ECJ Rules in Bollacke that Heirs of Deceased Employee are Entitled to Compensation for Unused Holiday – What Would be the Outcome under Serbian Law?

JULY 2014

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On 12 June 2014, the European Court of Justice (ECJ) ruled in *Gülay Bollacke v K + K Klaas & Kock B.V. & Co. KG* [1] that EU law entitles the successors of a deceased employee to claim from the employer a compensation for the annual leave not used by the employee prior to his/her death. In this Newsletter, we compare the relevant provisions of the Working Time Directive 2003/88/EC ("**Directive**") and the Serbian labor law provisions regulating paid leave, on the other hand, to see whether the holding of the ECJ's decision in *Bollacke* could potentially apply to the regulation of paid annual leave in Serbia.

Background

Mr. Bollacke worked for the German retailer K+K from 1 August 1998 to 19 November 2010 when he passed away. He had been seriously ill since 2009 and on medical leave until his death. By the time of his death, he had accumulated 140.5 days of unused holiday entitlement.

On 31 January 2011, Mrs. Bollacke submitted an application to K+K for a compensation on the account of annual leave not consumed by her husband prior to his death. K + K rejected her application. Mrs. Bollacke then submitted a claim to the German Federal Labour Court (Bundesarbeitsgericht), relying on paragraph 7(4) of the Federal Law on Paid Leave (Bundesurlaubsgesetz) of 8 January 1963 (BGBl. 1963, p. 2), as amended on 7 May 2002 (BGBl. 2002 I, p. 1529), which provides: "If, because of the termination of the employment relationship, the leave can no longer be authorized in full or in part, an allowance in lieu thereof shall be paid". The German court of first instance dismissed the claim holding, in line with the previous case law, that the entitlement to a compensation in lieu of untaken annual leave, otherwise arising upon termination of one's employment, does not exist when employment relationship is terminated as a result of

employee's death.

On appeal, the Landesarbeitsgericht (Higher Labour Court) referred, *inter alia*, the following questions to the ECJ: (i) whether the national legislation or practice which provides that no allowance in lieu of accrued and outstanding annual leave is owed to the employee on termination if the cause of termination is the employee's death, is compatible with the EU law and, in the event of a negative answer, (ii) whether the entitlement to the allowance depends on whether the employee had previously submitted to the employer an application for the leave.

Directive

Article 7 of the Directive prescribes:

1. Member States shall take the measures necessary to ensure that every worker is entitled to paid annual leave of at least four weeks in accordance with the conditions for entitlement to, and granting of, such leave laid down by national legislation and/or practice.
2. The minimum period of paid annual leave may not be replaced by an allowance in lieu, except where the employment relationship is terminated.

ECJ ruling

ECJ was of the opinion that Article 7 of the Directive could not be interpreted to mean that the entitlement to paid annual leave is lost because of the worker's death. The Court thus held that where the employment terminates as a result of the employee's death before the employee has consumed his/her entire paid annual leave, the employee is entitled to an allowance in lieu. It also held that such allowance for unspent annual leave is owed to the employee irrespective of whether he/she had previously submitted to the employer an application to use paid annual leave.

Comparison between the relevant provisions of EU law and the relevant provisions of Serbian law

The main difference between the Serbian Labor Law provisions on paid annual leave and the provisions of the Directive is in that under the Serbian law, termination of employment does not of itself entitle the employee to a compensation for unspent annual leave. According to Article 71 of the Serbian Labor Law, in the event of employment termination, the employer is obliged to issue to the employee a certificate on the number of unspent annual leave days. Those days can be carried forward to the subsequent employer. Another specific feature of the paid annual leave regulation under Serbian law is that it is not possible to carry forward unspent holiday days beyond 30 June of the subsequent year. Moreover, if at least three weeks of holiday are not used in the year to which the entitlement pertains, the remainder of the holiday days cannot be carried forward (except in case where the employee was unable to use those three weeks because of maternity or childcare leave). If

the pause between two employments is longer than 30 working days, the entitlement to holiday accrued with the former employer is affected by the rule that the employee cannot use holiday within the first six months with the new employer.

The only instance under Serbian law when the employee is entitled to a monetary compensation for unspent holiday is a situation where the holiday days were not used because of employer's fault (Article 76 of the Labor Law). In that case, the employee is entitled to damages calculated based on his/her average salary earned in the period of three preceding months (the Labour Law does not define a point in time from which the three-month reference period starts running), proportionately applied to the number of holiday days affected.

It is up to the court to determine the existence of the employer's fault in each particular case. The courts have held thus far that the employer's fault would exist when the employer failed to respond to a holiday request, or failed to approve a holiday request without justification. It has been also held that the situation where the employee was unable to use his/her holiday because the employment had ended for the employee's fault before the employee made a holiday application is not an employer's fault. Furthermore, the Ministry of Labor, whose opinions are not binding but may have persuasive force on courts, has opined that the employee's inability to use holiday because of absence from work for health reasons cannot be considered an employer's fault. On the other hand, the Ministry of Labor's position is that the employer would be at fault if it did not offer to the employee to consume the entire holiday entitlement prior to the termination for redundancy or retirement.

It follows that the Serbian law does not entitle an employee to a remuneration for untaken annual paid leave upon termination, except where the employee was prevented from using his/her paid annual leave prior to the termination as a result of the employer's fault, in which case the employee is entitled to damages.

This being said, the remaining question is whether the entitlement to damages in case of inability to use one's holiday for the employer's fault is an inheritable right under Serbian law. The answer depends on whether the claim is awarded or not. The claim awarded in a final judgment or recognized in a written settlement is inheritable. However, if the claim has not been finally awarded or recognized in a written settlement prior to the employee's death, the ability of heirs to assert it depends on the legal nature of the claim. If the damages resulting from the inability to use one's holiday because of the employer's fault are qualified as damages for pain and suffering, a claim would not be inheritable. This follows from Article 204 of the Law on Obligations which provides that a claim for non-material damage (pain and suffering) is inheritable only if awarded in a final judgment

or acknowledged in a written settlement. Serbian courts have not yet, to our knowledge, decided on the legal nature of a claim for damages resulting from inability to consume one's holiday faulted by the employer.

[1] Judgment in Case C-118/13, Court of Justice of the European Union

Evropski sud pravde u slu?aju *Bollacke* odlu?io da naslednici preminulog zaposlenog imaju pravo na naknadu štete za neiskoriš?eni godišnji odmor – kakav bi ishod bio prema srpskom pravu?

Evropski sud pravde (ESP) je 12. juna 2014. u slučaju *Gülay Bollacke v K + K Klaas & Kock B.V. & Co. KG* odlučio da EU pravo ovlašćuje naslednike da od poslodavca preminulog zaposlenog zahtevaju naknadu za godišnjii odmor koji zaposleni nije iskoristio pre svoje smrti. U ovom biltenu, uporedićemo relevantne odredbe Direktive o radnom vremenu 2003/88/EC („**Direktiva**") sa odredbama srpskog Zakona o radu koje regulišu pitanje odmora, kako bismo utvrdili da li dispozitiv presude ESP u *Bollacke* može imati primenu i u Srbiji.

?injeni?no stanje

G-din Bollacke bio je zaposlen u nemačkoj maloprodajnoj firmi K+K od 1. avgusta 1998. do svoje smrti koja je nastupila 19. novembra 2010. Od 2009. godine bio je na bolovanju zbog teškog zdravstvenog stanja. U trenutku smrti, imao je 140.5 dana neiskorišćenog godišnjeg odmora.

31. januara 2011, g-đa Bollacke podnela je zahtev K+K-u za naknadu na ime godišnjeg odmora koji njen suprug nije iskoristio pre smrti. Nakon što je K+K odbio njen zahtev, g-đa Bollacke je podnela tužbu nemačkom Saveznom sudu za radne odnose (Bundesarbeitsgericht), oslanjajući se na član 7(4) Saveznog zakona o godišenjem odmoru (Bundesurlaubsgesetz) od 8. januara 1963. (BGBI. 1963, str. 2), sa izmenama i dopunama od 7. maja 2002 (BGBI. 2002 I, str. 1529), koji kaže: „Ukoliko se godišnji odmor ne može odobriti u celini ili delimično usled prestanka radnog odnosa, zaposlenom će se isplatiti naknada". Prvostepeni nemački sud odbio je tužbeni zahtev sa obrazloženjem da, u skladu sa ranijom sudskom praksom po ovom pitanju, pravo na isplatu naknade za neiskorišćeni godišnji odmor, koje inače postoji u slučaju prestanka radnog odnosa, ne postoji ukoliko radni odnos prestaje zbog smrti zaposlenog.

Postupajući po žalbi, Viši sud za radne odnose (Landesarbeitsgericht) uputio je ESP-u, između ostalog, sledeća pitanja: (i) da li je nacionalno zakonodavstvo koje predviđa da, kada radni odnos prestaje usled smrti zaposlenog, poslodavac nema obavezu isplate naknade za neiskorišćeni godišnji odmor kompatibilno sa EU pravom, i u slučaju negativnog odgovora (ii) da li pravo na naknadu zavisi od toga

da li je zaposleni poslodavcu uputio zahtev za godišnji odmor pre prestanka radnog odnosa.

Direktiva

Član 7. Direktive predviđa:

1. Države članice će preduzeti neophodne mere kako bi obezbedile da svaki radnik ima pravo na godišnji odmor u trajanju od najmanje četiri nedelje, u skladu sa uslovima za sticanje i vršenje tog prava propisanim odredbama nacionalnog zakonodavstva i/ili praksom;
2. Minimalni garantovani period godišnjeg odmora ne može se zameniti za naknadu, osim u slučaju prestanka radnog odnosa.

Presuda ESP

ESP je našao da se član 7. Direktive ne može tumačiti tako da dozvoljava gubitak prava na plaćeni godišnji odmor u slučaju smrti radnika. Sud je stoga zaključio da u slučaju kada do prestanka radnog odnosa dođe usled smrti zaposlenog, zaposleni ima pravo na naknadu za neiskorišćeni godišnji odmor. Sud je takođe našao da ova naknada pripada zaposlenom bez obzira na to da li je prethodno poslodavcu podneo zahtev za korišćenje godišnjeg odmora.

Pore?enje relevatnih odredbi EU prava i relevantnih odredbi srpskog zakonodavstva

Glavna razlika između odredbi srpskog Zakona o radu koje se odnose na godišnji odmor i Direktive je u tome što prema srpskom zakonu, prestanak radnog odnosa sam po sebi ne daje pravo zaposlenom na naknadu za neiskorišćeni godišnji odmor. Prema članu 71. Zakona o radu, poslodavac je u slučaju prestanka radnog odnosa dužan da zaposlenom izda potvrdu o broju iskorišćenih dana godišnjeg odmora. Ti dani se prenose kod narednog poslodavca. Druga specifičnost odredbi srpskog prava o godišnjem odmoru je u tome što se godišnji odmor mora iskoristiti do 30. juna naredne godine, a i to je moguće samo ako je zaposleni u godini na koju se odmor odnosi iskoristio najmanje tri od zakonom garantovane četiri nedelje godišnjeg odmora. Jedini izuzetak kada se odmor može prebaciti u narednu godinu i ako nije iskorišćeno najmanje tri nedelje u tekućoj godini je slučaj kada je zaposleni bio sprečen da iskoristi godišnji odmor zbog porodiljskog odsustva, odsustva sa rada radi nege deteta ili posebne nege deteta. Ukoliko dođe do prekida radnog odnosa koji je duži od 30 radnih dana, na pravo prenosa neiskorišćenog odmora kod novog poslodavca utiče pravilo da se godišnji odmor kod novog poslodavca ne može koristiti u prvih šest meseci rada.

Zaposleni ima pravo na novčanu naknadu za neiskorišćeni godišnji odmor samo ako godišnji odmor nije iskoristio zbog krivice poslodavca (član 76. Zakona o radu). U tom slučaju, zaposleni ima pravo na naknadu štete u visini njegove prosečne zarade u prethodna tri meseca (Zakon o radu ne definiše trenutak od koga se računa referentni tromesečni period), proporcionalno broju neiskorišćenih dana

odmora.

Na sudu je da oceni u svakom konkretnom slučaju da li postoji krivica poslodavca. Prema raspoloživoj sudskoj praksi, krivica poslodavca postoji ako ne odgovori ili bez obrazloženja odbije zahtev zaposlenog za korišćenje godišnjeg odmora. S druge strane, sudovi su našli da nema krivice poslodavca ako je zaposleni onemogućen da koristi svoj odmor jer je dobio skrivljeni otkaz ugovora o radu pre nego što je podneo zahtev za korišćenje godišnjeg odmora. Ministarstvo rada, čija mišljenja nisu obavezujuća ali mogu imati uticaj na sudove, smatra da nema krivice poslodavca u slučaju da zaposleni ne iskoristi godišnji odmor zbog bolovanja. Sa druge strane, prema Ministarstvu rada, postoji krivica poslodavca ukoliko zaposlenom ne omogući da iskoristi godišnji odmor pre nego što mu prestane radni odnos usled tehnološkog viška ili odlaska u penziju.

Dakle, prema Zakonu o radu zaposleni u slučaju prestanka radnog odnosa nema pravo na naknadu za neiskorišćeni godišnji odmor, osim ako je krivicom poslodavca bio sprečen da koristi odmor, u kom slučaju ima pravo na naknadu štete.

Ostaje pitanje da li je pravo na naknadu štete zbog nemogućnosti da se krivicom poslodavca iskoristi godišnji odmor nasledivo prema srpskom pravu. Odgovor zavisi od toga da li je naknada dosuđena. Ukoliko je naknada dosuđena konačnom sudskom presudom ili priznata u pisanom poravnanju, ona je nasliediva. Ukoliko pak potraživanje naknade štete nije priznato pravnosnažnom odlukom ili pisanim poravnanjem pre smrti zaposlenog, mogućnost nasleđivanja zavisi od pravne kvalifikacije štete. Ukoliko se naknada za sprečenost zaposlenog da koristi godišnji odmor krivicom poslodavca kvalifikuje kao naknada nematerijalne štete, potraživanje iste nije nasledivo. Ovo proizilazi iz člana 204. Zakona o obligacionim odnosima koji propisuje da potraživanje naknade nematerijalne štete prelazi na naslednika samo ako je priznato pravnosnažnom odlukom ili pismenim sporazumom. Po našem saznanju, još nema sudske prakse o pravnoj prirodi štete nastale usled sprečenosti zaposlenog da iskoristi godišnji odmor krivicom poslodavca.

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