



## Labor law

# Does the Never-Ending Story of the German Federal Labor Court 's and ECJ's Vacation Case Law lead to Never-Ending Vacation Claims?

Dear Reader,

We have already informed you several times in the past about landmark rulings of the Federal Labor Court (hereinafter: "BAG") and the European Court of Justice (hereinafter: "ECJ") on issues of vacation law. This has developed rapidly since 2009 under the influence of European law due to numerous decisions of the ECJ and the BAG. These often concerned the carryover periods for vacation not taken (e.g. due to incapacity for work) as well as formal requirements for employers to grant vacation and possible forfeiture of vacation entitlements. This never-ending story has now been taken to the next level by a further decision of the BAG (BAG, ruling dated 20.12.2022, ref.:9 AZR 266/20). In this pre-Christmas newsletter, we would like to inform you about the content of the decision and the practical effects and handling of the decision:

The defendant employed the plaintiff from November 1, 1996, to July 31, 2017, as a tax clerk and accountant. After the termination of the employment relationship, the defendant paid the plaintiff EUR 3,201.38 gross in compensation for 14 days of vacation. The defendant did not comply with the plaintiff's further demand to compensate for 101 days of vacation from previous years.

While the Labor Court dismissed the claim, the Regional Labor Court awarded the plaintiff EUR 17,376.64 gross in compensation for a further 76 working days. In doing so, the Regional Labor Court did not consider the defendant's objection that the asserted vacation claims were time-barred to be valid.

The appeal filed by the defendant against this decision was unsuccessful before the BAG. According to the BAG, the provisions on the statute of limitations do apply to the statutory minimum leave. However, the regular limitation period of three years does not necessarily begin with the end of the vacation year, but only with the end of the year in which the employer informed the employee<sup>1</sup> about his specific vacation entitlement and the expiry periods and the employee nevertheless did not take the vacation of his own free will.

Already in 2018, the ECJ had held that leave could only be forfeited if employers had put their employees in a position to also exercise the leave entitlement by providing adequate information (ECJ, judgment of 06.11.2018, ref.: C-684/16). In practice, this meant that since this decision, employers must inform each employee annually about the existing residual leave entitlements.

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<sup>1</sup> In the following, the term "employee" is used equally for all gender forms (m/f/d/i). This is merely for the sake of simplification and better readability, but in no way constitutes gender-based discrimination.



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However, the BAG now goes one step further and refers to a further ruling of the ECJ of September 22, 2022, in which the ECJ determined that the health of employees, which is to be guaranteed by the vacation law, takes precedence over the interest in a limitation of vacation claims, so that vacation claims can only become time-barred according to very strict regulations.

Accordingly, the defendant in the present case had not enabled the plaintiff to exercise her vacation entitlement by fulfilling the obligations to request and notify. Therefore, the claims did not expire at the end of the calendar year pursuant to Sec. 7 (3) Sentence 1 German Vacation Act (hereinafter: "BUrlG") or a permissible carryover period pursuant to Sec. 7 (3) Sentence 3 BUrlG, nor could the defendant successfully argue that the vacation not granted had already become time-barred during the current employment relationship after the expiration of three years.

The current decision is therefore more far-reaching than the 2018 decision and leads to further notice obligations for employers with regard to employees' residual leave entitlements.

**Practical advice:** So far, only the press release on the BAG decision discussed here is available, so that changes to our recommendation may result from the reasons for the decision, which are expected in a few months. **However, it should be noted that in the future, in addition to the annual information to employees about residual vacation entitlements, a note should also be included about the conditions when residual vacation entitlements may expire/be time-**

**barred. Without this information, there is a risk of "vacation without end".**

It remains to be seen whether preclusion periods frequently contained in labor and collective agreements will be able to prevent employers from making claims in the future. However, it can be assumed that the never-ending story of the development of vacation law will also continue here and that further decisions of the ECJ and BAG will follow in the future. We will of course keep you up to date on this and say: To be continued!

We now wish you a happy and reflective Christmas season and a good transition into a healthy and happy 2023!

Best regards from Heidelberg

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