

Limitation of annual leave entitlement

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Provisions regulating an employee's annual leave entitlement are not just found in their employment contract, the Federal Annual Leave Act (Bundesurlaubsgesetz, BUrlG), plus any applicable Collective Agreements but also in the [EU Working Time Directive](#). Regarding the latter, a judgment of the Court of Justice of the European Union (CJEU) on the limitation of annual leave entitlement could once again threaten to cause trouble in German annual leave law.

The case

The claimant was employed as an accountant from 1996 to 2017 at the office of the defendant. Due to large workloads, they were unable to take all of their annual leave for years. The defendant did not request that they took their annual leave nor did they explain what the consequences of not taking annual leave were. After the termination of their employment, the claimant requested compensation for 101 days of annual leave from 2013 to 2017. On the other hand, the defendant is of the opinion that the claimant's annual leave entitlement had at least lapsed and that the claimant was therefore no longer entitled to it.

The Labour Court (Arbeitsgericht) agreed with this view for the most part and therefore dismissed the claim. The Regional Labour Court (Landesarbeitsgericht, LAG) stated to the contrary that the annual leave entitlement had not lapsed and held that the claim was mostly well founded. The defendant appealed on a point of law to the Federal Labour Court (Bundesarbeitsgericht, BAG). The BAG referred the matter to the Court of Justice of the European Union (CJEU) and requested a preliminary ruling ([Order for reference dated 29 September 2020 – AZR 266/20 \(A\)](#)).

The issue

The Federal Annual Leave Act states that, in principle, an employee must take their annual leave in the current calendar year or, in exceptional cases, no later than within the first three months of the following year ([section 7 \(3\) BUrlG](#)). Otherwise the annual leave will lapse.

In 2018 the CJEU held ([CJEU 6 November 2018, C-684/16, C-619/16](#) – cf. [Newsletter "The Fate of Residual Leave Time – Current ECJ Case Law"](#)) that this regulation could not apply in this way. As the weaker party, the employee should be protected and they must actually be put in such a position as to be able to take their annual leave. The employer should therefore inform its employees how much annual leave they have and that it would lapse. In addition, the employer should individually ask the employee if they want to take the annual leave to which they are entitled. If the employer does not comply with these obligations to invite the employee to take annual leave and to provide this information, then the employee's annual leave likewise does not lapse.

It is unclear until when, whether and if the annual leave that has not been taken lapses. The regular limitation period (sections [194](#), [195](#), [199](#) German Civil Code (BGB)) is three years from the end of the calendar year in which the claim arose. However, the commencement of the time period presupposes knowledge of the circumstances giving rise to the claim on the part of the obligee or that the obligee would have obtained such knowledge if they had not shown gross negligence. The BAG was previously inclined towards the opinion that annual leave entitlements were subject to this general limitation period and employees could no longer claim the right to take their annual leave once three years had passed after the end of the annual leave year. After all, the employee ought to be aware of their annual leave entitlement.

As the BAG felt that this conflicted with the EU rules, it referred the question to the CJEU for a preliminary ruling. The Advocate General of the CJEU suggested that the limitation period for annual leave entitlement only commences once the employer has complied with its obligations to invite the employee to take annual leave and to provide information about the limitation periods ([Opinion of the Advocate General dated 5 May 2022 – C-120/21](#)). After all, it cannot be readily assumed that employees know their exact annual leave entitlements. The solution favoured by the BAG presumes purely theoretical knowledge on the part of the employee and this breaches European Union law.

It is still not known how the CJEU will rule. While the CJEU does not have to follow the opinion of the Advocate General, it does tend to follow them in most cases. Such a decision could result in problems for employers.

Practical tips

The judgment of the CJEU expected in the coming months should once again give employers the opportunity properly to provide employees with information about their annual leave entitlements and the potential lapse thereof.

Many employers make do with stating the amount of annual leave remaining on pay slips or sending a short mass email in the last quarter of the year reminding employees to take their annual leave. Such a procedure would not be sufficient, however, because in accordance with the jurisprudence of the CJEU, employers must clearly inform every employee individually in

good time of how much annual leave they have remaining and when this may lapse. In addition, this information must be combined with a specific invitation to take annual leave on time. Furthermore, the information should be provided in a traceable way (such as by way of a personalised email), and any access thereof should be confirmed by the employee. In subsequent proceedings, the employer must provide evidence that it sufficiently satisfied its obligations to invite the employee to take annual leave and to provide information about the limitation periods. If the employer cannot do so, then it would lose out.

If an employer is unable to satisfy its obligations to invite the employee to take annual leave and to provide information about the limitation periods, it may no longer be able to grant the accumulated remaining annual leave entitlement/provided the annual leave entitlement is no longer granted until the end of the employment contract, the corresponding entitlement to receive compensation for annual leave pursuant to [section 7 \(4\) BUrlG](#) is suspended. If the CJEU was to decide that annual leave entitlements do not lapse automatically, in certain circumstances employees could request compensation for their annual leave that has been saved over the years. In the current case before the BAG the defendant is facing a payment of around €20,000. And this is just one employee and payment for annual leave entitlement from just a few years. Employers could be liable for considerably greater sums in the event of claims cumulated over several years from long-standing employees.

Note

This overview is solely intended for general information purposes and may not replace legal advice on individual cases. Please contact the respective person in charge with GÖRG or respectively the author Pia Pracht on +49 221 33660-524 or by email to ppracht@goerg.de. For further information about the author visit our website www.goerg.com.

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