

New principles for carrying over vacation claims

European Court of Justice and German Federal Employment Court impose strict conditions for forfeiture of vacation entitlements

By Dr. Svenja Fries, LL.M.

In recent decisions, the European Court of Justice and subsequently the German Federal Employment Court (*Bundesarbeitsgericht*) have strengthened employees' rights regarding vacation claims and their forfeiture. The courts found that employees do not automatically lose their entitlement to paid annual leave simply as a result of not having applied for it.

Background of the decisions

The European Court's decision was based on a German case: An employee had been employed by his employer under a fixed-term contract until December 31, 2013. The employer had asked the employee to use his remaining vacation days before the end of his employment relationship. However, the employer had not obligated the employee to take his vacation on a specific date. The employee complied with the request by taking just two days off and did not apply for any more vacation time. After the employment relationship ended, the employee

demanded compensation for 51 outstanding vacation days. The employer refused to comply, and the employee sued for payment.

Previous case law: No vacation without application

Before the European Court of Justice was called upon, the statutory and case law comprised the following:

- According to the provisions of the German Federal Leave Act (*Bundesurlaubsgesetz*, "BUrlG"), employees are entitled to paid vacation each calendar year. The act's provisions are designed to help employees reduce their stress and workload.
- Section 7 paragraph 3 of the *BUrlG* provides that vacation must be granted and taken during the current calendar year. A transfer of any outstanding vacation days to the next calendar year is only permissible if there are urgent operational reasons



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or reasons involving the employee's person that prevent the employee from taking the vacation in due time. Special principles can apply if an

employee could not take vacation due to sickness.

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- Pursuant to section 7 paragraph 4 of the *BUrlG*, vacation that can no longer be granted as a whole or in part due to termination of the employment relationship is to be compensated with money.
- The Federal Employment Court had developed these principles further: According to its previous case law, vacation could still be claimed in the subsequent calendar year if the employer did not grant time off despite the employee having requested it. However, the Federal Employment Court also emphasized that an employer could not force an employee to take his or her vacation, therefore a vacation claim could lapse if an employee did not exercise his or her claim during the respective calendar year.

In the context of the underlying case, the employer argued that the employee's entitlement had lapsed because the employee did not request vacation, and consequently there was no claim to time off that could be converted into a claim for compensation.

Referral to the European Court of Justice

The Federal Employment Court referred the matter to the European Court of Justice to clarify whether the German law was compatible with the European Working Time Directive and the EU Charter of Fundamental Rights.

The European Court of Justice made its decision on November 6, 2018 (docket number: C-684/16). It found that a forfeiture of vacation entitlements merely based on a lack of application for vacation on the part of the employee was not compatible with EU law. The Court instead held that employees could only lose their vacation entitlement — and thus their claim to financial compensation for unused vacation at the end of an employment relationship — if the employer enabled them to take their vacation days in due time. Thus, in the eyes of the European Court of Justice, a claim to vacation can only lapse if the employee voluntarily renounces an annual leave claim in full knowledge of the consequences.

The European Court of Justice justified this decision by emphasizing the fact that the employee, as the weaker party in the employment relationship, needs to be protected. The European Court sees a risk

that employees might otherwise refrain from asserting their rights for fear of consequences and a negative impact on their employment relationship. In addition, any practice or omission by an employer that could discourage employees from taking annual vacation was found to infringe the objective of the right to vacation, which is intended to ensure that employees have an effective rest period to protect their safety and health. Therefore, a law that makes the employee alone responsible for the effective exercise of the right to vacation and enables the employer to shirk its obligations simply by citing that the employee did not ask for vacation was deemed a law that could not stand.

However, the European Court of Justice also agreed that there were cases where the claim to paid leave could lapse. It held that the claim's forfeiture was not objectionable if the employer could prove that the employee was aware of the situation and nevertheless voluntarily waived the assertion of his or her vacation claim. In this context, the European Court confirmed the Federal Employment Court's case law, pursuant to which an employer cannot force its employees to take vacation. However, it put a high threshold in place: Employers must enable their employees to exercise

their claims. According to the European Court of Justice, employers must request (formally, if necessary) that employees take their vacation and inform them both clearly and in good time that their vacation claims, if not exercised, will lapse.

The burden of proof for this lies with the employer: If an employer cannot prove that it has fulfilled this obligation, the vacation entitlement will be carried over to the subsequent calendar year.

Implications for German employers and employees

The decision of the European Court of Justice was confirmed by the German Federal Employment Court in its decision from February 19, 2019 (docket number: 9 AZR 541/15). The German employment courts of lower instance will now have to clarify the manner in which formal notice must be given and when it must be given to be considered on time.

Employers should start taking measures now to ensure that their employees can in fact use the vacation to which they are entitled during the respective calendar year. Therefore, employers should:

- ensure they always have an overview of their employees' outstanding vacation entitlements,
- encourage their employees to take their vacation in a timely manner to make sure the employees' absence is spread throughout the calendar year,
- inform their employees in writing or via email about the applicable law and request they take their outstanding vacation in due course, and
- document their compliance with their obligation to inform their employees about this matter.

It is to be expected that some employees will approach their employers to claim additional vacation, despite both employer and employee having previously believed the respective claims had lapsed. It remains to be seen whether the German employment courts will grant employers the protection of legitimate expectation in this respect. Should the courts fail to grant this protection, a thorough review of previous communication regarding vacation will need to be performed to establish whether employees' can rightly demand additional entitlements stemming from the previous year(s). ←



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