

IS THE ANNUAL LEAVE AN AD INFINITUM RIGHT?

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Abstract

In 2015, the Romanian Labor Code was amended in order to transpose a vast and constant CJEU case law in this field, providing that in the event the employee, for justified reasons, cannot take the annual leave during the year in which it was accrued, the employer is under the obligation to grant the employee the untaken leave days, with his consent, in a reference period of 18 months, calculated from the start of the year following the one in which the right to annual leave was accrued.

In the same context, the Labor Code expressly provided for the accrual of annual leave in certain cases where workers cannot perform work due to objective reasons, such as, but not limited to medical leave and maternity leave.

The above cited regulation gave rise to endless debates in the legal literature regarding aspects such as (i) whether the right to annual leave lapses upon expiry of the 18 months term and, (ii) whether in such a case the corresponding right to payment of an allowance in lieu of leave not taken upon expiry of the 18 months also lapses.

This study intends to address the above-mentioned questions and suggests an approach that takes into account both the purpose (ratio legis) of the annual leave and the legal nature thereof, as well as the recent CJEU case law rendered in the interpretation of Directive 2003/88, pursuant to which the workers' right to annual leave may be construed as lapsed in cases where (i) the employer is able to prove that it enabled workers to exercise their right to paid annual leave in a concrete and transparent manner and (ii) the worker refused to benefit from annual leave voluntarily.

Keywords: *annual leave; lapse of annual leave; fundamental social right; indemnity in lieu.*

1. Introduction

According to the Labor Code provisions¹ if the employee, for justified reasons, can not make all or part of the annual leave he/she was entitled to in that calendar year, with the agreement of the person concerned, the employer is obliged to give the rest of the leave not performed during a period 18 months starting from the year following the one in which the right to annual leave was born.

The provisions mentioned above are referring to an exception from the rule mentioned at paragraph one from the same article 146 from Labor Code which establish that the annual leave shall be taken each year.

Also the same provisions gave rise to endless debates in the legal literature regarding aspects such as (i) whether the right to annual leave lapses upon expiry of the 18 months term and, (ii) whether in such a case the corresponding right to payment of an allowance in lieu of leave not taken upon expiry of the 18 months also lapses.

2. General aspects regarding the annual leave

Employees are entitled to annual leave in accordance with the legal provisions in force.

The right to paid annual leave is a constitutional right provided by art. 41 paragraph 2 of the Constitution of Romania², paragraph stipulating the following: "Employees are entitled to social protection measures. These concern the safety and health of employees, the working conditions of women and young people, the establishment of a minimum gross national salary, weekly rest, paid leave, special or special work, vocational training, as well as other specific situations by law."

The right to annual leave is also provided by art. 39, paragraph 2 of the Labor Code, as it is guaranteed to all employees and can not form the object of any assignment, renunciation or limitation³.

One of the mandatory clauses of the individual labor contract is the annual leave⁴ which is also included in the framework model of the individual labor contract stipulated in the Annex to Order no.63/2004⁵ and mentioned in item M. General rights and obligations of the parties, paragraph 1, letter c.

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¹ Art.146, par 2, Law no. 53/2003 regarding Labor Code, republished in The Official Gazette of Romania, Part I, Issue no.345 from 14th May 2011, with subsequent amendments

² The Romanian Constitution updated and republished in The Official Gazette of Romania, Part I, Issue no.767 from 31st October 2003

³ See art.144, par 2 from Labor Code

⁴ See art.17, par. 3, letter i from Labor Code and par 4 from the same article

⁵ Order no. 64 of February 28, 2003, issued by the Minister of Labor and Social Solidarity for approval of the framework model of the individual labor contract, as subsequently amended and supplemented

The annual leave is governed by Articles 145-151 of the Labor Code.

One of the elements in respect of which the person selected for employment must be informed before the conclusion of the individual employment contract which is the subject of negotiations between the parties to the individual employment contract and which must be compulsorily included in the individual employment contract is the annual leave.

The right to annual leave is an application of the principle of the protection of employees' rights set out in the provisions of Article 6 of the Labor Code.

The annual leave is a fundamental principle of social law and, thus, part of the EU and national public order. As put by the Court of Justice of the European Union, the annual leave aims to ensure that workers are entitled to actual rest, with a view to guaranteeing effective protection of their health and safety.

To this end, both EU Directive 2003/88 on the organization of working time and the Romanian Labor Code preclude the payment of an allowance in lieu of the annual leave not taken before the termination of the employment relationship.

3. Length of annual leave

Article 7 of Directive⁶ 2003/88 EC requires the Member States to take the necessary measures to ensure that every worker receives an annual paid leave of at least four weeks and that the minimum paid annual leave can not be replaced by an allowance financial, unless the employment relationship ceases.

According to the Romanian legislation, the minimum annual leave is 20 working days⁷, with the stipulation that the effective annual leave is set in the individual labor contract in compliance with applicable law and collective labor agreements.

Legal holidays in which the employees are not working and also the paid days off laid down in the applicable collective labour agreement shall not be included in the length of the annual leave⁸.

There are also employees who, in view of certain specific elements, enjoy an additional leave, employees working in difficult, dangerous or harmful conditions, the blind persons, other disabled persons and the young people under the age of 18 enjoy an additional leave to at least 3 working days⁹.

The number of working days related to additional leave for the above categories of employees is set by

the applicable collective labor agreement and will be of at least 3 working days.

Additional leave will have to be stipulated distinctly from the annual leave in the individual labor contract. In the same sense, the framework model of the individual labor contract stipulated in the Annex to the Order no. 63/2004 mentions distinct the additional leave at element "I. The leave" whose provisions are mentioned below:

"I. leave

The duration of the annual leave is working days, in relation to the duration of the work (full-time, part-time).

The employee also benefits from an additional leave of" "

4. Can the right to annual leave elapse in certain conditions?

Annual leave shall be taken each year¹⁰ on the basis of a collective or individual schedule¹¹ laid down by the employer after consulting the trade union or, as the case may be, the representatives of the employees, as far as the collective schedule is concerned, or after consulting the employee, as far as the individual schedule is concerned. Programming is done by the end of the calendar year for the following year.

If the employee, for justified reasons, cannot take all or part of the annual leave he/she was entitled to in that calendar year, with the consent of the person concerned, the employer is obliged to give the untaken leave in a period of 18 months from the year following that in which the right to annual leave was born¹².

Compensation in cash for untaken annual leave is allowed only in the case of termination of the individual employment contract. Article 7 (2) of Directive 2003/88 / EC of the European Parliament and of the Council of 4 November 2003 concerning certain aspects of the organization of working time laid down, as stated above, that the minimum paid annual leave may not be replaced by a financial indemnity, unless the employment relationship ceases.

Consequently, the rule laid down by both the Romanian¹³ and the European legislators is for the annual leave to be taken in-kind, except for the termination of the individual employment contract, in which case the untaken leave will be compensated in cash. The aim is to restore the working capacity of the employee and as stated at the beginning of this article

⁶ Directive 2003/88/EC of the European Parliament and of the Council of 4 November 2003 concerning certain aspects of the organisation of working time

⁷ See art.145 from Labor Code

⁸ See art.145, par.3 from Labor Code

⁹ See art.147 from Labor Code

¹⁰ See art.146, par.1 from Labor Code

¹¹ See art.148 from Labor Code

¹² See art.146, par.2 from Labor Code

¹³ See in this sens also Al.AthanasIU, Ana Maria Vlăsceanu, Labor Law. Course notes. C.H.Beck Publishing house, Bucharest, 2017,p.174

represents a transposition of the principle of social protection.

Also, in the sense of confirming this rule set by the Romanian legislator, we consider that there are also the provisions of Article 149 of the Labor Code which state that the employee is obliged to take in kind the annual leave of rest during the period in which he was scheduled, except cases expressly provided by law or when, for objective reasons, the annual leave cannot be taken.

If the right to annual leave is set in proportion to the actual time worked by an employee in a calendar year, naturally it follows that a cash offset of untaken annual leave will take into account the same rule for determining the number of unpaid leave days to be paid¹⁴.

Annual leave can be interrupted at the request of the employee for objective reasons.

The employer can recall the employee from the rest leave in case of force majeure or for urgent interests requiring the presence of the employee at the workplace. In this case, the employer has the obligation to bear all the expenses of the employee and his / her family necessary for his / her return to the workplace, as well as any damage suffered by him / her as a result of the interruption of the leave.

Regarding Article 146 (2) of the Labor Code, the following questions arise:

1. If the 18 months mentioned in art.146, paragraph 2 of the Labor Code pass, the days of unpaid leave shall be lost in the case of an employee who did not unduly took his annual leave even though the employer repeatedly told him/her to take the annual leave he was entitled to?
2. What will happen in the case of an employee who, for objective reasons, did not take annual leave within the respite period?
3. Loss of annual leave would only entail the loss of the right to annual leave in kind or also to the right to benefit from the cash compensation at the termination of the contract for the same days referred to in Article 146 (3) of the Labor Code?

We will answer in the following to the above questions.

Answer for the 1st question

If the employee, for unjustified reasons, did not take, all or a part, of the annual leave he/she was entitled to in the respective calendar year, with the agreement of the person concerned, the employer is obliged to grant the untaken annual leave during a period of 18 months from the year following that in which the right to annual leave was born.

If the employee has not taken the annual leave for unjustified reasons, although the employer repeatedly informed him about the annual leave and the term established by art. 146, paragraph 2 of the Labor Code was exceeded, the employee loses the right to annual leave for that period? We consider that, in such a

situation, as long as the employer has made all the necessary steps in order for the employee to take the annual leave according to the schedule, and if necessary informed the employee also after that about the annual leave and the employee did not want to exercise this right, the fulfillment of the conditions provided by art. 46, paragraph 2 of the Labor Code will result in the employee's loss of the right to take the remain annual leave for the respective period.

Answer for the 2nd question

We consider that if an employee, for objective reasons, that can be demonstrated, did not take the annual leave within the respite period, he/she will not lose his/her right, because the factors which stopped the employee to take his annual leave could not be controlled by him/her.

Answer for the 3rd question

According to Article 146, 3rd paragraph from the Labor Code: "The cash compensation of the annual leave not taken shall only be permitted in the event of termination of the individual labor contract." So regarding the provisions mentioned before, we consider that the right to the annual leave in kind is indissoluble linked to the annual leave allowance and as a consequence with the compensations to which is referring Article 146, 3rd paragraph from the Labor Code. As a consequence, the loss of annual leave would not only entail the loss of the right to annual leave in kind but it will also attract the loss to the right to benefit from the cash compensation at the termination of the contract for the same days.

The Court of Justice of the European Union ("CJEU") issued on 6 November 2018 a decision regarding case C-684/16, on the interpretation of art. 7 of Directive 2003/88/EC concerning certain aspects of the organisation of working time and of Article 31 Para. (2) of the Charter of Fundamental Rights of the European Union, regarding the annual leave.

The dispute was concerning the fact that a German employer, Max-Planck-Gesellschaft zur Förderung der Wissenschaften eV, refused to grant one of its workers, upon termination of employment, a financial compensation for the untaken leave days. The employer's refusal was based on the German legislation pursuant to which the annual leave must be granted in the course of the calendar year when it is accrued – the possibility of carrying forward the annual leave in the following year being permitted only in the event of compelling operational grounds or for personal reasons pertaining to the employee.

In those circumstances, the Bundesarbeitsgericht (Federal Labour Court) decided to stay the proceedings and to refer the following questions to the CJUE for a preliminary ruling:

"(1) Does Article 7(1) of Directive [2003/88] or Article 31(2) of the [Charter] preclude national legislation, such as Paragraph 7 of the [BUrlG], under which, as one of the methods of exercising the right to

¹⁴ See in this sens also Al.Athanasiu, Ana Maria Vlăsceanu, Labor Law. Course notes. C.H.Beck Publishing house, Bucharest, 2017,p.174

annual leave, an employee must apply for such leave with an indication of his preferred dates so that the leave entitlement does not lapse at the end of the relevant period without compensation and under which an employer is not required, unilaterally and with binding effect for the employee, to specify when that leave be taken by the employee within the relevant period?

The CJEU ruled that if the employer is able to prove that it enabled workers to exercise their right to paid annual leave in a concrete and transparent manner and the worker refuses to take annual leave voluntarily, being aware of all the consequences arising thereof, EU law does not preclude national legislation from providing the loss of annual leave or payment of an allowance in lieu of untaken paid annual leave at the end of the employment relationship.

In addition, CJEU recalled that, according to its consistent case law (which remains applicable hereinafter), the right to paid annual leave must be regarded as a particularly important principle of

European Union social law, the implementation of which by the competent national authorities must be confined within the limits expressly laid down by Directive 2003/88 itself.

5. Conclusions

In light of the above cited CJEU case law and considering the Romanian legal framework on the subject matter, it is our view that art. 146 of the Labor Code may be construed in the sense that the right to annual leave lapses at the end of the calendar year during which it was accrued provided the employer guaranteed the employee the right to perform the annual leave (e.g.: specific and timely information, notification with regard to the number of untaken leave days) and the employee refuses to benefit from annual leave without having any objective justification.

CJEU ruled that if

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