Newsletter Labour and Employment

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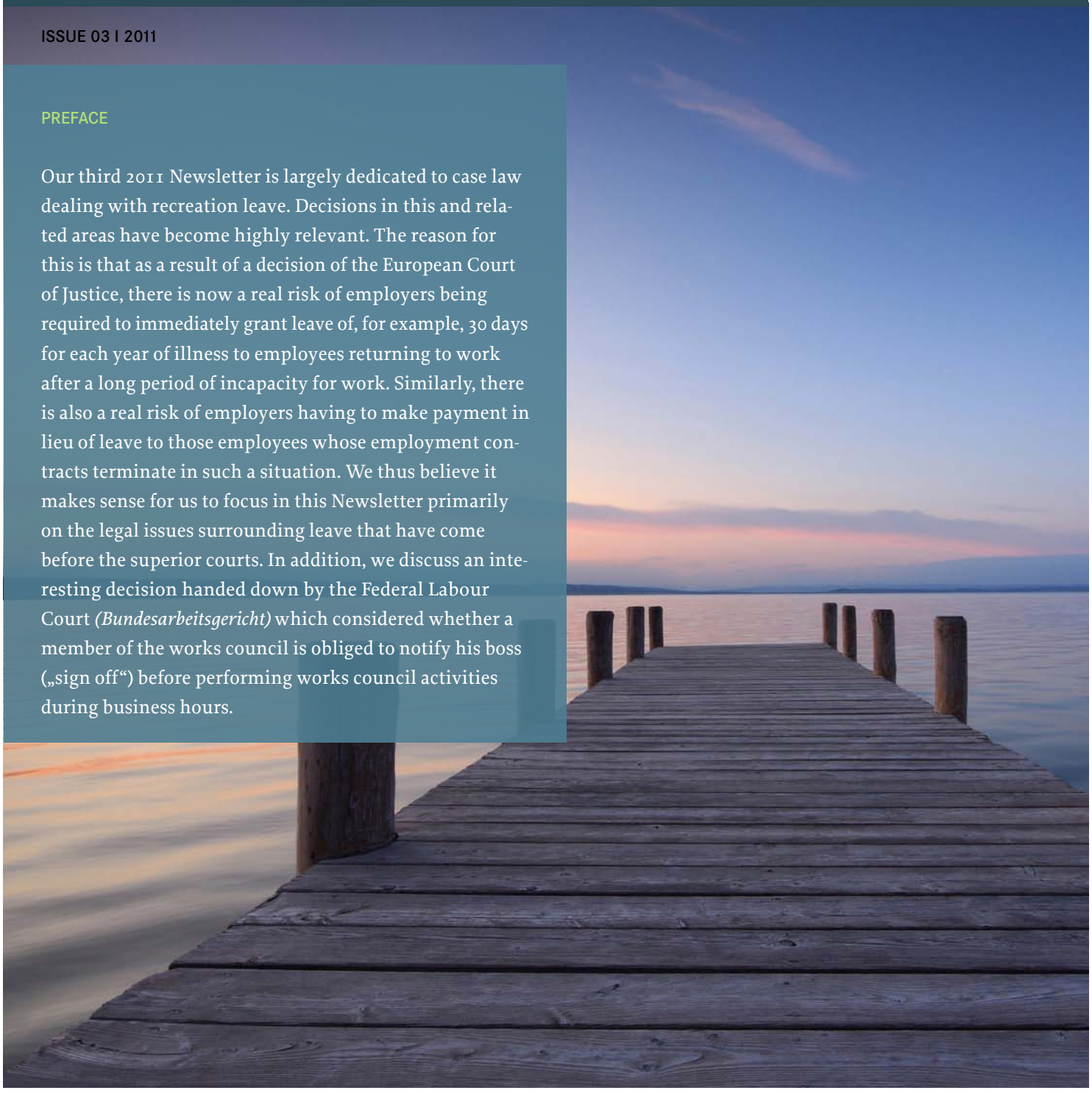

PREFACE

Our third 2011 Newsletter is largely dedicated to case law dealing with recreation leave. Decisions in this and related areas have become highly relevant. The reason for this is that as a result of a decision of the European Court of Justice, there is now a real risk of employers being required to immediately grant leave of, for example, 30 days for each year of illness to employees returning to work after a long period of incapacity for work. Similarly, there is also a real risk of employers having to make payment in lieu of leave to those employees whose employment contracts terminate in such a situation. We thus believe it makes sense for us to focus in this Newsletter primarily on the legal issues surrounding leave that have come before the superior courts. In addition, we discuss an interesting decision handed down by the Federal Labour Court *(Bundesarbeitsgericht)* which considered whether a member of the works council is obliged to notify his boss („sign off") before performing works council activities during business hours.

Once again: Accumulation of Annual Leave Entitlements in the case of Long-Term Illness?

Headnote

Annual leave entitlements may extinguish to a certain extent even where an employee was ill during all or part of the entitlement period and his incapacity for work continued until the end of his employment relationship. The leave entitlement must, however, continue to exist during at least such carry-over period as is compatible with the objective of recuperation. This will in any event be the case where there is provision for a carry-over period of 18 months following the end of the leave year. However, the Member States are free to adopt other rules to achieve this purpose while observing the limits imposed by the Directive *(Opinion of the Advocate-General of the European Court of Justice of 7 July 2011 – C-214/10, Case „Schulte").*

Problem

The Advocate General of the European Court of Justice delivered her Opinion to the court in the *„Schulte"* case on 7 July 2011. In it she suggests limiting the leading *„Schultz-Hoff"* case, which we discussed in Newsletter 1/2009. The European Court of Justice had decided in that case that the minimum annual leave granted to an employee under European law does not extinguish if he is unable to take his leave due to uninterrupted incapacitation for work. Against the background of the European Court of Justice's decision, the Federal Labour Court also adjusted its case law in its decision of 24 March 2009, which we discussed in Newsletter 2/2009.

Since then it has been the case under German law that an employee's annual leave entitlement no longer extinguishes on 31 March of the following year, where he was unable to take the leave because he was incapable of working for a period extending beyond this carry-over period. Until now neither the European Court of Justice nor the Federal Labour Court has had to decide whether there is an upper limit for the validity of annual leave entitlements or whether these can accumulate uninterrupted. The German courts of first instance have since then held in the case of long-term incapacitation for work that leave entitlements may, without any limitation, be accumulated over several years and that payment in lieu of leave must be made in the full amount when the employment contract terminates. For example, the Hessian Higher Labour Court *(Landesarbeitsgericht)* held in its judgment of 7 December 2010 that an employee whose long-term incapacity for work stretched over a 13-year period was entitled to 314 days of leave. As a result, the court awarded him a payment exceeding a year's salary (!).

This has rightly been criticized as an unjustified financial burden on the employer. The court rulings have, however, in the end done employees a disservice since companies now always have to consider whether they should dismiss on grounds of illness an employee who is ill over a longer period to avoid such costs. Until now it had been possible to maintain an employment relationship on a more or less cost-neutral basis until the expiry of the statutory sick pay period and thus allow the employee an opportunity to return to work. As a result of the recent rulings, it will be necessary to set up provisions for each additional year of incapacitation to cover annual leave entitlements that arise but which are not subject to extinguishment.

Opinion of the Advocate General

The Advocate General at the European Court of Justice recommended limiting this case law in her Opinion of 7 July 2011. In the case of employees unfit for work for long periods, she was also in favor of allowing leave entitlements to extinguish after a carry-over period. However, she made it a condition of such limitation that the carry-over period be measured in such a way as to

achieve the „primary objective of the right, namely recuperation". As a guideline for the temporal limit, the Advocate General relied on an International Labour Organization Treaty that provides that leave entitlements may extinguish 18 months after the end of a calendar year. The Advocate General thus wishes to allow the Member States to adopt their own rules on extinguishment while suggesting a carry-over period of 18 months. If one uses the limitation of 18 months suggested by the Advocate General as a basis, sick employees who are permanently incapable of working may as a result accumulate a maximum period equal to 2.5 times their annual leave.

Comment

As a rule, the European Court of Justice follows the Advocate Generals' Opinions in its decisions. Even if we have to wait and see what the chamber rules in the decision expected to be handed down in the next few months, a decision along the lines described above from Luxembourg is likely. The European Court of Justice would thus at least limit the scope of its „*Schultz-Hoff*" ruling to a level more tolerable for employers.

Nonetheless, whether the expected judgment from the European Court of Justice will directly affect German rules on holiday leave entitlement remains to be seen. Ultimately, Community law only sets out employees' minimum rights and therefore individual Member States are entitled to provide for additional rights extending over and beyond such rights. So far the Federal Leave Entitlement Act (*Bundesurlaubsgesetz* – BurlG) does not include an 18-month carry-over period, which was the period considered adequate by the Advocate General. Instead it only provides for a three-month carry-over period, which would be too short in the view of the European Court of Justice and thus non-applicable in the event of long-term incapacity for work. Therefore, even after the European Court of Justice's judgment, we will still have to wait and see whether a comparable limitation on the accumulation of annual leave entitlements finds its way into German law. It is, on the one hand, conceivable that the German courts will be guided by European law in their development of German law. On the other hand, since the wording of the German Leave Entitlement Act does not really support any such interpretation of German law, the likelihood of the courts calling upon the legislature to act cannot be ruled out.

Dr. Frank Wilke

Extinguishment of Annual Leave Entitlements

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 section7(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.

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 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).

Evelyn Iris Helmstreit

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.

Application of Time Limits to Payments in Lieu of Leave

Headnote

A time limit contained in an employment contract or an applicable collective bargaining agreement also extends to an entitlement to payment in lieu of leave pursuant to section 7(4) of the Federal Leave Entitlement Act (Federal Labour Court – 9 AZR 352/10).

Facts

The Federal Labour Court was required to decide on 9 August 2011 whether a time limit contained in a collective bargaining agreement applied to an employee's claim for payment in lieu of leave, which she had accumulated over several years due to long-term illness making her incapable of working. The plaintiff was employed as a part-time nurse by the defendant from October 1975 to 31 March 2008. She has remained incapable of working due to illness since 19 October 2006 and has been receiving an unlimited disability pension since her employment contract terminated. By letter of 25 February 2009, she claimed payment from the defendant of the amount of € 1,613.62 in respect of outstanding leave entitlements from 2007 and 2008. Pursuant to section 37(1) of the Collective Agreement for the Public Service of the States *(Tarifvertrag für den öffentlichen Dienst der Länder* - TV-L) of 12 October 2006, rights under an employment contract will extinguish inter alia if the employee does not assert them in writing within six months from the date they accrue.

Decision

The plaintiff's appeal to the Federal Labour Court, which was restricted to the question of payment in lieu of her minimum statutory annual leave entitlement, was unsuccessful. Pursuant to section 7(4) of the Federal Leave Entitlement Act, payment in lieu of leave must be made where the employee is unable to take leave because the employment contract has terminated. In the opinion of the Federal Labour Court, the plaintiff's entitlement to payment in lieu of leave extinguished in the present case since she failed to take the leave within the time limit in section 37(1). Pursuant to section 7(4) of the Federal Leave Entitlement Act, if incapacity for work continues beyond the termination of employment, a claim for payment in lieu of existing leave will arise at the time employment terminates and be immediately due. It is not a substitute for a leave entitlement, but is instead purely a money claim. Thus, like other rights under an employment contract, it is subject to the limitation periods contained in the employment contract or a collective agreement. The Federal Labour Court also stated that this applied to payment in lieu of the inalienable minimum statutory annual leave entitlement pursuant to section 13(1) sentence 1 in conjunction with section 3(1) of the Federal Leave Entitlement Act.

Comment

The Federal Labour Court had refused to apply time limits to claims for payments in lieu of leave in its previous case law. It explained its refusal on the basis that the law imposes a time limit on annual leave entitlements and that payments in lieu of leave were a substitute for such entitlements. In the present decision, the Federal Labour Court diverges from its case law and takes into account the European Court of Justice's decision of 20 January 2009 in the „Schultz-Hoff" case, where it was held that the Federal Labour Court's previous case law violated European law because it allowed annual leave entitlements to extinguish by the expiry of the carry-over period in the case of continued incapacity for work. Since this special „time frame" for annual leave and payment in lieu of leave no longer applies, the justification for applying different time limits to a money claim in respect of leave than to other statutory payment claims has been removed and, as a result, these limits also apply to payments in lieu of leave (Düsseldorf Higher Labour Court, judgment of 23 April 2010 - 10 Sa 203/10).

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Annual Leave Entitlements Are Not Inheritable

Headnote

All of an employee's outstanding leave entitlements will extinguish when he dies. They are not converted into an inheritable entitlement to payment in lieu of leave *(Federal Labour Court, judgment of 20 September 2011 – 9 AZR 416/10).*

Facts

From April 2001 up until his death in 2009, the plaintiff's husband, who was employed by the defendant, had been permanently incapable of working due to illness. He was unable to take his leave entitlements for 2008 and 2009 because of his permanent incapacity for work. His heirs brought an action against the defendant seeking compensation for the leave entitlements outstanding at the date of his death, which amounted to 35 days of leave.

Problem

For a long time, it has been established case law of the Federal Labour Court that leave entitlements extinguish upon the death of an employee and can therefore not be passed on to his heirs. In light of the European Court of Justice's „Schulz-Hoff" decision, which held that leave entitlements do not extinguish in the case of long-term incapacity for work, this legal issue has (again) become relevant. In the lower instance, the Hamm Higher Labour Court had assumed that European law made it necessary for leave entitlements to be inheritable and that the Federal Labour Court's case law would therefore require correction. According to the Higher Labour Court, the reason for the termination of an employment relationship was irrelevant. Whether the relationship ended through termination, retirement, death of the employee or due to other reasons did not matter. In the court's view, existing leave entitlements would be converted into an inheritable entitlement to payment in lieu of leave irrespective of the reason why the employment relationship terminated.

Decision

The Federal Labour Court overturned the decision of the Hamm Higher Labour Court in its judgment of 20 September 2011 and made clear that it also intended to adhere to its own case law in the future. The court stated that there was no need for it to correct its case law on the basis of European law. In its view, an employment relationship terminates upon the death of an employee as do all of his leave entitlements. Moreover, since the heirs have no leave entitlement against the employer, they also have no entitlement to payment in lieu of leave.

Comment

The result of the Federal Labour Court's decision is to be welcomed. The leave entitlement acquired under an employment contract means simply that an employee is entitled to be released from work for recuperative purposes while continuing to receive his salary. If he dies in the course of the contract, no work duties can arise from which he can be released. Nor do any considerations under European law speak against allowing an employee's annual leave entitlements to extinguish upon his death. The European Court of Justice emphasized recently that leave is primarily designed to protect the employee's health. In this connection, it is irrelevant whether he takes the leave in the current leave year or not until a significantly later point in time. Against this background,

the decision of the Federal Labour Court would appear correct: on the one hand, a dead employee can no longer be granted the outstanding leave at a later date. On the other hand, an entitlement on the part of the heirs to payment in lieu of leave would not in any way be connected with the purpose of leave entitlement, namely the protection of the employee's health.

Dr. Frank Wilke

The leave entitlement acquired under an employment contract means simply that an employee is entitled to be released from work for recuperative purposes while continuing to receive his salary.

Does a Member of the Works Council Have to „Sign Off“?

Headnote

A member of the work council is, as a rule, bound to notify his employer in advance if he is going to carry out activities for the works council at his desk during business hours and to inform his employer as to how long such activities are likely to take. However, as an exception to the above, he will have no such duty if there is no need to seriously consider a temporary redistribution of work *(Federal Labour Court, Order of 29 June 2011 – 7 AZR 135/09).*

Facts

The nine-member works council of a company engaged in automobile market research sought a court declaration that its members were not obliged to first notify their employer before carrying out activities for the works council at their desks. In the view of the works council, no such duty to notify the employer exists at least where the member is able to carry out his activities for the works council without leaving his desk. The member is then fully available to his employer, colleagues and business partners while carrying out works council activities. For this reason, the employer has no legitimate interest in being informed.

Decision

Like the Baden-Württemberg Higher Labour Court before it, the Federal Labour Court has now rejected the works council's application in its order of 29 June 2011. The Federal Labour Court does, however, point out that it is not possible to establish a general rule accepting or rejecting the existence of a duty on the part of a works council member to notify his employer that he is going to carry out activities for the works council, but that it is instead a question of the circumstances of the individual case. In this connection, it has to be considered that the works council member's notification duty primarily serves the purpose of allowing the employer to cover the loss of working time. In principle, the works council member is required to notify the employer in advance. However, by way of exception to this duty, prior notification can be dispensed with where there is no serious necessity for temporarily redistributing work. Nonetheless, in this situation the works council member will also be obliged to inform his employer subsequently as to how much time he spent on his works council activities during a certain period of time.

Comment

The Federal Labour Court has confirmed the viewpoint it has adopted in its case law over a longer period of time and has made clear that the duty to notify the employer will apply in principle even when the works council member performs his works council activities at his desk. This clarification by the Federal Labour Court is to be welcomed if for no other reason than what matters is whether work that cannot be postponed has to be redistributed because the works council member is occupied with his activities for the works council and not available for the employer's work. Whether he is physically present in his office or in the works council office is irrelevant for these purposes. In addition, the Federal Labour Court's statement that the works council member must at least inform his employer subsequently as to the total amount of time he spent on works council activities is to be welcomed. Employers should not be left totally unaware as to when and for how long time was spent on works council activities since they have to at least be able to do a plausibility check on the scope and thus the necessity for such activities. Otherwise there would be plenty of opportunity for abuse.

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