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# ECJ rules on Austria's annual leave allowance

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### Introduction

Austrian law mandates that upon termination of the employment relationship, unused vacation shall be compensated by way of an allowance in lieu of annual leave, unless it was the employee who terminated the employment early and without good cause.

The Supreme Court had doubts as to whether this principle would be accepted under EU law and requested a preliminary ruling on the issue. The European Court of Justice (ECJ) confirmed this decision and ruled that when employees terminate their employment relationship early and without good cause, they have an entitlement to an allowance in lieu of annual leave.<sup>(1)</sup>

### Background

Austria's Annual Leave Act mandates that employees are not entitled to a compensatory indemnity for unused vacation if they terminate the employment relationship without notice and without good cause. Such an unjustified withdrawal is unlawful and, in general, makes the worker liable for any losses the employer suffered from this early departure without reason. A premature withdrawal would only be justified in a scenario where the employee cannot reasonably be expected to maintain the employment relationship, not even during the notice period (eg, because the employer committed a severe breach of contract). In this regard, a justified withdrawal by the employee can be viewed as the antagonist of a summary dismissal from the employer's perspective.

According to the Supreme Court, the purpose of the statutory provision is punitive, because it aims at discouraging employees from terminating the employment without justification. Its purpose is also economic, in that it is intended to "financially relieve the employer faced with the unforeseeable loss of one of its workers".

### Facts

The plaintiff employee worked from 25 June 2018 to 9 October 2018, the date on which he terminated his employment agreement by premature and unjustified withdrawal. During the period of employment, the employee acquired a leave entitlement of 7.33 days, of which four days were used during his employment. The case concerned compensation for the remaining 3.33 working days and a corresponding claim of €322.06. Referring to the statutory provision that prohibited a compensation payment in case of an unjustified withdrawal, the employer refused to pay the allowance in lieu of vacation.

Both the court of first instance and the Court of Appeal dismissed the complaint on the basis of this statutory provision.

The Supreme Court followed the plaintiff's line of argument. The plaintiff had doubted that the Austrian provision aligned with EU law (in particular, article 7 of Directive 2003/88/EC (Working Time Directive) and article 31 paragraph 2 of the Charter of Fundamental Rights of the European Union (CFR)). Therefore, the Court stayed proceedings and referred the following questions to the ECJ for a preliminary ruling:

- Is the following compatible with article 31 paragraph 2 of the CFR and article 7 of the Directive 2003/88/EC?:
  - a provision of national law under which no allowance in lieu of paid annual leave is payable in respect of the current last working year; and
  - where the employee unilaterally terminates ("withdraws from") the employment relationship early without cause.
- Is it necessary to verify additionally if the employee was unable to use their annual leave? If the following question is answered in the negative, what are the criteria for verification?

### Decision

The ECJ pointed out that, according to settled case law of the ECJ, the entitlement of each community-employee to paid annual leave is to be regarded as a particularly important principle of the European Union's social law, from which there must be no derogations and whose implementation by the competent national authorities must be confined within the limits expressly referred to in the Working Time Directive.

The ECJ further opined that article 7 paragraph 1 of the Directive reflects and gives effect to the fundamental right to an annual period of paid leave enshrined in article 31 paragraph 2 of the CFR.

The ECJ also emphasised that the purpose of the right to paid annual leave is to enable the employee to:

- rest from performance of duties incumbent upon their employment agreement; and
- enjoy a period of relaxation and leisure.

This purpose is based on the premise that the employee actually worked during the reference period.

Aside from that, this fundamental right also includes a right to payment and the right to an allowance in lieu of annual leave not taken

upon termination of the employment relationship.

In case of termination of the employment relationship, it is no longer possible to take paid annual leave. In order to ensure that the employee is not prevented from enjoying that right, even financially, article 7 paragraph 2 of the Directive provides that the employee is entitled to an allowance in lieu.

Moreover, it follows from settled ECJ case law that article 7 paragraph 2 of the Directive does not impose any other condition for the accrual of the entitlement to an allowance in lieu other than where:

- the employment relationship has been terminated; and
- the employee has not taken all the annual leave to which they were entitled until the end of the employment relationship.

Consequently, the ECJ concluded that the reason for the termination of the employment relationship is irrelevant regarding the entitlement to an allowance in lieu that is enshrined in article 7 paragraph 2 of the Working Time Directive.

In the case at hand, this meant that the employee acquired a right to paid annual leave without regard to the fact that he had terminated the employment relationship early and without good cause.

Therefore, in answering the first question submitted by the Supreme Court, the ECJ held that article 7 of the Working Time Directive, read in conjunction with article 31 paragraph 2 of the CFR, must be interpreted as precluding a provision of national law under which no allowance is payable in lieu of paid annual leave, only because the employee unilaterally terminated the employment relationship early and without cause.

The ECJ also confirmed that in light of this unambiguous legal position, Austrian courts also need not verify whether the employee was unable to take the leave before terminating the employment relationship.

#### **Comment**

The ECJ failed to address a significant concern that the Supreme Court had also raised: given that an unjustified withdrawal is unlawful, wouldn't it run counter to the principle that no one should benefit from a right resulting from his or her unlawful actions?

Indirectly, the ECJ answered this question in the negative when referring to the plaintiff's argument, stating that there were "other means, contractual or legal, available to the employer to obtain compensation for any loss [caused by an unjustified withdrawal]". In essence, this means that conduct outlawed by the national lawmaker (unjustified withdrawal) gives rise to an entitlement under EU law, and employers are referred to other legal remedies available under national law, such as tort law and contractual penalties, to recoup any damages prompted by an employee's unlawful acts.

The judgment will therefore incentivise employers to include contractual penalty clauses in their employment contracts, offsetting employers' and employees' claims, and for those who do, it will have the same effect as the statutory provision in the Annual Leave Act that the ECJ found contrary to EU law, resulting in a zero-sum game.

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#### **Endnotes**

(1) ECJ 25.11.2021, C-233/20.