

Case Reports

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Compensation in lieu of paid leave, if not time-barred, can be inherited by a deceased employee's heirs (GE)

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Summary

42 An employee who does not recover from illness during the calendar year in which he accrues paid leave (the 'leave year') and who continues to be incapable of taking that leave, loses the right to take it 15 months after the end of the leave year, i.e. on March 31 of the second calendar year following the leave year. If his employment terminates within that 15 month period, his entitlement to leave converts into a claim for payment in lieu, and as such, can be claimed by his heirs if he dies.

Facts

The plaintiffs were the heirs of Mr M, who died in 2013. Mr M had been employed by the defendant as a full-time teacher. The terms of his employment included the terms of a collective agreement for the public sector (the 'TV-L'). Consistent with this collective agreement, Mr M was entitled to 30 days of paid leave annually. This is more generous than the German Federal Vacation Act (*Bundesurlaubsgesetz*; BUrlG), which grants employees 20 days of paid leave per year, unless they are severely disabled, in which case they are entitled to 25 days per year. These 20 or 25 days are referred to here as 'statutory days'. The balance between the 20/25 statutory days and the number of days of paid leave to which an employee is entitled on the basis of an

individual or collective contract are referred to as 'contractual extra days'.

M became disabled and was granted permanent disability benefits in March 2011. Pursuant to the collective agreement, his employment relationship ended on 17 March 2011.

The BUrlG provides that annual leave is to be granted and taken in each calendar year and lapses if not taken. As an exception to this rule, it can be taken until 31 March of the next year if "*urgent operational reasons or reasons concerning the person of the employee justify this*". This period 1 January – 31 March, during which paid leave can be taken after the end of a calendar year, is known as the 'carry-over period'. The collective agreement in this case stipulated that vacation which could not be taken by the employee due to illness would not lapse until 31 May of the next calendar year. Thus, the statutory carry-over period was extended by two months.

Mr M claimed compensation for 95 unused vacation days as per 17 March 2011. The defendant only paid compensation for 40 days. Mr M then filed a claim for compensation for 26 outstanding days (it is not clear why he did not claim the full balance of 95 minus 40 days).

The court of first instance awarded Mr M compensation for 14.33 vacation days (why this number, is not clear from the published judgment). The defendant appealed, without success. The defendant then appealed to the Federal Labour Court (*Bundesarbeitsgericht*). As Mr M died during the court proceedings, his heirs pursued the action.

Judgment

The Federal Labour Court (BAG) rejected the appeal, reasoning as follows. The carry-over period under the collective agreement applies in full to the contractual extra days. Therefore, Mr M lost these days on 31 May 2010. As for the statutory days, the dispute centered on the vacation entitlements for the calendar year 2009.

In its 2009 judgment in *Schultz-Hoff* (C-350/06), the ECJ held that Directive 2003/88 precludes national legislation or practices which provide that the right to paid leave (or to payment in lieu in the event of untaken leave on termination) extinguishes at the end of the leave year

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and/or a carry-over period where the worker has been on sick leave for the whole or part of the leave year and where his incapacity to work has persisted until the end of his employment relationship. In its 2011 judgment in *Schulte* (C-214/10), the ECJ refined this doctrine, holding that Directive 2003/88 does not preclude national legislation or practices which limit the accumulation of entitlement to paid annual leave of a worker who is unfit for several consecutive reference periods by means of a carry-over period of 15 months, on the expiry of which the right to such leave lapses. In 2012, the BAG, applying *Schulte*, held that paid leave that could not be taken due to sick leave does not extinguish until 15 months following the end of the leave year¹.

Based on *Schulte*, the court established that the statutory leave days Mr M had accrued in 2009 had not lapsed on 17 March 2011, the date on which his employment ended and on which he had asked for compensation in lieu of unused annual leave. They would have lapsed two weeks later had Mr M still been in the defendant's employment at that time, but this was not the case.

In its 2014 judgment in *Bollacke*, the ECJ held that Directive 2003/88 precludes national legislation or practice which provides that the entitlement to paid annual leave is lost without compensation where the employment relationship is terminated by the death of the worker. Therefore, upon the termination of Mr M's employment his entitlement to paid leave converted into a claim for monetary compensation. That claim was an asset which does not differ from any other pecuniary claim of the employee against his employer upon termination of the employment (e.g. for outstanding salary or overtime). This meant that the claim was part of his estate, which passed with the rest of his property to his heirs.

Commentary

“Don't deny a dead man his right to annual leave” is how the legal press in Germany has characterized this recent judgment. As surprising as a German lay person would find this decision, it was only a matter of time before the Court was going to have to rule in a case of this kind and apply the findings of the ECJ. Contrary to the former belief that a deceased person could not use his annual leave to recuperate after he had passed away and should therefore not benefit from it, the decision means that employers can be pursued by heirs for compensation for annual leave that employees themselves could not use. The decision seems logical from a legal point of view, but many employers might find it hard to understand. Not only can the employer not benefit from the employees' service but in addition it has to pay for outstanding annual leave days.

There has recently been some discussion in Germany about whether it is possible to give employees different tasks that their illness does not prevent them from doing. For example, someone with a broken hand might not be able to type but could still take calls in a call centre. There is a question as to whether this would have to be on a voluntary basis, but there is no consensus around this as yet.

Subject: paid leave

Parties: unknown

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1. BAG 7 August 2012, case number 9 AZR 353/10.