Limitation of Carry-Over of Paid Annual Leave in the Event of Illness? Clarifying Decision of the ECJ in Sight

Introduction	In its judgment of 20 January 2009 in the litigation of Schultz-Hoff and others (C-350/06), the European Court of Justice (ECJ) ended the ongoing feud between the Superior Labour Court of Dusseldorf and the Federal Labour Court and established that, although the ability to carry over the minimum paid annual leave granted under *Directive 2003/88/EC of the European Parliament and of the Council of 4 November 2003 concerning certain aspects of the organisation of working time (Directive 2003/88/EC)* can be limited in principle by national law regulations, this is only possible, however, under the condition that the employee in question was actually able to avail himself of his claim to paid annual leave. If this possibility did not exist, particularly due to work incapacity caused by illness, the claim to paid annual leave would not lapse. In its judgment of 24 March 2009 (file no.: 9 AZR 983/07), the Federal Labour Court - grudgingly - concurred with this decision. Since then, employers have been confronted by the claims of (former) employees to allowance in lieu of paid annual leave, which may be quite substantial, where employees after a long-term illness and corresponding work incapacity leave their employment or negotiations over a mutual termination of the employment relationship are started only then. Limitations on compensation claims are only considered due to contractual clauses governing prescriptive periods and cut-off dates under collective bargaining agreements.
Decision of the Superior Labour Court Hamm of 15 April 2010 - 16 Sa 1176/09 - to refer the matter to the ECJ	Not only employers, but also the labour courts, were confronted by further questions following this decision. The Superior Labour Court Hamm was presented with the case of Winfried Schulte, who had left his employment at the end of August, 2008 under the terms of a termination agreement after he had been out sick from work since January of 2002. Mr. Schulte had received a time-restricted invalidity pension since October, 2003 due to his full work incapacity. The relevant collective bargaining agreement provided for the lapse of any paid annual leave claim which could not be taken during the leave year due to illness after the expiration of a further twelve months following the principal three-month carry-over period. In March of 2009 Mr. Schulte sued his former employer for allowance in lieu of paid annual leave for the years from 2006 to 2008; this was granted to him by the Labour Court with respect to the statutory claim to paid annual leave. On appeal, the Superior Labour Court of Hamm submitted to the ECJ the question of whether Directive 2003/88/EC precludes the application of a national regulation governing the lapse of a claim to paid annual leave even if this regulation provides for a limited carry-over period in the case of the long-term work incapacity of an employee and whether this period must be for a minimum of 18 months. The latter would follow from a treaty of the International Labour Organisation (ILO) and the national statute implementing such treaty.
Opinion of Verica Trstenjak, Advocate General, on 7 July 2011 in the litigation KHS AG v. Winfried Schulte (C-214/10)	In preparation for the decision of the ECJ, the Advocate General, the same one representing the Schultz-Hoff litigation, stated in her opinion that Directive 2003/88/EC does not prevent a limited carry-over period as long as the purpose of the primary claim to relaxation and recreation is warranted. A carry-over period of at least 18 months after the expiration of the actual leave year does justice to this purpose. This is a welcome clarification following the Schultz-Hoff decision.

	The Advocate General first analysed the Schulz-Hoff decision at length and established that it was not necessary for this decision to address the issue of a further limitation of the leave claim in the event of illness continuing over a very long period. As an argument for a limitation, the Advocate General submitted that the intended purpose of relaxation and recreation would not be achieved where leave is not taken in good time, nor does a doubling of the leave claim necessarily result in increased recreational value. The weighing of the interests of the employee and the employer also shows that an unlimited accumulation of leave claims is not necessary. The employee will not be (re-)integrated into his or her work environment; on the contrary, this creates an incentive for the employer to terminate the employment contract to avoid financial disadvantages. In addition, the formation of accruals will place a burden on small and medium-sized companies, a situation which is not reconcilable with the objectives of the Directive. Given this circumstance, one must assume that there is also the possibility of a limitation in cases of long-term work incapacity due to illness. A carry-over period of 18 must be deemed to be sufficient. The ILO rules are not to be rigidly applied, but merely serve as a guideline. Rules which are more favourable to employees are thus possible.
Outlook and Recommended Action	It remains to be seen how the ECJ will ultimately decide. The Court very often follows the opinion of the Advocate General so that a correction and/or specification of the decision in the Schultz-Hoff litigation appear possible. For the individual employer this would only have an indirect effect though, because there has not been any regulation in the German Federal Leave Act for the limitation of the carrying over of the leave claim in the case of continued work incapacity of the employee. It remains to be seen whether and in what form this type of regulation would be introduced, even in the event of a positive decision by the ECJ. In any case, deviating terms which are only contained in the individual employment contracts will not be sufficient. Specific opportunities for influencing this situation may yet arise, however, in collective bargaining negotiations. Even now, some collective bargaining agreements - as is shown in the case discussed here - contain special provisions for carrying over the leave claim in the event of ongoing work incapacity on the part of the employee. These existing provisions would have to be examined and adjusted, where needed, to comply with the anticipated decision of the ECJ. If such provisions have not been included in the collective bargaining agreement until now, this should be a topic for the next round of collective bargaining.
Outlook for National Decisions on Paid Annual Leave Law	Other interesting questions have also been submitted to the Federal Labour Court. In August and September of 2011 one can expect several decisions concerned, in particular, with the application of cut-off dates for claims to allowance in lieu of paid annual leave under collective bargaining agreements, the creation of a claim to paid annual leave during the suspension of an employment relationship (e.g. because an invalidity pension is drawn), and the lapse of claims to paid annual leave upon recovery from illness during the statutory carry-over period. In all of this litigation, particularly with respect to the application of the cut-off dates, there is the possibility that the matter will be referred to the ECJ.
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