Vacation Escapes?
How case law is redefining the claim to vacation time

INTRODUCTION

The season for "early booking discounts" is slowly coming to an end, and employee preferences for vacation time are being submitted to employers. This is a good time to revisit the current case law of the Federal Labor Court (Bundesarbeitsgericht - "BAG") concerning vacation law. In its judgment of February 10, 2015 (File no.: 9 AZR 53/14 (F)), the BAG has re-answered the question of how the claim to vacation time is defined if an employee changes his work hours during the ongoing calendar year.

THE FACTS

BAG, JUDGMENT OF FEBRUARY 10, 2015, 9 AZR 53/14

The employee in the present case was employed full-time over five days a week until July 15, 2010. He did not take any vacation during this period, whereby the reason for this is unknown. As of July 16, 2010, he changed to part-time work over four days a week. According to the applicable collective bargaining agreement, he was entitled to 30 vacation days in the case of a five-day work week. In the event that weekly work hours are distributed differently, the collective bargaining agreement provides for an appropriate adjustment of the claim to vacation time. After changing to part-time work, the employer granted him 24 vacation days for calendar year 2010 (30:5x4=24 vacation days).

The employee sued for a declaratory judgment establishing that he was entitled to three additional days of vacation for 2010 which had not yet been taken (15 vacation days from full-time employment/12 days of vacation from part-time employment for a total of 27 vacation days). The Local Labor Court decided in favor of the complaint.

The employer – successfully – entered an appeal against that judgment at the Regional Labor Court of Hesse (LAG) (judgment of October 30, 2012 – 13 Sa 590/12). The LAG was of the view that the employee was only entitled to 24 vacation days. The Federal Vacation Act provides for a proportionate calculation of vacation time if part-time employees regularly work on fewer work days per week than full-time employees. Following the change in his working time and its distribution, the number of vacation days was to be calculated in accordance with the distribution of the work hours regardless of whether the claim to vacation had fully or partially accrued prior to the change. Taking into account the principle of equal treatment, this ensured employees could avail themselves of the same vacation period in the sense of a rest and relaxation period (weeks per vacation year) irrespective of the distribution of their work hours.

The ECJ, however, had previously deemed in its "Tirol" decision (judgment of April 22, 2010 – C-486/08) that a proportionate reduction of vacation time and vacation pay in the case of employees who had not taken their vacation from the periods of their full-time work prior to changing to part-time work was unlawful due to the prohibition of the discrimination of part-time employees. In the view of the ECJ, claiming annual vacation at a later period stands in no relation to the subsequent scope of the employee's working time. A change, particularly a reduction of working time during the transition from full-time to part-time employment thus may not result in a reduction in the claim to vacation which the employee had earned in times of full-time employment and which could not be taken during that time. Similarly, it is not possible that the employee should receive less vacation pay for this vacation time. The principle of „pro rata temporis“ thus may not be applied retroactively to the claim to annual vacation from the period of full-time employment.

Following the decision of the LAG, the ECJ confirmed this in the “Brandes” decision (order of June 13, 2013 – C-415/12) which was based on litigation from Germany. In that case, an employee changed from a five-day to a three-day week after parental leave without having been able to take all of her vacation from the time when she was working full time. The ECJ reiterated that, due to the prohibition of discrimination against part-time employees and the lack of opportunity to have taken vacation prior to changing to part-time work, a reduction of the vacation claim and the vacation pay was not possible. If an employee is given one "week" of vacation after changing to part-time, he is *obviously* only being released from his duty to work on the actual work days. The other days of the week on which the employee does not have to work as such ("normal work inactivity"), on the other hand, are not equivalent to vacation days. In order to satisfy the originally acquired claim, an employee must therefore be granted additional vacation days for the purpose of releasing him from work duties. The local and regional labor courts thus ruled in favor of the plaintiff; the second appeal before the BAG is still pending.

DECISION BY THE BAG

The BAG, having embraced the decisions of the ECJ, has now departed from its case law to date. Until now, it has assumed that a corresponding change in the amount of vacation days to which an employee is entitled was inherent to a change in the distribution of work-

ing time to more or fewer work days in the week over the course of a calendar year (judgment of April 28, 1998 – 9 AZR 314/97). This was based on the fact that the individual length of vacation to which an employee was entitled was not governed by the work performance he had already provided and his previous distribution of working time, but according to the distribution of working time governed by the Federal Vacation Act. Where the distribution of working time changes in such manner that the employee works on fewer work days than he has previously worked, the vacation claim must be reduced accordingly. This would not result in disadvantages for part-time workers because a distribution of work hours over more or fewer work days can occur in all employment relationships.

The BAG now views this differently. As documented in the new press release, it infers from the case law of the ECJ that, due to the prohibition of discrimination against part-time employees, it is not sufficient if the accrued claim to paid vacation is not reduced when expressed in vacation weeks. The vacation claim accrued prior to the change to part-time work with fewer work days during the week thus may not be reduced proportionately after the fact. For this reason, collective bargaining provisions concerning the subsequent reduction of vacation days are void. The employee in the present case was thus entitled to three additional vacation days.

PRACTICAL SIGNIFICANCE OF THE DECISION

Although the decision would appear at this point to generally answer the question of the "recalculation" of the vacation claim when work hours or the number of weekly work days are reduced, other questions have remained unanswered, at least for the time being.

The ECJ also assumes that part-time employees can generally be given less vacation in accordance with their working time. The problematical issue is the adjustment after the fact in the case of a change in working time and its distribution. This applies above all if the employee did not have an opportunity to take vacation prior to the change. In the case decided by the BAG, there was no indication, however, that the employee had been unable to take his vacation prior to the change, but, rather, that he did not want to. Despite this, the recalculation was still deemed to be unlawful. One should also bear in mind the decision of the Regional Labor Court of Berlin-Brandenburg (judgment of June 12, 2014 – 21 Sa 221/14; cf. also BAG, judgment of March 24, 2009 – 9 AZR 983/07), which sees the employer as being obliged to provide for vacation time. The request by the employee for vacation time is not decisive. Annual vacation planning with an equivalent early allocation of vacation time should thus counteract the "feeling" that a vacation claim is growing, at least partially. If a change in working time and its distribution is announced, efforts should be made for the vacation to be taken prior to the change. This should at least make it more difficult for an employee to argue that he was unable to take vacation prior to the change. However, changes in working time and its distribution directly after extended absences from work will remain critical cases.

The fact that the ECJ views the release from work duties and vacation pay as parts of a uniform claim has remained relatively unnoticed until now. Taking vacation at a later time thus may not lead to a reduction of vacation pay. If an employee has "rolled over" vacation days after a change in his working time and its distribution, they will be presumably paid for with the vacation pay applicable for the period prior to the change.

Another unanswered question is how one is to deal with a change in the opposite direction, that is, an increase of working time and/or a change in its distribution over more work days. According to the case law of the BAG to date, an adjustment is made with regard to the number of vacation days, and vacation pay is calculated according to the new working time model. This would appear to no longer be mandatory. At the same time, care must be taken that at least the minimum statutory vacation time is granted.

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