PAYMENT IN LIEU OF LEAVE IN THE CASE OF LONG-TERM INABILITY TO WORK: ADDITIONAL ANNUAL LEAVE FOR THE SEVERELY DISABLED AND ANNUAL LEAVE BASED ON A COLLECTIVE BARGAINING AGREEMENT

HEADNOTE The right of severely disabled employees to additional annual leave is subject to the same rules as apply to the statutory minimum annual leave entitlement. Accordingly, an employee does not forfeit his leave because, due to illness, he was absent from work until the end of the year in which the leave should have been taken and/or the end of the leave carryover period. The situation can, however, be different where leave entitlements are based on a collective bargaining agreement or individual employment contract that provides for leave entitlements over and above the statutory minimum. Where the collective bargaining agreement underlying an employment contract contains a provision to the effect that leave based on the collective bargaining agreement may only be taken during a specific leave carryover period, and if an employee fails to take his leave during such carryover period, then he will forfeit his leave entitlement even though he was prevented by illness from taking the leave (Federal Labor Court, judgment of 23 March 2010 - 9 AZR 128/09).

DECISION In the wake of the leading decision handed down by the European Court of Justice on 20 January 2009, the Federal Labor Court last year departed from its previous case law on the issue of whether the minimum statutory annual leave entitlement extinguishes in the case of employees who are unable to work for a long time. From now on the minimum statutory annual leave entitlement will no longer extinguish on the 31st of March of the following year, if the employee was prevented from taking the leave due to illness.

As was to be expected, the Federal Labor Court has now applied this case law to the additional annual leave available to severely disabled employees. Thus these leave entitlements will not extinguish if the employee was not able to take the leave due to illness. This means that where an employment relationship is terminated after many years of uninterrupted illness, an employee may have accumulated significant entitlements to payment in lieu of leave.

The Federal Labor Court has, however, clarified that this does not necessarily apply to leave entitlements based on collective or individual agreements that exceed the statutory minimum annual leave entitlement. Instead the parties are free to determine whether annual leave entitlements based on collective or individual agreements should extinguish or continue in the case of long-term illness. If a collective bargaining agreement does not contain an express provision on this, it will be sufficient if this can be deduced through interpretation. In the case for decision before the court, the social partners had agreed in their collective bargaining agreement on a carryover period for leave under the agreement and that the leave would extinguish at the end of such period. The collective bargaining agreement did not make special provision for cases of long-term employee illness. The Federal Labor Court deduced from

the fact that the social partners did not make any exceptions in relation to the carryover period that they had clearly intended that the annual leave entitlement should extinguish if leave could not be taken due to illness.

COMMENTS

The Federal Labor Court's decision extending its new case law to the additional leave entitlement of the severely disabled was to be expected, but was by no means a necessary consequence of the ECJ's rulings. The additional annual leave entitlement of the severely disabled does not fall within the scope of the "minimum annual leave" permitted under the EU Working Time Directive. Accordingly, the ECJ decision on this issue did not have to be applied to the additional annual leave of the severely disabled. The Federal Labor Court has, however, broadened the application of the principles expounded by the ECJ so that it is not just the minimum annual leave under European law that does not extinguish in the case of long-term illness, but also every minimum statutory annual leave entitlement. From a legal point of view this was, of course, not absolutely necessary since the ECJ's decision would have ruled out the extinguishment of the minimum annual leave provided for in the European Directive on the basis of considerations of European law.

On the other hand, the Federal Labor Court rightly grants the social partners latitude for negotiating annual leave entitlements under collective bargaining agreements and the contracting parties the same latitude in relation to individual employment contracts. It is also correct in adopting a broad interpretation of existing provisions.

The Federal Labor Court made it clear in both its decision of 23 March 2010 and its decision of 24 March 2009 that minimum statutory annual leave entitlements in excess of the statutory minimum can also extinguish in the case of long-term illness if the parties have made an agreement to this effect. This means that it is vital to include, whenever possible, a clause in collective bargaining agreements and employment contracts that expressly provides that leave entitlements exceeding the statutory minimum will extinguish. Due to the fact that employment contracts are subject to review under the Act Regulating General Terms and Conditions of Business (which is part of the German Civil Code), it is important to ensure that such clauses are formulated in a clear and unambiguous manner so that they are not held invalid because they violate the transparency requirement.

OUR OFFICE LOCATIONS

BERLIN
Klingelhöferstraße 5
D-10785 Berlin

COLOGNE
Sachsenring 81
D-50677 Köln

ESSEN
Alfredstraße 220
D-45131 Essen

FRANKFURT/M.
Neue Mainzer Str. 69-75
D-60311 Frankfurt/M.

MUNICH
Prinzregentenstraße 22
D-80538 München

WWW.GOERG.COM

YOUR CONTACTS

BERLIN

— Dr. Axel Dahms
adahms@goerg.de / Tel +49 – 30 – 88 45 03-122

COLOGNE

— Dr. Ralf Hottgenroth
rhottgenroth@goerg.de / Tel +49 – 221 – 33 660-504

— Dr. Thomas Bezani
tbezani@goerg.de / Tel +49 – 221 – 33 660-544

— Dr. Christoph J. Müller
cmueller@goerg.de / Tel +49 – 221 – 33 660-524

— Dr. Marcus Richter
mrichter@goerg.de / Tel +49 – 221 – 33 660-534

FRANKFURT/M.

— Dr. Christian Pabst
cpabst@goerg.de / Tel +49 – 69 – 17 00 00-140

— Dr. Lars Nevian
lnevian@goerg.de / Tel +49 – 69 – 17 00 00-210