Update on Limitations of Claims for Minimum Paid Annual Leave Brought by Employees Suffering from Long-Term Illnesses

Introduction	Since the decision of the European Court of Justice in *Schultz-Hoff et al.* (case no. C-350/06), courts have held that a statutory claim for minimum paid annual leave does not lapse even after the carry-over period has expired, if the employee was unable to take the leave due to long-term work disability. However, the European Court of Justice has yet to decide to what extent claims for paid annual leave may be accumulated even if an employee is disabled due to illness for a period of several years and to what extent carry-over periods limiting the accumulation of claims for paid annual leave may be used. The European Court of Justice will have an opportunity to do so in a currently pending proceeding (*KHS AG v. Schulte* – C-214/10), a case on which we previously reported in Newsletter 4/11. The Federal Labor Court (*BAG*), too, had an opportunity to decide two cases in this context on August 9, 2011 (case nos. 9 AZR 352/10 and 9 AZR 425/10), which likewise involved issues concerning the limitation of claims for paid annual leave or compensation in lieu of paid annual leave brought by employees suffering from long-term illnesses. In one proceeding, the court addressed the issue of whether a claim for compensation in lieu of paid annual leave accruing upon termination of employment is subject to exclusionary periods provided for in a collective bargaining agreement and if the claims may lapse as a result of such exclusionary periods. In a second proceeding, the Federal Labor Court addressed the issue of whether accrued claims for paid annual leave have lapsed if carried-over paid annual leave could have been taken in the current calendar year after the employee regained his ability to work after a long-term illness, but the employee failed to do so. In both proceedings, appeals to the Federal Labor Court were - according to press releases issued in advance – unsuccessful.
Regional Labor Court proceedings **Regional Labor Court of Cologne, decision dated April 20, 2010 – case no. 12 Sa 1448/09** **Regional Labor Court of Cologne, decision dated May 18, 2010 – case no. 12 Sa 38/10**	The first proceeding dealt with the applicability of a six-month exclusionary period provided for in a collective bargaining agreement, which applied to all employment-related claims. The employment relationship between the parties had ended in March 2008, after the employee had been disabled due to illness on a long-term basis from October 2006 until the end of her employment. In February 2009, the employee demanded compensation for her remaining claims for paid annual leave, arguing that the statutory claim for paid annual leave was not subject to exclusionary periods provided for in a collective bargaining agreement. The Regional Labor Court denied the complaint, finding that the claim for compensation in lieu of annual paid leave had lapsed as a result of the exclusionary period provided for in the collective bargaining agreement. In the second proceeding, which also was decided by the Regional Labor Court of Cologne on appeal, the plaintiff, who had suffered from disability due to illness from January 2005 until June 2008, demanded to take annual paid leave that had accrued in the years 2005 through 2007. The employer allowed him to take 30 days of paid leave before the end of the year 2008. The plaintiff then sought declaratory judgment that he was entitled to 90 additional days of paid annual leave for the years 2005 through 2007. The Regional Labor Court of Cologne denied the complaint on the grounds that the plaintiff could have taken the remaining days of paid annual leave after regaining his ability to work in 2008, but had failed to do so and that therefore the claim had, in effect, lapsed in accordance with § 7 para. 3 of the Federal Act Governing Paid Annual Leave (*BUrlG*).

Decisions of the Federal Labor Court dated August 9, 2011 **Case no.:** **9 AZR 352/10** **Case no.:** **9 AZR 425/10**	In the first proceeding (case no.: 9 AZR 352/10), the Federal Labor Court agreed with the lower court that the claim for compensation in lieu of paid annual leave accrued upon termination of employment and became due immediately. Interestingly, the Federal Labor Court assumed in this connection - contrary to its earlier view on this issue - that a claim for compensation in lieu of paid annual leave was not a surrogate for a claim for paid annual leave. As a pure monetary claim, the court held, claims for compensation in lieu of paid annual leave were subject to exclusionary periods provided for in employment agreements or collective bargaining agreements, like any other employment-related claims. According to the court, the same applies to claims for compensation in lieu of the minimum paid annual leave mandated by law. Because the plaintiff had failed to bring its claim for allowance in lieu of paid annual leave within the exclusionary period provided for in the collective bargaining agreement, the claim for compensation in lieu of paid annual leave has lapsed. In the second proceeding (case no.: 9 AZR 425/10), the Federal Labor Court also agreed with the lower court. As far as we can tell from the press release, the rationale of the court's decision is that after the plaintiff recovered in the year 2008, he had sufficient time to take his accrued days of paid annual leave before the end of the year 2008. According to the court, paid annual leave that accrued in previous years however generally lapses, as does the claim for paid annual leave accruing at the beginning of each calendar year, at the end of the calendar year in accordance with § 7 para. 3 of the Federal Act Governing Paid Annual Leave (*BUrlG*), at the latest at the end of the carry-over period on March 31 of the next year. While the court recognized that an employee's inability to take paid annual leave for reasons beyond his control provides grounds for the carry-over of paid annual leave in accordance with § 7 para. 3 of the Federal Act Governing Paid Annual Leave, the court also found that those grounds do not persist once the employee has regained his ability to work.
Prospects and Recommendations	The most recent decisions by the Federal Labor Court open up new possible defense strategies for companies facing substantial claims for paid annual leave or allowance in lieu of paid annual leave by employees who have returned to work after a long-term illness. In particular, employees are required to take accrued paid annual leave after their return to work in due time before the end of the current calendar year. If an employee fails to do so, his claims for paid annual leave may lapse. It remains to be seen whether and, if so, to what extent, the most recent case law on the applicability of exclusionary periods provided for in collective bargaining agreements to claims for compensation in lieu of paid annual leave will stand without limitation in light of the outstanding decision from the European Court of Justice in *KHS AG v. Schulte*. Of particular interest in this connection is the question of whether a claim for compensation in lieu of paid annual leave can, in fact, be regarded - as the Federal Labor Court did - as a pure monetary claim. A different view on this issue was, for example, recently taken by the responsible Attorney General in her opinion filed in *KHS AG v. Schulte*. There, she argued that the claim for compensation in lieu of paid annual leave was not a general claim for payment of a settlement or money, but rather a surrogate for paid annual leave, which the employee is no longer able to take as a result of his dismissal.
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