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EMPLOYMENT AND LABOUR LAW 10-11/2020

CONTENT

Endless leave - ECJ must decide on the limitation period for unexpired leave entitlements

In its decision of 29 September 2020 (9 AZR 266/20), the Federal Labour Court (Bundesarbeitsgericht - BAG) referred the question to the European Court of Justice (ECJ) for a preliminary ruling on whether Article 7 of the Working Time Directive 2003/88/EC and Article 31(2) of the Charter of Fundamental Rights of the European Union preclude application of the national statute of limitations (§§ 194 et seq. BGB).

In the case to be decided by the BAG, an employee who was employed by the defendant from 1 November 1996 to 31 July 2017 seeks compensation for days of holiday not taken. The plaintiff was entitled to 24 working days of paid leave per calendar year. In a letter dated 1 March 2012, the defendant certified to the plaintiff that the "remaining holiday entitlement of 76 days from the calendar year 2011 and previous years" did not expire on 31 March 2012 because she had not been able to take her holiday due to the high volume of work. In the years 2012 to 2017, the plaintiff took a total of 95 working days of holiday. After termination of the employment relationship, the plaintiff requested compensation for a total of 101 days of holiday from 2017 and previous years. In the opinion of the defendant, these holiday claims were already time-barred due to the regular limitation period of three years.

Why is the forthcoming ECJ ruling important?

Entitlement to paid leave generally expire at the end of 31.12. of the respective calendar year. Only in exceptional cases it is possible to carry forward the holiday until 31.03. of the following year. These may be either urgent operational reasons (e.g. order situation during the Christmas business) or reasons relating to the employee (e.g. sickness-related incapacity to work). In the case of long-term sick persons, a transfer is possible until 31.03. of the year following the next calendar year.

With the judgment of 06.11.2018 (C-684/16), the ECJ ruled that the employer is obliged "to ensure, in a concrete and fully transparent manner, that the worker is actually able to take his paid annual leave, by formally requesting him to do so, if necessary, and, in order to ensure that the leave can still provide him with the rest and relaxation to which he is supposed to contribute, by informing him clearly and in good time that, if he does not take it, the leave will lapse at the end of the reference period or of an authorised carry-over period". The BAG concurred with this case law (judgement of 19 February 2019 - 9 AZR 321/16 and judgement of 19 February 2019 - 9 AZR 423/16).

Since then, leave only expires on 31 December or 31 March if the employer notifies the employee of his specific leave entitlement in the calendar year, asks him to apply for his annual leave in time so that it can be taken within the current calendar year and informs him

of the otherwise imminent expiry.

It remained unclear, however, whether this could also result in holiday entitlements being accumulated beyond the national limitation periods if the employer had failed to comply with the above obligation to provide information - as in the case in question.

PRACTICAL NOTE:
Employers already face a considerable financial burden as a result of the European Court of Justice's case law on information obligations towards employees, as holiday entitlements cannot lapse at the end of the year or on 31 March of the following year if no specific information has been provided. The financial risk for employers is increased if the national statutory limitation periods do not apply to employees' holiday entitlements and employers may also be confronted with holiday or compensation claims that are more than three years old. The ECJ could now eliminate this legal uncertainty in the preliminary ruling procedure submitted.

Higher Labour Court Hessen: Invalidity of the notice of termination in the event of a notification of mass dismissal to an incompetent authority

If a notification of mass dismissal is filed with the incompetent authority, the termination of the employment relationship is invalid (according to the ruling of the Higher Labour Court (Landesarbeitsgericht - LAG) Hessen of 4 November 2019 - 17 Sa 1483/19).

The parties disputed the validity of a dismissal for operational reasons in an airline's insolvency. The airline was based in Berlin but had stations in several German cities. The applicant was a flight attendant. Although her assignment was in principle planned by the head office in Berlin, she was stationed in Frankfurt am Main. Having concluded a contract for the transfer of slots, flight bookings, aircraft seat covers and a crew container, the airline filed a collective redundancy notice with the Berlin Nord Employment Agency. On that occasion, the airline announced that it intended to dismiss all cabin staff, including all staff based in Frankfurt.

The plaintiff had brought an action for dismissal protection against the subsequent dismissal. Both the Frankfurt am Main Labour Court and the LAG Hessen upheld that action. The dismissal had been ineffective in particular because the notification of mass dismissal had been filed with the authority that was not competent. A notification to the employment agency must be made in the district in which the business is located. Since the airline's station in Frankfurt am Main was to be qualified as an independent operation, the notification of the mass dismissal should have been filed with the Frankfurt/Main Employment Agency.

PRACTICAL NOTE:
This judgment underlines the importance of reviewing the notification of collective redundancies. When a business decision affects several companies or parts of companies located in different regions, care should always be taken to ensure that the notification of collective redundancies is submitted to the local employment agency responsible for the company concerned.

Higher Labour Court Munich: Invalidity of the temporary increase in weekly working hours

As a rule, the limitation of individual contractual conditions is only permissible if circumstances exist which justify a limitation of an employment contract as a whole pursuant to Section 14, Subsection 1, TzBfG (according to the ruling of the Higher Labour Court (LAG) Munich of 20.10.2020 - 6 Sa 672/20).

The plaintiff was employed part-time as a church musician with the defendant church congregation, with a working time of 3.5 hours per week. The employment relationship was then concluded for an unlimited period. In order to replace a full-time church musician who was ill, the working hours were increased to 39 hours per week, initially for the duration of one year, by means of an amendment agreement. The time limit for the increased working hours was then extended for a further year. As a result of a staff restructuring, the defendant finally decided to employ only two full-time musicians, let the limited increase in the plaintiff's working time expire and put the two full-time posts out to tender. The applicant's application for those full-time posts was rejected.

The action brought against the only temporary increase in weekly working hours was successful both in the first instance before the Labour Court and in the second instance before the LAG Munich. The employment contract preformulated by the employer constitutes general terms and conditions of business under Sections 305 et seq. BGB. According to these provisions, a limited increase in working time by at least 25% of a full-time employee is in principle only appropriate and thus effective if there are circumstances which justify a limited employment relationship as a whole under Section 14, Subsection 1, TzBfG. This was not the case in the present case; in particular, there was not only a temporary operational requirement for the increase in working time.

PRACTICAL NOTE:
Even though the judgement of the LAG Munich is not yet final and absolute, it shows that the limitation of individual working conditions (e.g. owed work, working hours, remuneration etc.) can hardly be agreed in a legally effective manner as a rule. Such a limitation of time therefore always carries the risk for the employer that he must grant the "limited" benefit on a permanent basis if the employee objects to the limitation of time. Before such an agreement can be reached, it should therefore always be checked whether there are objective reasons which support the fixed term.

Emden Labour Court: obligation to introduce a time recording system

In the opinion of the Emden Labour Court (ArbG Emden, ruling of 20.02.2020 - 2 Ca 94/19), employers should already now be obliged to set up an objective, reliable and accessible system for recording working time. However, this case law is neither consistent with the current national legal situation nor with the prevailing opinion, which rejects a direct horizontal third-party effect of the European Working Time Directive and the decisions of the

European Court of Justice (ECJ).

1. Facts

The ArbG Emden had to decide on a claim for remuneration of alleged overtime in the above-mentioned case. In 2018, the plaintiff worked for the defendant as a construction worker for seven weeks at an hourly remuneration of EUR 13.00 gross. In return, the defendant paid the plaintiff remuneration based on 183 hours worked. The plaintiff claimed that he had actually worked 195.05 hours for the defendant and claimed the difference in remuneration. There was no system for recording working hours in the employer's company.

2. Principles on the burden of proof and demonstration in overtime litigation

If the employee claims that he has worked overtime for which he is liable to pay, he satisfies his burden of proof by stating the days on which he worked, from when to when, or was available for work on the employer's instructions. However, this regularly poses great challenges to the employee during the process. This is because the employee not only has to list exactly when he has worked which overtime hours, but also has to present and prove for each of these overtime hours that they were caused by the employer.

If the employee succeeds in proving this, the employer, for his part, must provide a substantiated account of the activities which he has entrusted to the employee and the periods during which the employee has performed them. Otherwise, the hours of work performed by the employee are deemed to have been granted and must be remunerated accordingly.

3. Decision of the ArbG Emden

The ArbG Emden upheld the action for payment and obliged the defendant employer to pay compensation for overtime. According to the Emden ArbG, the employee complied with the burden incumbent on him to account for the overtime worked. By submitting his own records of working hours, he had shown the times at which he had worked overtime. On the other hand, the documentation submitted by the defendant employer did not indicate which work had been assigned to the employee and when he had actually performed this work.

In addition, according to the Emden ArbG, Article 31(2) of the Charter of Fundamental Rights (GRC) imposes an obligation on the employer to establish an "objective", "reliable" and "accessible" system for recording daily working hours. The employer had violated this obligation.

4. Background to the decision

The background to the decision of the ArbG Emden is the fundamental ruling of the European Court of Justice (ECJ - ruling of 14.05.2019 - C-55/18), according to which employers are obliged to record the working time of their employees by means of working time recording systems. This obligation follows from Article 31 (2) GRC and the Working Time Directive 2003/88/EC.

5. Evaluation of the decision / effects

The argumentation of the ArbG Emden is not convincing. This is particularly because, firstly, the ECJ's requirements have not yet been transposed into national law. Secondly, a direct horizontal third-party effect of Art. 31 (2) GRC is rejected by the prevailing opinion. A final decision of the ECJ on this is lacking. In addition, the ArbG Emden - as already the ECJ - leaves undecided, how the required time recording systems must be designed in order to meet the requirements of the burden of proof.

However, even today - before the implementation of the European requirements by the national legislator - there is already the risk that in the absence of an objective, reliable and accessible system for recording daily working time, the employer will not be able to meet its staggered burden of proof and demonstration for the scope of the working time to be remunerated in the labour court process due to a lack of objective and reliable data. The overtime claimed by the employee can then be regarded as granted and would have to be remunerated.

PRACTICAL NOTE:

Nevertheless, employers should already now review their systems for recording working time and, if necessary, adjust them, particularly with regard to compliance with the mandatory provisions of working time law. Furthermore, such recording is urgently recommended when short-time work benefits are paid. This is because the extent of the loss of working hours and thus the entitlement to receive short-time working compensation must be proven to the Federal Employment Agency.

As usual, we will of course keep you up to date with the latest developments in the legal and regulatory situation.

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