

CASE LAW OF THE FEDERAL LABOR COURT: COMPENSATION FOR ANNUAL LEAVE IN THE CASE OF LONG-TERM INABILITY TO WORK

HEADNOTE Entitlement to compensation for all or part of statutory annual leave does not extinguish if an employee is ill until the end of the year in which leave is due and/or the end of the carry-over period and is therefore incapable of working. Subsections 7(3) and (4) of the Federal Holiday Act (Bundesurlaubsgesetz – BurlG) must be developed in relation to private employers in accordance with the requirements of Article 7 of Directive 2003/88/EC in conformity with Community law. The Senate abandons its previous opposing case law.

COMMENT As a consequence of the landmark decision handed down by the European Court of Justice on 20 January 2009, which we discussed in our last Newsletter (01/2009), the Federal Labor Court has abandoned its case law on compensation for annual leave. Until now the Federal Labor Court has interpreted subsections 7(3) and (4) of the Federal Holiday Act so as to mean that entitlement to compensation for annual leave extinguishes if the leave cannot be taken by the end of the year in which the leave is due to be taken or in the carry-over period because the employee is incapable of working due to illness. For this reason, entitlements to leave and compensation for annual leave extinguished in principle on 31 March of the following year if an employee was still incapable of working due to illness after this point in time.

As a consequence of the decision of the European Court of Justice of 20 February 2009, the 9th Senate of the Federal Labor Court interpreted subsections 7(3) and (4) of the Federal Holiday Act in its judgment of 24 March 2009 in conformity with European law and thus found that an entitlement to compensation for annual leave will not extinguish if an employee is ill until the end of the year in which leave is due and/or the end of the carry-over period and is therefore incapable of working. With regard to the retrospective effect of the change in the case law, the Court held that there was at any rate no legitimate expectation in the continued existence of the existing case law after the case had been referred to the European Court of Justice by the Düsseldorf Regional Labor Court (Landesarbeitsgericht) on 2 August 2006. Leave entitlements and compensation for leave entitlements which, according to the Federal Labor Court's previous case law, had not yet extinguished on 2 August 2006, may therefore still be asserted even where the employee is incapable of working due to illness. Accordingly, there is only protection of legitimate expectations in the case of leave entitlements which had already extinguished according to the old case law on 2 August 2006, i.e. leave entitlements originating from 2005 and the preceding years.

The relevant decisions of the European Court of Justice and the Federal Labor Court relate only to the statutory leave entitlement (24 working days – 4 weeks) pursuant to section 3 of the Federal Holiday Act. They do not, however, cover additional leave over and beyond the foregoing, which is laid down in collective agreements, works agreements or individual contracts.

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The right of the parties to an employment contract to make their own provisions on this is not restricted by the need to develop subsections 7(3) and (4) of the Federal Holiday Act in relation to statutory leave entitlements in a manner that conforms to European law. This means that the parties to an employment contract are free to regulate entitlements to leave and compensation for annual leave which exceed the minimum four-week annual leave entitlement established by section 3(1) of the Federal Holiday Act as they wish and may continue to provide for same to extinguish.

To date there have been no decisions handed down by the courts on the specific content of leave entitlements that have not extinguished, i.e. it has not been determined whether the employee has a right to settlement in kind or will always receive financial compensation. However, one can basically assume that there must be settlement in kind where there is an ongoing employment contract and the entitlement relates to previous years. Only where the employee leaves the company will a claim for financial compensation accrue.

Another issue which is still open is the influence contractual time limits for asserting claims and statutory limitation periods will have on the continuing leave and compensation entitlement. There are good arguments in favor of at least making entitlement to compensation for annual leave, which accrues when a contract terminates, subject to compliance with contractual time limits.