Limitation of the Carry-Over of Annual Leave in the Event of Illness – Clarifying decision from the ECJ!

Introduction	After the European Court of Justice (ECJ) held in the case of *Schultz-Hoff* et al. (case no. C-350/06) at the beginning of 2009 that the right to carry over minimum annual paid leave that must be granted in accordance with *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) may generally be limited by provisions of national law, however only if the employee was actually able to avail himself of his claim to paid annual leave, German employers, in particular, faced a problem. For if an employee was unable to avail himself of his claim for paid annual leave due to illness-related incapacity to work, that claim was not supposed to lapse. Unfortunately, the decision of the ECJ did not address any possible limits on the accrual of such carry-over claims. Since then, German labour courts have confronted many cases in which employers relied, in particular, upon prescriptive periods in collective bargaining agreements to defend against claims for allowance in lieu of paid annual leave brought by employees suffering from long-term illnesses (see our Newsletter 6/11). The more pressing issue, however, is what limitations, more generally, are lawful. An opportunity to address this issue was presented by a case that was submitted by the Regional Labour Court of Hamm to the ECJ (see our Newsletter 4/11). Mr. Schulte had left his employment at the end of August 2008 under the terms of a termination agreement after he had been out ill from work since January of 2002. Since October 2003, he had received full disability benefits for a limited time 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 for paid annual leave. The relevant collective bargaining agreement provided for the lapse of any paid annual leave which could not be taken during the year of leave due to illness, after expiration of an additional twelve months from expiration of the principal three-month carry-over period. The Regional Labour Court therefore submitted to the ECJ the question of whether Directive 2003/88/EC precludes the application of a national provision governing the lapse of a claim to paid annual leave even if this provision provides for a limited carry-over period in case of the long-term disability of an employee and whether this period must have a length of at least 18 months; the Regional Labour Court of Hamm pointed out that the latter may be implied by a treaty of the International Labour Organisation (ILO) and the national statute implementing that treaty.
Decision of the European Court of Justice, Judgment dated November 22, 2011 in the Matter of KHS AG v. Winfried Schulte (case no. C-214/10)	By judgment dated November 22, 2011 (case no: C-214/10), the ECJ clarified that Directive 2003/88/EC does not preclude national provisions or practices, such as collective bargaining agreements, if such provisions limit, by a carry-over period of 15 months on the expiry of which the right to paid annual leave lapses, the accumulation of entitlements to such leave of a worker who is unfit for work for several consecutive accrual periods. In short: Under certain circumstances a claim for paid annual leave that could not be taken by an employee in the leave year due to illness-related incapacity to work lapses after expiration of an extended carry-over period. In its reasoning, the ECJ first made reference to its finding in the *Schultz-Hoff* case that there is nothing wrong with provisions of national law that result in the loss of claims for paid leave at the end of an accrual or carry-over period, provided that the employee actually had an opportunity to avail himself of that claim. Otherwise such provisions would be unlawful.

	Now, however, the ECJ has realized that this "conclusion must none the less be qualified in specific circumstances such as those in the main proceedings." Otherwise an employee such as Mr. Schulte would have a right to accrue claims for paid annual leave indefinitely. Such a right does not exist, however, according to the ECJ. A very welcome insight indeed. The ECJ arrived at this insight by contemplating the purpose of paid annual leave: One purpose, according to the Court, is to provide employees with time off to recover from their work-related duties and responsibilities, another is to ensure employees have time for relaxation and recreation. While an unlimited carry-over of paid annual leave would allow for a long time period of recreation and relaxation, the positive effect of such leave granted at later times in terms of recovery is however said to be not unlimited. With respect to the length of such an "illness-related" carry-over period, the ECJ explained that the carry-over period must take into account the specific circumstances of the employee who is incapacitated to work for several accrual periods. The employee must have an opportunity to plan for and avail himself of recovery time. Conversely, the employer must however be adequately protected from difficulties that may arise in this connection for the employer's business operations. The ECJ did not define an absolutely binding limit for the carry-over period. However, the carry-over period must *clearly* exceed the length of the accrual period for which paid leave is granted. In this specific case, which involved an accrual period of one year, a carry-over period of 15 months was regarded as sufficient. This, the ECJ opined, was also the critical difference between the *Schulte* case and the *Schultz-Hoff* case, in which the carry-over period was only six months.
Practical Significance of the Decision	For practical purposes we welcome the clarification by the ECJ that provisions of collective bargaining agreements may also limit the carry-over period for minimum paid annual leave in cases in which employees could not avail themselves of those claims due to illness-related incapacity to work in the year of leave. The judgment by the ECJ also provides a guideline for the length of the carry-over period, in that the court held that if the accrual period is one year, a carry-over period of 15 month, such as the one provided for in the collective bargaining agreement in that case, is sufficient. In our opinion, the carry-over period therefore should be at least one year, ideally longer. The parties to collective bargaining agreements therefore have a specific opportunity to influence this situation. If current collective bargaining agreements should not be in compliance with the requirements of this most recent decision, this should be made a topic at the next round of collective bargaining. It is likely that the Federal Annual Leave Act also stands in need of amendment. Since the *Schultz-Hoff* decision, this Act has already been interpreted very broadly in order to allow for the carry-over of paid annual leave by employees incapacitated to work due to illness. A more far-reaching interpretation that reintroduces limits on this carry-over right would however stretch the language of the Act too far. In the meantime, employers who are not subject to collective bargaining agreements will therefore have to make do with the incorporation by reference of provisions on paid annual leave included in collective bargaining agreements.
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