

LEGAL UPDATE LABOUR AND EMPLOYMENT LAW

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Can employees take months of annual leave after parental leave? Curtailment options for employers

Jens Völksen

Annual leave is a great thing which, in an ideal scenario, everyone should benefit from. It allows employees to spend a minimum of four weeks per year at home or travelling the world on full pay. In turn employers receive motivated and relaxed employees. It can be problematic, however, when annual leave accumulates over several months. Then the threshold of reasonableness is reached for companies. This case provides employers with information about an important instrument to prevent employees from taking too much annual leave.

The decision

In its judgment dated 16/04/2024, the Federal Labour Court (Bundesarbeitsgericht, BAG) had to address annual leave entitlement after the completion of parental leave (9 AZR 165/23). The claimant, a young mother, was after the birth of her children on continuous parental leave from August 2015 to November 2020. She gave notice to terminate her employment contract while she was still on parental leave. The employer received an unpleasant letter after the expiry of her parental leave. The mother claimed payment of annual leave entitlement in

the amount of approx. €25,000 gross. This corresponded to 146 working days. The employer suddenly declared (after the end of the employment contract) that all annual leave entitlement that had been accrued during parental leave had been curtailed. The mother then filed a claim with the Labour Court.

All three instances held in favour of the claimant. The BAG awarded her the full annual leave entitlement and addressed section 17 of the Federal Parental Allowance and Parental Leave Act (Bundeselterngeld- und Elternzeitgesetz, BEEG), in accordance with which recuperative leave for employees on parental leave may be curtailed by 1/12 for every full calendar month. This explanation, however, presumes that the employment contract is *still ongoing*. The outstanding annual leave entitlement can no longer be curtailed after the end of the employment contract (section 17 (3) BEEG). The remaining annual leave entitlement is converted into an entitlement to a payment in lieu that may no longer be curtailed.

Practical relevance

The decision of the BAG is in line with the case law of previous years (cf. BAG [judgment dated 05/07/2022, 9 AZR 341/21](#), see also the GÖRG Newsletter 12/2015).

In this case the employer could have saved approx. €25,000, however they neglected to make use of the assistance provided to them by the legislature.

What is the legal situation?

In section 17 of the BEEG there is a special rule on entitlement to annual leave. The otherwise applicable provisions in section 7 of the Federal Annual Leave Act (Bundesurlaubsgesetz, BUrlG) on loss of transfer of and compensation for annual leave are significantly modified by section 17 BEEG. The most important key points are the following:

- Parental leave does not preclude the formation of recuperative leave.
- As annual leave cannot be actually taken during parental leave, annual leave entitlement may accumulate over years, particularly in the case of consecutive parental leaves (in this case it was 146 working days).
- Upon completion of parental leave the annual leave entitlement must be granted in full, provided there has been no curtailment.
- Should the employment contract be terminated during the parental leave or not continued at the end of parental leave, the employer must compensate the employee for any remaining untaken annual leave (section 17 (3) BEEG).

The provisions of section 17 BEEG significantly differ from the general statutory provisions. In

particular, annual leave entitlement does not lapse until 15 months after expiry of the annual leave year, which may be the case in the event of illness.

What must employers be aware of?

Employers must not stand idly by and allow annual leave entitlement to cumulate. The legislature has recognised that this may lead to an unreasonable burden for employers. Therefore the law contains an effective instrument which is, however, rather unknown and thus used relatively little in practice.

Section 17 (1) sentence 1 provides employers with the right to curtail annual leave entitlement that has arisen during parental leave by one twelfth for each full month (this of course does not apply if the employee continues to work part time; then, as usual, the annual leave entitlement may and must be reduced within the scope of their active employment). This curtailment must, however, be expressly declared, even in an ongoing employment contract. It is too late to do so after the end of the employment contract. The curtailment does not happen automatically. If too much annual leave has been granted before the commencement of parental leave this may also be curtailed again at a later point (section 17 (4) BEEG).

The document curtailing annual leave does not have to be in any specific format. However, written form or text form (with acknowledgement of receipt) is recommended for evidentiary purposes. It is also recommended that the curtailment of annual leave is documented annually during parental leave.

The legislature has left the curtailment option to the discretion of employers. There may be good reasons to not curtail annual leave in individual cases. In favourable economic times deliberately abstaining from curtailing annual leave may be used as an instrument to support families and even be actively promoted.

Conclusion

The BAG's decision has made it clear how important it is for employers to be aware of and

correctly implement the legal opportunities for curtailing annual leave entitlement during parental leave. If the curtailment is not carried out in good time this could result in considerable financial burdens, as outlined in this case. Employers should pay close attention to the regulations in section 17 BEEG and, in cases of doubt, obtain legal advice to protect their interests and avoid expensive consequences.

Note

This overview is solely provided for information purposes and should not replace professional legal advice. If you have any questions please contact your usual contact at GÖRG or the author Jens Völksen on +49 221 33660 504 or jvoelksen@goerg.de. Information about the author is available on our website www.goerg.de.

Our locations

GÖRG Partnerschaft von Rechtsanwälten mbB

BERLIN

Kantstr. 164, 10623 Berlin
Tel. +49 30 884503-0
Fax +49 30 882715-0

HAMBURG

Alter Wall 20 - 22, 20457 Hamburg
Tel. +49 40 500360-0
Fax +49 40 500360-99

FRANKFURT AM MAIN

Ulmenstr. 30, 60325 Frankfurt am Main
Tel. +49 69 170000-17
Fax +49 69 170000-27

COLOGNE

Kennedyplatz 2, 50679 Cologne
Tel. +49 221 33660-0
Fax +49 221 33660-80

MUNICH

Prinzregentenstr. 22, 80538 Munich
Tel. +49 89 3090667-0
Fax +49 89 3090667-90