BALTIC JOURNAL OF LAW & POLITICS
A Journal of Vytautas Magnus University
VOLUME 12, NUMBER 2 (2019)
ISSN 2029-0454

Cit.: *Baltic Journal of Law & Politics* 12:2 (2019): 78–96
https://content.sciendo.com/view/journals/bjlp/bjlp-overview.xml
DOI: 10.2478/bjlp-2019-0012

CONTENT AND IMPLEMENTATION OF THE RIGHT TO ANNUAL LEAVE: ANALYSIS BASED ON THE CASE STUDY OF LITHUANIA

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Received: May 25, 2019; reviews: 2; accepted: December 23, 2019.

ABSTRACT

Annual leave is granted to employees in order for them to rest and to regain efficiency at work. In accordance with Article 31 (2) of the Charter of Fundamental Rights of the European Union and Article 7 of the Directive 2003/88/EB of the European Parliament and of the Council regarding certain aspects of work time organization (Working Time Directive), employers must guarantee employees at least 4 [work] weeks of paid annual leave. Furthermore, Article 49 of

the Constitution of the Republic of Lithuania maintains that every employed individual has the right to paid annual leave. The question arises whether this type of constitutional right can be absolute and if, as a result, employees are able to exercise their discretion to decide for themselves how to use this right. Can employers decide to grant or refuse to grant leave based on their own discretion?

This article aims to address the content of the right to paid annual leave and its implementation details. In particular, it seeks to verify the extent to which an employee or an employer can affect the implementation of such a right.

KEYWORDS

Annual leave, right to paid leave, employee, transfer of leave, granting of leave, order of leave

INTRODUCTION

Paid annual leave is given to employees in order for them to rest and to regain efficiency at work. In accordance with Article 31(2) of the Charter of Fundamental Rights of the European Union[1] and Article 7 of 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 (Working Time Directive)[2], Member States must guarantee employees at least 4 weeks of paid annual leave. In addition to that, in Lithuania, an EU Member State, Article 49 of the Constitution of the Republic of Lithuania provides that every employed individual has the right to paid annual leave.

On 1 July 2017, the recast of the Labour Code (LC) of the Republic of Lithuania[3] came into effect and made substantial changes to the regulation of annual leave. First, leave is now calculated by work days rather than by calendar days. Earlier, when annual leave was calculated by calendar days, the factual amount of leave days depended on whether the particular employer allowed the employee to take leave in short periods (e.g. taking 5 days, not including the weekend, – the weekly rest, and thus saving annual leave days). With the new regulation, the number of actual leave days does not depend on flexibility of the employer, thus resulting in an equal situation for all employees. Second, under the LC the possibility to accumulate annual leave from earlier years is limited (under the previous regulation this was possible, thus some employees were not taking leave for several years and, in such a way, accumulating a considerable number of leave days). Third, an employee can no longer be called back to work while on leave, nor can the leave be postponed without a reason, both of which had been allowed until July 2017. This raises questions if such changes strengthened the rights of employees and whether the employer is now obliged to grant the employee the paid annual leave.

For more clarity, certain factual tendencies in Lithuania should be explained. First, there is a trend in Lithuania that employees do not take their leave in order to save it for a "rainy day" in hopes of receiving monetary compensation for unused leave in case of termination of employment. Second, a significant number of employers do not provide all the annual leave to which their employees are entitled.[4]

In this context, the question arises whether the constitutional right to annual leave should be seen as an absolute one and if, as a result, employees are entitled

[1] *Charter of Fundamental Rights of the European Union*, OJ C 326, 26.10.2012, p. 391–407.
[2] *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*, OJ L 299, 18.11.2003, p. 9–19.
[3] *Labour Code of the Republic of Lithuania*, TAR, 2016, no 23709.
[4] According to the Statistics Department under the Government of the Republic of Lithuania, the average number of days that an employee did not work due to annual leave in the sectors of industry, construction, and services was: in 2002 – 17.6 work days; 2006 – 14.3; 2010 – 15.9; and 2014 – 16.6 work days (Authors' note: with a five-day work week, annual leave comprises 20 work days).

to exercise their discretion to decide themselves how to use this right. One could also raise the question of whether employers maintain the discretion to grant or (in certain cases) to refuse annual leave. The implementation of such a right – an obligation to provide annual leave – entails costs for employers, who must pay for the period during which the employee does not work. This becomes especially costly when the employees on leave are difficult to replace. This raises the question whether the employee's entitlement to leave can be restricted for work organization and economic reasons. And also – if there was no opportunity to exercise the right to annual leave in a certain year – can this right be lost and how the right to annual leave would be implemented then.

This article aims to address these aforementioned questions. This article evaluates the effects of the Lithuanian Labour Code reform on those seeking to use paid annual leave as a guarantee ensuring safety and health at work.

This research was conducted using the methods that are typical for this type of research: systemic and document analysis, which is linguistic, logical and comparative. The analysis provided is important not only for a Lithuanian audience or those interested in the comparative perspective, but also for other EU Member State, because the paper analyses the provisions of the Working Time Directive from a perspective of a Member State's national law.

1. GRANTING OF LEAVE – AN EMPLOYEE'S RIGHT OR EMPLOYER'S OBLIGATION?

To start the analysis, we first consider universal international and European instruments that set standards for protection of the right to paid annual leave.

In the European Social Charter (as well as in its Revised version)[5], the right to just conditions of work is regulated in Article 2, while the right to safe and healthy working conditions is guaranteed in Article 3. The right of all workers to just conditions of work encompasses inter alia obligation to provide for a minimum two weeks (four weeks' according to Revised European Social Charter) annual holiday with pay (Article 2 (3)), to eliminate risks in inherently dangerous or unhealthy occupations, and where it has not yet been possible to eliminate or reduce sufficiently these risks, to provide for either a reduction of working hours or additional paid holiday for workers engaged in such occupations (Article 2 (4)). Even though the right to just conditions of work and right to safe and healthy working conditions are regulated in separate Articles, they cannot be treated as separate and unconnected rights. The Committee on Social Rights in its activity has pointed out the aim of the

[5] *European Social Charter (Revised)*, Strasbourg, 3.V.1996 // https://rm.coe.int/168007cf93.

Article 2 as regulation addressed to protect the health of workers[6]: Article 2 (4) ensures consistency with Articles 3 (right to safe and healthy working conditions) and 11 (right to protection of health).[7]

The documents adopted by the International Labour Organization (ILO) also encompass the legal instruments designed to fully enjoy the right to annual leave. The first instrument on holidays with pay adopted by the ILO was the Holidays with Pay Convention of 1936 (No. 52), which applied to workers in industry, commerce and offices and fixes the minimum duration of annual leave at six working days after one year of continuous service. The Convention of 1946 (No. 72), regulating right to annual leave of maritime workers, is also important. The subsequent Holidays with Pay (Agriculture) Convention of 1952 (No. 101) left the determination of the length of paid annual leave to national legislation. The Holidays with Pay Convention (Revised) of 1970 (No. 132), which revised Conventions No. 52 and No. 101, also regulates the right to paid annual leave. During the preparatory work for Convention No. 132, it was emphasized that the standards set out in Convention No. 52 were out of date and needed re-examination in light of the technological change and economic progress that had taken place over the years. Particular importance was placed on broadening the scope of application of the instrument to include agricultural workers and on extending the length of the minimum holiday to at least three weeks (ILO 2018, p. 193). In sum, it is important to note that subsequent ILO conventions (as well as recommendations) were widening the scope of the right to paid annual leave. This is clearly illustrated by the Convention No.132, which unfortunately was not ratified by Lithuania.

In the EU context, an important document in this context is the Charter of Fundamental Rights of the European Union[8], which since the entry of the force of the Treaty of Lisbon has the same legal status as the Treaties. Article 31 of the Charter guarantees every worker the right to limitation of maximum working hours, to daily and weekly rest periods and to an annual period of paid leave (Article 31(2)). In more detail the guarantee of right to paid annual leave is regulated in the Working Time Directive, which entitles every worker to maximum average working time and minimum four weeks paid annual leave, which cannot be replaced by an allowance in lieu, except where the employment relationship is terminated (Article 7). As noted in the doctrine, there has been a dynamic and productive engagement between Article 7 of the Directive and Article 31 (2) of the EU Charter, with the Charter giving

[6] Council of Europe, *Digest of the Case Law of the European Committee of Social Rights* (September 2008), 29.
[7] Council of Europe, *Digest of the Case Law of the European Committee of Social Rights* (December 2018), 68.
[8] *Charter of Fundamental Rights of the European Union*, *supra* note 1.

significant extra force to the proposition that the right to paid annual leave is a fundamental social right of special importance in EU law.[9]

According to settled case-law of the Court of Justice of the European Union (CJEU), the entitlement of every worker to paid annual leave must be regarded as a particularly important principle of the European Union's social law from which there can be no derogations and of which the implementation by the competent national authorities must be confined within the limits expressly laid down by Council Directive 93/104/EC of 23 November 1993 concerning certain aspects of the organisation of working time (OJ 1993 L 307, p. 18) itself, a directive now codified by Working Time Directive.[10] Leave is part of safe and healthy working conditions for employees. Like other rest periods (days, weeks), leave should also be granted over a certain period, i.e. work year.

In accordance with Lithuanian legal regulation, annual leave is granted 'the same work year' (Labour Code of 2003) and 'at least once per work year' (Labour Code of 2016, hereinafter – the LC). What is the difference between these two forms of wording? The former regulation was not comprehensive, as it did not oblige the employer to provide full-time annual leave so that employees could periodically rest every year and regain their energy for work. Under the former regulation, the employer had no right to dismiss employees' requests on the ground that he/she did not acquire the right to full annual leave (worked less than a year) (Article (169(1) of Labour Code of 2003). On the other hand, the Labour Code contained a rule that in the case of dismissal an employee only had the right to compensation for 3 years of unused annual leave. However, there was no obligation for the employee to use the right to annual leave. This created a problem for an employer who had no instruments to force employee to use annual leave (except one - the limitation of accumulation of unused annual leave in case of dismissal). The current regulation should be more flexible, as it provides that annual leave to the employee should be granted at least once per year, or it may spread across several times during the same year of work. The new regulation creates favourable conditions for the employer to more effectively organize and allocate tasks to the employees. But is that really the case?

The employer's obligation to create conditions for the realization of the employee's right to leave arises from the employee's constitutional right. The Constitutional Court of Lithuania ruled in its decision of 7 December 2007 that "the

[9] Claire Kilpatrick, "Article 21": 585; In: Hervey Peers and Ward Kenner, eds*., The EU Charter of Fundamental Rights. A commentary* (Beck-Nomos-Hart, 2014).
[10] See more: *KHS AG v Winfried Schulte*, Judgment of the Court of Justice of the European Union (2011, no C-214/10); *Concepción Maestre García v Centros Comerciales Carrefour SA*, Judgment of the Court of Justice of the European (2013, no C-194/12).

employee's right to paid annual leave is his constitutional right (Art 49(1) of the Constitution). Therefore, the essential conditions for the implementation of this right must be determined by law." The Constitutional Court has also noted that this law regarding the essential conditions for implementation arising from Article 49 of the Constitution must also establish a legal regulation that would ensure that employees have a real opportunity to exercise this constitutional right.[11] Consequently, the employee's right to annual leave should be implemented by providing in law for the employer's obligation to grant leave in such a way that employees could take leave during a prescribed period – a work year.

After analysing the provisions of the LC, it should be noted that the LC does not impose any obligation for the employee to take such leave, although this is regulated in other countries. For example, Article 7 of the German Leave Law provides not only for the possibility of granting leave, but also the requirement to take leave: "Leave must be authorised and taken in the course of the current calendar year."[12] Such provisions reinforce the implementation of the right to leave because they oblige both parties with responsibilities: for the employer to grant leave and for the employee to take advantage of leave. The question then arises whether the employee can voluntarily refuse this constitutional right and not take leave for at least one year. The answer to this question should be guided by the fact that leave is an employee's guaranteed constitutional right that the employer must fulfil, not only because it is a constitutionally guaranteed right but also because leave helps create safe and healthy work conditions for the employee. Moreover, leave is classified as a rest period, which again the employer must guarantee. The Supreme Court of Lithuania also confirmed this fact in one case where it stated that "work must be organized without violating the rights of employees, as well as the rights to annual rest, i.e. the work must be organized in such a way that every employee has a realistic opportunity to take advantage of the guarantees that the law provides, including the right to annual leave during the year for which the leave is granted and not later."[13]

The year of work for which annual leave is granted starts from the beginning of the employee's employment period according to the employment contract (in the former LC this was regulated in Art 170(2) and in the present LC – in Art 127(3)). The legislator sets out a different leave procedure for the first year of work. Before the labour law reform in Lithuania, leave for the first work year could normally be granted after six months of work. This provision according to the former LC protected

[11] *On remuneration of the mayor and its deputy and on their leave*, The Constitutional Court of Lithuania (2013, no 50/2010).
[12] *Bundesurlaubsgesetz (The Federal Law on leave) 1963, as amended on 2002 ["the BUrlG"]*, BGBl. 1963, p. 2.; BGBl. 2002 I, p. 1529, Paragraph 7.
[13] *AA v UAB "Lautra Motors"*, Supreme Court of the Republic of Lithuania (2008, no. 3K-3-437).

the employer so that an employee who had not worked even a few months could not take the entire period of annual leave and then terminate his/her employment, thus causing material damage to the company. On the other hand, planning leave for new employees in the remaining 6 months could have been complicated for both the employer and the employee. Because of that, the present LC regulates this process in a more flexible manner, ensuring that 'the entire duration of annual leave is granted only after working at least half of the days in a work year' (LC Art 128(2)). This regulation concerns the granting of the full leave and does not forbid the granting of a few days of leave before 6 months of work. In addition, the recast LC provides even clearer regulation, stating that 'the right to take part of annual leave appears when the worker becomes entitled to at least one day's leave' (LC Art 127(2)). That means that the employee may request leave before having first worked 6 months but does not have the right to demand it.[14] In this case, the employer can limit the duration of the leave, i.e., at the worker's request the employer can grant leave shorter than the minimal duration of annual leave described in LC Article 128.

Is the employer obliged to consider or can he ignore the employee's wishes regarding the exercise of the right to leave? Restrictions and prohibitions are possible only in accordance with the procedure established by the law, which means that only the law can establish these restrictions. For example, German law states that:

> In determining the time of leave consideration shall be given to a worker's wishes, save where consideration thereof is precluded on compelling operational grounds or by the wishes of other workers who deserve to be given priority for social reasons. Leave shall be granted when requested in connection with preventive or post-care medical treatment.[15]

In Lithuania, there are also cases in which the employer must take into account the demands of employees. These cases are: 1) pregnant employees before or after maternity leave; 2) fathers during their child's mother's pregnancy or maternity leave or before or after their paternity leave; 3) employees who are pursuing higher studies while working and must organize leave around exams, writing their theses, laboratory works and consultations; 4) employees taking care of ill or disabled family members and employees with chronic illnesses that worsen depending on the conditions of the atmosphere, with a recommendation from a health care institution (LC Art 128(5)). In other cases, both parties should agree.

It should also be noted that there is a duty to agree on the granting of leave. As the case law of Lithuanian courts reveals, the mere fact that the applicant has

[14] Tomas Davulis, *Comment on Labor Code of the Republic of Lithuania* (Vilnius: Centre of Registers, 2018), 398.
[15] *The BUrlG*, *supra* note 12, Paragraf 7.

applied for annual leave does not entitle him to be absent from work in the absence of an agreement with the employer.[16]

Special attention should be drawn to Article 128(5) and to its application together with Article 128(3) on annual leave schedule[17] of the LC, which requires additional action – structuring annual leave around special leave. The main goal of Article 128(3) is to establish the schedule of annual leave, which enables coordination of leave within the employing organisation, works as a tool to organize the work (to avoid situation when all employees want to have annual leave at the same time) and which serves as an instrument to force the employee to take the leave. However, in cases where the employer does not establish a leave schedule, or the employee requests to change it, the employer might be objecting the wishes of the employee. As ruled by the Supreme Court of Lithuania, in cases where the employer and the employee agree on a pre-arranged annual leave schedule and, in addition to that, in the organisation there is the common practice to formalise the leave on the basis of the request of the employee and the order of the employer, the latter procedure shall be construed as procedural formalisation of the acquired employee's entitlement to annual leave under pre-defined annual leave schedule. The absence of such formalities cannot deny the right of the employee to annual leave on the basis of a pre-established annual leave schedule.[18]

To summarize: the employer has a duty to provide the employee with the constitutional right to leave in accordance with the procedure and conditions provided for by law as a basis for safe and healthy working conditions, only in cases where the employee wishes to make use of this right. The current LC regulates the provision of annual leave more flexibly than its predecessor: a person can exercise his/her right to annual leave before 6 months of work, only the leave will be of shorter duration. However, this employee's right is not absolute because in certain situations the law provides for the obligation of both parties to coordinate annual leave with other special leave or other periods or to take into account the wishes of other persons who, for social reasons, are accorded priority.

[16] *V.A. v "Miesto šiluma"*, Kaunas district court (2017, no. e2A-1471-259).
[17] Article 128(3) provides: "3. Annual leave for the second and subsequent years of work are granted at any time during the working year according to the annual leave schedule at the workplace. This schedule is drawn up according to the procedure established in the collective agreement or an arrangement between the employer and the work council, or in other labour law provisions for the period from 1 June to 31 May of the following year, unless otherwise specified therein."
[18] *L.D. v UAB "Alzida"*, Supreme Court of the Republic of Lithuania (2017, no. e3k-3-405-1075).

2. PROCEDURE FOR GRANTING LEAVE

As noted by the Supreme Court of Lithuania:

> The requirement to come to an agreement regarding the implementation of the worker's right to annual leave is enshrined in the law in order to maximally reconcile the often conflicting interests of the parties; the employees may prioritize leave of desired duration, for example, in parts, and at a time convenient for them; the employer may seek to organize the work process so that an employees' leaves do not impair the effectiveness of the institution's operations.[19]

So how should the right to annual leave be implemented properly?

Pursuant to Article 128 of the LC, leave is granted "at any time of the work season according to the order or queue for granting leave in the specific workplace" or at an employee's request in the cases foreseen in Article 128(2) and Article 128(5) in the LC. The law also provides for a procedure for the formation of the "queue": it might be set in a collective agreement or an agreement between the work council and the employer, or in other provisions regulating the labour law, for the period from 1 June until 31 May of the following year, unless otherwise specified. Under the earlier regulation (before labour reform), if there was no collective agreement in the company the rules were more flexible, as the order of annual leave could have been determined by agreement of the parties. The current regulation (if there is no collective agreement in the company) allows for the establishment of the order of leave to be fixed by agreement between the work council and the employer. In order for that to occur, trade unions or work councils must be active. As confirmed by research conducted in the UK, the unions indeed have a substantial impact on paid holiday entitlement.[20] If they do not request the order to be set, the employer itself decides the order of leave, e.g. in the internal documents of the company.

The law also includes the right of preference when making such an order (LC Art 128(4)). Among those employees in the list with priority when determining the date and duration of leave, are employees who have taken less than 10 work days of leave in the previous calendar year and employees with unused annual leave days from the previous work year. Prior to the labour law reform, such employees had no guarantee of being able to choose leave time. With the present regulation, the legislator acknowledges that there may be cases where leave could not be taken in the same year.

[19] *AA v UAB "Lautra Motors"*, *supra* note 13; *R.K. v "Pico line"*, Kaunas district court (2018, no. e2A-1339-773).
[20] This paper also shows that the European Union Directive on Working Time may affect the holidays of about one and a quarter million workers. See more: Francis Green, "Union Recognition and Paid Holiday Entitlement," *BJIR* 35 (2) (1997) // DOI: 10.1111/1467-8543.00050.

Psychologists have found that the shorter the leave the shorter the duration of its effect on employees' health after returning to work.[21] Yet the Lithuanian law still allows leave for only a few days, except for certain exceptions, as long as at least one portion of leave is not shorter than 10 work days in a five-day week or 12 work days in the case of a six-day week or two working weeks in a flexible working schedule. Planning leave ahead of time may be difficult for both employees and employers, as unforeseen events may occur, e.g. an employee breaks his foot, becomes ill, goes on pregnancy and maternity leave when she had to go on annual leave or temporarily replaces other employees who are on leave. Nevertheless, as the CJEU indicates that the right to annual leave is given to the employee as time for rest and for leisure activities.[22] Therefore, should the aforementioned risks occur, the employer should be more flexible, since the obligation to provide annual paid leave remains.

The CJEU has also ruled that the EU law precludes national provisions or collective agreements that provide that a worker who is on sick leave during a period of annual leave scheduled in the annual leave planning schedule of the undertaking which employs him does not have the right, after his recovery, to take his annual leave at a time other than that originally scheduled, if necessarily outside the corresponding reference period.[23] An analogous situation also arises from parental leave, which becomes a justifiable reason for annual paid leave accumulated a year prior to the child's birth to be transferred to another time.[24] Therefore, in order for the employer to fulfil his obligation, there must be an established procedure for granting, extending, or for transferring annual paid leave. As noted by A. Bogg, the possibility of a carryover of leave entitlement into a subsequent leave year must be permitted by the legal framework to prevent the extinction of the workers's fundamental social right with is hers absolutely.[25]

Article 129 of the LC provides that annual leave that has been set is to be transferred when a person is temporarily unfit for work[26] or invokes the right to

[21] See more: Jessica de Blooma, Sabine A.E. Geurtsa, Toon W. Tarisa, Sabine Sonnentaga, Carolina de Weertha, and Michiel A.J. Kompiera, "Effects of vacation from work on health and well-being: Lots of fun, quickly gone," *An International Journal of Work, Health & Organisations* 24 (2) (2010) // DOI: 10.1080/02678373.2010.493385; Christine J. Syrek, Oliver Weigelt, Jana Kühnel, and Jessica de Bloom, "All I want for Christmas is recovery – changes in employee affective well-being before and after vacation," *An International Journal of Work, Health & Organisations* 32 (4) (2018) // DOI: 10.1080/02678373.2018.1427816.

[22] See more: *Vicente Pereda v. M. M. SA*, Court of Justice of the European Union (2009, no C-277/08; *Gerhard Schultz-Hoff v Deutsche Rentenversicherung Bund* and *Stringer and Others v Her Majesty's Revenue and Customs*, Court of Justice of the European Union (2006, no C-350/06 and C-520/06).

[23] *Vicente Pereda v. M. M. SA*, *supra* note 22.

[24] *Zentralbetriebsrat der Landeskrankenhäuser Tirols v. Land Tirol*, Court of Justice of the European Union, 2010, no C-486/08).

[25] Alan Bogg, "Article 31": 860; in: Hervey Peers and Ward Kenner, eds., *The EU Charter of Fundamental Rights. A commentary* (Beck-Nomos-Hart, 2014).

[26] Author's note: the employee may be unfit for work himself or because of taking care of an ill child or other person.

special leave (pregnancy and maternity, parental leave), or is granted compulsory unpaid leave (as described in LC Art. 137(1)). This article lists the justifiable reasons (events) due to which the annual leave may not be granted according to the established leave order. The question arises whether the employer could refuse the request of the employee to transfer the annual leave for other important reasons than those expressly listed in the Labour Code. In fact, it is allowed if the parties reach a consent. But what if the employer would not agree to such transfer? The Law on Occupational Safety and Health of the Republic of Lithuania (hereinafter - the Law)[27] provides for an obligation on the part of the employer to provide workers with safe and healthy working conditions, including the rules on working and rest time laid down by the LC.[28] But this is not enough, as the employer may grant part of the leave, claiming that the rest time was provided, although this would not be a full-fledged rest and would not be fully implementing in terms of the safety and health of workers.

The parties' agreement on an annual leave schedule has legal significance as well as legal consequences and is binding for both the employer and the employee. If such an agreement exists, the employee is entitled to annual leave on the basis of a pre-arranged leave schedule and the employer is obliged to provide the employee with the annual leave according to such a schedule.[29] When the leave order is confirmed, employees need not request leave unless they wish to change the time period of their leave.[30] The employee has the right to plan and to take leave in a different time period only upon approval from the employer.[31]

When the company has no pre-arranged annual leave schedule and has established a different order for leave, employees must formally request leave. For example, as in a case analysed by the Lithuanian courts, this could be done according to the internal rules of the company.[32]

The LC does not include a specific time limit, however, for how many days in advance before the requested leave the employee must express his intentions to his employer via a request for a leave (whether short notice is enough, or the opposite,

[27] *Law on Occupational Safety and Health of the Republic of Lithuania*, Official Gazette, 2003, no. 70-3170.
[28] *Ibid*., art. 25, sec 1 (8).
[29] *L.D. v UAB "Alzida"*, supra note 18.
[30] As ruled by the Supreme Court, the right to a pre-agreed annual leave entitles the employee to annual leave in accordance with the schedule and no additional employee request is required. See more: *ibid*.
[31] Tomas Davulis, *supra* note 14, 397.
[32] In one of the cases analysed by Lithuanian courts, Rules of Procedure of a certain company set specific details in this regard. In particular, the clause 2.9 of the Rules of Procedure for UAB Semitransa (a company in question) stated that "employees plan their annual leave period with the company's manager by submitting a written request no later than 30 calendar days prior to their intended leave. The court concluded that a 30-day deadline was necessary since that was the usual duration of a normal driver's mission including travel. Because of that, a driver must inform the manager in writing, before leaving on a mission, of his intent to take leave. Then the employer has time to reorganize other employees' missions" (*R. B. v. UAB "Semitransa",* Court of Vilnius Region, Chamber of Trakai (2016, No 2-964-983)).

that such a request should be submitted a fortnight or a month in advance). As the Supreme Court of Lithuania stated, the parties to the contract of employment may also agree on the deadline for lodging a request for a leave. What is important in such an agreement is that the true will of both parties be expressed. The parties' agreement may be expressed both by writing and by conduct, e.g. by the employee placing a request for leave only one day prior to its commencement and by the employer satisfying such a request. Such actions by the parties reveal their common will to derogate from the established rules.[33]

When analysing the case law it was noted that there is a considerable number of cases which arose from the fact that the employer did not react in a timely and proper manner when turning down the employees' leave requests.[34] This suggests that the right to annual leave would be better protected if the law would provide the precise deadline for submitting the requests for leave and for reacting to the requests for the leave. Such a rule exists for example in the UK, where under the regulations[35] the notice required is equivalent to twice the length of time of the holiday requested. The rule is also foreseen for the employer: the employer is allowed to turn down the leave request giving the notice the same amount of time of the holiday requested. For example, if a person asked for a week off (submitting a request two weeks before), the employer has to give at least a week's notice that that the employee' request has been denied.

Prior to the labour law reform in Lithuania, in addition to the indicated cases currently in force, rescheduling annual leave was also allowed with the employee's request or consent (former LC 2003, Art 173-174) without even indicating a reason. Practice has revealed, however, that in such a case the employee's "request" and "consent" was often a result of the employer's pressure to comply with his will, for example as a test of employee loyalty. In other cases, employees abused these provisions. Though there are no explicit rules in the new Labour Code, it seems that the employer and the employee still have the right to reach an agreement regarding the annual paid leave that has already been granted.

However, in compliance with the provision of Article 24 of the LC that states that in the exercise of their rights and in the performance of their duties, employers and employees must act honestly, cooperate, and not abuse the law, the procedures and conditions for the cancellation of leave may be regulated in the procedure for granting leave, e.g. in the collective agreement, an agreement between the employer and the work council, or another internal legal act of the institution. In an unforeseen

[33] *B.B. v. UAB "Keback Vilnius"*, Supreme Court of the Republic of Lithuania (2012, No 3K-7-149).
[34] E.g. *Decision of the Kaunas district court of 21 September 2017*, Civil case No. e2A-1471-259/2017.
[35] *The Employment Rights (Employment Particulars and Paid Annual Leave) (Amendment) Regulations*, 2018, No 1398 // http://www.legislation.gov.uk/uksi/2018/1378/contents/made.

individual case, the parties – both the employee and the employer – may request a derogation from a prior agreement or order, such as requesting a change in the date and duration, rescheduling or delaying, dividing, etc., but should do so in a fair manner and without discrimination towards other employees and ensure safety and health conditions at work. For example, as decided by the Supreme Court of Lithuania, the employer cannot refuse to grant the leave simply because the employee does not take it in the predetermined order; the employer must prove that the absence of the employee at that time would create serious consequences for the company. However, in this particular case where the employer refused to grant the employee leave, it was ruled that:

> [The employee's] absence from work should not be considered as an absence without valid reasons, since it was partly determined by the defendant's inappropriate behaviour in the failure to fulfil the obligation to provide the employee with leave <…> therefore, there was reason to claim that the employer was also partially to blame for the employee's behaviour.[36]

In other words, in exceptional cases of granting leave, both parties must act fairly and seek to reconcile their interests, as well as to ensure that the requirements linked to health and safety at work are taken into account.

The law establishes the following rules on how the annual leave should be rescheduled: (a) if the circumstances in question arose before the start of annual leave, the start of the leave shall be postponed, but until no later than the end of the granted leave period; (b) if these circumstances arose during the annual leave, the unused portion of the leave is granted at a different time agreed upon by the parties, but during the same work year. The innovation is the fact that the legislator more strictly establishes the principle of the transfer of leave and refuses the principle of automatic annual leave renewal.[37] In both cases, the obligation to provide rescheduled leave remains in the same work year.

According to the case-law of the CJEU, while the positive effect of paid annual leave for the safety and health of the worker is deployed fully if it is taken in the year prescribed for that purpose, namely the current year, the significance of that rest period in that regard remains if it is taken during a later period.[38] However, in Lithuania, the legislator provides for a more flexible case for the employer: at the request of the employee, the part of the annual leave that is extended may be transferred and added to the annual leave of the next work year (LC Art. 129(2)). In such a case, in the following work year, the order for annual leave shall be rearranged

[36] *AA v UAB "Lautra Motors"*, *supra* note 13.
[37] Tomas Davulis, *supra* note 14, 401.
[38] *Federatie Nederlandse Vakbeweging v. Staat der Nederlanden*, Court of Justice of the European Union (2006, no C-124/05), paragraph 30.

according to priority, i.e. in these cases the employee shall have the preference to choose his time of leave (LC Art. 128(4) and (5)). These norms are imperative, which means that the employer cannot by its actions directly restrict or otherwise limit the guarantees of the employees' entitlement to the said leave.[39] In order to ensure safe and healthy working conditions, the obligation to agree on paid annual leave remains with both parties. However, there are no guarantees that the employer would provide for a full annual leave.

3. OTHER PARTICULARITIES OF GRANTING ANNUAL LEAVE

One might also raise the question if the right to annual leave for a certain year disappears if such leave was not used due to other reasons not covered by the law or if other periods of leave were granted. An example could be other unpaid leave, sabbaticals, year-long internships, etc.

Under Lithuanian law the fact that, for example, annual leave may be extended or rescheduled only under circumstances provided in LC Article 129 does not mean that the leave may disappear. Other provisions in the LC elaborate on this. For example, Article 127(4) of the LC indicates which time periods are included in the year of employment for which an employee can earn annual paid leave, and this list is not exhaustive. Therefore, for example, a person who has received 12 months of sabbatical leave (Article 136 (1) of the LC) is unable to exercise the right to paid annual leave the same year. Even though the possibility to transfer paid annual leave is not foreseen in Article 129 (1) LC, such person will not lose the annual leave from that year and will instead take the leave at another time after returning from the sabbatical. However, the law also provides for a restriction on the exercise of such a right. Article 127(5-6) of LC provides that:

> 5. The right to take all or part of the annual leave (or to receive monetary compensation for it in the event specified in this Code) is lost three years after the end of the calendar year in which the right to full-time annual leave has been acquired, unless the worker actually could not use it.
> 6. The replacement of annual leave with monetary compensation is prohibited, except for the termination of an employment relationship where the employee is compensated for unused full-time annual or part thereof, with restrictions set forth in paragraph 5 of this article.

It should be noted that prior to the labour law reform, under former Article 177 of the LC compensation for unused vacation was paid in full if the employer's actions

[39] *R.K. v "Pico line"*, *supra* note 19.

were responsible for that situation, and for a maximum of 3 work years if the employee was actually able to take leave but did not.

Therefore, the reasons for which the employee was not actually able to take annual paid leave should be identified. And this should not be related to the grounds for the termination of the employment relationship. In the context of those grounds, the CJEU has found that the EU law precludes national legislation:

> Which deprives the worker, whose employment relationship was terminated following his request for retirement, of an allowance in lieu of paid annual leave not taken and who has not been able to use up his rights to paid annual leave before the end of that employment relationship, because he was prevented from working by sickness.[40]

In assessing the causes it is necessary to take into account what has led to such a situation – an employer's actions or an employee who, for example, simply did not take leave. In order to investigate the cases of abuse, Advocate-General Yves Bot addressed this question in his recent conclusion in case *Max-Planck-Gesellschaft zur Förderung der Wissenschaften eV v. Tetsuji Shimizu*. In his view, national provisions that provide that a worker loses the right to monetary compensation for unused paid annual leave after the termination of employment if that worker has not applied for this leave during the employment relationship, and that do not require to verify beforehand that the employer took necessary measures to ensure that during the employment relationship the employee had the realistic opportunity to exercise the right to paid annual leave, should be prohibited. If the employer provides evidence of having acted with due diligence, and, despite the measures taken, the employee, voluntarily and aware of the consequences, refused the right to exercise the right to paid annual leave even though he was able to do so during the employment relationship, this employee cannot claim monetary compensation for the unused paid annual leave after the termination of the employment relations on the basis of Article 7(2) of the Working Time Directive.[41]

The analysis of the case law of the CJEU allows the assumption that the provisions of the Lithuanian LC regarding the rescheduling and extension of unused annual paid leave should not be bound by a single norm and should be interpreted by taking into account a complex assessment of each situation individually. However, the provisions of the Working Time Directive do not restrict or provide exceptions for which the employer or law could limit the granting of unused paid annual leave. In assessing Lithuania's legal regulation and comparing it with the earlier one, it should

[40] *Hans Maschek v. Magistratsdirektion der Stadt Wien – Personalstelle Wiener Stadtwerke*, Court of Justice of the European Union (2016, no C-341/15).
[41] *Max-Planck-Gesellschaft zur Förderung der Wissenschaften eV v. Tetsuji Shimizu*, Court of Justice of the European Union (2018, no C-684/16) Opinion of AG Bot.

be observed that the laws have become more progressive, since more general provisions for flexibly adjusting and applying have been established, and these provisions allow abuse neither by the employer nor the employee.

CONCLUSIONS

In Lithuania the granting of the constitutional right to annual leave is ensured by setting certain obligations upon the employers in the Labour Code. In particular, taking into account the organisation of the work the employers establish a queue for the annual leave, the rules of changing/rescheduling annual leave, as well as the term to submit the requests for an annual leave. This is part of ensuring safe and healthy conditions at work. The parties' agreement on a pre-arranged annual leave schedule has legal significance as it has legal consequences and is binding for both the employer and the employee.

The Labour Code of the Republic of Lithuania regulates the provision of annual paid leave more flexibly than its predecessor – employees can exercise the right to leave without waiting for 6 months of work, but the duration of the leave may be limited. Leave may also be given for one day; however, this is not in line with the requirements of ensuring annual leave as part of ensuring safe and healthy conditions at work. In Lithuania there is no obligation for the employer to implement the right to paid full annul leave; there is only an employee's right that the employer can exercise at its own discretion.

The granting of the right to leave is not an employee's absolute right, since in some cases the law requires both parties to coordinate annual leave with other special leave or other periods or to take into account the wishes of other persons who are given preference for social reasons.

Unused leave resulting from the employer's actions or from other justified reasons must be granted through transfer or extension, otherwise the provisions of the Working Time Directive are not implemented. Employers will implement workers' right to annual leave (as a part of safe and healthy working conditions) more properly only if they will be fully aware of their duties. The right to annual paid leave would be better ensured if the law would provide for a deadline for submitting and rejecting applications for leave.

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