2024/5

# German holiday law can apply to a managing director of a private limited company (GE)

**CONTRIBUTOR** Othmar Traber*

## Facts

The plaintiff was a managing director of the defendant company. Before this, she had worked approximately 21 years as an employee for this particular firm, a private company with limited liability ('GmbH'). With regard to the written service agreement and by order of the defendant, she was required to work from 7 am to 6 pm every day. In the morning, she had to carry out 'cold calling' on the telephone. In the afternoon she had to offer services on her own initiative and was deployed in the sales force, on customer visits and with control and monitoring tasks. She had to prove that she made 40 telephone calls and 20 customer visits per week. She also conducted job interviews and recruitment negotiations. After six years of service, the employment contract provided for an annual leave of 33 days, which the plaintiff had to apply for from the company. The plaintiff took 11 days of leave in 2019 and none in 2020. The contractual relationship between the parties ended when the plaintiff gave notice of termination in October 2019 with effect from 30 June 2020. From 30 August 2019 until the end of the contractual relationship she was unfit for work and no longer provided any services.

After the plaintiff had been sued by the company with regard to a claw-back of paid bonuses, she herself brought an action against the defendant and claimed for payment due to the untaken vacation entitlements in the years 2019 and 2020, amounting to gross EUR 11,300.



## Judgment

The Federal Labour Court ruled that the plaintiff, as managing director, can demand holiday pay in lieu. The Federal Labour Court based its decision on the fact that the federal holiday law implements the provisions of the Working Time Directive 2003/88/EC. For this reason, the question whether a managing director can be considered an employee in terms of the federal holiday law must be determined in accordance with EU law. According to the established ECJ case law, an employee is "any person who, for a specified period of time, performs work for another person in accordance with that person's instructions in return for which that person receives remuneration." The decisive factors are therefore the conditions under which the member of the company management was appointed, the nature of the tasks assigned to them, the framework within which these tasks are carried out, the scope of the powers the member holds and how much the member is controlled by the company, as well as the circumstances under which they can be dismissed.

Since the plaintiff was largely subject to the instructions and control of the company in the performance of her work, she was to be qualified as an employee within the meaning of Union law.

Apart from that, the Court also outlined again under what circumstances a managing director who claims having been employed like an employee can file a lawsuit against his or her former contractual party with the industrial tribunals instead of the usual civil courts, mainly district courts. As a matter of fact, the determination whether the industrial tribunals or the civil courts are responsible for such proceedings is often controversial and can vary from case to case.

Another interesting issue in the case at hand was the question if the vacation entitlement accrued also in that period in which the plaintiff had not been working after she resigned her office as managing director and was subsequently ill until the expiry of the termination period. The Court discussed in its decision that, as a rule, a managing director is not obliged to perform their work for the remaining term of the contract after they have resigned from their office as managing director and terminated the contract. In this case, it could be questionable if during this period the vacation entitlement must be calculated on the basis of the average actual days of work during the calendar year in comparison with the number of working days per year. This had not been decided by the Court due to the fact that in the case at hand the parties had agreed that the managing director

* Othmar K. Traber is a partner at Ahlers & Vogel Rechtsanwälte PartG mbB in Bremen, www.ahlers-vogel.com.



doi: 10.5553/EELC/187791072024009001006

was obliged to perform some type of work which had to be considered as typical work for an employee instead of managing tasks normally associated with a managing director. Consequently, the Court ruled that work would have been possible in principle during this period had the plaintiff not been unfit for work. Therefore, the defendant was ordered to pay the full remuneration in lieu of the untaken vacation entitlement.

**Subject**: Annual Leave
**Parties**: Unknown
**Court**: *Bundesarbeitsgericht* (Federal Labour Court of Germany)
**Date**: 25 July 2023
**Case number**: 9 AZR 43/22
**Internet publication**: https://www.bundesarbeitsgericht.de/wp-content/uploads/2023/11/9-AZR-43-22.pdf

## Commentary

The German Federal Labour Court's decision shows once again that external managing directors of a private limited company are moving ever closer to the status of an employee. The reason for this is that the ECJ has established in several rulings such as *Balkaya* (Case C-229/14) and *Danosa* (Case C-232/09) the concept of employment with regard to external managing directors and refers to the fact that they can be freely dismissed and are subject to instructions from the shareholders' meeting, from which the status of employee then follows, thus using a definition that is different from the concept of employee under German law.

This ruling is likely to be of great practical relevance. If external managing directors are not informed about their holiday entitlement and the possibility of forfeiture, or if the information is not sufficiently transparent, holiday entitlements that have not been taken do not expire at the end of the calendar year but are carried over to the next calendar year and updates accordingly. Since the external managing director of a private limited company cannot fulfill the obligation to inform towards themself, the shareholders' meeting might be responsible for that information or, if applicable, another managing director of the firm. The procedure in these cases is the same as with ordinary employees following the latest rulings of the ECJ and the German Federal Labour Court. But one must be careful: managing directors will be treated as employees only if the question at hand refers to the European Union concept of employment in the context of respective Directives or Regulations, and on the other hand it depends on the facts of the case if a managing director performs work for another person in accordance with that person's instructions in return for which the managing director receives remuneration. Because this will not always be the case, company lawyers are required to assess very carefully whether it will be sensible to regard an external managing director partly as an employee or not and to draft the contract accordingly. The legal situation has now become unclear, the certainty is gone when dealing with the European notion of an employee in connection with managing directors' claims.



doi: 10.5553/EELC/187791072024009001006