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An employer cannot compel an employee, without notice, to take deferred annual leave (FR)

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Summary

The rules for determining the order of departures (the dates that leave is taken) on holidays apply to both annual leave and deferred annual leave. The employer therefore cannot compel an employee, returning to the company after a leave of absence following an occupational accident, to take without notice all of their deferred annual leave. Doing so is an abuse of the employer's managerial powers, so that the employee's refusal lacked any wrongful character.

Facts

Mr G, a truck driver hired by Rhenus Logistics Satl Company (the 'Employer'), was put on sick leave from 11 July to 18 October 2015 following an occupational accident. After being declared fit by the labour doctor to resume his work, on the day he returned back to work, the Employer asked him to immediately take his deferred annual leave. Mr G had accumulated at the time 796 recuperation hours and 24.5 days of deferred annual leave in addition to the annual leave earned over the new paid holidays acquisition period. Mr G refused to go on leave. The Employer, considering that it was part of its prerogative to decide on the dates Mr G could take his deferred annual leave, initiated dismissal proceedings against him for gross misconduct.

Mr G was dismissed for gross misconduct on 16 November 2015. He lodged a claim against the Employer before the labour tribunal for unfair dismissal and sought damages.

Judgment

Mr G's dismissal was ruled unfair by the Colmar Court of Appeal in its decision dated 26 June 2018, the Court emphasizing the abusive exercise by the employer of its managerial powers as well as its failure to provide work to the employee.

The French Supreme Court upheld the Court of Appeal's ruling by holding that:

Given the purpose assigned to paid annual leave by the EU Directive 2003/88/EC dated 4 November 2003, deferred annual leave and annual leave have the same nature, so the rules of fixing the order of departures on annual leave apply to deferred annual leave. Having noted that it resulted from the terms of the dismissal letter that the Employer had intended to force the employee to take, overnight, all of his accrued [deferred] annual leave, by requiring him without notice to take his deferred annual leave, the Court of Appeals was able to deduce that the abusive exercise by the employer of his managerial power had deprived the employee's refusal of a wrongful nature.

Commentary

In principle, annual leave must be taken each year during the period provided for this purpose. However, it may happen that an employee is unable to take their annual leave because of a leave of absence during the said period. In cases provided by law or case law, untaken annual leave is carried over. This is particularly the case when the absence is related to maternity leave, occupational accident/sick leave or non-occupational sick leave.

In the case at hand, the Employer had argued before the Supreme Court that the statutory notice periods (two months for information on the period during which annual leave is taken pursuant to Article D 3141-5 of the French Labour Code and one month for individual information on the order of departures on annual leave pursuant to Article D 3141-6 of the French Labour Code) only applied to annual leave and not to deferred annual leave. The Employer therefore claimed that it could impose on the employee the dates he could take his deferred annual leave.

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The Supreme Court rejected this argument by holding that in view of the purpose assigned to paid annual leave by Directive 2003/88/EC, annual leave and deferred annual leave have the exact same nature, hence the same rules apply to both.

The decision of the French Supreme Court is perfectly in line with the rules laid down by the Court of Justice of the European Union. According to the latter's settled case law,[1] the right to annual leave provided by Article 7 of the aforementioned Directive is intended to allow the employee, on the one hand, to take a break from their duties entrusted to them under the employment contract and, on the other hand, to have a period of relaxation and leisure.

The French Supreme Court has confirmed for the first time in this decision that the deferral of annual leave does not cause the deferred annual leave to lose its nature and purpose. Therefore, the aforementioned statutory notice periods, which are public policy rules, shall apply to both annual leave and deferred annual leave.

In the same way that the employer cannot postpone the approved dates of annual leave without respecting a one-month notice period, except in case of exceptional circumstances,[2] it cannot compel an employee to go on annual leave or deferred annual leave (except in case of mandatory company closure during summer and Christmas holidays). In both cases, the employee's refusal is not wrongful and cannot justify a valid termination. Therefore, in general the employee remains in control of their vacation dates, provided that those dates are approved by the employer who has the prerogative to determine the order of departures on holidays.

The prohibition on imposing on employees the dates of annual leave and/or deferred annual leave is demonstrated once again during the Covid-19 pandemic. As an exceptional measure and until 31 December 2020, in France a company collective agreement or a sector-wide collective bargaining agreement can allow employers to unilaterally, with a minimum notice of one day, force employees to take up to six working days of annual leave (whether consecutive or not). The temporary nature of this exceptional measure and the limited number of days are a testament to the purpose of annual leave, despite a global pandemic crisis where going forward annual leave could be to some extent a cost-saving measure for many companies whose employees cannot work remotely.

Finally, it goes without saying that the organizational constraints and the costs generated for companies by the accumulation of deferred annual leave can be significant. This is all the more true when considering that the French Supreme Court did not set a time limit beyond which the deferred annual leave would be forfeited. Therefore, even though the employer cannot impose on employees the dates of deferred annual leave, employees should be encouraged to take them in due time in an attempt to preserve their health and safety, which is a legal obligation placed on the employer, and to keep their balance of paid holidays in check.

1. Court of Justice of the European Union, 20 January 2009, joined cases C-350/06 and C-520/06, *Schultz-Hoff and Others* and *Stringer and Others*.
2. Supreme Court, 3 June 1998, No. 96-41.700; 12 November 2002, No. 00-45.138.

Comments from other jurisdictions

Austria (Hans Georg Laimer/Melina Peer, Zeiler Floyd Zadkovich): Under Austrian labour law the consumption of annual leave has to be agreed upon by the employer and the employee. Thus, the employee cannot be compelled unilaterally by the employer to take any outstanding annual leave.

Annual leave can be taken by the employee as long as the employee's claim for annual leave is not forfeited. Generally, the claim for annual leave is forfeited within two years after the end of the year – starting with the commencement date – in which it accrued.

There are no statutory time limits as to when an agreement must be concluded before the actual consumption of the annual leave. Moreover, there are no statutory requirements to consume the annual leave within a certain period of the year.

Regarding the above-mentioned principles, there is no distinction between annual leave and deferred annual leave.

Austrian law has provided for two exceptional measures during the Covid-19 pandemic. These measures are currently limited until 31 December 2020. First, the employer may unilaterally order the consumption of annual leave provided that entering the company building is prohibited or restricted by the authorities. Nevertheless, claims of annual leave from the current year only have to be consumed up to the extent of two weeks and in total of not more than eight weeks. Furthermore, in a case where corona short-time work is in place, it is also possible to regulate the consumption of annual leave by shop agreement. This does not apply to the consumption of annual leave from the current year.

Germany (Nina Stephan and Jana Voigt, Luther Rechtsanwaltsgesellschaft mbH): Section 7 paragraph 1 sentence 1 of the Federal Leave Act (*Bundesurlaubsgesetz*, 'BurlG') makes provision for who determines the time of holiday in Germany. This states:

> In determining the time at which vacation is taken, the employee's vacation requests shall be taken into consideration, unless urgent business interests or other employees' vacation requests deserving priority from a social point of view stand in the way.

That means: If an employee makes a claim for time off, the employer has to consider this in principle. It can only refuse to grant time off if justified by the law, namely for the following reasons:

– urgent business interests; and

– in a case where there is a collision of vacation requests of several employees.

However, what should be applicable in cases in which the employee does not make any leave requests or in which the employer intends to grant the employee leave unilaterally is not regulated by the law. The Federal Labour Court (*Bundesarbeitsgericht*, 'BAG'), however, already decided in 1986 that the employer is not entitled to grant leave of its own accord during the vacation year or to grant leave at its own discretion (BAG, decision dated 18 December 1986 – 8 AZR 502/84). In conclusion, this means that a unilateral leave order by the employer is only possible if the employee does not reject the leave order. This applies regardless of whether it concerns the current annual vacation or transferred vacation entitlements.

Based on this, the decision of the French Supreme Court is not surprising. In fact, a German court would have presumably ruled the same way. Here, an employee cannot be forced to take leave without their consent.

With regard to the French decision, three special aspects of German vacation law and German case law should be pointed out, namely the forfeiture of vacation entitlements in the case of long-term illness, vacation entitlement after a long illness and the possibility of retrospectively modifying periods of leave.

1. Vacation entitlement after a long illness

In the case at hand, the employer wanted to force the employee unilaterally to go on vacation. There is – as mentioned above – no legal basis for this in Germany. Things are different, however, if an employee wants to take a vacation after a long illness. This is at least the case if the inability to work was most recently based on a measure of medical prevention or rehabilitation. In this case, the employee can determine the time of their holiday independently. The employer is obliged under Section 7 paragraph 1 sentence 2 BurlG to grant the employee leave if the employee requests it.

2. Forfeiture of vacation entitlements

In case of continuous long-term illness (possibly even lasting several years), it has been settled case law in Germany since 2012 that the statutory vacation entitlement of an employee expires at the latest 15 months after the end of the vacation year. However, the ECJ decided on 6 November 2018 (C-684/16), that holiday entitlement only forfeits if the employer informed the employee about their vacation claim and the thread of its forfeiture. It is not clear yet whether this rule about forfeiture of the vacation entitlement will also apply in cases of continuous long-term illness. The employee will not be able to take their holiday due to their incapacity for work. An information about their holiday entitlement would only be pro forma. However, this is subject to an upcoming decision of the ECJ: With its decision of 7 July 2020 – 9 AZR 401/19 (A), the BAG decided to submit this question to the ECJ. Therefore, German vacation law will still be exciting in the future.

3. Subsequent change of the agreed times of leave

If the employer has confirmed the employee's request for leave, the fixed period of time cannot usually be changed unilaterally – neither by the employer nor by the employee. If one of the parties to the employment contract wants to change the fixed period of vacation a corresponding agreement is required.

Hungary (Dr. Gábor T. Fodor, Ferencz, Fodor T., Kun & Partners): In Hungary courts would most certainly decide the opposite way for two reasons. First, as a general rule, with the exception of seven working days, the employer decides on when to send the employee on holiday, so it is not the employee who makes the decision. There is a vague obligation to consult with the employee before deciding on the date of the vacation (and also with the works council with respect to vacation plans) though, but these are just consultation rights, not co-decisive rights. Principles of labour law, for example acting in good faith, might play a role here but they will not be game changers in most cases.

Secondly, there is a strict rule that all holidays that could not have been given out in the subject calendar year (for example due to illness or maternity) have to be given out within 60 days. (It is a bit unclear though whether within that deadline the holiday has to begin or end, and if the latter, what is the legal situation if there are more than 60 days of unused holidays – there is no court practice on this.) Also, calendar year holidays have to be given out – at least as a general rule – until the end of that calendar year. So in quite a lot of cases there is not even a legal possibility to postpone the vacation even if the employee requests to do so.

If I may add, the notion of a worker being terminated for declining to be on holiday is also a little strange for me as a Hungarian lawyer – since the employer organises work, why was the worker provided with work tasks on such day? Why didn't the employer simply send the worker home?

The Netherlands (Jan-Pieter Vos, Erasmus University Rotterdam): In the Netherlands in principle the employee decides when to take their leave, unless it follows otherwise from the employment contract or a collective agreement. It is widely accepted however that such agreement cannot result in the employer being able to decide on (all) leave days at its sole discretion. In the past, only in exceptional cases has it been held that an employer could determine when an employee was to take their leave.

The Covid-19 pandemic has generated some case law containing considerations that could give employers a little more leeway in unilaterally determining on annual leave (or forcing employees to take leave), although the employers in these judgments ultimately failed to do so successfully. Employers taking a more cautious approach than those in the judgments may have some success however.

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From an EU law point of view, it is interesting whether forcing the employee to take leave during the pandemic would meet the ECJ's requirements for annual leave, namely (i) rest and (ii) relaxation and leisure. It could be argued that the possibilities to enjoy the latter have been limited so much that the latter function has been lost. In fact, something similar has been argued already: in his opinion on the *Max-Planck* judgment (C-684/16), Advocate General Bot seemed to suggest that an employee whose employment contract is about to expire cannot be required to take leave as relaxation and leisure would be illusionary (paragraph 61). Although the Court remained silent on the issue, this is a possibility that cannot be ruled out.

Fortunately for employers, Dutch law contains provisions that prevent an unlimited accumulation of rights of leave. Statutory paid annual leave lapses six months after the year in which it is accrued (Article 7:640a of the Dutch Civil Code), unless the employee was not able to take their leave. Sickness *can* be such a reason. In that case, just like non-statutory paid annual leave – which is annual leave exceeding the four weeks provided for in Directive 2003/88/EC – it expires five years after the year in which it is accrued (Article 7:642 of the Dutch Civil Code). Apart from these provisions, and before being able to rely on them, employers should reckon with the duty to provide information as has become clear from *Max-Planck*. This does not follow from Dutch legislation but nevertheless has direct effect.

Norway (Julie Piil Lorentzen, Advokatfirmaet Wiersholm AS and Ragnhild Jøndal Nakling, Advokatfirmaet Storeng Beck Due Lund AS): There is no case law on this particular point in Norway. However, in our view the referred case from France would have the same outcome in Norway. The Norwegian Holiday Act does not explicitly regulate when deferred annual leave should be taken. In our view, the ordinary rules for determining when to take annual leave should apply, including the rules on consultation and notification.

In Norway, the employer may determine, to some extent, when the annual leave should be taken, provided the employee is given reasonable notice. Thus, the Holiday Act does not normally warrant an employer to force an employee to take their holiday without any prior consultation or notice. As the same rules will apply for deferred annual leave, a Norwegian court would most probably reach the same conclusion as the French court in a similar case.

Like in France, the Norwegian rules regarding deferred annual leave might in some cases cause practical difficulties because there is no time limit beyond which the deferred annual leave is forfeited. Thus, it is important that employers both use their right to determine the time for the annual leave, giving the employees reasonable notice etc., and in addition encourage the employees to take their annual leave.

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