"Are Vacation Benefits that Increase with Age Unlawful Discrimination?" - Recent Case Law by the Regional Labor Court of Appeal Düsseldorf

Introduction	It is common for collective bargaining agreements to provide for vacation benefits that increase with age. Frequently, agreements provide for the number of vacation days an employee may take each calendar year to increase with the employee's age. Such provisions by nature lead to an unequal treatment of employees in different age groups. The Regional Labor Court of Appeal Düsseldorf recently reviewed such a provision in a collective bargaining agreement and, in a remarkable decision dated January 18, 2011, concluded that the provision at issue amounted to unjustified discrimination under the General Non-Discrimination Act (*AGG*).
Facts and holding of decision by the Regional Labor Court of Appeal Düsseldorf dated January 18, 2011 (case no.: 8 Sa 1274/10)	The decision of the Regional Labor Court of Appeal Düsseldorf, which so far has only been published as a press release, involved the following facts: A 24-year-old employee worked as a retail sales assistant for a retail chain. Her employment was subject to the provisions of the umbrella collective bargaining agreement for retailers in the State of North-Rhine Westphalia. According to the provisions of this collective bargaining agreement, employees working six days a week were entitled to the following vacation benefits per calendar year: • up to age 19: 30 workdays • ages 20-22: 32 workdays • ages 23-29: 34 workdays • age 30 or older: 36 workdays The Regional Labor Court of Appeal Düsseldorf has now decided – affirming the judgment of the trial court, the Labor Court of Wesel – that this provision of the collective bargaining agreement discriminated against the plaintiff on the basis of her age without justification. According to the court, the age discrimination in this case was also not justified under § 10 AGG, according to which unequal treatment is permitted if it is "based on objective standards, reasonable, and justified by a legitimate objective." In the view of the court, neither the collective bargaining agreement as such nor the context however indicated any legitimate objective in this case that could have justified age discrimination. The court also was not convinced by the employer's argument that the provision was intended to make it easier for employees to accommodate the needs of both family and job. The court therefore held that the plaintiff, who according to the wording of the provision in the collective bargaining agreement was entitled to only 34 vacation days, was entitled to 36 vacation days per year because the prohibition of age discrimination had been violated without justification. In effect, the court therefore moved the plaintiff up into the highest age group, reasoning that this was justified by the necessity of effectively implementing EU law. The decision is not yet final and conclusive. The defendant was granted leave to appeal to the Federal Labor Court.
Opinion and Recommendations	Should the legal position of the Regional Labor Court of Appeal Düsseldorf become the law of the land, this would have quite far-reaching consequences that would result in noticeable additional costs for businesses.

It seems premature, however, to worry that clauses in collective bargaining agreements providing for age-based vacation benefits will generally be invalid. One special feature of the provision at issue in the case decided by the Regional Labor Court of Appeal Düsseldorf certainly was that the collective bargaining agreement differentiated between several groups of relatively young employees.

An issue that was not decided by the Regional Labor Court of Appeal Düsseldorf is whether a collective bargaining agreement may lawfully provide for additional vacation days only for employees in a higher age group. Such a scenario was addressed by the Regional Labor Court of Appeal Berlin-Brandenburg in its decision of March 24, 2010 (case no: 20 Sa 2058/09), a case involving the Collective Bargaining Agreement for the Public Sector (*TVöD-VKA*). There, the court held that a provision of a collective bargaining agreement that discriminated based on age was justified under § 10 AGG because the provision accounted for the fact that the "need of employees for recreation and restoration" increases with age. In that case, the collective bargaining agreement provided for vacation benefits of 26 workdays for employees up to age 29, for 29 workdays for employees up to age 39, and for 30 workdays for employees at the age of or older than 40. Although the facts are at least similar to those of the case decided by the Regional Labor Court of Appeal Düsseldorf, the Regional Labor Court of Appeal Berlin-Brandenburg nonetheless reached the opposite result. Given the contrary views expressed in the above decisions, the question of exactly from what age the argument of an increased "need for recreation and restoration" is convincing and sufficient to justify age discrimination may provide occasion for much argument. But for practical purposes, a clear statement of what the law is and how this issue should be handled would certainly seem desirable.

Moreover, the rationale provided by the Regional Labor Court of Appeal Düsseldorf does not straightforwardly apply in cases where a collective bargaining agreement provides for increased vacation benefits solely, or least in part, on the basis of the employee's length of service. In such cases, it must be reviewed on a case-by-case basis whether different legal principles govern the validity of age-based vacation benefits.

It is to be expected that the employer that lost in the case before the Regional Labor Court of Appeal Düsseldorf will appeal to the Federal Labor Court. It remains to be seen whether the Federal Labor Court will concur with the view of the Regional Labor Court of Appeal Düsseldorf. Furthermore, it is not unlikely that the Federal Labor Court will submit this legal issue-as it has also done with the issue of whether compensation provisions discriminating on the basis of age are valid- to the European Court of Justice. Until the issues raised by the decision of the Regional Labor Court of Appeal Düsseldorf have been satisfactorily settled, it is however likely that, in practice, employees will in the future more frequently challenge (vacation benefit) provisions that discriminate on the basis of age. This should provide employers at least with reason to critically review their own collective bargaining agreements, as well as any provisions in their works agreements that discriminate on the basis of age, and identify any potential risks.

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