

Legal Update Labour and Employment

Extinguishment of Annual Leave Entitlements

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Headnote

Where an employee returns to work in good health after being incapable for work, he will lose within the time limit contained in section 7(3) sentence 1 of the Federal Leave Entitlement Act not just his leave entitlements for the current leave year, but also those that he has carried over (*Federal Labour Court – 9 AZR 425/10*).

Facts

On 9 August 2011, the Federal Labour Court handed down a decision on the provision in section 7(3) sentence 1 of the Federal Leave Entitlement Act prohibiting the carrying-over of current leave entitlements. The plaintiff had been employed by the defendant since 1991. The plaintiff was entitled to 30 days' annual leave. He was incapable of working due to illness for the entire period from 11 January 2005 to 6 June 2008 and subsequently returned to work. Later on during 2008 the defendant granted the plaintiff 30 days' leave. The plaintiff sought a

judicial declaration that he had a claim for 90 days' leave against the Defendant based on the years 2005 to 2007.

Decision

As had been the case before the lower courts, the plaintiff was also unsuccessful before the Federal Labour Court. Section 7(3) sentence 1 of the of the Federal Leave Entitlement Act provides that recreation leave must be granted and taken in the current calendar year. Sentence 2 of section 7(3) of the Federal Leave Entitlement Act only permits leave to be carried over to the next calendar year where urgent operational reasons or reasons based on the person of the employee justify this. Where leave is carried over, it must be granted and taken within the first three months of the following calendar year (section 7(3) sentence 3 of the Federal Leave Entitlement Act). The Federal Labour Court held that the plaintiff's leave entitlement claim had extinguished at the latest with the expiry of 31 December 2008. Unless there is a provision in an employee's contract or a collective agreement that

provides otherwise, leave that has not been taken extinguishes at the end of the leave year except where a reason for carrying it over exists pursuant to section 7(3) of the Federal Leave Entitlement Act. According to the court, it had to be assumed that leave extinguishes where the employee is not prevented from taking his leave by circumstances beyond his control such as incapacity for work. Similarly, there is a time limit on leave entitlements which are carried over to the next calendar year. In the court's opinion if an employee who is initially unable to work due to illness recovers his health during the calendar year or the carry-over period in time to be able to take his leave during the remaining period (as was the case here), his leave entitlement originating from previous periods will extinguish in the same way as his leave entitlement which accrues at the beginning of the leave year. The Federal Labour Court has left open the question of whether, and if so, to what extent employees may accumulate leave entitlements over a period of several years.

meaning that statutory entitlements to payments in lieu of leave do not extinguish where an employee becomes ill by the end of the leave year and/or carry-over period and is therefore incapable of working. It follows from this that a leave entitlement will not, as a rule, extinguish pursuant to section 7(3) of the Federal Leave Entitlement Act if it cannot be taken because the employee was incapable of working due to illness. In this decision, the Federal Labour Court did not address the issue of whether, and if so, to what extent employees may accumulate leave entitlements over a period of several years. However, it should be taken into account that leave which is carried over to the following year because of illness also qualifies according to the Federal Labour Court's new case law as part of the minimum statutory leave as defined in section 3(1) of the Federal Leave Entitlement Act. This would speak in favor of treating such leave in the same way as the statutory minimum leave which first accrues in the current calendar year (similarly, Cologne Higher Labour Court, 18 May 2010, 12 Sa 38/10).

Comment

The decision is in line with the change in the Federal Labour Court's case law following the European Court of Justice's „Schultz-Hoff“ decision of 20 January 2009. According to such case law, section 7(3) and 7(4) of the Federal Leave Entitlement Act must be understood as



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