Clarity, Finally? Limitations on the Carry-Over of Paid Annual Leave in the Event of Illness – the Federal Labor Court Follows the European Court of Justice

INTRODUCTION

Right in the middle of the summer holidays the Federal Labor Court has handed down another important decision on the carry-over of claims for paid annual leave of employees who suffer from long-term illness.

As we reported earlier, the European Court of Justice had held in the case of *Schultz-Hoff* et al. (case no. C-350/06) at the beginning of 2009 that while the right to carry over claims for paid annual 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, such limitations may be made conditional upon the ability of the employee to actually avail himself of his claims. If this is not the case – for example because the employee suffers from an illness-related disability – claims to paid annual leave could not lapse. In its decision of November 22, 2011 in the KHS AG v. Wilfried Schulte case (case no.: C-314/10), the European Court of Justice since then "nuanced" its prior decision (see Client Newsletter 8/11), holding that even if an employee is incapacitated to work due to a long-term illness, the carry-over of claims to paid annual leave may be limited, for example by provisions of collective bargaining agreements or applicable law. If – as in the KHS AG case – the carry-over of annual paid leave is limited to a time period of 15 months from the end of the year of accrual, this time period is sufficient, in the eyes of the European Court of Justice.

The question then arose what effect this last decision of the European Court of Justice would have in Germany. In its decision of December 13, 2011 (case no.: 9 AZR 399/10), where the Federal Labor Court had to decide the issue of whether exclusionary periods provided for in collective bargaining agreements also applied to claims for allowance in lieu of paid annual leave, this question did not need to be answered yet. Nonetheless in that decision the Federal Labor Court already called attention to the most important issues that arise in this connection. Among other things, the Federal Labor Court raised the question of whether even if § 7 para. 3 of the German Act on Paid Annual Leave (*BUrlG*) is interpreted in conformity with European law, a court could not only properly extend the carry-over period for claims to paid leave of which the employee could not avail itself due to long-term incapacity to work, but, by way of further statutory interpretation, could also limit the extended carry-over period, or whether due to the separation of powers this is a matter for the legislature to decide.

FACTS

DECISION OF THE FEDERAL LABOR COURT DATED AUGUST 7, 2012 , CASE NO. 9 AZR 353/10

LOWER COURT

REGIONAL LABOR COURT OF BADEN-WÜRTTEMBERG, DECISION DATED APRIL 29, 2012, CASE NO. 11 SA 64/09

The Federal Labor Court has now had occasion to decide this legal issue. In the case decided by the Court, the plaintiff, who had been employed with the defendant from July 1, 2001 through March 31, 2009 and who had been classified as severely disabled, sued for allowance in lieu of 149 days of paid annual leave that had accrued in the years 2005 through 2009. The employee had become ill in the year 2004 and since December 20, 2004 had collected pension benefits for reduced earning capacity beyond the termination date of her employment. Under the collective bargaining agreement for public servants (*TVöD*) applicable to the plaintiff's employment, employment is suspended while pension benefits are collected, and, in addition, claims for paid leave are reduced by 1/12 for each calendar month of suspension. Both lower courts ruled in favor of the plaintiff on the claims for allowance in lieu of minimum paid annual leave and additional leave for severely disabled employees, but denied the plaintiff's claims for allowance in lieu of additional paid annual leave due under the collective bargaining agreement.

According to the press release available to us, the Federal Labor Court upheld the plaintiff's claims for allowance in lieu of minimum paid annual leave and additional leave for severely disabled employees only for the years of 2008 and 2009. For the years 2005 through 2007, the Court found that while claims to minimum paid annual leave had accrued despite suspension of employment and could not be excluded by contract, those claims could not be cashed out because they had in each case lapsed prior to termination of employment on March 31 of the second year following the year of accrual in accordance with § 7 para. 3 sent. 3 of the Act on Paid Annual Leave.

The Federal Labor Court thus confirmed that claims to minimum paid annual leave accrue even if an employee is incapacitated to work due to illness for the entire year of accrual. This applies even if under provisions of a collective bargaining agreement employment is suspended while temporary pension benefits are collected. Claims to minimum paid annual leave cannot be exclud-

ed by agreement of the parties to a collective bargaining agreement. However – the Federal Labor Court ruled – if an employee suffers from long-term incapacity to work due to illness, § 7 para. 3 sent. 3 of the Act on Paid Annual Leave must, in conformity with EU law, be interpreted such that claims to paid leave lapse 15 months after the end of the year of accrual.

PRACTICAL SIGNIFICANCE OF THE DECISION

After a little more than three years of uncertainty, the controversy regarding the "carry-over of claims to paid annual leave of employees suffering from long-term illness" seems to have settled down some. Surprising – but welcome – is the quite bold course of action taken by the Federal Labor Court, which despite the doubts it had expressed in the decision of December 13, 2011 (case no.: 9 AZR 399/10) regarding the lawfulness of such a course of action likewise "nuanced" its earlier position on this issue by following the European Court of Justice decision rendered in the KHS AG case and interpreting the Act on Paid Annual Leave to include a limitation on the carry-over period even for employees suffering from long-term illness. In particular for employers not subject to collective bargaining agreements, this has the advantage that they too can benefit from this nuanced position. Moreover, the Federal Labor Court once again made clear that it is proper to distinguish between minimum paid annual leave and additional paid leave in terms of the carry-over period. This should be taken into consideration both when negotiating collective bargaining agreements as well as individual employment agreements. Such contractual provisions should also address the special case where employment is suspended.■

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