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LEGAL UPDATE LABOUR AND EMPLOYMENT LAW

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Lapse and limitation of annual leave entitlement – the Federal Labour Court follows the case law of the Court of Justice of the European Union and dismisses both cases, as the employer had not complied with their obligation to provide information and their notification obligation

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After the Court of Justice of the European Union (CJEU) held that the employer had not complied with their notification obligation in judgments dated 22 September 2022 regarding the lapse (case nos.: C-727/20 and C-518/20) and the limitation period (case no.: C-120/21) of annual leave entitlement, the Federal Labour Court (Bundesarbeitsgericht, BAG) was prompted to implement the corresponding guidelines of the CJEU. The BAG decided on the fundamental proceedings on 20 December 2022 (press releases 47/22 and 48/22). This did not contain any surprises here, but helpful confirmations of the controversial decisions of the CJEU. Further questions will likewise follow which will be first answered in real life.

Starting position

The first decision of the BAG (no.: 9 AZR 245/19) dealt with an employed lorry driver who had worked for his employer since 2000 and retired on 1/12/2014 with a full reduced earning capacity pension. He claimed that he had 34 days of annual leave from 2014 of which his employer did not notify him. The second decision (case no.: 9 AZR 266/20) related to an employee who worked for her employer from November 1996 to July 2017. After the end of the employment contract she requested her employer pay her compensation for 101 days of annual leave that she had not taken in 2017 and previous years.

In both cases, the BAG referred the matter to the CJEU for clarification of the legal questions raised and requested a preliminary ruling. The annual leave entitlements had already been the subject of preliminary rulings in previous years. Initially, in 2011 (judgment dated 22/11/2012 – C-214/10), the CJEU held that annual leave en-

titlements may not be accumulated inappropriately and therefore even in the case of employees who are unable to work, a carry over period of 15 months and the subsequent lapse of annual leave entitlements, as envisaged in section 7 (3) sentence 3 of the Federal Annual Leave Act (Bundesurlaubsgesetz, BUrlG), does not infringe EU law. In 2018, (judgment dated 06/11/2018 – C-684/16) the CJEU made waves when it imposed far-reaching notification and cooperation obligations on employers when employees exercise their annual leave entitlements and stated that these entitlements did not lapse if these obligations were not complied with. In the most recent proceedings the CJEU had to decide between protecting employers from the inappropriate accumulation of annual leave entitlement and the interests of employees in actually being able to take their annual leave even in cases of inability to work.

The CJEU gave the latter interest priority and took the view that employees who still had outstanding annual leave entitlement from the year in which they became unable to work, of which their employer had not notified them in advance, did not lose this entitlement even beyond the carry-over period of 15 months. If the employer fails to notify the employee of this, the employee's entitlement persists. Any right to receive compensation for untaken annual leave could also not then be limited if the employer did not comply with their notification and cooperation obligations. The regulation in section 195 German Civil Code (BGB) would not preclude this.

Decision of the BAG dated 20 December 2022 – 9 AZR 245/19 and 9 AZR 266/20

As expected, the BAG followed the CJEU's commentary on lapse and limitation of annual leave entitlement if the employer fails to provide clarification. The BAG held that the entitlement to statutory minimum annual leave from an annual leave year in which the employee actually worked before they were prevented from taking their annual leave on health grounds, usually only then lapses after the expiry of a carry-over period of 15 months if the employer had put the employee in a position to exercise such leave in good time. This follows from the interpretation of section 7 (1) and (3) BUrlG in conformity with the Directive.

The BAG likewise complied with the CJEU's guidelines in relation to the limitation of annual leave entitlement. Employees' statutory entitlement to paid annual leave is subject to the statutory limitation period. However, the three year statutory limitation period first commences at the end of the calendar year in which the employer informed the employee of their specific annual leave entitlement and the limitation periods, and the employee has not taken their annual leave of their own accord.

Legal background

The connecting factor for the CJEU's latest decision was Art. 7 of Directive 2003/88/EC, in accordance with which member states are to take the measures necessary to ensure that all employees are entitled to paid annual leave of at least four weeks, and Article 31 (2) of the Charter of Fundamental Rights of the European Union, which enshrines the right to paid annual leave. The BAG is therefore subject to the requirement of interpreting section 7 BUrlG in a manner which conforms with EU law, so that the right to paid annual leave only lapses if the employer has previously placed the employee in a position to take their annual leave. With its decision dated 19 February 2019 (case no.: 9 AZR 423/16), the BAG has already given more details about these guidelines and determined that the employer must specifically encourage the employee to take their annual leave and clearly

notify them in good time that otherwise the annual leave will be extinguished at the end of the leave year or carry-over period. If this cooperation obligation is infringed the statutory annual leave entitlement is not extinguished for the year in which an employee who is on long-term sick leave or is incapacitated first became unable to work. The entitlement may also not become time-barred under the statutory provisions. The court supported this with an interpretation of section 199 (1) BGB in line with EU law.

Comments

The decision of the CJEU in relation to the range and legal consequences of employers' notification and cooperation obligations has been subject to justified criticism. The lapse of annual leave entitlement has also been significantly restricted in cases of long-term sickness. This leads employees being able to accumulate annual leave in order to then take the leave over a consecutive longer period of time. This would not just be detrimental to the employer’s process of organising work. Above all, this conflicts with the purpose of recuperative time off, to take this at regular intervals in the same calendar year and not to save it up over a long period of time. In the absence of limitation, in some circumstances this can even result in a financial inducement for employees to avoid actually taking annual leave if they have not been notified by their employee of the amount of annual leave they have remaining.

The CJEU justified this in that employees must always be enabled to actually take their annual leave. In any case, only the entitlement to annual leave in the reference period in which the employee becomes unable to work is carried over. Entitlement to annual leave which was accrued during an employee's inability to work may also not be taken by a notification by the employer and thus lapses as before after the expiry of 15 months from the end of the annual leave year without requiring any act of cooperation from the employer. Therefore there is no danger that employees will accumulate paid annual leave entitlement without restriction. This is also clarified by the BAG in its decision.

This very difference makes it clear that the new guidelines are inconsistent with regard to the lapse of annual leave entitlement. If this entitlement which arose during the inability to work normally would lapse after the carry-over period of section 7 (3) sentence 3 BUrlG, then this must also be the case for annual leave entitlement that arose before the employee became unable to work but could no longer be taken even with a notification by the employer. This is a causation problem that the CJEU has swept aside.

The BAG must follow these guidelines. It seems strange then that the demand for legal certainty that section 195 BGB intends to protect is in the background. The court seems to have protected the commencement of the limitation period as per section 199 (1) no. 2 BGB without there actually having been positive knowledge.

In practice, this means that the employer has to have notified the employee "clearly and in good time" of the impending lapse of annual leave. The BAG has not (yet) commented on any possible burden of producing evidence and burden of proof. Employers would, however, be well advised to document the notification. If employees are granted addition contractual annual leave beyond minimum statutory annual leave, the lapse of such leave should be regulated appropriately in their employment contract. The BAG has already clarified that it is possible for the entitlement to contractual annual leave to lapse, regardless of the notification obligation, if the intention of such regulation contains "significant indications" in the Lapse clause. It remains to

be seen whether, in particular, clauses in old contracts fulfil these requirements.

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 Timo Rehfisch on +49 221 33660541 or by email to TRehfisch@goerg.de. For further information about the author visit our website www.goerg.com.

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