

Legal Update

Labour and Employment

Waiver of compensation for annual leave now possible as part of a court settlement

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Headnote

According to a recent decision by the Federal Labour Court, employees may waive compensation for the statutory minimum annual leave as part of a court settlement (*Federal Labour Court, judgment of 14 May 2013 - 9 AZR 844/11*).

Facts

The defendant had dismissed the plaintiff, an employee who had been unable to work due to illness since January 2006, with effect as of 30 June 2009. A legal dispute concerning the dismissal ended with a settlement that called for, among other things, termination of employment with effect as of 30 June 2009, payment of compensation in cash in the amount of € 11,500 and extinguishment of all pecuniary claims of the parties against each other arising from the employment relationship, whether known or unknown or for whatever legal rea-

son. The plaintiff then brought a claim for € 10,656.72 against his former employer for annual leave from the years 2006 to 2008.

Decision

The Chemnitz Labour Court dismissed the action, but the plaintiff filed an appeal with the Saxony Higher Labour Court, which partially revised the judgment of the lower court and ordered the former employer to pay compensation for annual leave in the amount of € 6,543.60 (*Saxony Higher Labour Court, judgment of 26 May 2011 - 9 Sa 86/11*). The employer's appeal before the Federal Labour Court was then successful and the judgment of the court of first instance reinstated.

Comments

Under the previous case law of the Federal Labour Court, rights to annual leave and compensation for such leave were inseparable. The right to compensation involved, according to the Federal Labour Court, not merely a pecuniary claim, but represented a "surrogate" for the underlying right to annual leave, which meant that the accrual and extinguishment of the right to compensation were subject to the same legal requirements as the entitlement to free time. Since the first sentence of § 13(1) of the Federal Holiday Act (*Bundesurlaubsgesetz – BUrlG*) stipulates that the right to minimum annual leave under §§ 1 and 3(1) of the Federal Holiday Act is an absolute right, the same would also apply to any claim for compensation based on the statutory minimum leave according to the "surrogate" theory. The Federal Labour Court has since completely abandoned this theory since it was incompatible with EU law (see ECJ, judgment of 20 January 2009, - C-350/06 and C-520/06, "Schultz-Hoff") (Federal Labour Court, judgment of 19 June 2012 – 9 AZR 652/10).

According to the Saxony Higher Labour Court, express abandonment of the surrogate theory by the Federal Labour Court did not, however, mean that the absolute right to compensation for the statutory minimum annual leave pursuant to the third sentence of § 13(1) sentence and § 7(4) of the Federal Holiday Act can be ignored since the right to compensation for annual leave is not simply a pecuniary right that the parties are at liberty to dispose of at will.

The decision of the Federal Labour Court, which has up to now appeared only in the form of a press release, marks a departure from this opinion and is in that regard consistent with the court's more recent case law on annual leave and claims for compensation for annual leave. According to this decision, the third sentence of

§ 13(1) of the Federal Holiday Act permits deviation from the provision contained in § 7(4) of the Federal Holiday Act, which calls for compensation for annual leave if it cannot be taken, either in its entirety or in part, due to termination of employment, but not at the expense of the respective employee. However, the court argued, this provision forbids only individual contracts that exclude the possibility of claims for pecuniary compensation for accrued annual leave; if an employee has a claim to compensation for statutory leave for the purposes of rest and relaxation pursuant to § 7(4) of the Federal Holiday Act when employment is terminated, nothing prevents that employee from waiving that claim.

The logical consequence of this would be that it is now possible for an employee to waive claims to compensation for the minimum annual leave required by law not only through a settlement reached through the courts, but also by signing a release to that effect upon termination of employment. Under previous case law, this possibility existed as regards annual leave in excess of the legal minimum granted in employment contracts. In the case of claims to compensation under collective agreements, it is important to keep in mind that the first sentence of § 4(4) of the Collective Agreement Act (*Tarifvertragsgesetz – TVG*) stipulates that such claims may be waived only under a settlement approved by the bargaining partners.

However, it remains to be seen whether the European Court of Justice will approve this welcome addition to the case law of the Federal Labour Court. To be on the safe side, in the case of disagreement as to the number of days of annual leave that have not been taken, it is for the time being necessary to keep in mind the possibility of settling the question of compensation for annual leave through the use of an agreement on the underlying facts that confirms that all annual leave has been taken "in kind".

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 herself: Christine Vesper, LL.M. on +49 221 33660-534 or by email to cvesper@goerg.de. For further information about the author visit our website www.goerg.com.

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