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Supreme Court rules on limitation of leave entitlements following new decision by ECJ

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In a recent decision,⁽¹⁾ the Supreme Court concluded that the statutory right to leave cannot be time-barred if the employee did not have the opportunity to take the leave.

Facts

The plaintiff had been employed as a gamekeeper since 2003, and later also as an estate manager. He worked seven days a week. During his employment, the plaintiff took only 121 days of leave. When the employment relationship ended in 2020, the plaintiff had an outstanding leave entitlement of 322.75 days. Instead of settling the entire leave compensation, the employer only paid the portion that, in his view, was not yet time-barred (effectively three years following accrual). The plaintiff claimed the remaining leave compensation, arguing that the leave entitlement could not yet be time-barred, because he had no opportunity to use the leave, especially since the care of the animals and the maintenance of the farm would have severely suffered had he not continuously performed his services. In addition, the employer had never requested that the plaintiff use up the remainder of his leave entitlement, nor was he made aware of the impending limitation period.

Decision

Under article 31 paragraph 2 of the Charter of Fundamental Rights of the European Union, every employee has the right to paid annual leave. Article 7 paragraph 1 of the Working Time Directive 2003/88/EC provides that an employee shall be entitled to paid annual leave of at least four weeks. Austrian labour law goes beyond the requirements of the European Union law by providing for an annual leave entitlement of at least five week, according to section 2 paragraph 1 of the Vacation Act. Pursuant to section 4 paragraph 5 of the Vacation Act, this entitlement to leave lapses after two years from the end of the leave year in which it arose. The transfer of unused leave entitlements to subsequent leave years shall be possible only as long as they are not time-barred. This results in a total of three years for the actual use of annual leave.

The European Court of Justice has now ruled in the case C-120/21 (*LB v TO*) that article 7 paragraph 1 of the Working Time Directive 2003/88/EC also precludes national legislation which provides that the right to paid annual leave lapses after the expiry of a period of three years from the end of the year in which the right arose if the employer has not actually allowed the employee to exercise that right. Otherwise, the employer could evade their obligation to request that leave be taken and to inform the employee of any detrimental consequences, and the employer would also be enriched by the forfeiture of paid annual leave. Based on this decision, it is now clear that the leave entitlement secured under EU law cannot become time-barred if employers have not met their obligations to inform their employees of their leave entitlements and request that leave should be taken so as to avoid forfeiture.

Following the decision on C-120/21 (*LB v TO*), the Supreme Court opined that the plaintiff's employer had failed to comply with the above-mentioned obligations and awarded compensation for leave entitlements not already taken.

Comment

Based on this new decision of the Austrian Supreme Court, employers have to ensure that they:

- inform their employees in a timely manner to use up their statutory leave entitlements; and
- notify them of the impending limitation period.

Failure to do so means that the limitation period of two years following the end of the annual accrual period does not start to run and the claim to past statutory leave remains valid.

For further information on this topic please contact [Jakob Widner](#) or [Sarah Micheuz](#) at GRAF ISOLA by telephone (+43 1 401 170) or email (j.widner@grafisola.at or s.micheuz@grafisola.at). The GRAF ISOLA website can be accessed at www.grafisola.at.

Endnotes

(1) OGH 27 June 2023, 8 ObA 23/23z.

