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No acquisition of leave entitlement during sabbatical (GE)

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Summary

While it is not strictly necessary to actually work in order to acquire leave entitlement under German law, the Federal Labour Court (*Bundesarbeitsgericht* – BAG) has ruled that during a sabbatical (unpaid special leave) the employee does not gain any entitlement to paid annual leave.

Background

In Germany, every employee acquires their statutory minimum annual leave according to Sections 1and 3 of the Federal Leave Law (*Bundesurlaubsgesetz* – BurlG). The only prerequisite for gaining this is the existence of an employment relationship and a minimum waiting period of six months. However, the amount of the statutory minimum leave is determined by the number of working days per week for the employee. This means, working fewer days per week will reduce the acquired leave entitlement *pro rata temporis*. The minimum leave entitlement for working six days per week is 24 days per year.

Facts

The claimant, who had been working full-time for the employer for several years, concluded a part-time work agreement to reduce her working time to three days per week (for a limited period until July 2014). Based on specific regulations in the applicable collective bargaining agreement, the claimant was granted special unpaid leave (sabbatical) from April 2014 to January 2016 for the intensive care of a family member. When the claimant returned from the sabbatical, she claimed 35 days of annual leave for the years 2014 and 2015. According to the regulations in the collective bargaining agreement, the annual leave entitlement for employees would be reduced *pro rata temporis* for the time of special leave, which meant that the claimant would not acquire any leave entitlement during the sabbatical. Therefore, the employer rejected the employee's claim. The employee filed a case against her employer for a declaratory judgment regarding the purported leave entitlement gained during her sabbatical. Both the Labour Court of Berlin (*Arbeitsgericht* – ArbG) at first instance and the Regional Labour Court of Berlin-Brandenburg (*Landesarbeitsgericht* – LAG) at second instance dismissed the case.

Judgment

The BAG confirmed the decision of the previously engaged courts and dismissed the claim. The Court reiterated that the number of days for the statutory minimum leave entitlement is based on the number of working days per week and this principle is also applied in a case where a person does not work at all for a certain time during special leave. Thus, during a special leave period, the number of leave days gained is 'zero'.

The BAG thereby changed its position on its previously held opinion that the leave entitlement has to be calculated for the entire calendar year on the same basis. In previous decisions, it has held that during periods of unpaid special leave, the employee's obligation to work was *not* suspended, but did not need to be discharged. This meant that an employee would acquire annual leave entitlements during these periods. Such a calculation had allowed the employee to claim additional leave entitlement. The new view of the BAG is based on the purpose of the minimum leave, to allow the employee to recover. However, the need for recovery from work requires that the employee has actually been obliged to work and the amount of recovery time corresponds to the amount of the work obligation. In accordance with national and EU law, this rule should not apply for employees relieved from their duty to work due to sickness or maternity leave.

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Commentary

This decision is applicable only to statutory minimum leave entitlement. For any additional leave entitlement stipulated in employment contracts or collective bargaining agreements, parties are generally free to negotiate a different arrangement. While in the case at hand the reduction in leave entitlement is based on regulations in a collective bargaining agreement, the rules laid down by the BAG are meant to be generally applicable, i.e. the acquisition of leave entitlement of any employee is reduced during a sabbatical without the need of an agreement.

With this decision, the BAG has abandoned it previous case law regarding the calculation of paid annual leave and introduced a new calculation method, which is in line with the decisions of the ECJ on Article 7 of the Working Time Directive 2003/88/EC. In its judgments in joined cases C-350/06 and C-520/06 (*Schultz-Hoff*), the ECJ has held that employees on sick leave acquire annual leave without actually having worked in the relevant period. The BAG however referred to the decisions C-385/17 (*Hein*) in which the ECJ has stated that the calculation of claims to paid annual leave is based on the periods of actual work. Furthermore, the BAG referred to joined cases C-229/11 and C-230/11 (*Heimann and Toltschin*), in which the ECJ confirmed the application of the *pro rata temporis* principle for the calculation of the leave entitlement of part-time employees and applied it to time periods when the employee did not actually work at all. In this context, the BAG also dealt with case C-12/17 (*Dicu*). Here the ECJ decided that neither Article 7(I) of Directive 2003/88/EC nor Article 31(I2) of the Charter of Fundamental Rights of the European Union require that parental leave be regarded as actual working time. A decision of the LAG of Berlin-Brandenburg in June 2019 (Case No. 3 Sa 42/18) has had to deal with the issue more intensively where the LAG decided that the time in which the employee is on parental leave is not to be taken into account when calculating the annual leave (cf. also case report EELC 2019/34, which deals with the decision in detail) and on which no final decision of the BAG (yet) exists. The current decision may indicate that the BAG will agree with this. However, the final decision remains to be seen.

Comment from other jurisdiction

United Kingdom (Richard Lister, Lewis Silkin LLP): Similar questions arise in the UK in relation to sabbaticals and career breaks and whether an employee's statutory annual leave entitlement under the Working Time Directive continues to accrue. Under the UK's Working Time Regulations, entitlement to paid annual leave merely depends on an individual having the status of 'worker'. Arguably, therefore, the fact that the employment contract continues in existence during a sabbatical – albeit suspended – is enough for this to apply, and there is no requirement for any work to be done in order for a worker to accrue annual leave.

It is not clear, however, whether this line of argument remains sustainable in light of the various ECJ judgments highlighted by Fabian in his report of the BAG's ruling. It would be helpful to have a decision of a UK appellate court to clarify the position, or an ECJ judgment specifically dealing with sabbaticals/career breaks.

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