

The right of employees to paid leave

Practical example

Ms Zhao joined her employer in Beijing (hereinafter, "BFMC") on 26 December 2007. During her period of employment, BFMC never allowed her to take paid leave. Pursuant to Article 5 of the *Regulation of the People's Republic of China on employees' paid leave* (hereinafter the "Regulation"), if an employer does not allow an employee to take paid leave due to work-related constraints, the employer must pay the employee additional remuneration to compensate for the days of paid leave that have not been taken, corresponding to 300% of the daily wage of the employee. BFMC has, however, never paid this additional remuneration to Ms Zhao.

Pursuant to Articles 38-2 and 46 of the Law of the People's Republic of China on employment agreements (hereinafter, the "Law"), if an employer does not pay the remuneration of the employee in full and on time, the employee may terminate the employment agreement and demand financial compensation from the employer. Ms Zhao terminated her contract with BFMC on 30 January 2015 on the grounds of the aforementioned provisions.

In January 2015, Ms Zhao instigated arbitration proceedings against BFMC claiming:

- the payment of additional remuneration to compensate for her days of paid leave in respect of the years 2008 to 2014, in accordance with the provisions of Article 5 of the Regulation;
- the payment of financial compensation on the grounds of Articles 38-2 and 46 of the Law.

BFMC asserted that its internal work regulations provided that "paid leave expires on 31 December of the current year and are neither cumulable nor transferable to the following year." In reliance of this provision, BFMC rejected the monetary claims of Ms Zhao.

Judgment

- Concerning the additional remuneration due in compensation of paid leave: Article 5 of the Regulation provides that paid leave may be taken in one or several instalments during the year, or transferred to the following year. If the employer is not able to organise paid leave for his employees, he will in such case be obliged to pay additional remuneration to compensate for the days of paid leave that has not been taken. In the case of Ms Zhao, despite the special provisions of the internal work regulations, BFMC cannot therefore be discharged from its obligation to pay Ms Zhao the additional remuneration due *in lieu* of the paid leave which has not been taken.

Pursuant to Article 27 of the Law on mediation and arbitration of labour law disputes, the limitation period for instigating arbitration proceedings is one year, however there is no limitation period for actions for failure to pay remuneration. In the case of Ms Zhao, the additional remuneration due *in lieu* of paid leave must be considered to be a benefit granted to the employee and not as part of her remuneration. Consequently, the limitation period of one year applies and begins from 31 December of the year following the deadline by which paid leave must be taken. In the case of Ms Zhao, paid leave for 2012 could have been taken

until 31 December 2013, therefore the limitation period expires on 31 December 2014. Ms Zhao instigated the arbitration proceedings in January 2015, therefore her claims for the payment of additional remuneration for paid leave for the years prior to 2012 (including 2012) were time-barred and only claims relating to 2013 and 2014 were held admissible.

- Concerning financial compensation: Article 46 of the Law provides that an employer must pay the employee economic compensation where the employee had terminated the employment agreement on the grounds of Article 38 (in our case, paragraph 2 - failure to pay remuneration) of the aforesaid Law. However, Article 38-2 is not applicable in the case of Ms Zhao in so far as as mentioned above, the "additional remuneration" in respect of paid leave that has not been taken is considered to be a benefit and not remuneration. Ms Zhao's claim for financial compensation was therefore held to be non-admissible.

Analysis of the case

In practice, it is rare to see a dispute arising solely on the grounds of failure to pay paid leave, this claim often being in the alternative.

We can learn from this case that it would be better not to state in the internal work regulations that paid leave expires at the end of the year in which they should have been taken, but instead to provide that they may be carried forward to the following year until a specific date to be defined or until 31 December. If employees have not taken their paid leave within the time periods thereby specified, the employer will still be under an obligation to pay additional remuneration for the days of paid leave that have not been taken. As the employer will have already paid the monthly fixed remuneration, the additional remuneration corresponds to 200% of the daily remuneration of the employee.

Lastly, the courts consider that such additional remuneration is a benefit granted by the employer and, in this respect, is subject to the limitation period of one year. Consequently, the additional remuneration for paid leave due in respect of a given year Y becomes time-barred on 1st January of the Year Y+3 (e.g. the additional remuneration for paid leave for 2015 shall become time-barred on 1st January 2018).

Recommendations from DS AVOCATS

In addition to the key points set out above, we would draw your attention to the following points:

- The Regulations provide that employees who have worked continuously for more than one year are entitled to paid leave. The concept of "one year" refers to the overall seniority of the employee, including work time with their former employers. Consequently, stating in the internal work regulations that an employee is entitled to paid leave solely upon having worked for a full year for his current employer should be avoided.
- An employer is entitled to organise the paid leave of their employees in accordance with the effective production requirements and the workload while taking their respective preferences into account. It is therefore important to take the initiative to organise the paid leave of the employees. If the employees refuse to take leave, we recommend asking them to sign a written declaration of the voluntarily waiver of their right to paid leave on personal grounds. Once this declaration has been written, the employer shall be discharged from their obligation to pay additional remuneration.
- The following table sets out a summary of the rights to paid leave:

Cumulative Seniority of the Employee	Number of Days of Paid Leave
1 year \leq X < 10 years	5 days
10 year \leq X < 20 years	10 days
X \geq 20 years	15 days

If your paid leave policy is more favourable than that provided by law, we would advise you to distinguish between statutory paid leave and the additional days of paid leave granted by the firm in your internal work regulations, stating that for the latter, no additional remuneration shall be due if they are not taken by the deadline provided.

- Employees under a trial period and with employment seniority greater than one year are also entitled to benefit from paid leave. It is, however, possible to provide in the employment agreement/internal work regulations, that paid leave may only be taken once the trial period has been completed.
- In the event of the departure of an employee, if the number of days of paid leave that such employee has taken exceeds the number of days to which the employee is entitled, it shall not be possible to deduct any amount from the employee's remuneration.

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