2019/34

Reduction of annual leave during parental leave is lawful (GE)

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Summary

The Higher Labour Court of Berlin-Brandenburg (*Landesarbeitsgericht* (LAG)) has held that the pro rata reduction of annual leave depending on the period of parental leave is lawful. In general, statutory holiday entitlement also exists for the period of parental leave. However, the employer has the right to reduce leave pro rata for each full month of parental leave according to Section 17 paragraph 1 sentence 1 of the Federal Parental Allowances and Parental Leave Act (*Bundeselterngeld- und Elternzeitgesetz* (BEEG)). The proportional reduction is in line with European law.

Facts

The plaintiff had been employed by the defendant as an assistant tax consultant since 2012. During her employment the plaintiff became the mother of two children.
When the plaintiff had her first child in July 2014, she claimed parental leave from August 2014 to June 2015. During her absence, the plaintiff became pregnant again and did not work until November 2015 when she had her second child. First she was incapacitated for work and later she was subject to an employment ban. Again, she claimed parental leave until November 2016. Afterwards the plaintiff was on sick leave until the end of the year. By letter of November 2016, the employer dismissed the plaintiff.
After termination of the employment relationship, the plaintiff claimed an allowance in lieu of the paid annual leave not taken in the years 2014 to 2016. The defendant paid the allowance but reduced the amount pro rata for the time the plaintiff had taken parental leave in accordance with Section 17 of the BEEG.
The plaintiff had already been informed about the pro rata reduction in her payslip of June 2015 and was told that the entitlement to paid annual leave had been reduced due to parental leave.
The plaintiff was of the opinion that the pro rata reduction of the number of days of annual leave was unlawful in that Section 17 paragraph 1 of the BEEG violated European law and was not therefore applicable. She claimed an allowance for her annual leave in relation to the number of days reduced by the employer. The defendant considered the pro rata reduction to be legal and refused to pay the additional annual leave allowance.

The Labour Court of Berlin (*Arbeitsgericht* (ArbG)) ruled in favour of the defendant and dismissed the employee's claim. The plaintiff appealed against the decision of the ArbG before the LAG.

Legal background

According to German law, an employee is entitled to (unpaid) parental leave for a duration of not more than 3 years. Leave must be claimed a reasonable time in advance (seven or thirteen weeks, depending on the child's age). During such leave, the employee is not obliged to work. However, according to Section 5 paragraph 4 of the BEEG, while on parental leave an employee is still allowed to work part time for up to 30 hours a week. The employee may return to their job after parental leave and the employment relationship cannot be terminated except for urgent operational reasons. For the purpose of (partial) financial compensation, the employee can apply for public parental allowance.
The German vacation law is based on the Federal Leave Act (*Bundesurlaubsgesetz* (BUrlG)). According to Section 1 of the BUrlG, every employee is entitled to paid annual leave. The only requirement of this regulation is an existing employment relationship. By default, it is not relevant whether the employee actually works or is absent due to sickness, holiday, parental leave, etc. if there is no diverging regulation. According to Section 3 paragraph 1 of the BUrlG every employee is entitled to at least 24 days annual leave based on a 6-day week.
The regulation in question is Section 17 paragraph 1 sentence 1 of the BEEG:

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"The employer may reduce the annual leave, to which the employee is entitled, by one-twelfth for each full calendar month of parental leave. […]."
Based on this provision, the statutory vacation entitlement may be reduced pro rata for employees while on parental leave. The provision's wording "*may*" indicates that it is at the discretion of the employer whether to reduce the annual leave or not. Further, Section 17 paragraph 1 sentence 2 of the BEEG states that this option is excluded in those cases where the employee still works part time for the employer.

Judgment

The plaintiff's appeal was not successful. The LAG held that the employer lawfully reduced the employee's annual leave and, in its opinion, Section 17 paragraph 1 of the BEEG is compatible with European law.
To substantiate its decision, the LAG pointed out that the Parental Leave Directive 2010/18/EU would not determine that paid annual leave must be granted for the period of parental leave itself. In the annex to Article 2(2) of the Directive, it was only required that the employee be entitled to parental leave of at least four months. In addition, the Member States would be required to define regulations on parental leave.
Moreover, Section 17 paragraph 1 of the BEEG did not violate Article 31(2) of the Charter or Article 7 of Directive 2003/88/EC. Rather, Section 17 paragraph 1 sentence 1 of the BEEG constitutes a permissible national legal provision, which determines the conditions for annual leave while being on parental leave.
To justify its decision, the LAG referred to the case law of the ECJ (see ECJ 18 March 2004, C-342/01). According to the ECJ, a period of leave guaranteed by Community law (in this case: parental leave) cannot affect another leave entitlement (in this case: minimum period of paid annual leave). However, Section 17 paragraph 1 of the BEEG would not lead to parental leave being counted up to annual leave (or vice versa). Rather, only the period of parental leave would not be taken into account in the calculation of the annual leave. According to the LAG, the purpose of the annual leave would not preclude such a pro rata reduction. In this respect, the LAG referred to the decisions of the ECJ on short-time work (C-229/11; C-230/11), in which the ECJ – unlike in cases of absence due to illness – accepted a reduction of the leave entitlement.
The LAG considered that the right to paid annual leave does not hinge on the employee actually having worked during the reference period. Therefore, annual leave should not be reduced if the employee was on sick leave and if they were not able to claim their entitlement to paid annual leave. However, the ECJ also ruled that this could not be applied to the case of a short-time worker. The reason given by the ECJ was that the situation of an employee who is incapacitated for work and the situation of a short-time worker differ significantly. The short-time worker may either rest or engage in recreational activities during predictable short-term work.
According to the LAG parental leave corresponded to the case of a short-time worker who was not obliged to work. Since the employee did not have to work, recreation by means of leave was not necessary. This was not required by the protective purpose of the Directive either.

Commentary

In German case law, legal questions concerning the relationship of annual leave according to the Directive with other different types of leave have great relevance. They are subject to various decisions by state labour courts such as LAG Hamm and LAG Berlin-Brandenburg. Eventually, both the Federal Labour Court (*Bundesarbeitsgericht* (BAG)) and the ECJ had to decide on this issue. Both the ECJ and the BAG have meanwhile confirmed the decisions of both LAG Hamm and LAG Berlin-Brandenburg.
The decision of the LAG was made before the judgment of the ECJ in the case of *Dicu* (C-12/17 – judgement from 4 October 2018), when the ECJ's opinion on this question was not yet known. However, the Advocate General's statements had already been published and the LAG could refer to them.
The ECJ's preliminary ruling concerned the interpretation of Directive 2003/88/EU. The ECJ ruled that the Directive does not require having regard to periods of parental leave when calculating annual leave for employees. Like the LAG, the ECJ pointed out that the purpose of the annual leave requires that the employee actually worked during the reference period. Something else would only apply to employees on sick leave or maternity leave. However, the ECJ noted that these cases were not equivalent to parental leave.
Also, without yet knowing the ECJ's judgment, in January 2018 the LAG Hamm had to decide a case similar to the one of the LAG Berlin-Brandenburg. The plaintiff was also dismissed shortly after the end of parental leave. The plaintiff claimed for full leave compensation. Similar to the LAG Berlin-Brandenburg the LAG Hamm was of the opinion that Section 17 of the BEEG would be compatible with European law (LAG Hamm, judgment of 31 January 2018 – 5 Sa 625/17).
In March 2019, this case concerning the compliance of Section 17 paragraph 1 of the BEEG with European Law was subject to the BAG's jurisdiction for the first time (BAG, judgment of 19 March 2019 – 9 AZR 361/18). The BAG considered the ECJ's judgment and decided that the statements by the ECJ apply for various German cases as well. The BAG decided that – in accordance with European law – it is legal to reduce the amount of leave by 1/12 for each full month of parental leave. The employer would only need to claim this option and inform the employee accordingly.

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Comments from other jurisdictions

Bulgaria (Rusalena Angelova, DGKV): Pursuant to Bulgarian legislation female employees are entitled to:
- maternity and child-birth leave (410 days, commencing 45 days before the planned date of the birth);
- child-care leave until the child has attained 2 years of age; and
- unpaid child-care leave until the child has attained 8 years of age.

Further to the explicit provisions of the Bulgarian Labour Code the time during which any leave listed above is used shall be considered and counted as length of employment service. In addition, the duration of the paid annual leave entitlement is determined pro rata to the time which is considered as length of service. As a result, while using any of the above types of leave, the employee simultaneously accrues paid annual leave entitlement. Contrary to what the Higher Labour Court of Berlin-Brandenburg has held, in Bulgaria it is not legally admissible to reduce the annual leave pro rata depending on the period of parental leave.

Finland (Janne Nurminen, Roschier, Attorneys Ltd.): According to Section 5 of the Finnish Annual Holidays Act (162/2005, as amended, the 'Act') an employee in entitled to two and a half weekdays of holiday each full calendar month if the duration of employment has been at least a year by the end of the holiday credit year. Under Section 6 of the Act, an employee accrues annual holiday each full calendar month during which the employee has worked at least 14 days. According to Section 7 of the Act, an employee accrues annual holiday also during maternity, paternity and parental leave but only up to 156 days of leave are considered comparable to working days. Further, the 156 days are per one childbirth. The mother can commence the maternity leave 30 to 50 days, e.g. 5 to 8 weeks, before the due date and she is allowed to choose the starting date within the provided period.
If a similar case was assessed under Finnish law, the claimant would have commenced her maternity leave most likely in May or June. The maternity leave that commences before the parental leave is included in the 156 days that entitle the employee to annual holiday accrual. Since the claimant gave birth twice, her maternity and parental leaves would have established a total of 312 days of comparable days. Thus, the claimant would have accrued approximately 25 to 26 days of annual holiday during her leave for family reasons.

Italy (Caterina Rucci, Katariina's Gild): Under Italian law holidays accrue during mandatory maternity leave, and do not accrue during additional and voluntary parental leave. They also accrue during sickness leave. Any reduction would therefore not be allowed.

Romania (Andreea Suciu and Gabriela Ion, Suciu I The Employment Law Firm): The case of *Dicu* (C-12/17) mentioned in the report is a preliminary ruling pronounced by the ECJ related to a preliminary question addressed by the Romanian Court of Appeal (the Cluj Court of Appeal) after the dispute was settled in favour of the employee in the first instance by the Cluj Tribunal. The ruling provides a similar case file as the report above.
In summary, Mrs. Dicu, after being on maternity leave from 1 October 2014 to 3 February 2015 and on parental leave from 4 February 2015 to 16 September 2015 respectively, took 30 days paid annual leave from the 35 days paid annual leave to which she was considered entitled for 2015. Then, she requested the remaining 5 days paid annual leave, but the employer refused the request on the ground that, under Romanian law, the duration of paid annual leave is commensurate with the period of time actually worked during the current year. Mrs. Dicu did not work for the full year so, the 30 days paid annual leave taken by her during the year 2015, included also 7 days leave taken in advance for the year 2016.
As she considered that she was entitled to receive the entire annual leave (35 days) for 2015, Mrs. Dicu filed a claim against the employer.
The Cluj Tribunal admitted Mrs. Dicu's request based on the interpretation of Directive 2003/88/EC and the ECJ's jurisprudence in the matter. Thus, the Cluj Tribunal stated that, although parental leave is not expressly listed by article 145 par. 4 of the Romanian Labour Code and article 2 par. 2 of the Decision of the Superior Council of Magistracy among those leaves listed that equal time actually worked, one should analyze if this restriction is actually in line with Directive 2003/88/EC and the ECJ case law.
According to article 7 par. 1 of Directive 2003/88/EC, "Member States shall take the measures necessary to ensure that every worker is entitled to paid annual leave of at least four weeks in accordance with the conditions for entitlement to, and granting of, such leave laid down by national legislation and/or practice". The Cluj Tribunal further referred to judgments given by the ECJ concluding that EU law must be interpreted in a way that forbids Member States to unilaterally limit the right to annual leave by establishing a condition for performing it which results in the exclusion of certain workers from the benefit of this right. Additionally, the Directive makes no distinction between employees who have been temporarily unable to work and those who have worked.
Thus, even if the parental leave is not expressly provided for by the Labour Code as being a period of actual work, the legal provision cannot be interpreted restrictively.
The Cluj Tribunal's ruling was appealed before the Cluj Court of Appeal. The Cluj Court of Appeal addressed the following preliminary question to the ECJ: "Does Article 7 of Directive 2003/88/EC preclude a provision of national law which, for the purpose of determining the duration of a worker's annual leave, does not consid-

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er a period of parental leave to care for a child under the age of two to be a period of actual work?" for ruling in this case. Based on the decision given by the ECJ, according to which the Romanian legislation at issue is in line with Directive 2003/88/EC, the Cluj Court of Appeal dismissed Mrs. Dicu's request, because article 145 par. 4 of the Romanian Labour Code does not provide that parental leave is "a period of actual work".
Even if the ECJ ruled in the *Dicu* case that parental leave is "a reflection of the worker's wish to take care of his or her child" which cannot be assimilated to "a period of actual work", it is interesting that the Cluj Tribunal, by interpreting the European legislation and the existing jurisprudence prior to the *Dicu* case, extended the interpretation of the legal provisions and assimilated parental leave to "a period of actual work".

United Kingdom (Richard Lister, Lewis Silkin LLP): While this decision appears to be consistent with EU law and the ECJ's judgment in *Dicu*, the position in the UK in relation to annual leave and parental leave is quite different. In essence, a UK employer would not be entitled to prevent or reduce an employee's accrual of annual leave during a period of parental leave.
The relevant legislation in the UK is contained in the Maternity and Parental Leave Regulations etc 1999 ('MPL Regulations') and the Working Time Regulations 1998 ('WTR'). The MPL Regulations provide that an employee's contract of employment continues during parental leave, but they do not expressly say that accrual of holiday continues. Under the WTR, however, entitlement to paid annual leave merely depends on an individual having the status of 'worker'. The fact that the employment contract continues in existence is sufficient for this to apply – there is no requirement for work actually to be done in order for a worker to accrue annual leave. Moreover, the WTR expressly prohibit the parties from contracting out of the statutory right to annual leave or reducing the entitlement.
It is apparent from the *Dicu* case that Romanian law provides for the employment contract to be 'suspended' during a period of parental leave. Again, this is in stark contrast to the position under UK law. As mentioned, the MPL Regulations provide that the contract is preserved during parental leave, and any step by an employer to suspend or terminate it – even on a temporary basis – would constitute an unlawful detriment or an unfair dismissal.

Subject: Maternity and Parental Leave, Paid Leave

Parties: Unknown

Court: *Landesarbeitsgericht Berlin-Brandenburg* (Higher Labour Court of Berlin-Brandenburg)

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