No fun in the sun! – The duty of employers in vacation law to take the initiative and to instruct employees

INTRODUCTION

The topic of vacation and the question of whether vacation claims can be carried over and when they lapse has been the subject over recent years of numerous decisions of the Federal Labor Court and the European Court of Justice regarding various situations, and has also been the subject of our Client Newsletters (see, for instance Client Newsletters **04/2012**, **02/2014** and **03/2015**)). Time and again, the received local wisdom on questions concerning vacation law has been turned upside by the requirements of European law.

In reaction to a previous decision of the European Court of Justice, the Federal Labor Court has just handed down a spectacular **judgment on February 19, 2019**, which has already been broadly discussed in the media and which we would like to address in more detail due to its far-reaching consequences:

THE FACTS AND PROCEDURAL JOURNEY OF THE DECISION OF FEBRUARY 19, 2019 (FILE NO. 9 AZR 541/15)

The facts of the decision concern an academic who worked for Max-Planck-Gesellschaft from 2001 to the end of 2013. Following the termination of his employment relationship, he demanded financial compensation for vacation not taken in the years 2012 and 2013. This was a total of 51 vacation days or a gross financial offset of EUR 11,979.26. The employee had not submitted a request for vacation during the employment relationship.

The legal conflict in this matter has been going on since 2014. After the employer refused to make payment, the plaintiff filed a complaint at the **Labor Court of Munich** and initially won both there and in the appeal instance before the **District Labor Court in Munich**. In its decision from May of 2015, the District Labor Court assumed that, although the claim to vacation generally lapses at the end of the year, the plaintiff here could at least demand damage compensation because the employer had not complied with his **duty to grant vacation in good time**.

A fundamental dispute already emerged here on the question of which party to an employment contract would have to become active first with respect to the grant of vacation time during the year, that is, if there was really a “duty” of the employer to at least actively encourage his employees to take vacation or if the employer just had to wait to see if an employee submitted a request for vacation.

The latter had been the traditional understanding in Germany, but it seemed doubtful that this understanding could still be reconciled with the requirements of European law. Under Article 7 of Directive 2003/88/EC concerning certain aspects of the organization of working time, member States must implement the necessary action to ensure that every employee receives a paid minimum annual vacation of four weeks in accordance with the conditions provided for in the legal provisions or customs of the individual States. This appeal alone suggests that German vacation law must also be interpreted to mean that the employer has a duty to actively encourage that vacation is taken. According to the earlier view, the German legal provision of Sec. 7 Federal Vacation Act was nevertheless understood to mean that **the employee would first** have to submit a request for his desired vacation time frame to prevent the lapse of his vacation at the end of the year or at the end of the carry-over period.

In the subsequent period, the Federal Labor Court submitted this question at the end of 2016 to the **European Court of Justice** for its ruling. At the beginning of November of last year, the European Court of Justice ruled on this submission and responded – in somewhat abbreviated terms – to the effect that a lapse of vacation claims may only be considered under the E.U. law if the employee has been put in a position by the employer, e.g. through reasonable advice, to take vacation on time (ECJ, judgment of November 6, 2018 – C 684/16 - Max-Planck-Gesellschaft zur Förderung der Wissenschaften eV / Tetsuji Shimizu).

This requirement of the European Court of Justice has now been implemented by the **Federal Labor Court** in its latest decision and it has again been noted that, under Sec. 7 (1) of the German Federal Vacation Act, the employer is reserved the right to set down the general time frame for the vacation, but must take into account the vacation wishes of the employee. The court continues to assume that, although this regulation does not force the employer to grant vacation on his own initiative, the employer is supposed to be subject to a “burden to take the initiative” for the realization of vacation time under the rules of European law!

In interpreting the provisions of German vacation law in compliance with the directive, a lapse of vacation claims is thus only to be able to occur, as a rule, if the employer has **previously specifically demanded of the employee that he take his vacation and has informed him clearly and in good time that his vacation will otherwise lapse upon the end of the vacation year or of the carry-over period**.

With this statement, the Federal Labor Court is implementing the requirements of the European Court of Justice which demands, amongst other things, that the employer must specifically and transparently ensure that employees are actually able to take their paid annual vacation by requesting that they do so, including through a formal request if necessary.

PRACTICAL RAMIFICATIONS OF THE JUDGMENT AND RECOMMENDATION ON HOW TO PROCEED

The ramifications of this decision are far-reaching!

Companies should right now urgently introduce processes to ensure compliance with the increased information and advice requirements in relation to their workforce and the satisfaction of their obligations to limit the otherwise threatened economic risks. It must be ensured that employees are specifically and transparently advised to a sufficient extent of their vacation claim and the possibility that it could lapse and that they are requested to take their vacation.

The pressure to act here is high. In light of the more recent court rulings, just “going about business as usual“ can very quickly lead to significant economic risks in the form of the build-up of continually growing claims to vacation and financial offsets for vacation time.

The judgment also means that trouble can arise from both employees who are still employed or those who have recently left the company. If they have not been advised of the lapse of their vacation claims in the absence of an equivalent company practice (which is probably the rule), there is the threat that these employees could revisit past vacation claims that were believed to have lapsed or that they will raise equivalent claims to a financial offset.

These risks should also be urgently assessed. Up to which limit a subsequent, retroactive reference to the new court ruling is possible appears to be a question that has not yet been finally decided.

Similarly, the actual requirements the court rulings would place on sufficiently clear and timely advice to an employee cannot be conclusively assessed at the moment so that, in the event of doubt, one would be well advised in the sense of limiting risk to do too much rather too little. It remains to be seen if the anticipated detailed grounds of the judgment of the Federal Labor Court will provide any further insight.

Please do not hesitate to contact us if you have questions on this topic. We would furthermore be very happy to include you on the list of subscribers to our free newsletter in which we also regularly discuss topics relating to compensation. Just send us a brief **Mail** with your request.

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