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Lapse of the right to paid annual leave: how does Max Planck apply to a manager? (NL)

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Summary

The Arnhem Court of Appeal has examined whether an employee was reasonably able to take leave, applying the ECJ's *Max Planck* and *Kreuziger* judgments. According to the Court, the employer did not violate its obligation to inform the employee regarding the lapse of the right to paid annual leave. The Court stated that the employee was reasonably able to take leave, despite being incapacitated for work due to sickness. The Court ruled that the employee was not entitled to an allowance in lieu of untaken paid annual leave, as the right to such leave had lapsed.

Facts

The employee (the claimant) had worked as a manager for a healthcare institution (the defendant) for almost twenty years. On 1 July 2017 she was made redundant and put on 'special leave' (also called 'garden leave'). From 26 October 2017 until 5 April 2019 the employee was incapacitated for work due to sickness. Later, on 11 February 2019, her employment contract was terminated.

The employee claimed allowance in lieu of untaken paid annual leave, which the healthcare institution denied. On 26 February 2020 the Zutphen subdistrict court rejected the employee's claim, applying the ECJ's *Maschek* judgment (20 July 2016, ECLI:EU:C:2016:576) and ruling that the obligation to inform the employee concerning the right to paid annual leave did not rest upon the employer, which judgment has been examined in **EELC 2020/26**. The employee lodged an appeal with the Arnhem Court of Appeal.

Legal background

Article 7 of Directive 2003/88/EC aims to ensure that every worker is entitled to a certain period of paid annual leave, in order to protect the worker's safety and health by being granted a rest period. Dutch law has implemented this Article into Articles 7:634–7:645 of the Dutch Civil Code (DCC). As Article 7(2) of the Directive stipulates and is implemented in Article 7:641 DCC, an allowance in lieu of untaken paid annual leave can be claimed upon termination of the employment contract. As stated in Article 7:640a DCC, the right to a minimum period of paid annual leave (amounting to four weeks of paid annual leave) lapses six months after the last day of the calendar year in which the entitlement was acquired, unless the employee has not been reasonably able to take leave up to that day.

Judgment

First, the Arnhem Court of Appeal clarified that it had to determine whether the entitlements to paid annual leave acquired in 2016 and 2017 had lapsed based on Article 7:640a DCC.

The Court cited the preparatory works on the implementation of Article 7:640a DCC. It held that Article 7 of the Directive implies that the right to a minimum period of paid annual leave cannot lapse if the employee was not reasonably able to take leave. This can be the case, for instance, when an employee is incapacitated for work due to sickness. In that case, paid annual leave has the same function as when an employee is capable of performing his/her regular work. This means that, in principle, sickness does not prevent the employee from being able to rest from his/her work. Only if the employee is in fact not able to take leave, for example because taking leave would complicate the employee's reintegration, the right to paid annual leave will not lapse.

The Court then referred to the ECJ's judgments in *Max Planck* (6 November 2018, ECLI:EU:C:2018:874) and *Kreuziger* (6 November 2018, ECLI:EU:C:2018:872). According to the Court, the employer must enable the employee to exercise their right to paid annual leave and

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inform the employee accurately and in good time about their right to paid annual leave and lapse thereof. If the employer does not fulfil this obligation, the right to paid annual leave will not lapse. Furthermore, the Court noted the horizontal direct effect of Article 31(2) of the Charter of Fundamental Rights of the European Union.

The Court went on to assess whether the employee's entitlements to paid annual leave acquired in 2016 and 2017 had lapsed. The Court considered that the employee was not incapacitated for work due to sickness on 1 July 2017 (when the entitlements to paid annual leave she acquired in 2016 would in principle have lapsed). The question remained whether the employer had violated its obligation to inform the employee about the (lapse of) the right to paid annual leave, as derived from *Max Planck* and *Kreuziger*. The Court held that an announcement regarding the lapse of the right to paid annual leave acquired in 2015 had been sent to all employees in January 2016. Furthermore, the employee concerned in this case had drawn up the policy regarding the right to paid annual leave as part of the management team. The Court came to the conclusion that the employer had not violated its obligation to inform the employee about (the lapse of) her right to paid annual leave and the employee had therefore been reasonably able to take leave before 1 July 2017. The Court noted that it made no difference that the notification, sent in January 2016, related to the lapse of the entitlements to paid annual leave acquired in 2015. According to the Court it is not mandatory to inform the employees on an annual basis.

The Court then examined whether the employee's entitlements to paid annual leave acquired in 2017 had lapsed. As the employee had been incapacitated for work for some time on 1 July 2018 (when the entitlements to paid annual leave she acquired in 2017 would in principle have lapsed), the Court needed to determine whether the employee's illness prevented her from being reasonably able to take leave. The Court deduced from the fact that reintegration of the employee had started that the employee was in principle able to take leave. It was only in August 2018 (when the right to paid annual leave had in principle lapsed) that it was first reported that the employee was fully incapacitated for work. According to the Court, there were also no other reasons why the employee was not reasonably able to take leave, as there was also no breach of the employer's obligation to inform. The fact that another year had passed since the aforementioned notification regarding the (lapse of the) right to paid annual leave did not alter the Court's conclusion.

The Court concluded that the entitlements to paid annual leave acquired in 2016 and 2017 had lapsed on the grounds of Article 7:640a DCC. As a final remark, the Court stated that it was not necessary to examine whether the right to paid annual leave had useful effect during the employee's 'special leave' (referring to *Maschek*), because the employee had been reasonably able to take leave.

Commentary

This case provides an example of how Dutch national courts apply the ECJ's case law on the lapse of the right to paid annual leave. To determine whether the entitlements to paid annual leave acquired in 2016 and 2017 had lapsed, the Court examined whether the employee was reasonably able to take leave. Thus, the Court applied the *Max Planck* and *Kreuziger* judgments.

Unlike the Zutphen subdistrict court (in the first instance), the Court did not directly apply the *Maschek* judgment. Eventually, the Court stated that it was not necessary to determine whether the right to paid annual leave had useful effect during the employee's 'special leave', because it was already established that the employee had been reasonably able to take leave. Reading the *Maschek* judgment, however, the question is whether the Court should have applied *Maschek* first. In paragraph 35 of *Maschek* the ECJ stated:

> In those circumstances, and in order to ensure the effectiveness of the right to annual leave, it must be held that a worker whose employment relationship has ended and who, pursuant to an agreement with his employer, while continuing to receive his salary, was required not to report to his place of work during a specified period preceding his retirement, is not entitled to an allowance in lieu of paid annual leave not taken during this period, unless he was not able to use up that entitlement due to illness.

From this paragraph it seems to follow that, in principle, the employee is not entitled to an allowance in lieu for untaken paid annual leave when leave has no useful effect. As an exception, the situation is mentioned in which the employee has not been able to take leave due to illness. Although it should thus ultimately be assessed whether the employee was reasonably able to exercise his/her right to paid annual leave, which was also assessed by the Court in this case, according to the main rule the employee was not entitled to an allowance in lieu if 'special leave' met the requirements arising from *Maschek*. Also, the question remains whether a violation of the employer's duty to inform the employee about the right to paid annual leave can result in the entitlement to an allowance in lieu, as the ECJ does not name this exception in *Maschek*.

Other elements regarding the Court's application of *Max Planck* and *Kreuziger* also deserve to be mentioned. First of all, the Court stated that the employee is not obligated to inform employees about the (lapse of the) right to paid annual leave on an annual basis. In this case it was obvious that the employee was aware of the policy regarding this matter, as she herself had drawn up this policy. In other cases, however, it can be reasonable to inform employees on an annual basis. The question is what the Court would have ruled if, for example, the employee had been employed after January 2016 and had therefore not received the notification.

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As Advocate General Bot stated regarding the *Max Planck* case, it is incumbent on the referring court to ascertain whether the employer has taken appropriate measures to ensure that the worker was actually able to exercise the right to paid annual leave. The Court will therefore need to examine the specific circumstances of the case, as it did in this case. The question remains whether the rule, that an employer does not have an obligation to inform the employees on an annual basis regarding the (lapse of the) right to paid annual leave, generally applies. After all, it is the right to paid *annual* leave that is at issue.

Finally, this judgment shows that in Dutch case law it is assumed that an employee who is incapacitated for work due to sickness is reasonably able to take leave when reintegration has started. Although there are exceptions (for example when taking leave would impede reintegration) it is difficult to prove that such an exception applies, as is apparent in this case. However, this assumption has been challenged by Advocate General Hogan in his opinion in case C-217/20 *(Staatssecretaris van Financiën)*, in which he held that a worker who is not fully fit to perform the work required does not risk losing their right to paid annual leave if they postpone their annual leave as the case law of the ECJ protects the worker's right to paid annual leave from being extinguished at the end of the leave year and/or of a carry-over period laid down by national law (paragraph 28).

In conclusion, this case provides a fine example of the application of the judgments in *Max Planck* and *Kreuziger* in Dutch case law. Although the Court does not explicitly apply *Maschek* (as the Court focuses on the lapse of the right to paid annual leave) the main question of the case remains whether the employee was reasonably able to take leave, as should be the main question.

Comments from other jurisdictions

Bulgaria (Rusalena Angelova, DGKV): In Bulgaria, this issue has been resolved by an express regulation on the matter.

Paid annual leave may be granted to employees in a single uninterrupted period or in a piecemeal way during the calendar year in which the leave is accrued.

Annual paid leave must be used with the written authorization of the employer. The employer is obligated to authorize use of the employee's annual paid leave unless use of the leave has been postponed until the next calendar year under the following circumstances:

- by the employer—due to important production reasons, whereas, in any case, the employee must be allowed to use not less than one-half of his or her paid annual leave entitlement by the end of the calendar year for which it is due; or
- by the employee—when using other types of leave or upon his or her request and with the consent of the employer.

If the annual leave is postponed or not used by the end of the calendar year to which it pertains, the employer is obliged to ensure its use during the next calendar year, but no later than six months following the end of the calendar year for which the paid annual leave is due. If the employer has not authorized the use of the postponed leave within the required time period, the employee has the right to determine the period for using the leave by notifying the employer in writing at least 14 days in advance.

The right to take unused annual paid leave *lapses after two years' time from the end of the year to which the leave pertains*. Where the annual paid leave has been postponed on the employer or employee's initiative, the right of the employee to use annual paid leave lapses in two years' time from the end of the year in which the reason for the non-use of the leave ceases to exist.

The Labor Code prohibits payment of cash compensation in lieu of annual leave except in the case of termination of the employment contract, when the employee is entitled to monetary compensation for the unused portion of his or her annual leave.

Germany (Leif Born, Luther Rechtsanwaltsgesellschaft mbH): In Germany, the courts would have come to a different conclusion in this case. According to a decision of the Federal Labour Court ('*Bundesarbeitsgericht' or* '*BAG*') following the ECJ's judgment in *Max Planck*, the employer's information about the impending lapse of the leave entitlement must refer to the concretely designated leave entitlement of a certain year. It shall not be sufficient if the notification is made in general in the employment contract, on a leaflet or in a collective agreement. Therefore, the notification in January 2016 would not have been sufficient, as it did not refer to the specific leave entitlement of the years 2016 and 2017.

The German courts would also have come to a different conclusion regarding the leave entitlement during reintegration. According to the established case law of the BAG, the employment relationship is suspended during reintegration. Since the employee has no obligation to work, the leave entitlement, which serves as a release from the obligation to work, cannot be fulfilled either.

As a result, the German courts would have had to decide whether the leave entitlement could be lapsed due to the employee's permanent inability to work. According to German law, the leave entitlement of an employee who is permanently ill lapses 15 months after the end of the leave year. It has not yet been decided whether this also applies if the employee was not correctly informed by his employer about the lapse of leave. Especially if the employee was temporarily in good health during the leave year, the lack of information could prevent the leave entitlement from expiring. Last year, the BAG referred precisely this question to the ECJ for a preliminary ruling.

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Greece (Effie Mitsopoulou, Effie Mitsopoulou Law Firm): This issue at hand - under a slightly different perspective (i.e. the employee had been terminated and was not under a garden leave, as in the present case) – has been examined by the Greek Supreme Court in Plenary Session (see EELC 2020/25). The Supreme Court has taken under consideration ECJ cases Egenberger, Schulz-Hoff, Maschek and King. The issue was whether an employee on sick leave which continued up until the end of his employment and due to such sickness he was not able to exercise his right to paid annual leave, is deprived of such a right. The Supreme Court ruled that provided that the employee has not exercised his right to annual leave "in natura, this is converted in a monetary claim and the employee is entitled to paid annual leave.

Hungary (Gergely Torma, CMS Cameron McKenna Nabarro Olswang LLP): In this case, the national courts of Hungary would have possibly come to a different conclusion.
Firstly, it is the employer's obligation to allocate the vacation days of the employees, i.e. the employee himself/herself cannot "take" vacation days. Therefore, the employee cannot be "punished" on the ground that he/she did not take vacation.
Secondly, in case of incapacity for work, typically sickness, the employee is, as a general rule, exempted from his/her working and availability duties on the legal ground of sick leave. It is legally not possible for an employee to be absent on more than one legal entitlement at the same time, i.e. it is not possible for an employer to allocate sick leave and ordinary leave at the same time in the case of an employee's illness.
Finally, based on the teleological interpretation of the relevant labour law rules, an employee's paid annual leave is intended to ensure that the employee has adequate rest during a calendar year. If the employer could allocate the employee the mentioned paid annual leave also during the sick leave, this would clearly not foster the employee's constitutional right of having adequate annual rest time.
In summary, under the assessment of Hungarian courts, the employee would have had the right for compensation of her 2017 annual leave in case of termination of his/her employment relationship.

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