

## A New Variation on an Old Theme – Paid Annual Leave During Leave of Absence after Termination

### INTRODUCTION

Placing employees on leave is a tool commonly used by employers to relieve employees from their duties and responsibilities at least on a temporary basis. To reduce claims for compensation that accrue while employees perform no work in return, employees are frequently placed on leave with reference to § 615 sentence 2 of the German Civil Code (*BGB*). Under this code section any income from other employment or savings which an employee earns or realizes (or in bad faith fails to earn or realize) during a leave of absence are credited against the compensation that continues to be due the employee while on leave. Leave may also take the form of paid annual leave. As a result, when an employee is placed on a leave of absence in connection with termination of employment, the question arises whether leave is granted for purposes of paid annual leave or for other reasons. Depending on the specific terms, the employer runs the risk of having to compensate the employee for potential paid annual leave claims. The requirements for a statement by the employer that places an employee on leave and is also intended in settlement of any paid annual leave claims were most recently addressed by Division 9 of the Federal Labor Court (*BAG*) in two decisions.

### FACTS OF CASE 1

#### FEDERAL LABOR COURT DECISION

DATED MAY 14, 2013, CASE NO. 9 AZR 760/11

#### LOWER COURT:

#### REGIONAL LABOR COURT OF HESSIA DECISION

DATED FEBRUARY 29, 2011,

CASE NO. 16 SA 406/10

The employer terminated the employee and placed the employee on a leave of absence using the following clause:

"The leave of absence is granted [...] in settlement of any present or future claims for paid annual leave or off-time [...]. Any leave other than off-time in settlement of paid annual leave claims is subject to § 615 sentence 2 *BGB*."

The employee prevailed in the original wrongful termination action. In the following action the employee sought compensation for paid annual leave claims.

### FACTS OF CASE 2

#### FEDERAL LABOR COURT DECISION

DATED JULY 16, 2013, CASE NO. 9 AZR 50/12

#### LOWER COURT:

#### REGIONAL LABOR COURT OF NUREMBERG, DECISION

DATED OCTOBER 4, 2011, CASE NO. 7 SA 191/11

After termination by the employer there was agreement between the parties that employment would end. Until the end of employment the employee was placed on a leave of absence as follows:

"I hereby irrevocably place you [...] on a leave of absence. Any outstanding paid annual leave days must be used by you in the time period of the irrevocable leave of absence."

After termination of employment the employee sought to recover compensation for paid annual leave time.

### DECISIONS OF THE

#### FEDERAL LABOR COURT

What the two cases have in common is that the employer placed the employee on a leave of absence after giving the employee notice of termination. In each case the leave of absence was intended to be in settlement of the employee's paid annual leave claims. The problem was that the employee could not tell on which days leave was granted for paid annual leave purposes and on which days leave was granted for another purpose.

In both decisions the Federal Labor Court first reiterated that a leave of absence can be in settlement of paid annual leave claims only if the employer expressly states that the irrevocable leave is granted for paid annual leave purposes. If the employer grants a leave of absence without specifically addressing paid annual leave time, the employee, in the opinion of the Federal Labor Court, generally may assume that the employer leaves it up to the employee to determine when to schedule his paid annual leave during the leave of absence. Therefore, the court concluded, it is generally not necessary to specify the dates of paid annual leave time that is granted ahead of time.

As an exception to the general rule it is however necessary to specify the dates of paid annual leave time, according to the Federal Labor Court, if

this is necessary for reasons related to the employee. Such reasons are said to be present, in particular, if the employer states that any leave other than off-time in settlement of paid annual leave claims is subject to the provisions of § 615 sentence 2 BGB. While placed on a leave of absence, the court explained, an employee has a financial interest in basing his course of action on whether or not income from other employment will be credited against the compensation due the employee during the leave of absence. When paid annual leave time is combined with other leave, the court held, it is therefore the responsibility of the employer to specify the paid annual leave time during which income from other employment will not be credited, to clearly state the order of the time periods, or to otherwise apprise the employee whether, and if so, in which time period income from other employment will be credited. In the first of the above cases, the leave of absence therefore was found not to be in settlement of outstanding paid annual leave claims, and the employer was required to compensate the employee for those claims.

The situation is different, according to the Federal Labor Court, if the employer irrevocably places an employee on a paid leave of absence without referencing the crediting clause of § 615 sentence 2 BGB. Under these circumstances, the court held, it is not necessary for the employer to differentiate between leave in settlement of paid annual leave claims and leave granted for other purposes. In the second of the above cases, the leave of absence therefore was found to be in settlement of the employee's outstanding paid annual leave claims, and the employer was not required to compensate the employee for those claims.

#### **PRACTICAL SIGNIFICANCE OF DECISIONS**

The two decisions of the Federal Labor Court show that – as in so many cases – it depends. In these cases the outcome depended on whether the employer reserved the right to credit income from other employment. Under § 615 sentence 2 BGB any income earned by an employee from other employment while the employer refuses to accept services is credited against the compensation owed by the employer. If an employer places an employee on a leave of absence, the employer must differentiate between leave granted for paid annual leave purposes and leave granted for other purposes. If the employer wants income earned by the employee from other employment during the leave of absence to be credited, it is absolutely

necessary to specify the exact dates of paid annual leave time. Only if the employee can clearly tell which days are intended for paid annual leave or off-time purposes and on which days income from other employment will be credited in accordance with § 615 sentence 2 BGB, will a leave of absence be in settlement of the employee's paid annual leave claims. If income from other employment is not supposed to be credited, all the employer has to do is make sure that the leave of absence is granted irrevocably. Under these circumstances no dates for paid annual leave time have to be specified.

In the future employers therefore will have to decide how to proceed. Employers should carefully review cases where employees still have outstanding paid annual leave claims to make sure that paid annual leave time will be granted in due time, so as to avoid any future claims for compensation. If an employee should nonetheless seek compensation for paid annual leave claims later on, the employer should review whether the employee possibly was granted paid annual leave time during times of other employment. If the employee was able to accept such other employment only because he had been placed on a leave of absence by the original employer, any paid annual leave time granted during the time of other employment will be credited (decision of the BAG dated February 21, 2012 – 9 AZR 487/10).

We also call your attention to the appeal from the decision of the Regional Labor Court of Hamm (LAG) (decision dated March 14, 2013 – 16 Sa 763/12) that is currently still pending before the BAG. The LAG found that the employee had continued paid annual leave claims despite being placed on a leave of absence after termination for good cause. In the opinion of the court, settlement of a paid annual leave claim depends both on the leave of absence being granted as well as paid annual leave pay being paid prior to the start of paid annual leave time in accordance with § 11 para. 2 of the German Act on Paid Annual Leave Benefits (*BUrlG*). The court stated that any other interpretation would not be in conformity with European law. In the past the BAG has interpreted this code section only as a provision governing the time paid annual leave pay is due, but not as part and parcel of the paid annual leave claim in the narrow sense. It is quite possible that the BAG will submit this issue to the European Court of Justice for a preliminary ruling. In the Robinson-Steele decision (decision dated March 16, 2006 –

C 131/04), which was also cited by the LAG, the European Court of Justice however stated that the Directive does not specify any particular time for payment of paid annual leave pay. The Directive is however intended to guarantee that paid annual leave pay will place the employee in a financial position during his annual paid annual leave comparable to the financial position which the employee enjoys while at work. It therefore appears possible that paid annual leave pay may be paid later on along with the employee's regular salary, as long as this does not place the employee in a worse position. The Federal Labor Court thus may also decide the issue without submitting the matter to the European Court of Justice.

This issue is relevant not only in cases involving a leave of absence after termination. Under many employment agreements paid annual leave pay generally is paid along with the regular salary and thus often after the actual paid annual leave time. However, such a different payment date would appear to be permitted only based upon (cross-referenced) provisions of a collective bargaining agreement (§ 13 BUrlG). If a paid annual leave

claim can be settled only if paid annual leave pay is paid prior to the start of paid annual leave time, changes to payment procedures will be necessary in many cases. This issue becomes particularly pressing when paid annual leave time is granted on short notice, in which case paid annual leave pay in many cases will be timely only if made in cash – a return to the days when employees were handed their monthly wages in a paper bag?! ■

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