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Mobility of employees and entitlement to annual leave (AU)

CONTRIBUTORS Peter C. Schöffmann and Andreas Tinhofer*

Summary

Under Austrian law employees are entitled to more annual leave if they have worked for at least 25 years for the same employer. Employment with other employers is taken into account, but not for more than a total of five years. The ECJ will have to decide whether this limitation complies with EU law or whether it unlawfully restricts the freedom of movement of employees.

Facts

The Austrian Vacation Act (*Urlaubsgesetz* – UrlG) sets out a mandatory entitlement to five weeks of paid annual leave for each working year. After 25 years of service this entitlement increases by one additional week. In order to obtain a leave entitlement of six weeks, all years of service with the same employer must be taken into account. Years of prior employment with a different employer are only considered if the employment relationship has lasted for more than six months. In addition, not more than a total of five years of service with different employers is taken into account.

The Vacation Act also provides that only years of service within Austria will be considered. However, according to the established case law of the Austrian Supreme Court the Vacation Act must be interpreted in line with EU law. Therefore, periods of prior employment are to be taken into account regardless of whether the employee was working in Austria or in another EU member state. For example, if the employee works for the same employer for 25 years, but ten years outside Austria, this time counts in full.

Prior national proceedings

The plaintiff (a works council) argued that taking into account only up to five years of prior employment was not compatible with EU law. The provision in question is particularly detrimental for migrant workers, since they suffer a disadvantage from making use of the freedom of movement.

The defendant claimed that the provision was permissible under EU law as way of properly accounting for a worker's professional experience. Further, without this provision the burden of a higher entitlement to annual leave would be distributed unfairly amongst employers.

The court of first instance found for the defendant on the grounds that years of employment are recognised by the Vacation Act regardless whether they were completed at a national or foreign employer. Therefore, no discrimination can be found. The appeal proceedings also found in favour of the defendant. The court of appeal argued that it was not out of the question that the chance of missing an extra week of annual leave could cause workers to refrain from exercising their freedom of movement. However, the restriction was deemed to be legitimate because it was felt it should be consistent with EU law that a benefit should be granted to workers who have been loyal to their employers.

The applicant filed a further appeal to the Austrian Supreme Court.

Judgment

The Supreme Court decided to initiate the preliminary ruling procedure (Art 267 TFEU) regarding the following question:

> *"Are Article 45 TFEU in conjunction with Article 7 (1) Regulation (EU) No 492/2011 to be interpreted as precluding a national regulation such as Sec 3(2)(1) in conjunction with Sec 3(3) and Sec 2(2) Vacation Act under which an employee having worked for 25 years in total for different employers is entitled to five weeks of vacation whereas an employee having worked for 25 years at the same employer may claim six weeks of vacation?"*

* Peter C. Schöffmann is an associate at MOSATI Rechtsanwälte (www.mosati.at). Andreas Tinhofer is a partner at MOSATI Rechtsanwälte (www.mosati.at).

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In its reasoning, the Supreme Court first questions whether the national regulation constitutes indirect discrimination against foreign workers. Since the legal provision interpreted by the courts does not differentiate between national and foreign employers, indirect discrimination could only take place if foreign workers change their jobs more often than Austrians. The Supreme Court found no empirical evidence for that and therefore held that there was no indirect discrimination against foreign employees.

The Supreme Court then turned to the question of whether the regulation dissuades migrant workers from taking jobs in Austria or Austrian workers from taking jobs in other member states. Citing the ECJ cases of *SLK* (C-514/12) and *De Clercq* (C-315/13) the Supreme Court pointed out that any restriction of freedom of movement, however minor, is prohibited. It then sought to ascertain if the provision in question could give rise to such a restriction.

Firstly, the Supreme Court pointed out that the basic entitlement to annual paid leave under Austrian law of five weeks is already higher than required by directive 2003/88/EC. Therefore, it seems unlikely that foreign employees would be dissuaded from taking up jobs in Austria because of the limited recognition of previous years of service.

Secondly, the Supreme Court found that the completion of 25 years of service was (in most cases) an event far in the future, which probably does not influence most current career decisions.

Thirdly, even Austrian employees would be unlikely to be influenced in their decision-making by whether they should resign and seek a job in another member state if they want to return to Austria at a later stage. Also in these cases, it would be very uncertain whether an employee would in fact return to Austria – in which case the limitation would apply.

Finally, the Supreme Court examined whether the national rule could be justified by a legitimate social policy aim. In the Court's view, the rule aims to incentivise loyal employees. Indeed, taking into account all the years of prior service (without limitation) could constitute an obstacle on the job market for older employees.

Commentary

In our view, the arguments presented by the Supreme Court are convincing and so we would expect the ECJ to confirm that regarding the Vacation Act complies with EU law. As the plaintiff is a works council there might also be a political agenda behind this litigation. For some years now the trade unions have been demanding to change the law so that the entitlement to six weeks of vacation only depends on the number of years of service, no matter for which employer.

Comment from other jurisdiction

The Netherlands (Peter Vas Nunes, BarentsKrans): According to the Austrian Supreme Court, there is no empirical evidence that foreign workers change jobs more often than Austrian employees. Therefore, the Austrian legislation at issue does not indirectly discriminate against foreign workers or restrict freedom of movement. But how about the Framework Agreement on Fixed Term Work, annexed to Directive 199/70? It prohibits treating fixed-termers, absent objective justification, less favourably than permanent workers solely because they have a fixed-term contract. What does "solely" mean in this context? Does it mean that the directive prohibits only direct discrimination? Or is it possible to be discriminated against indirectly on grounds of having a fixed term contract, for example because migrant workers have such a contract more often than others? If not, could the works council in this case have based its claim on the requirement in the Framework Agreement that period-of-service qualifications relating to particular conditions of employment shall be the same for fixed-term workers as for permanent workers, absent objective justification?

Subject: Nationality discrimination

Parties: Gemeinsamer Betriebsrat E***** GmbH (Works council) – v – E***** GmbH (employer)

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