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Holiday entitlement in the release phase of partial retirement according to the so-called 'block model' (GE)

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Summary

The Federal Labour Court of Germany (*Bundesarbeitsgericht*, 'BAG') had to decide on a case in which an employee claimed vacation entitlements for the release phase of a partial retirement scheme. Because the employee was released from his work obligation during the release phase of the partial retirement under the so-called 'block model' he was not entitled to statutory leave so that the lawsuit was unsuccessful in the final instance.

Legal background

In Germany, the Federal Paid Leave Act (*Bundesurlaubsgesetz*, 'BUrlG') regulates the minimum leave entitlements of employees. Pursuant to Section 1 BUrlG, every employee is entitled to paid recreational leave in each calendar year. Unless otherwise agreed, this law also applies to contractual additional leave. According to Sections 1 and 3 BUrlG, the statutory holiday entitlement generally only requires the existence of an employment relationship.

However, Section 3(1) BUrlG determines the number of days of leave based on the recovery purpose of the statutory minimum leave, depending on the number of days with the duty to work. The provision assumes a duty to work on six days of the calendar week and, under this condition, guarantees a statutory minimum leave of 24 working days. If, contrary to Section 3(1) BUrlG, the duty to work is less than six days per week, the holiday entitlement is reduced accordingly. To ensure that all employees have the same length of vacation the distribution of working hours over the days of the week shall be determined.

If the number of working days changes within a year the statutory holiday entitlement is to be converted taking into account the individual periods of employment and the weekdays with a work duty attributable to them. Accordingly, a reduction in the number of weekly working days affects the number of leave days. However, a different calculation is required in the case of corresponding statutory, collective bargaining and contractual regulations (Section 13 BUrlG).

Section 24, first sentence of the Maternity Protection Act (*Mutterschutzgesetz*) provides, for example, that periods of absence due to a prohibition of employment are to be regarded as periods of employment with regard to the holiday leave. Section 17 of the Parental Allowance and Parental Leave Act (*Bundeseltergeld- und Elternzeitgesetz*) also assumes that the entire leave entitlement initially exists for the period of parental leave. The adjustment of the leave entitlement is then made dependent on a declaration of reduction being issued. However, there is no corresponding regulation for the leave periods during partial retirement.

Nevertheless, the BAG had already previously emphasized (judgment of 22 January 2019, 9 AZR 10/17), that in certain circumstances it may be necessary to interpret Section 3(1) BUrlG in conformity with Directive 2003/88/EC (the 'Directive') to the effect that employees who are unable to fulfil their work duties during the reference period are to be treated in the same way as employees who actually work during this period. However, no reference was made to partial retirement in the decision just cited.

According to the law on partial retirement (*Altersteilzeitgesetz*), older employees should be enabled to make a smooth transition from working life to retirement pension through partial retirement from the age of 55. The employer pays top-up amounts to the employee and makes additional contributions to the statutory pension insurance on their behalf. The partial retirement law provides for the reimbursement of these expenses in favour of the employer if the conditions for entitlement are met.

One form of part-time work for older employees is the so-called 'block model'. According to this model, the employee receives the same reduced salary plus top-up amounts throughout. However, the reduced working

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time is distributed in such a way that the entire working time is performed in the first half and paid time off in the second half. The employee performs their work, so to speak, in advance and is in an employment relationship with the employer throughout.
In the case at hand, the BAG therefore had to decide whether holiday entitlements also arose for the periods of release from work, during which the plaintiff was formally still classed as an employee but was not obliged to perform any work.

Facts

The claimant was initially employed by the defendant under a full-time employment contract. The parties then continued the employment relationship from 1 December 2014 as a partial retirement with one half of the previous working hours. Under the agreed so-called block model, the claimant was obliged to work to the extent of his full-time position until 31 March 2016 and was subsequently released from work until 31 July 2017. During the period of the partial retirement agreement, he received a salary calculated on the reduced working hours plus the legal top-up amounts.
Under his employment contract, the claimant was entitled to 30 working days' vacation per year. In 2016, the defendant granted him eight working days of vacation. The claimant had taken the position that he was entitled to a total of 52 working days of vacation for the release phase of the partial retirement programme which the defendant was required to compensate. The lower instance courts dismissed the claim. Consequently, the BAG had to decide on the claimant's appeal.

Judgment

The BAG dismissed the sought revision.
The action was unfounded in its entirety because the plaintiff was not entitled to take vacation leave for the period in which he was in the release phase of the partial retirement employment relationship due to a lack of work obligation. Furthermore, the defendant had fulfilled the vacation entitlement that had arisen solely for the work phase in 2016. This resulted from Sections 1, 3(1) BUrlG for both the statutory and the contractual vacation entitlement. The conversion of the statutory holiday entitlement, which is measured in working days pursuant to Section 3(1) BUrlG, into days of real work, must also be carried out if the parties to the employment contract have agreed on partial retirement. Neither in the partial retirement law nor elsewhere had the legislator made any provisions deviating from the Federal Paid Leave Act for the calculation of the statutory minimum leave in partial retirement employment relationships. Only the distribution of the working time and the modalities of the remuneration payments in the block model of partial retirement do not require a calculation of the statutory holiday entitlement deviating from Section 3(1) BUrlG. According to the case law of the ECJ (judgment of 4 October 2018, C- 12/17 (*Dicu*)), equal treatment of employees who have not worked, with those who have worked, is not required in conformity with the Directive if the employee has voluntarily suspended his or her duty to work.
Article 7 of the Directive demands that the worker has carried out an activity which, in order to protect their safety and health as provided for in the Directive, requires them to have a period of rest, relaxation and leisure (ECJ 4 October 2018, C-12/17 (*Dicu*)). Based on these principles, the entitlement to paid annual leave was to be calculated on the basis of the periods of work actually performed. Article 7(1) of the Directive also did not demand that the exemption phase of partial retirement had to be considered despite the absence of a duty to work. There is also no obligation on the employee to conclude a partial retirement contract. The necessity of an amendment agreement ensured that the employee could freely decide whether to switch to partial retirement and, in addition, whether to reject the employer's offer to distribute working time according to the block model.
In the case of the part-time model, according to which employees are obliged to work continuously but no longer work full-time, holiday entitlements arise, as it is only the number of weekly working days and not the hours worked that matter. This does not constitute an unreasonable disadvantage. The different treatment was justified by the recreational purpose of the statutory minimum leave.
Nor does the disregard of the exemption phase infringe the prohibition of discrimination against part-time workers laid down in Section 4(1) and (2) of the Framework Agreement on Part-Time Work (annex to Directive 97/81/EC), which was transposed into national law by Section 4(1) of the Law on Part-Time and Fixed-Term Work (*Teilzeit- und Befristungsgesetz*, 'TzBfG'). According to Clause 4(2) of the Framework Agreement, the principle of *pro rata temporis* applies where appropriate. The ECJ had ruled that the *pro rata temporis* principle was to be applied to the granting of annual leave for a period of part-time employment and that for this period the reduction of the entitlement to annual leave in comparison with the entitlement existing for full-time employment was justified for objective reasons. Only the holiday entitlement already acquired may not be reduced (ECJ 22 April 2010, C-486/08 (*Zentralbetriebsrat der Landeskrankenhäuser Tirols*)). The calculation of the holiday entitlement in the partial retirement employment relationship in accordance with Section 3(1) BUrlG depending on the number of days of compulsory work in the holiday year would comply with these principles. The holiday entitlements already acquired would not be lost even in the event of a change during the year.

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Commentary

In its judgment the BAG implements the existing principles consistently and comprehensibly. The differentiation between the part-time model and the block model shows that a need for recreation is not generally excluded in the case of partial retirement but rather exists in accordance with the purpose of the recreational leave if work was actually performed. The BAG had already previously decided that unpaid leave without a work obligation must not be taken into account when calculating the holiday entitlement (judgment of 19 March 2019, 9 AZR 315/17). Ultimately, there are also no serious differences here that would justify a different assessment. Like the ECJ (4 October 2018, C-12/17 (*Dicu*)), the BAG judgment is based on the premise that the entitlement to paid annual leave in accordance with Article 7 of Directive 2003/88/EC presupposes that the employee has actually worked. In such a case, a need for rest logically arises. Consequently, the ECJ also regarded the reduction of leave during parental leave as being in conformity with European law.

After all, there are no significant reasons why a need for rest must be assumed during the release phase of partial retirement by way of exception. In view of all this, the BAG judgment paves the way for other cases dealing with periods of unpaid leave with no obligation to work, and it seems to be crystal clear after that subsequent ruling that this interpretation of the Directive as well as the national law is in conformity with European and German law.

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Parties: Unknown

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