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What are the consequences for vacation entitlement where the number of working days changes during the year? (GE)

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Summary

This decision of the German Federal Labour Court ('Bundesarbeitsgericht', or 'BAG') concerns what happens to leave entitlement if the employment contract is amended in the middle of the year and the number of working days changes from a four-day week to a five-day week.

Facts

The 55-year-old employee (in 2013) had been working for the defendant since 1992 as a childcare worker. According to her contract, the claimant was supposed to work 32 hours, over four days a week. In August 2013 the parties agreed to amend the contract to the effect that the employee would work 23.5 hours over five days a week. Both of the parties were bound by the civil service collective agreement (in German, known as the 'TVöD') and so the following provision applied to their agreement:

> *"§26 Annual leave*
> *(1)Each calendar year, employees are entitled to paid leave (Paragraph 21). When the amount of work per week is distributed over five days in the calendar week, the entitlement to leave for each calendar year shall be […] and and for those over 55 30 working days. […] When the amount of work is distributed other than over five days, the entitlement to leave shall increase or decrease correspondingly. When a calculation of paid leave results in a fraction which corresponds to at least a half day of leave, it shall be rounded up to a full day of leave. Fractions of less than a half day of leave shall not be taken into account. […]."*

Until the amendment of the contract on 19 August 2013, the employee got 26 days off work for 2013, of which three had been carried over from the previous year. For the rest of 2013 the defendant granted the claimant only one more day off.

At the end of the year the employee asked her employer to grant her two more days off work. She believed that, even without the remaining days from the previous year, she had a right to 26 days of leave in 2013 and argued that §26(1) TVöD would require a calculation for the particular period of time. According to this, she felt she had a right to 16 days from 1 January to 31 August 2013. The calculation was as follows: as she worked a four-day week, her leave for the whole year would have been 24 days (30d/5d*4d=24d). Since the contract was changed in August, the annual leave for the whole year needed to be calculated only for this time based on a four-day week (i.e. for January to August: 24d/12m*8m=16d) and after the amendment, based on a five-day week (September to December: 30d/12m*4m=10d). By this calculation, she argued her annual leave entitlement would be 26 days in total in 2013. By contrast, if one looked simply at the number of working days at the date on which annual leave was granted, this would constitute discrimination against part-time employees compared to full-time employees.

The employer did not agree that he needed to grant more than one additional day for 2013. Not counting the three days carried over from the previous year, the claimant had a total leave entitlement of 24 days. As she had already been granted 23 days off work, only one more day remained to be taken. This would be the same even if the contract was changed to a five-day week, as that would have entitled the employee to an extra 1.25 days off (1d/4d*5d). The TVöD says that less than half a day does not count and therefore, this would be rounded down to one day. By contrast, the calculation made by the employee would have led to leave entitlement of more than six weeks a year, which would be contrary to the will of the parties to the TVöD.

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The first instance court rejected the claim made by the employee, whereas the regional labour court ('Landesarbeitsgericht', or 'LAG') found for the claimant.

Judgment

The BAG overturned the ruling of the LAG and followed the defendant's calculation.

The BAG made clear that the defendant had granted the claimant all the time off work that she had asked for by letting her have 27 (24+3) days off in 2013.

At the beginning of 2013, when working four days a week, the claimant had been entitled to 24 days' leave per year. This corresponds to §26(1) TVöD, which reads that the right to go on leave increases or decreases accordingly to a person's working days, if the employee does not work five days a week. Contrary to the findings of the LAG, the amendment of the contract in August 2013 did not lead to the result that the claimant had been entitled to two extra days.

In its reasoning, the BAG clarified that where working days are adjusted during the course of a year, §26(1) TVöD should not be interpreted in a way that meant that entitlement to annual leave needed to be calculated for each separate period. In fact, meaning and purpose of §26(1) TVöD was to ensure that the length of every employee's leave was equal, no matter how many working days were agreed in the contract. In this way, the TVöD ensures that every employee can take leave for a total of six weeks per year.

The BAG stated that the critical date for deciding how many days of annual leave applied, was the date on which the leave was taken. Further, the court pointed out that an employee such as the one in this case, who was entitled to 30 days when working five days a week, had a right to his or her full entitlement of annual leave under the TVöD even if taking leave whilst only working four days a week. The basic idea is that the total entitlement to leave for every employee – notwithstanding the actual number of days worked – is always six weeks a year.

Hence, even if the number of working days per week changes before the employee has taken all his or her leave, the remaining entitlement should be calculated as follows: the number of days of leave remaining when the number of working days changes must be multiplied by the figure which results from the number of working days in the amended contract ('dividend') and the number of working days in the original contract ('devisor').

In terms of this case, the claimant had already taken 23 days of her total 24 days at the beginning 2013. After the amendment of the contract only one day remained to be multiplied by the quotient 5/4, because the contract had changed to five working days a week. According to §26(1) TVöD, the result of this calculation – 1.25 days – should only be regarded as one day, as less than half a day did not count. In the end then, the defendant was required to grant an additional day off in 2013, which he had done. In its reasoning, the BAG clarified that the law does not discriminate against of part-time employees. On the contrary, it ensures that the total amount of leave for both full-time and part-time employees remains equal (six weeks in both cases).

Further, the BAG clarified, that there was no need for a preliminary ruling under Article 267(3) TFEU because Directive 2003/88 only stipulates an entitlement to 4 weeks a year. Indisputably, this minimum annual leave was granted by the defendant.

Commentary

This decision of the BAG deals primarily with the interpretation of a collective agreement, though essentially it should be transferable to the statutory regulations on holiday entitlement stipulated in the German Federal Vacation Act ("Bundesurlaubsgesetz"). It is not an employee-friendly decision though. But considering meaning and purpose of the applicable collective rules, it ensures equal treatment of full-time- and part-time employees.

It should, further, be noted that the ECJ decided differently in the opposite case when an employee changes from five working days to four or less working days during the year. In this case the ECJ held, that a decrease of the already accrued days of holiday is prohibited by the interpretation of Directive 1997/81 and Art. 7 of Directive 2003/88 as well (see judgment "Brandes", C-415/12). However, in a recent judgment the ECJ underlined that the provisions of clause 4.2 of the Framework Agreement on part-time work and those of Art. 7 of Directive 2003/88 do not require Member States to make a new calculation of entitlement to annual leave already accumulated where an employee increases the number of hours worked ("Greenfield", C-219/14.) Therefore, it seems, that the BAG is in line with the latter ruling of the ECJ.

Comments from other jurisdictions

Austria (Peter C. Schöffmann and Andreas Tinhofer, MOSATI Rechtsanwälte): In recent years, adjustments for leave not yet taken, where an employee's working days change, has been the subject of considerable attention. Two ECJ decisions, *Zentralbetriebsrat der Landeskrankenhäuser Tirols* (C-487/08) and *Brandes* (C-415/12), have caused much ambiguity in Austria.

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The Austrian Supreme Court found those ECJ decisions to have limited impact on the interpretation of the Austrian Vacation Act. In a series of decisions, the Supreme Court confirmed that the Austrian understanding of paid annual leave encompasses the entire time span, from the first day after stopping work until the last day before resuming (esp. OGH 8 ObA 35/12y; OGH 9 ObA 20/14b). Therefore, both weekends and public holidays can fall within an annual leave period. Generally, annual leave entitlement amounts to five full weeks of paid leave.

Under the Vacation Act, annual leave can be taken in two parts, but employees prefer to split their annual leave into more than two parts. According to case law, this is lawful provided it does not disadvantage the employee. Therefore, leave entitlement must be calculated based on the number of days the employee regularly works. Whereas leave entitlement is 25 days for a five-day week (five weeks x five days), it is only 20 days if the employee works four days a week.

If the number of working days changes during a leave year (which generally corresponds to the working year, not the calendar year), leave entitlement must be recalculated, but the method used is different from that proposed by either of the parties in the German case. If the number of working days increases from four to five days a week, the leave entitlement would rise from 20 to 25 days. All leave that had already been taken would be deducted from this. In the German case the claimant has used 23 days of her vacation entitlement for 2013. Under Austrian law she could have asked for two more days that year. Unlike the approach she suggested, the question of when the change occurred during the year would be irrelevant under Austrian law.

Italy (Caterina Rucci, Bird and Bird): In Italy, there is a distinction between so-called 'horizontal' and 'vertical' part-time working arrangement.

In the case of horizontal work, leave entitlement is the same as for full time employees (but the salary paid out is less), whereas, in the case of vertical work, the entitlement is reduced in proportion to the reduction to working days compared to full time work.

The employee has and keeps his or her (reduced) entitlement to leave based on the four-day week system that applies to them, but from the point of starting the five-day week, they will gain an increased entitlement to leave, proportionate to the higher number of days worked.

Please note, however, that although this is the general principle, in any particular case, the applicable collective agreement should be checked, since what is meant by full-time or part-time work can vary depending on the agreement in question and the sector of industry involved.

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