Developments in Vacation Law – ECJ and BAG with further "misappropriations" of vacation claims

INTRODUCTION

Following a series of decisions by the European Court of Justice ("ECJ") and the Federal Labor Court ("BAG") on the transfer of vacation claims in case of sickness, the situation in vacation law had calmed a bit for some time. Just in time for the vacation season in the summer of 2014, however, two judgments are again causing a stir. In these judgments, the ECJ and the BAG have continued down their path of disengaging vacation claims from its actual purpose of "relaxation from work". According to the judgments, not only employees may demand compensation for vacation time, but also their heirs if employment ended through death and there were unsettled vacation claims at such time. In addition, employees may demand vacation or compensation for vacation – apart from some special cases regulated by statutory law - for periods in which their employment was suspended, such in the case of unpaid special leave.

DECISION OF THE ECJ JUDGMENT OF JUNE 12, 2014 - C-118/13

In the case on which the judgment of the ECJ is based, the wife and sole heir of an employee, who died on November 19, 2010, was demanding compensation for a minimum of 140.5 vacation days. The decedent had been seriously ill since 2009 and was first unable to work on individual days and was then permanently unable to work beginning on October 11, 2010. The Local Labor Court had dismissed the complaint on the grounds that, under the case law of the Federal Labor Court (BAG), a claim to compensation for vacation days was not created in the case of the termination of employment through the demise of the employee. Upon the submission of the matter to the ECJ by the Higher Labor Court of Hamm, the ECJ established that Article 7 of the EU Working Time Directive (2003/88/EG) contradicts this practice.

In its grounds, the ECJ referred to its case law, according to which the claim to paid annual vacation was to be regarded as a particularly significant principle of EU Social Law from which no exception could be made. The claim to compensation for vacation time thus may not be linked to any requirements other than the fact that the employment relationship has terminated and the employee has not taken all of his vacation. The grant of compensation for vacation time is absolutely necessary to ensure the practical validity of the claim to paid vacation. The EU Working Time Directive thus cannot be interpreted to mean that the claim to compensation for vacation time will expire upon the death of the employee; rather, it may be inherited and claimed by the heirs. In addition, the compensation cannot be made dependent on whether or not the deceased had previously applied for it.

DECISION OF THE BAG JUDGMENT OF MAY 6, 2014 – 9 AZR 678/12

PREVIOUS INSTANCES: SUPERIOR LABOR COURT OF BERLIN-BRANDENBURG, JUDGMENT OF MAY 15, 2012 – 3 SA 230/12

In this judgment - which has only been available up to now as a press release – the BAG handed down its decision in the case of an employee who had unpaid special leave from January 1, 2011 to the termination of her employment on September 30, 2011 and then demanded compensation from her employer for 15 days of vacation in 2011. The BAG agreed with the employee and dismissed the second appeal of the defendant.

In the opinion of the BAG, the negotiated special leave prevents neither the creation of a statutory claim to vacation nor does it entitle the defendant to reduce the claim to statutory vacation time. Under Sec. 1 Federal Vacation Act, every employee has a claim in every calendar year to paid vacation. This provision is mandatory under Sec. 13 (1) sentences 1 and 3. The creation of the statutory claim to vacation only requires that the employment relationship legally exists and that the waiting period is met once. The Federal Vacation Act thus does not make the claim to vacation contingent on the fulfillment of primary duties under the employment contract nor does it demand a reduction of the claim to vacation in the event that the employment relationship is suspended. However, special statutory provisions provide employers with the opportunity to reduce the amount of vacation in the case of parental leave (Sec. 17 (1) Federal Parental Leave Act) or military service (Sec. 4 (1) Protection of Employment during Military Service Act). There is no rule on the reduction of vacation time, however, in the case of the suspension of employment when nursing a relative - as was the case here. Due to the mandatory nature of the claim to vacation, the defendant could not invoke any rules under a collective bargaining agreement which provided for the opportunity for a reduction in the case of suspended employment relationships.

PRACTICAL SIGNIFICANCE OF THE JUDGMENT

Both judgments are in line with the more recent decisions of the ECJ and BAG on the topic of vacation and compensation for vacation time. Indeed, the ECJ hat established at the beginning of 2009 that the transfer of the minimum statutory vacation claim can only be limited if the employee actually could have taken it previously and was not prevented from doing so due to work incapacity (C-350/06 – *Schultz-Hoff*). Although the courts have limited the transfer period to 15 months after the expiration of the relevant vacation year because of the subsequent decisions

of the ECJ (C-314/10 - *KHS*) and the BAG (9 AZR 399/10), they are nevertheless taking a path on which employees even have a claim to vacation and compensation for vacation days for periods in which they did not perform any work.
This disengagement of vacation claims from their actual purpose of granting employees relief from their work duties has been further pursued by the courts in the decisions cited above. This may be surprising at first glance because the ECJ itself explicitly emphasizes the recuperative purpose of vacation claims in all of the judgments cited above. In the case of the termination of employment by death, this recuperative purpose will most certainly not be obtained. For this reason, one could still follow the argument of the BAG still maintained in a judgment of March 12, 2013 - that is, long after the change in the case law initiated by the ECJ in 2009 - that vacation claims could not be created upon the termination of employment by death and thus could not be asserted by the heirs (9 AZR 532/11). This case law now can be deemed to be obsolete. Employers must therefore reckon with demands by the heirs of deceased employees whose vacation claims were unsettled on the date of their death. This will be the rule in practice. In the case of possible negotiations for a works agreement on death benefits, employers should thus be aware that financial claims by heirs will already exist under the aspect of compensation for vacation time. On the other hand, much older claims to vacation will lapse in the case of permanent sickness prior to the death of the employee on March 31st of the second year following the vacation year so that no compensation is to be paid for this period (ECJ and BAG op cit.). In addition, the BAG now deems the claim to compensation to be a claim to money so that prescriptive clauses in employment contracts or collective bargaining agreements or under the statute of limitations can prevent such claims (9 AZR 652/10).

Less surprising, on the other hand, is the judgment of the BAG on the creation of vacation claims during special leave, as, from a legal standpoint, the legal existence of the employment relationship is alone crucial for the creation of the vacation claim. Even so, one wishes that more pragmatism had been applied here. The objective being pursued by special leave, which is regularly based on the initiative of the employee himself, is the creation of a situation of “freedom” without the continuation of the main performance duties under the employment contract. Whether this is implemented by a suspended employment relationship (in which vacation claims are created) or through a termination with a reemployment commitment (then there are no vacation claims) is irrelevant, at least with a view to the recuperative purpose of the vacation claims, and should thus not be treated differently. This example illustrates, however, that the effects of the case law can be mitigated in practice by a corresponding design of supplemental agreements to work contracts. In addition to a termination agreement which includes a reinstatement of employment commitment, other provisions such as an adjustment of salary are conceivable. In order to avoid such intensive modifications of the existing contract situation, a complete or partial waiver of contractual claims to additional vacation days is conceivable - depending on the duration of the special leave. This type of waiver to contractual vacation claims is legally permitted (BAG – 9 AZR 374/12). In case of a total vacation claim of 30 days, this could absorb special leave of up to four months in any event (the employee would then have the minimum 20 vacation days for the remaining eight months, which would be equivalent to the pro-rated 30-day vacation claim for this period).

These examples show that there is a broad need for regulation and adjustment as a result of the new decisions with regard to the vacation provisions contained in numerous employment agreements. To the extent such provisions are permitted with respect to vacation arrangements in collective bargaining agreements, this applies to (i) standard employment contracts, (ii) mutual termination and settlement agreements and (iii) further specific employment contracts such as sabbatical agreements. When drafting these agreements, boilerplate solutions will often not be conducive to achieving the desired goal. This is shown to be true if one looks at the recent decisions of the BAG under which employees can effectively waive compensation for vacation days, such as through a discharge clause in a court settlement (BAG – 9 AZR 844/11). Under the case law of the ECJ, a legally valid waiver requires, however, that the employee could have had the opportunity to exercise the rights granted to him under the EU Working Time Directive (ECJ op cit.), which is not possible in case of a claim to compensation for vacation until the employment relationship had lapsed. The date of the conclusion of the termination agreement and the date of the lapse of the employment relationship thus govern whether claims to compensation for vacation time can be excluded by such discharge clause

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