. was a teacher employed by school X during 2014 to 2018. Between September 2014 to February 2016 she was also temporarily appointed as director of the school.

Prior to the termination of her employment following retirement in August 2018 Mrs. A.D. requested her employer to compensate her for the untaken annual leave. The school calculated and compensated for a total of 52 days.

The former teacher challenged the decision of the school and argued that she was entitled to a higher compensation for the period of time spanning September 2014 to August 2018, as she had claimed payment of more days (it is not clear how much).

**Judgment**

The Court started its analysis by reference to the ECJ Case C-619/16 (*Sebastian W. Kreuziger – v – Land Berlin*), in order to verify whether the employer fulfilled its obligation to ensure in a concrete and fully transparent manner that (a) the employee was actually able to take her annual leave, and (b) the employee was informed, in an accurate and efficient manner, of the fact that if she did not do so the entitlement to annual leave would be lost at the end of the reference period/an authorized carry-over period/the employment relationship.

The Court ascertained that it was the employer's responsibility to grant the employee the possibility of taking their annual leave, the latter having the obligation to effectively exercise such right. In the situation where the employee deliberately and in full knowledge of the consequences refrains from taking their annual leave after being offered a real and effective possibility in this regard, the right to take the leave or to obtain compensation is lost.

Following inquiries made to the school and the school inspectorate, the Court ascertained that the former teacher, during the period she held the position as director of the school (September 2014 to February 2016), made no requests for annual leave, and made no collective/individual schedules for annual leave either for herself or for the other school teachers.

The Court stated that it was the task of the claimant, in her position as school director, to act diligently and ensure that school teachers take their annual leave by way of collective/individual appointments. Such obligation was also applicable in connection to her own right to annual leave (as she was herself an employee of the school), irrespective of the fact that the approval for taking leave was granted by the school inspectorate in her case.

By failing to do so for the entire duration of her mandate (i.e., 18 months), the Court rejected the former director's claim for compensation and concluded it was not possible for her to invoke her own culpability in performing her duties as school director pertaining to the scheduling of annual leave and obtain compensation for the untaken leave.

Furthermore, the Court ascertained that the employer correctly calculated her compensation based on school records, scheduling reports and individual requests submitted by the former teacher after her mandate as school director had ended.

**Commentary**

Prior to the ECJ decision in *Sebastian W. Kreuziger – v – Land Berlin*, compensation for untaken annual leave was awarded by courts upon termination of employment for the last three years of employment (applicable statute of limitations), irrespective of the reason why the annual leave was not taken by the employee.

Following the ECJ decision, national courts were put to the test by having to analyse and validate the conditions ascertained by the ECJ.

The decision of the Dolj Tribunal is one of the first cases where the Court considered that,

given the nature of the position held by the employee (i.e., head of a public school), there was sufficient evidence to demonstrate that she the was actually able to take her annual leave.

An aspect that was not debated by the Court related to the consequences for not taking the annual leave, as the former employee argued that she was not informed by the school during and after her mandate as director of such risk of loss. In most cases where national courts have expressed an opinion on this issue, the findings were that it was not sufficient for the employer to schedule the annual leave if the employee was not being informed of the consequences deriving from not taking such leave. The simple abstention from taking the leave is not to be considered a direct intention to refrain from such obligation.

However, in the case at hand, it was sufficient for the Court to ascertain that the director did not fulfil her obligation of scheduling the annual leave either for herself or for other school teachers, and to conclude the she refrained from taking her annual leave although she was provided with the opportunity to do so.

Given her position (i.e., legal representative of the public school), it can be interpreted that the Court considered the director to have been aware of the general legal framework on employment and the consequences of not observing the main employment obligations, including those related to annual leave.

In a different scenario, for example in the case the request for compensation had been made by a different school teacher not exercising administrative tasks pertaining to the scheduling of annual leave, we believe that the conclusions of the Court would have been different. In this case the right to compensation would not have been considered lost and the school would have been liable to compensate for the untaken leave.

In conclusion, it remains to be seen whether the arguments of the Court will be upheld or not, as the former director has filed an appeal against its decision.

**Comments from other jurisdiction**

*Austria (Andreas Tinhofer and Isabella Göschl, Zeiler Floyd Zadkovich)*: This is an interesting judgment for Austria, because it is based on the ECJ decision in *Kreuziger* (C-619/16) and limits the employee's entitlement to receive a financial compensation for the vacation that has not been taken until the end of employment.

The ECJ recently ruled that an Austrian provision on non-compensation for annual leave is

contrary to European law (25 November 2021, C-233/20 - WD/job-medium; see EELC 2020/51 the Austrian reference). The Austrian law specifically provides that no compensation for unused leave is to be paid if the employment relationship is terminated by the employee without serious cause and without compliance with the termination period. In its reference to the ECJ the Austrian Supreme Court had pointed out that under Austrian law such a resignation constitutes a breach of contract which takes the employer the possibility to grant the annual leave *in natura*. Citing the ECJ's decision in the case *Max-Planck-Gesellschaft* (C-684/16, paragraph 48) the Court emphasised that the main objective of the right to paid annual leave is to maintain the employee's health. This objective would be undermined if the employee could enforce payment in lieu of annual leave by unlawful resignation.

However, without dealing with the arguments of the Supreme Court explicitly the ECJ held that the reason for the termination of employment was not relevant (citing *Maschek*, C-341/15). Consequently, there was no need for the national court to examine whether the employer was able to grant the annual leave before the end of employment. As a result of this judgement the possibilities for Member States to provide for the loss of the entitlement to payment in lieu of annual leave at the end of employment are restricted even further.

**Subject**: Paid Leave

**Parties**: D.A. – v – Ș.G.M.M.

**Court**: *Tribunalul Dolj* (Dolj Tribunal)

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**Creator**: Dolj Tribunal
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