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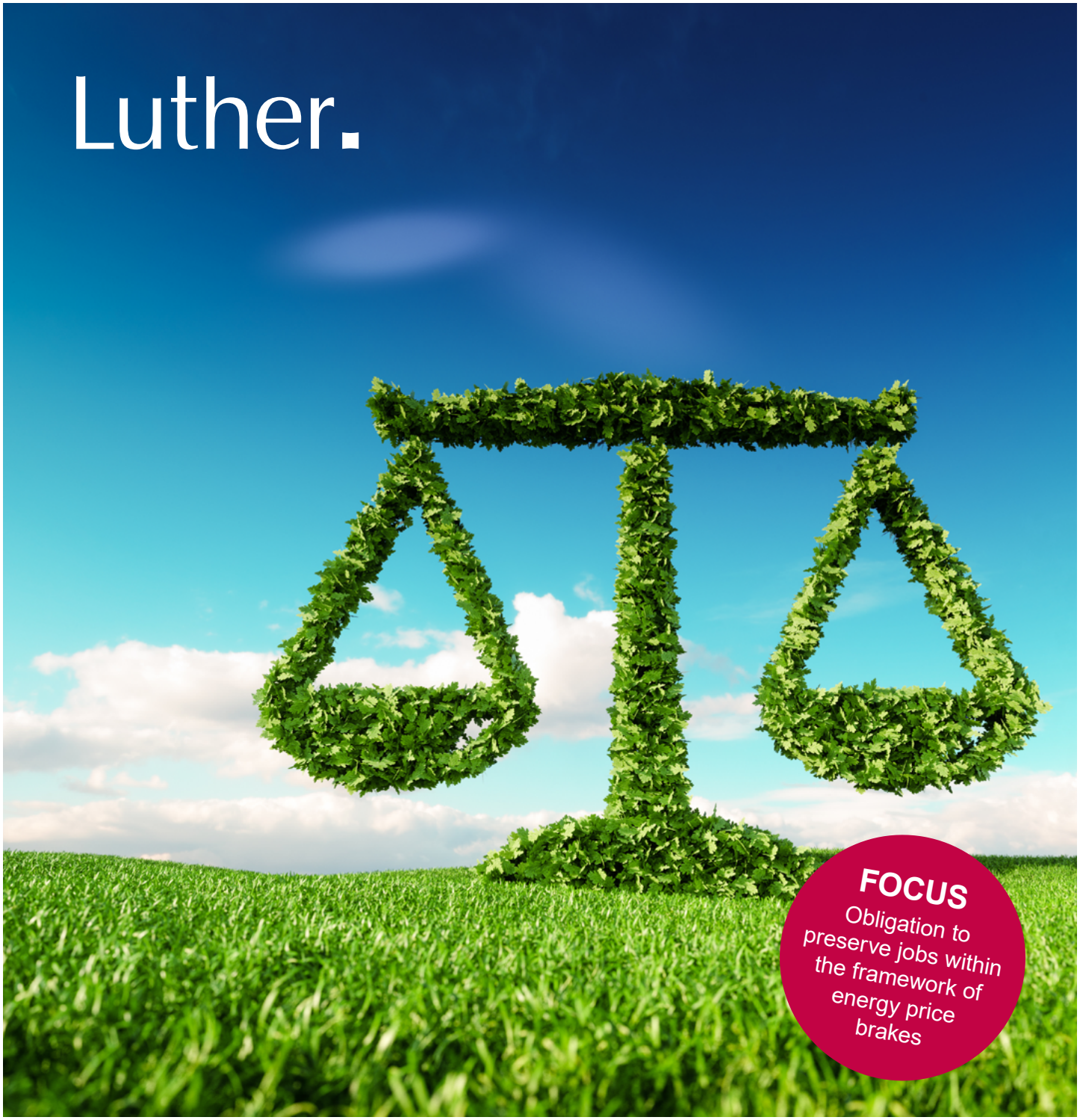

Labour & Employment Law Newsletter

Issue 1 2023

unyer GLOBAL ADVISORS

Content

Dear Readers,

We are pleased to present you with this newsletter, our first issue in the new year, and hope that the topics selected are of particular interest to you. We would like to take this opportunity to thank you for your active participation in our newsletter survey and for your feedback, which was of great help to us. We would be very grateful if we could continue to receive suggestions for topics and content that are relevant to you in practice.

In this issue, we start with the energy price brake. Dr Astrid Schnabel from our Hamburg office looks at the obligation to preserve jobs in the context of the energy price brake. The German government's energy cost containment programme, which was enacted at the end of 2022, provides for statutory regulations on price brakes for natural gas and heat and also includes relief for companies. In return, the relief granted provides, among other things, for an obligation to preserve jobs. Astrid Schnabel describes what this involves in her article.

Spring is finally upon us and we are looking forward to summer. Summer is the time to take your annual leave. It is also time to once again deal with the constantly evolving right to take leave. Caroline Risse and Paula Sophie Kurth from our Berlin office therefore deal in this issue with the forfeiture and limitation of leave entitlements and claims for payment in lieu of leave. At the end of 2022 and the beginning of 2023, the German Federal Labour Court issued several judgments on this issue, which also generated a great deal of media attention among consultants. Reason enough for us to take a closer look at this topic, which is relevant in practice.

Dr Annekatrin Veit, our expert in the field of occupational pensions, explains in her article the appropriateness of pension commitments for members of executive bodies of non-profit corporations.

Almost two years after the launch of unyer, an organisation for companies in the professional services sector, we are pleased to announce a new member: the Austrian law firm KWR joined our network this year. A total of 2,550 lawyers are now working for unyer at 16 locations. In this issue, we therefore once again report on current employment and labour law topics and developments from the unyer world. Caroline Ferté, partner at our French unyer network law firm Fidal, reports in her article on a recent judgment of the French Court of Cassation on the obligation to pay remuneration for travel time.

In addition to our main topics, this issue also provides you with the usual overview of current decisions of the labour courts, which we consider to be of particular relevance to HR work.

We hope you enjoy reading this issue.

Warmest regards,

Yours,

Achim Braner

Obligation to preserve jobs within the framework of energy price brakes

At the end of 2022, statutory regulations concerning price brakes for natural gas and heat, which also include relief for companies, were enacted under the Federal Government's so-called "energy cost containment programme". The new regulations include, inter alia, an obligation to preserve jobs as a condition for receiving this relief. This article deals with the related employment law issues.

I. Scope of the obligation to preserve jobs

The German Electricity Price Brake Act (*Strompreisbremsegesetz*, StromPBG) and the Natural Gas and Heat Price Brakes Act (*Erdgas-Wärme-Preisbremsengesetz*, EWPBG) were passed in December 2022 as part of the energy cost containment programme (*Energiekostendämpfungsprogramm*, EKDP), which – in addition to relief for households – also provide relief for companies upon application. Since the financial relief for companies is intended to contribute to the stability and preservation of jobs in these challenging times, additional requirements are placed on companies at various funding levels in addition to the funding requirements outlined below. These include the so-called obligation to preserve jobs (Section 37 StromPBG and Section 29 EWPBG) and a prohibition of the distribution of bonuses and dividends, which also includes a prohibition of certain increases in remuneration (Section 37a StromPBG and Section 29a EWPBG). Essentially, the laws contain identical requirements in this respect, even if the wording of the laws sometimes differs. Under the term "obligation to preserve jobs" relief in amounts in excess of EUR 2 million is only granted under the condition that the company has "made arrangements in the form of a collective bargaining agreement or works agreement to safeguard employment for the period up to at least 30 April 2025."

II. Entity subject to the obligation to preserve jobs

The obligation to preserve jobs refers to the (applicant) company. This follows from the wording of the law and is explicitly clarified in the explanatory memorandum: "In the case of affiliated companies, the obligation applies in each case to the individual companies" (Bundestag Printed Paper 20/4683, p. 92). This is worth mentioning insofar as both energy price brake acts are based on a group approach, e.g. when determining maximum funding limits.

III. Priority of a collective bargaining agreement and works agreement

The energy price brake acts are based on the assumption that safeguarding employment through collective bargaining agreements and works agreements has priority. This is based on the assumption that "it is precisely the parties to the collective bargaining and works agreements that have the competence and the constitutionally guaranteed right to conclude agreements concerning the exclusion of redundancies for operational reasons" (Bundestag Printed Paper 20/4683, p. 92). The general statutory provisions apply to the completion and conclusion of such agreements. If a collective bargaining agreement or works agreement cannot be concluded, e.g. because an agreement cannot be reached or a works council has not been formed, companies may use the voluntary self-commitment, which is, however, subject to stricter requirements. This voluntary self-commitment must include an undertaking to maintain a workforce until at least 30 April 2025 that is equivalent to at least 90% of the full-time equivalent jobs in existence on 1 January 2023. An explanation must also be provided as to why a collective bargaining agreement, or a works agreement has not been concluded.

IV. Requirements regarding safeguarding employment

The priority of collective bargaining agreements and works agreements was recognised as giving the parties concerned broad scope for negotiating and concluding such agreements. The requirement that the company undertakes to maintain a workforce of 90% of full-time equivalents and must implement this in principle applies exclusively to the voluntary self-commitment. There is no mandatory requirement to include the 90% threshold in a collective bargaining agreement or works agreement, nor is compliance monitored by the authorities. Whether the requirements of the collective bargaining agreement or the works agreement are met is subject exclusively to the control of the parties involved. The consequences of any breaches are also to be regulated by the parties involved or, if applicable, result from the law. For example, the works council has a right to implementation under a works agreement. However, from a practical point of view, it is doubtful whether commitments that are significantly below the 90% threshold will be accepted when a collective bargaining agreement or works agreement is negotiated.

V. Competence under works constitution law

The question arises from a works constitution law perspective as to where the competence for concluding a job preservation works agreement lies. In principle, the local responsibility of the works councils applies under works constitution law. The central works council (*Gesamtbetriebsrat*), on the other hand, is competent to deal with matters affecting the company as a whole or two or more establishments, which the individual works councils are unable to settle within their establishments (Section 50 (1) of the Works Constitution Act (*Betriebsverfassungsgesetz*, BetrVG)). In view of the fact that the obligation to preserve jobs is at the company level, we believe that this falls within the competence of the central works council. Local works councils cannot enter into any arrangements beyond their local competence. Moreover, negotiations at the company level in which various local bodies are also involved would lead to competition, which in practice is likely to result in such negotiations having little prospect of success. This, in turn, would encourage the use of the option of a voluntary self-commitment, which, however, the law considers to be of secondary significance.

If, contrary to the law, a central works council has not been formed, the employer does not have a competent negotiating partner. The only option in this case is a voluntary self-commitment. The "substitute competence" of one or more local works councils also lacks a legal basis in these cases. The view that - where there is only one works council in a company with several establishments capable of having a works council and a central works council cannot therefore be formed – the sole works council existing within the company has to be involved also has no basis in law.

VI. Self-commitment and unresolved issues

If a company has to fall back onto a self-commitment, the procedure consists of two stages. While the declaration of voluntary self-commitment must be submitted by 15 July 2023 at the latest, proof of actual compliance with the self-commitment must be provided after 30 April 2025. The date by which such proof is to be provided is not governed by law, but, according to the explanatory memorandum, it should be provided "within a reasonable period of time after 30 April 2025, but no later than 31 December 2025."

Legal ambiguities arise from the substantive criteria of the self-commitment. Although the company undertakes to main-

tain at least 90% of the full-time equivalents, what constitutes a full-time equivalent in this context, however, remains open. There is much to suggest that the definition of a full-time equivalent as used by the company must be applied. The Confederation of German Employers' Associations (*Bundesvereinigung der Deutschen Arbeitgeberverbände*, BDA) issued a statement pointing out that there is no legal definition, but refers to the calculation used by Eurostat, i.e. the European official statistics. It is also unclear what effect a change in the company's regular weekly working hours in the reference period may have.

Questions also remain concerning the definition of the terms "employee" or "workforce". According to the explanatory memorandum, the term "workforce" is to be interpreted broadly, so that temporary agency workers that are regularly used are also included. Questions raised by companies, on the other hand, relate to how to deal with employees on parental leave, long-term sick leave, trainees, or how to deal with vacancies following resignations or dismissals for reasons of conduct or personal reasons, especially when vacancies cannot be filled despite efforts due to the shortage of skilled workers. While it can be assumed that employees on parental leave and long-term sick leave are included because the job continues to exist, there is a risk that vacant positions are not considered to be "preserved" even if they are included, for example, in the human resources planning. However, should this be the case, recovery of the relief granted due to non-compliance with the obligation to preserve jobs could be dispensed with for discretionary reasons. Documentation must be carefully prepared in any event if dismissals occur during the reference period.

VII. Consequences of an infringement

While the law does not provide for any provisions in the event of an infringement of a works agreement or collective bargaining agreement, falling below the 90% threshold can or will lead to a partial recovery of the relief granted that exceeds the basic amount of EUR 2 million. While the recovery decision is discretionary, the acts or explanatory memoranda contain guidance on how such discretion is to be exercised. Depending on the extent of the shortfall, 20-60% of the relief granted in excess of EUR 2 million is to be repaid. In the event of a shortfall of more than 50%, the total amount paid in excess of EUR 2 million is to be repaid.

If a company ceases business operations completely or transfers them abroad, this also triggers a recovery. This is directly set out in the act in the case of the StromPBG; the EWPBG does not contain such a provision, although the explanatory memorandum refers to it. A failure to meet the obligation to preserve jobs can be compensated by investments that – as the common denominator – justify the assumption that the company will preserve jobs in the future. This includes investments, for example, in transformation, energy security or environmental protection. However, there are specific requirements regarding the investment ratio and amount.

VIII. Job preservation in the event of the sale of a company

Transformations and transfers of operations that result in the applicant company as a legal entity having no or fewer employees can be taken into account under the recovery provisions. In this case, an assessment is made as to how many jobs have been preserved by the current employer. While this may be more transparent to the (original) applicant company within the group, such information is difficult to access for the applicant company in the event of a sale to a third party. In this respect, the right to information vis-a-vis the transferee should probably also be reserved for such transfer processes. How to deal with staff reduction measures at the transferee that result in recovery claims arising against the seller, in particular with regard to any claims for damages or liability provisions, is just another issue in this context.

IX. Conclusion

The energy price brakes provide relief for companies in economically challenging times. The associated obligation to preserve jobs requires a very precise review of whether and how much relief is claimed. The purpose behind the obligation to preserve jobs is understandable. However, it would be necessary for the purposes of carrying out a reliable review for the requirements to be (more) clearly defined.

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News from the Federal Labour Court regarding the forfeiture and limitation of leave entitlements and claims for allowance in lieu of leave

Several judgments regarding the forfeiture and limitation of leave entitlements and claims for allowance in lieu of leave, including those relating to employees on long-term sick leave, that attracted media coverage, were handed down by the Federal Labour Court at the end of 2022 and beginning of 2023. In this context, press reports often spoke of employers now being threatened with "waves of lawsuits" regarding the granting and payment of leave. What exactly has changed as a result of the Federal Labour Court's current case law and whether employers are actually exposed to an increased risk of litigation and how they can counter this is examined below.

I. No forfeiture of leave where the employer fails to cooperate

Since 2018, employers have already had a strict obligation to cooperate with regard to when their employees take their leave. Employers have been required since then to give their employees adequate and timely notice during the calendar year to enable them to take their leave. Only if they have done so, and an employee has nevertheless voluntarily not taken the leave, may the employee's statutory entitlement to leave be forfeited at the end of the calendar year or any permitted carryover period. These principles were developed in the landmark judgment of the Court of Justice of the European Union (CJEU), which for the first time imposed such an obligation to cooperate on employers as a mandatory condition for the forfeiture of leave (CJEU, judgment of 6 November 2018 - C-684/16 [Max-Planck-Gesellschaft zur Förderung der Wissenschaften e.V.]).

However, the CJEU's decision in 2018 did not comment on whether these requirements regarding the obligation to cooperate also apply to employees who are on long-term sick leave. In the past, the Federal Labour Court had consistently ruled that the statutory entitlement to leave was forfeited with-

out the need for further action to be taken at the end of March 31 of the second following year, i.e., after a 15-month expiry period (see, for example, Federal Labour Court, judgment of 7 August 2012 - 9 AZR 353/10; Federal Labour Court, judgment of 11 June 2013 - 9 AZR 855/11).

The Federal Labour Court dispelled this uncertainty at the end of December last year in conformity with the judgment of the CJEU in the cases referred to it for a preliminary ruling (CJEU, judgment of 22 September 2022 - joined cases C-518/20 [Fraport AG Frankfurt Airport Services Worldwide] and C-727/20 [St. Vincenz-Krankenhaus GmbH]). The Federal Labour Court stated that in the case of a continued incapacity to work or long-term sickness a distinction must be made based on the time of the onset of the illness: If an employee has been prevented from taking leave for health reasons from the beginning of the leave year until 31 March of the second following year, the leave entitlement may be forfeited upon expiry of the 15-month period even if the employer has failed to cooperate. This is because, in this case, even notification by the employer could not have helped the employee to take the leave. If, on the other hand, an employee only falls ill during the course of the calendar year and the employer has failed to provide the necessary notification regarding the leave entitlement by this point in time, the leave entitlement cannot be forfeited (Federal Labour Court, judgment of 20 December 2022 - 9 AZR 245/19). In this case, notification from the employer could still have led to the taking of leave, at least until the illness. In summary, it has now been clear since the judgment of 20 December 2022 that forfeiture of the leave entitlement without the employer's involvement is now possible even less frequently, namely only in the case of an employee's continuous incapacity to work for at least 15 months since the beginning of the leave year.

II. Statute of limitation concerning leave only applies if the obligation to cooperate is met

In a further decision of the Federal Labour Court of 20 December 2022, the court also consistently continued its case law regarding the time-barring of leave entitlements: The court clarified that leave entitlements not only do not expire if the employer fails to comply with its obligation to cooperate, but also do not become time-barred (Federal Labour Court, judgment of 20 December 2022 - 9 AZR 266/20; CJEU, judgment of 22 September 2022 - C-120/21 [LB - allowance in lieu of days of paid annual leave not taken]). Until then, employers still had the statute of limitations as a defence as a last resort to address the problem of unexpired leave. Although the rules on limitation periods (Section 214 (1), Section 194 (1), and Section 199 (1) of the German Civil Code (Bürgerliches Gesetzbuch, BGB)) apply in principle to the statutory minimum leave, the regular limitation period, if interpreted in accordance with the directive, does not start to run until the end of the year in which the employer complies with its obligation to cooperate and the employee has nevertheless not taken the leave of his/her own accord. From now on, the limitation defence is therefore also linked to meeting the obligation to cooperate.

III. Exclusion and limitation of claims for allowance in lieu of leave

A claim for an allowance in lieu of leave, which is a purely financial entitlement, is to be strictly separated from the leave entitlement and only arises upon the legal termination of the employment relationship. In its decisions from the end of December 2022 the Federal Labour Court did not answer the question as to what extent do the above-mentioned decisions of 20 December 2022 regarding the leave entitlement affect the claim for allowance in lieu of leave. However, in two more recent judgments of 31 January 2023, the Federal Labour Court has now also commented on this: The court made it clear that, even if the employer fails to notify the employee, a claim for allowance in lieu of leave – in contrast to the leave entitlement – begins to become statute-barred immediately upon legal termination of the employment relationship and may continue to be subject to (collectively agreed) exclusion periods (Federal Labour Court, judgments dated 31 January 2023 - 9 AZR 456/20, 9 AZR 244/20).

This is easy to understand given the different legal nature of the leave entitlement existing during the employment relationship and the claim for allowance in lieu of leave that only arises thereafter. The Federal Labour Court stated that, in contrast to the leave entitlement, the purpose of the claim for allowance in lieu of leave is not to release employees from their work obligations for recreational purposes, but solely to compensate them financially. The structurally weaker position of an employee, from which the CJEU derives the need for protection of an employee regarding the taking of leave, ends with the termination of the employment relationship; meeting the obligation to cooperate is then not (or no longer) relevant.

IV. Practical advice

According to the Federal Labour Court's current case law, both the forfeiture and limitation of leave entitlements are still possible as long as employers meet their obligation to cooperate. Employers are therefore advised now more urgently than ever before to comply with this obligation in accordance with the Federal Labour Court's requirements. To this end, they should

- notify their employees in text form at the beginning of the calendar year of the number of leave days to which they are entitled;
- request their employees to apply for annual leave in time for it to be taken within the current leave year; and
- notify their employees of the consequences of not applying for leave in accordance with the request.

In order for the leave entitlements of employees who have gone on long-term sick leave during the year to be also forfeited after the 15-month period, employers are recommended to send the (first) notification as early as possible in the calendar year, i.e. not only in the third quarter of a year, as has been the usual practice up to now. Notification can be given by letter or also digitally, e.g. by e-mail. The immediate supervisor should also regularly remind his/her direct reports to apply for and take leave during the calendar year.

The employers bear the burden of production and proof that their obligation to cooperate has been met. They should therefore bear in mind that the sending of an e-mail alone does not prove nor does this constitute prima facie evidence of its receipt within the meaning of Section 130 BGB (Berlin-Brandenburg Higher Labour Court, judgment of 24 August 2018 - 2 Sa 403/18). When sending such e-mails therefore a read or receipt confirmation function should be enabled or employees should be asked for a (digital) confirmation of receipt to ensure that such e-mails constitute prima facie evidence at least.

V. Conclusion

The relatively great media excitement surrounding the new Federal Labour Court case law can be dampened down considerably upon closer examination. Employers need not fear "waves" of lawsuits over unforfeited or unexpired leave: if they meet their obligation to cooperate, the leave entitlement can continue to be subject to forfeiture and limitation without restriction; according to the Federal Labour Court, exclusion and limitation periods continue to apply to claims for allowance in lieu of leave as they are purely monetary claims anyway. In the future, the key point of dispute in connection with leave entitlements and claims for allowance in lieu of leave will probably be the correct fulfilment of the obligation to cooperate.

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Appropriateness of pension commitments for members of executive bodies of non-profit corporations

Companies are generally free to determine the amount of remuneration paid to their employees, managers and members of executive bodies. However, in some cases, certain limits regarding the amount of remuneration must be complied with. Non-profit corporations are required by law not to provide a benefit for any person by disproportionately high remuneration (Section 55 (1) no. 3 of the Fiscal Code (*Abgabenordnung*, AO).

The principles governing the hidden distribution of profits can be applied to the question of when remuneration is disproportionate. If excessive remuneration in turn constitutes a hidden distribution of profits is determined by means of an internal or external arm's length comparison. The total remuneration of the managing director is always taken into account, which includes not only salaries and special payments, but also pension commitments (Federal Fiscal Court judgment of 12 March 2020 - V R 5/17). For this purpose, pension commitments are to be valued at the so-called notional net annual premium, i.e. the annual premium that would have to be paid for an insurance policy with comparable benefits.

There are no fixed rules regarding the appropriateness of remuneration; salary structure studies (e.g. the so-called BBE study or the so-called Kienbaum study) may be used under certain circumstances. A "deduction" for members of executive bodies of non-profit organisations does not have to be made in the appropriateness test. The remuneration may be equivalent to the salaries for comparable activities at companies that do not have a tax-privileged status. Remuneration that exceeds the upper end of the appropriateness range by more than 20% jeopardises the non-profit status (Federal Fiscal Court, judgment of 12 March 12 2020 - V R 5/17).

If non-profit corporations do not comply with this appropriateness requirement, the potential consequences are manifold: They range from the loss of the non-profit status with all its tax and economic consequences, to civil liability claims against the persons involved, to the commission of the criminal offence of embezzlement.

For this reason, it is advisable to have the appropriateness of a pension commitment reviewed before granting it to members of the executive bodies of non-profit corporations. Pension commitments already granted should also be reviewed on the basis of internal and external circumstances, an actuarial valuation of the pension commitment as well as relevant reference values and remuneration studies.

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■ COMMENTS ON JUDGMENTS

Legitimate expectations regarding contractual limitation periods are not protected in the absence of an exception for liability claims

Limitation periods in contracts that do not expressly exclude liability claims for an intentional act from their scope of application are void due to an infringement of Section 202 (1) of the German Civil Code (*Bürgerliches Gesetzbuch*, BGB). The legitimate expectations of those using the clause are not protected.

Federal Labour Court, judgment of 5 July 2022 – 9 AZR 341/21

The case

The claimant was employed by the defendant as an office assistant administrator from the beginning of 2012 until the end of August 2017. Her employment contract contained a clause, under which all mutual claims arising from the employment relationship and those related to it expire if they are not asserted in writing within three months of their due date. If the opposing party rejects the claim or does not submit its argument within two weeks, the claim shall expire if it is not asserted in court within a further three months. The claimant took parental leave in the period from 4 April 2013 to 17 August 2017 interrupted only by short breaks. She terminated the employment relationship on 31 August 2017 and requested the defendant at the end of October 2017 to compensate her for 14 days of remaining leave from 2013 and 2014. In an action served on 1 February 2018 she also demanded compensation for a further 130 days of leave from the years 2013 to 2017, which the defendant rejected with reference to the exclusion clause. The Labour Court granted the claim with regard to seven days of vacation, the Higher Labour Court rejected the claimant's appeal.

The decision

The 9th Senate of the Federal Labour court upheld the claimant's appeal on points of law and granted her a claim for compensation for a further 116 days of leave. The previous assumption of the Higher Labour Court that the claim had expired due to the contractual limitation periods did not stand up

to judicial review by the appeal court, as the clause was void pursuant to Section 134 BGB due to an infringement of the statutory prohibition of alleviating liability for an intentional act in advance by a legal transaction (Section 202 (1) BGB). The provision is broad in scope and therefore also applies to claims for intentional breach of contract and intentional tort. However, the clause is invalid because it did not exclude liability for an intentional act, contrary to Section 202 (1) BGB. It cannot be applied either in whole or in part even if the special features applicable under employment law (Section 310 (4) sentence 2 BGB) are taken into account. Protection of the legitimate expectations of the employer as the user of the clause does also not come into question. The case law of the 8th Senate from 2013, which had still applied a restrictive interpretation, is no longer being applied. The 9th Senate of the Federal Labour Court also decided with regard to the claim for allowance in lieu of leave that the claim also existed in the amount stated, since the timing of leave set out in Section 7 (3) of the Federal Leave Act (*Bundesurlaubsgesetz*, BUrlG) did not apply during parental leave and the defendant had neither explicitly nor implicitly stated that the leave would be reduced in accordance with Section 17 (1) of the Federal Parental Allowance and Parental Leave Act (*Gesetz zum Elterngeld und zur Elternzeit*, BEEG) before the end of the employment relationship.

Our comment

Until a few years ago, the 8th Senate still assumed that an explicit exclusion of liability for an intentional act in contractual limitation periods is not necessary because, due to the clear legal situation, it can be generally assumed that the contracting parties do not want to govern cases differently from the law and in breach of statutory prohibitions. Clauses, which only violate the law in exceptional cases and which the contracting parties did not consider to be in need of regulation at the time the contract was concluded should therefore be effective (most recently Federal Labour Court, judgment of 20 June 2013 - 8 AZR 280/12). However, the 9th Senate of the Federal Labour Court now confirms the Court's more recent change in case law on the required exclusion of liability claims for an intentional act from forfeiture clauses. According to this new case law, exclusion clauses that also cover claims due to an intentional breach of contract or intentional tort are void as they infringe Section 202 (1) BGB (and Section 276 (3) BGB) (Federal Labour Court, judgment of 26 November 2020 - 8 AZR 58/20; judgment of 9 March 2021 - 9 AZR 323/20). In the present decision, the 9th Senate even provides instructions in para 28 on how to formulate the addition to the clause required under Section 202 (1) BGB:

"[...] all mutual claims except those arising from an intentional act[...]" or "This provision does not cover claims of the parties arising from an intentional act."

However, the decision warrants some criticism with regard to the protection of legitimate expectations: clauses included in contracts must be subject to the protection of legitimate expectations until there is a definitive change in case law. The fact that a legal opinion of the Federal Labour Court is criticised or evaluated differently by courts of instance and in the literature does not change its binding nature. General terms and conditions can only be based on the Federal Labour Court's (current) case law prevailing at the time they war drawn up, which is why changes in case law may only have a retroactive effect in exceptional cases. The Federal Labour Court, for example, also recently assumed that contractual limitation periods are partially invalid, if these do not exclude the entitlement to the statutory minimum wage and therefore are in violation of Section 3 sentence 1 of the Act Regulating a Minimum Wage (*Mindestlohngesetz*, MiLoG), but were agreed before the MiLoG came into force (Federal Labour Court, 18 September 2018 - 9 AZR 162/18). In this case, a change in the legal situation alone should not subsequently lead to the (overall) invalidity of a contractual limitation period. The same must apply to forfeiture clauses that were concluded at least prior to the 8th Senate's judgment of 26 November 2020, as its previous case law was only given up explicitly in that judgment. Even if a "lawful" arrangement could have been made beforehand on the basis of Sections 202 (1), 276 (3) BGB, the Federal Labour Court's case law and its interpretation, which was still restrictive at that time, is ultimately the relevant criterion for the legal situation in practice.

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Temporary employment in a joint establishment - need for uniform co-determination content

If there are arbitrarily several works councils in a joint establishment, which are only responsible for the employees of "their" employer, this militates against the characteristics of a joint establishment; where one participating company makes employees available to another, this constitutes temporary employment within the meaning of the German Temporary Employment Act (*Arbeitnehmerüberlassungsgesetz*, AÜG).

Federal Labour Court, judgment of 24 May 2022 – 9 AZR 337/21

The case

Since 2004, the claimant had been employed by the defendant employer, which is a commercial temporary employment agency. Its parent company operates an airport, to which the claimant has been assigned as a temporary employee since the beginning of his employment relationship. In the summer of 2017, the employer, the parent company and a third-party company entered into an agreement to establish a joint establishment [*Gemeinschaftsbetrieb*] for which they provided uniform personnel management. A joint works council was not to be established based on a collective agreement, but the employees were to be represented by the respective works council at their contractual employer. Because the parent company pays higher wages under the collective agreement for the public sector (*Tarifvertrag für den Öffentlichen Dienst*, TVöD), the claimant later requested that his work performance be remunerated by the employer accordingly, with retrospective effect to 1 January 2018. He claimed that an employment relationship had been established with the parent company pursuant to Section 10 (1) sentence 1, 1st half sentence AÜG in conjunction with Section 1 (1b) AÜG, since he had been permanently assigned to it and, de facto, a joint establishment did not even exist. The labour court and higher labour court dismissed the action.

The decision

The Federal Labour Court upheld the claimant's appeal on points of law, but referred the case back to the lower court. Although there is no temporary employment by a third party if the contractual employer maintains a joint establishment with the third party and also pursues its own business purposes therein, the Federal Labour Court did not consider all material aspects regarding the question of whether a joint establishment actually exists in this case. The splitting of operational co-determination between collective agreements raises doubts as to whether the employer function is actually exercised uniformly; in this context, the arbitrary creation of two works councils could have a considerable impact on personnel management, in particular because different operational regulations concerning social matters may arise under Section 87 (1) of the Works Constitution Act (*Betriebsverfassungsgesetz*, BetrVG). Uniformity is only to be assumed if these regulations are largely in conformity with or are at least coordinated with each other – this must be clarified accordingly by the higher labour court.

Our comment

In addition to the joint intention to manage the business, the fundamental condition for the existence of a joint establishment is that the participating employers pursue the same business purpose and there exists a uniform power of personnel management (see only Federal Labour Court, decision of 16 April 2008 - 7 ABR 4/07). According to the Federal Labour Court, the existence of several works councils does not necessarily preclude the assumption of a joint establishment. Nevertheless, in the view of the 9th Senate, there are strong indications here that the employees employed in the operation are subject to uniform management only in formal terms, but are in fact managed separately by the personnel departments of the contractual employers, if several works councils are each expressly responsible for the employees of "their" employer. As a result, the previously applicable case law of the Court on the temporary employment in joint establishments would then not apply (Federal Labour Court, decision of 25 October 2000 - 7 AZR 487/99). The assessment here is understandable if it uses the existence of several works councils as an important indication of separate management power and therefore rejects a joint establishment; it would be inconsistent to decouple the requirement of a unified management structure from co-determination in social matters in order to be able to assume a joint establishment.

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Effectiveness of a transfer abroad

Based on its right to issue instructions, the employer may also transfer the employee to a place of work of the company located abroad if a specific domestic place of work has not been agreed.

Federal Labour Court, judgment of 30 November 2022 – 5 AZR 336/21 et al.

The case

The claimant had been employed as a pilot by an airline based in Ireland since 2018. His "home base" was initially Nuremberg Airport, although the employment contract provided for the possibility of changing the location at which he was based. Since a collective bargaining agreement had been concluded between the defendant employer and the Vereinigung Cockpit, the claimant received a higher basic salary than provided for in his employment contract concluded under Irish law. At the end of March 2020, the defendant decided to close the Nuremberg base and to transfer the claimant to Bologna for this reason. At the same time, as a precautionary measure, it issued a corresponding notice of dismissal pending a change in contract (*Änderungskündigung*), which the claimant accepted subject to its social justification. The claimant then claimed that the transfer was unfair and justified this by the resulting withdrawal of his entitlement to remuneration under the collective bargaining agreement. The defendant replied to this by stating that a vacant workplace had not been available at another German base. The labour court and higher labour court dismissed the action.

The decision

The claimant's appeal was also unsuccessful before the Federal Labour Court. In the view of the Court, the employment contract to which the claimant and the defendant had agreed did not stipulate a domestic place of work and, on the contrary, even provided for the possibility of a transfer throughout the company. It can therefore be concluded that the employer's right to issue instructions pursuant to Section 106 sentence 1 of the German Industrial Code (*Gewerbeordnung*, GewO) also included the transfer abroad, the Court held. Furthermore, the law does not contain any limitation on the right to issue instructions regarding places of work in Germany. The transfer was a reasonable discretionary decision and was subject to a review for the proper exercise of discretion. It was the result of the defendant's corporate decision to close the Nuremberg base. As there had been no vacancies at any other domestic base, this also eliminated the possibility of continuing to base the claimant there. Furthermore, the instruction had no effect on the content of the employment contract and, in particular, on the remuneration under the employment contract. Only the scope of the collective pay agreement agreed by the parties to the collective bargaining agreement was decisive in the claimant receiving a higher collectively agreed salary. Finally, the fact that other disadvantages of the transfer, such as leaving the place of residence, were not financially compensated, also did not lead to its unfairness.

Our comment

In its judgment, the Federal Labour Court initially confirms in principle its previous case law, under which only the contractual stipulation of a specific place of work results in a restriction of the employer's right to transfer an employee. The new feature, in this case, is the explicit transfer of these principles to transfers abroad. The distance involved is secondary; for example, a transfer from Aachen to a city near the border in Belgium or the Netherlands may be less problematic than a transfer to Cologne. In the case of permanent transfers abroad, it should be borne in mind that the respective foreign employment and social security laws apply, while the Works Constitution Act (*Betriebsverfassungsgesetz*, BetrVG) does not. The territorial principle is mandatory in the two latter cases. A change of the everyday and/or working language certainly has a more serious impact in occupational fields than in the working world of a transport pilot, but is also likely to be relevant in principle. The decision makes it clear that these legal consequences are predominantly of a mandatory nature and consequently do not constitute aspects subject to a review for proper exercise of discretion in individual cases. The following previously applied: the designation of the first place of employment in the contract does not restrict transferability, in contrast to the contractual agreement of a fixed place of employment. The decision may therefore require a critical review of transfer clauses.

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An individual staff measure must not be actually implemented without the (renewed) involvement of the works council

If an employer implements a staff measure without the involvement of the works council, it can only submit a timely and therefore proper request for consent to the works council pursuant to Section 99 (1) of the Works Constitution Act (*Betriebsverfassungsgesetz*, BetrVG), if it has previously rescinded the measure. For this purpose, it is necessary that the employee concerned is not actually employed in the new job, at least temporarily.

Federal Labour Court, decision of 11 October 2022 – 1 ABR 18/21

The case

As part of a reorganisation of its business, the employer concerned assigned the position of head of a newly created department to one of its employees in May 2018, who previously headed another department; the employer did not involve the works council. At the works council's request, the labour court ordered the employer to rescind the measure in June 2019, against which the employer filed an appeal. In January 2020, it then informed the works council that it was withdrawing the transfer, whereupon the parties involved declared the proceedings to be settled and the proceedings were discontinued. On the same day, the employer asked the works council to approve the intended reassignment of the person concerned to the same management position; in addition, it informed the works council that the reassignment would be on a temporary basis. In a letter dated 14 January 2020, the works council refused to give its consent, which is why the employer applied in the present proceedings for the consent of the works council to be substituted by a court order and to establish that the temporary implementation of the measure was urgently required on objective grounds. The labour court dismissed the motions, the higher labour court granted the motions based on the appeal by the employer.

The decision

The 1st Senate of the Federal Labour Court in turn upheld the works council's appeal on points of law. The Court ruled that the employer's motions were without merit because the employer did not properly initiate the consent process. The prerequisite for the substitution of consent by a court order pursuant to Section 99 (4) BetrVG is that the works council has been properly informed by the employer. The deadline for refusing consent only starts to run upon proper notification. However, in this case, the employer's notification and its request for the works council's consent in January 2020 were not submitted prior to the transfer of the person concerned

pursuant to Section 99 (1) BetrVG. The provision explicitly requires that the employer informs the works council *prior* to the personnel measure being carried out and obtains its consent for the planned measure. It also follows from the rationale of the law that the works council is involved at a point in time when no final decision has yet been made or such a decision can at least still be revised without difficulty.

In the opinion of the Court, the works council was not informed and the request for consent was not submitted in due time and therefore properly, as the employer had already finally transferred the employee in May 2018 and the employee concerned had been deployed to the newly assigned position without interruption since then. The mere notification by the employer that it was "withdrawing" the transfer and that it was now only "temporary" did not mean that it had thereby planned a "new" transfer. An employer may ask the works council several times in succession to give its consent for a measure or may, after being unsuccessful (legally binding) in the proceedings for substituting such consent with a court order, initiate the personnel measure aimed at the same objective again in accordance with Section 99 (1) BetrVG, if necessary, by way of Section 99 (4) in conjunction with Section 100 (2) BetrVG. Nevertheless, the employer must always refrain from carrying out the measure and initiate a new - independent - recruitment or transfer process, for which it must actually cancel the measure. It is not sufficient if it merely asks the works council for its consent after the fact or informs it that it is withdrawing the measure and will only implement it on a temporary basis – this follows from Section 101 BetrVG. In this context, it is irrelevant if, after a reorganisation, it is impossible to work at the former workplace, whereby a transfer that has already been finally implemented cannot, in principle, be cancelled by a "transfer back". Rather, the decisive factor is that the employee is not employed in the last assigned position – at least temporarily until the initiation of any new co-determination procedure.

Our comment

The Federal Labour Court's decision is not surprising against the background of the case law of its 7th Senate from 2018 and continues to apply this consistently. Here, too, the Court has decided that the employer cannot prevent the cancellation of a measure carried out without the prior involvement of the works council pursuant to Section 101 BetrVG by subsequently initiating the co-determination procedure under Section 99 BetrVG without first rescinding the measure already carried out and, if necessary, go through a new appointment procedure, as long as the works council does not subsequently consent to the original appointment (Federal Labour Court, 21 November 2018 – 7 ABR 16/17). In practice, one would assume at first glance that there would be significant financial implications for the employer if, for example, the original job no longer exists due to a restructuring, as a result of which employment in the old job actually becomes impossible for the employer (keyword: default of acceptance) However, according to the Federal Labour Court, the employer must refrain from assigning the employee only until the initiation of any new co-determination procedure pursuant to Section 99 (1), Section 100 (2) BetrVG. A well-advised employer will therefore act quickly in such a case and initiate a new procedure pursuant to Section 99 (1), Section 100 (2) BetrVG as soon as possible. The potential business (interruption) risk with the consequence that it will be in default of acceptance can therefore be greatly minimised by acting quickly. Also relevant in the context: the Federal Labour Court has only recently developed a different, employer-friendly assessment standard for transfers between companies (Federal Labour Court, decision of 15 November 2022 – 1 ABR 15/21).

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Malicious omission of other earnings in the event of failure to register as a job seeker under Section 38 SGB III

The failure to register as a job-seeker in accordance with Section 38 SGB III at the Employment Agency is (only) an indication of a malicious omission of other earnings.

Federal Labour Court, judgment of 12 October 2022 – 5 AZR 30/22

The case

The parties are in dispute about compensation for default of acceptance and compensation for the loss of use of a company car that was not made available to the claimant. The claimant works for the defendant in a managerial position on the basis of an employment contract. In addition to his gross monthly salary, he is entitled to the provision of a company car, also for private use. The defendant terminated the employment relationship without pointing out the obligation to register as a job seeker under Section 38 (1) of the Social Security Code, Third Book (*Sozialgesetzbuch*, Drittes Buch, SGB III). The claimant did not register as a job seeker and did not receive any benefits from the employment agency. However, the claimant was aware of this obligation. The claimant was successful in his action for protection against unfair dismissal and then claimed compensation for default of acceptance as well as compensation for loss of use of the company car. The defendant objected that the claimant's breach of the obligation to report under social security law meant that he had maliciously not earned other income within the meaning of Section 11 no. 2 of the German Protection against Dismissal Act (*Kündigungsschutzgesetz*, KSchG). The labour court upheld the claim for payment, the higher labour court overturned this decision with reference to the failure to register as a job-seeker and dismissed the claim.

The decision

The Federal Labour Court in turn set aside the judgment of the higher labour court and referred the case back to it. The judges in Erfurt first determined that the crediting of other earnings or their malicious omission in this case followed from Section 11 no. 2 KSchG and not from Section 615 of the German Civil Code (*Bundesgesetzbuch*, BGB), which has almost the same wording. The claim for compensation for the use of the car that was not made available to the claimant is based on Sections 280 (1), 283 BGB (and not on Section 11 no. 2 KSchG or Section 615 BGB).

The Federal Labour Court further decided that the mere fact that the failure to register as a job-seeker pursuant to Section 38 (1) SGB III did not automatically confirm the maliciousness of the omission of earnings. This was merely a circumstance that had to be taken into account as part of an overall consideration. Compliance (or the failure to comply) with the

obligation to register is a connecting factor for defining the concept of "maliciousness" of the omission of other earnings. In addition, all circumstances of the individual case, e.g. also the fact whether and why the employer did not notify the claimant of the obligation to register, have to be taken into consideration within the scope of an overall assessment.

If the claimant's malicious conduct were to be affirmed, it would have to be further determined whether and which placement offers the employment agency would have made, whether an application by the claimant would have been successful, and what remuneration he could have earned during the relevant period. First of all, the employer only has to provide conclusive evidence that there were placement offers from the employment agency for the claimant's field of work during the period in dispute. The claimant must then provide information that is as specific as possible on the chances of placement. It would then still be up to the employer to prove the reasonableness of any placement proposals and the chances of employment in the event of an application. With regard to the compensation for use, the failure to register as a job-seeker would have to be taken into account in the context of possible contributory negligence under Section 254 (1) BGB.

Our comment

The judgment hardly strengthens the employer's position in practice. It is still difficult for the employer to prove that the omission of earnings is malicious. In detail:

The employer shall always be liable to pay compensation for default of acceptance, if it does not accept the work offered by the employee under the employment contract. The classic case is when an employer's notice of dismissal is declared invalid during proceedings for protection against unfair dismissal. The employer is then liable to pay the salary for the period after the expiry of the notice period without having received the work performance. In addition to Section 11 (2) KSchG (for the period of the unfair dismissal proceedings), Section 615 of the German Civil Code (BGB) governs the obligation to pay compensation for default of acceptance in the current employment relationship. For example, compensation for default of acceptance may be payable if the employer is temporarily unable to assign tasks to the employee due to a lack of orders.

If the employee engages in other gainful employment during this period, the remuneration earned as a result shall reduce the compensation for default of acceptance. The compensation for default of acceptance shall also be reduced if the employee maliciously fails to obtain other employment because he intentionally and without cause refuses work or prevents it from being offered to him. There is no clear definition of the word "malicious." Therefore, courts consider all the circumstantial evidence where there is a dispute as to whether income was earned from another source or there was a malicious failure to do so. Failure to register as a job-seeker constitutes such evidence, but it cannot alone establish maliciousness in omitting earnings. In view of the Federal Labour Court's decision, it must also be conclusively demonstrated that the Employment Agency would have submitted placement proposals that would have led to a successful application. Furthermore, the employer must prove from which point in time which employment opportunities would have existed.

In this context, the employer has a right to information vis-à-vis the employee: The employer shall be entitled to receive information about the placement proposals submitted by the Employment Agency and the Jobcenter pursuant to Section 242 BGB (Federal Labour Court, judgment of 27 May 2020 – 5 AZR 387/19). The employer may well meet the court requirements for proving the malicious omission of earnings if it has offered the employee a position in its own company or group of companies. However, this is only taken into consideration in a few cases after a notice of dismissal has been issued, particularly in the case of dismissal on personal grounds. However, the defence of other earnings and their malicious omission is tactically useful in most cases.

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Celebrating at a White Night Ibiza Party while off sick constitutes grounds for dismissal without notice

Dismissal without notice for feigning incapacity to work is justified if an employee calls in sick for two days while submitting a certificate of incapacity to work and during this time attends a "White Night Ibiza Party".

Siegburg Labour Court, judgment of 1 December 2022 – 5 Ca 1200/22

The case

The claimant is employed by the defendant as a health and nursing assistant. She was scheduled for late duty on the weekend of the 2nd and 3rd of July 2022; she called in sick for these duties. She attended the so-called White Night Ibiza Party, together with some work colleagues, on the night of 2/3 July 2022. This is documented by photos published by the claimant in her WhatsApp status and by the party organiser on his website. The claimant submitted on 4 July 2022 a certificate of incapacity to work issued by an online provider dated the same day, according to which she had been unable to work on 2/3 July 2022. After hearing the explanations given by the claimant, the defendant terminated the employment relationship without notice.

The decision

The Siegburg Labour Court dismissed the action for protection against unfair dismissal. The dismissal without notice was justified; the Court was convinced that the claimant had only feigned her incapacity to work for the days of 2 and 3 July 2022, and was not incapable of working. On the basis of the photographs, it can be seen that the claimant had attended the White Night Ibiza Party on the day of her alleged incapacity to work "in the best of moods and in the best of health." In addition, the certificate of incapacity to work was issued after the fact. This cast doubt on the probative value of the certificate with the consequence that the claimant bore the full burden of proof that she was actually unable to work. In the Court's opinion, the claimant was by no means successful in doing this. The Court considers that the claimant has a propensity to be untruthful: The original statement that she had called in sick because of flu symptoms was later revised by her. The Court was not receptive to the forced explanation given by the claimant: "A lie is a lie." Against this background, the Court also did not believe the claimant's later admission that she had suffered from a two-day mental illness due to an internal bullying situation. The very fact that she had attended the party with her work colleagues would argue against this; moreover, such short-term mental illnesses simply do not exist.

Our comment

As is generally known, feigning incapacity for work constitutes good cause for dismissal without notice. If the employee submits a medical certificate of incapacity to work, the employer regularly faces the challenge of casting doubt on the high probative of such a certificate. In this context, the employer does not have to prove the contrary; however, it must present facts that give rise to serious doubts about the employee's incapacity to work. These include, for example, the backdating of the certificate, notification of incapacity to work after a request for leave has been rejected, the pursuit of a secondary activity during the medically certified period of incapacity to work or the submission of a certificate of incapacity to work issued on the day of the employee's own dismissal notice is issued, which exactly covers the notice period. Meanwhile, the question, which is increasingly relevant in practice, of whether a certificate of incapacity to work issued by an online provider on the basis of a telemedical examination has high probative value remains open. The Siegburg Labour Court indicates in this case that it also considers the probative value of the certificate of incapacity to work to be questionable, because the attending doctor is not a specialist and determined retroactively the incapacity to work when she had recovered without conducting a physical examination. However, there is no unambiguous statement on telemedical examinations, so this is not likely to be relevant at the next instance.

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Impeding the work of the works council by a notice publicly displayed on a notice board

The public display on a notice board and the statement made at a works meeting announcing that a works council member had demanded a high severance payment and had abused the trust of and his responsibility vis-à-vis the workforce by his demand, which is a breach of the prohibition of preferential treatment, constitutes a breach of the prohibition of impeding the works council's work, unless there is a legitimate interest for the publication. The same applies to corresponding statements made at the works meeting. If the publication is extended to other companies (e.g. via intranet, app, notice board), this generally constitutes a gross breach of the principle of cooperation based on trust. If a works council member does not submit the grounds for its appeal following a negative decision by the labour court until two and a half months after service of such decision, there is generally no (longer) any urgency.

Nuremberg Higher Labour Court, decision of 14 November 2022 – 1 TaBVGa 4/22

The case

The applicant is the former chairman of the works council and most recently a full-time member of the works council. The employer operates other businesses, in each of which a works council has been established. In November 2020, while still in his position as chairman of the works council, the applicant signed a works agreement which provided for a severance payment capped at EUR 250,000 in the event of a voluntary resignation. However, the applicant demanded a severance payment of initially EUR 750,000 and later EUR 360,000 for his voluntary resignation.

The employer then initiated proceedings for the expulsion of the applicant from the works council for gross breach of duty. A shareholder of the group of companies and chairman of the board of directors of the employer's general partner as well as the managing partner of the general partner informed the workforce at all of the employer's businesses about the applicant's actions by means of a circular entitled "Works council abuses trust" and published the notice on the Intranet and an internal app used across all businesses. The notice publicly displayed on a notice board contained various accusations against the applicant. According to this notice he had breached the prohibition on favouring works councils by seeking a personal advantage based on his position as a works council member and is therefore putting his interests ahead of the interests of the workforce, which no longer allows for cooperation based on trust.

The applicant then initiated preliminary injunction proceedings, claiming that the notice and its publication hindered him in his work as a works council member. It was clear from the details in the notice that management was referring to him. Moreover, the facts of the case were not correctly stated. His reputation had in any event been considerably damaged. He requested that the defendants be ordered to withdraw the notice on the notice board as being untrue, to post a withdrawal at all places where the circular was posted and to order the defendants to stop asserting and disseminating the various statements in any form.

The employer was ordered by the court of first instance to remove the notice from the notice boards at all locations and to refrain from publishing it again in writing and from disseminating its contents orally (both verbatim or in words with the same effect). In all other respects, the motions were dismissed. Each of the parties lodged an appeal against this decision. After an extension of the deadline, the applicant did not substantiate his appeal until two and a half months after receipt of the decision of the court of first instance. After the notice had been removed in the meantime, the proceedings were declared settled by mutual agreement insofar as the removal of the notice was ordered.

The decision

The Higher Labour Court partially amended the Labour Court's decision and prohibited the employer from making public within the company that a full-time works council member or the applicant had demanded a severance payment of 750,000 or 360,000 euros for leaving the company, which was to be regarded as an abuse of responsibility vis-à-vis the workforce and/or a breach of the prohibition of preferential treatment and/or an attempt to gain a personal advantage. An administrative fine of up to 10,000 euros was threatened in the event of non-compliance. Insofar as the Labour Court prohibited the republishing of the notice on the notice board, the motion was dismissed.

The Higher Labour Court based its decision on the fact that the statement regarding the application for expulsion is an accurate factual claim that serves the employer's legitimate interests. The publication of this information - without mentioning the background and restricted to the company concerned - cannot be prohibited. Furthermore, there was no need or necessity for the publication of further information. The workforce not represented by the works council, of which the applicant is a member, had nothing to do with the proceedings. It was the employer's duty to ensure that such information was not disseminated outside the company, not to disparage the work council member concerned vis-à-vis third parties and to refrain from infringing the personal rights of works council members. In any case, this would result from the principle of cooperation based on trust. In this case, the notice on the notice board gives the reader the impression that there has been serious misconduct on the part of the works council member, which goes far beyond an appropriate comment.

Insofar as it was alleged that the applicant had demanded an excessive severance payment, that this had been an abuse of his responsibility vis-à-vis the workforce, a violation of the prohibition of preferential treatment or an attempt to gain a personal advantage, the employer should have prevented these statements from being made. Even if these statements had been made and were accurate, they were clearly not intended for public disclosure. They should have been considered confidential. There was not even the slightest need to make them public within the company. Rather, it was to be expected that the applicant would come under pressure to justify himself and that the workforce's trust in him and therefore in the performance of his duties would be damaged. This would result in the applicant suffering an inadmissible disadvantage and the works council activities being objectively impeded within the meaning of Section 78 of the Works Constitution Act (*Betriebsverfassungsgesetz*, BetrVG).

Insofar as the applicant asserts his motions at the court of first instance, there is no urgency. The applicant had waited more than two months before resubmitting its motions as part of the appeal. He has thus shown that his request lacked the urgency that must exist in preliminary injunction proceedings. When the grounds of appeal were submitted, the notices had been in the public domain for more than four months, the statements made at the works meeting were three months old and the Labour Court's decision was almost three months old. Insofar as the motions had been dismissed at first instance, there had apparently no longer been any urgency.

Our comment

If the employer initiates proceedings for the expulsion of a works council member from the works council, notification of this circumstance must always only be made public within the company. However, above and beyond that, communication should be restrained. The reasons for the application for the expulsion of a works council member should not be communicated within the company prior to the conclusion of the court proceedings, unless the employer specifically has a legitimate interest in doing so. In particular, own assessments should not be presented and published as fact. Details from confidential discussions, which were clearly not intended for the public, should be kept under lock and key. Public disclosure of this information generally constitutes a violation of the cooperation based on trust and an impediment to the works council's work. If, in addition, third parties not directly involved in the works council relationship (e.g. the workforce of other companies) are informed, this generally constitutes a gross violation of the principle of cooperation based on trust, unless there is a special need for this. Consequently, special attention must be paid to the recipient group of such information.

The decision also once again highlights the need for swift action in preliminary injunction proceedings - irrespective of the specific individual case. By exploiting statutory deadlines to the full and applying for extensions of deadlines, the applicant can disprove the urgency of his application by his own actions. The same shall apply if the applicant fails to immediately obtain a judgement in the principal proceedings. Lastly, it always depends on the circumstances of the individual case. In case of doubt, however, action should be taken as quickly as possible.

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Protection against unfair dismissal in the event of pregnancy

The Federal Labour Court adheres to its employee-friendly calculation method for determining the start of a pregnancy pursuant to Section 17 (1) of the German Maternity Protection Act (Mutterschutzgesetz, MuSchG).

Federal Labour Court, judgment of 24 November 2022 – 2 AZR 11/22

The case

The parties were in dispute in the case to be decided about the validity of a dismissal of an employee by the employer and the applicability of the special protection against dismissal under Section 17 of the Maternity Protection Act (MuSchG). In this context, there was essentially a dispute as to whether the claimant employee had immediately informed her employer that she was pregnant. The employment relationship had commenced on 15 October 2020. The defendant had already terminated the employment relationship with the claimant on 6 November 2020, notice of which was received by the claimant on the following day. The claimant filed an action for unfair dismissal on 12 November 2020, seeking a finding that the termination was invalid. During these proceedings the claimant informed the Labour Court on 2 December 2020 through her lawyer that she was already six weeks pregnant and submitted a medical certificate dated 26 November 2020, which indicated 5 August 2021 as the expected date of birth.

The lower courts had dismissed the action for protection against unfair dismissal. The Baden-Württemberg Higher Labour Court had used the average pregnancy duration of 266 days as the basis for calculating the beginning of pregnancy in accordance with Section 17 (1) no. 1 MuSchG and, having performed a calculation on this basis, rejected the existence of a pregnancy and therefore the applicability of the special protection against unfair dismissal at the time of the dismissal.

The decision:

The claimant's appeal on points of law was successful. In its decision, the Federal Labour Court clarified that it was adhering to its calculation method for determining the beginning of pregnancy pursuant to Section 17 (1) no. 1 MuSchG, which it had applied consistently in its case law. Under this method the first day of pregnancy is to be determined from the date of birth predicted in the medical certificate by performing a back calculation using a period of 280 days, without including the date of birth itself.

The Federal Labour Court based its decision for applying the back calculation using a period of 280 days on the protection mandate under constitutional law and the requirements of EU law. The concept of pregnancy, which is a prerequisite for being entitled to special protection against unfair dismissal, is not defined in more detail in Pregnant Workers Directive 1992 (92/85/EEC) nor in the MuSchG. However, the MuSchG bases the calculation of the prenatal maternity protection period solely on the date of birth predicted in the medical certificate. This predicted date of birth is the deciding factor even if it does not coincide with the actual date of birth (Section 3 (1) sentences 3 and 4 MuSchG). Consequently, the earliest possible beginning of the pregnancy, i.e. to provide the greatest possible protection for the pregnant employee, is to be assumed when determining the beginning of the pregnancy and therefore the beginning of the applicability of the special protection against unfair dismissal based on the date of birth predicted in the medical certificate. The Federal Labour Court's calculation method is in line with this, in that the average duration of a menstrual cycle of 28 days each (one lunar month) and thus the average pregnancy duration of ten lunar months is taken as a basis for the back calculation using a period of 280 days. Although this would also include days on which pregnancy is unlikely to have begun, the determination of the beginning of pregnancy as a prerequisite for the applicability of the special protection against dismissal is not about a scientifically correct determination in the individual case.

This method for determining the beginning of pregnancy under Section 17 (1) sentence 1 MuSchG also complies with EU law. According to the Pregnant Workers Directive, 1992 all Member States are required to take measures to prohibit dismissal during the period from the beginning of pregnancy to the end of maternity leave. According to the CJEU's case law, the aim of the Directive is to prevent pregnant workers from being exposed to the risk of dismissal for reasons related to their condition during pregnancy and to avoid any resulting harmful

physical and psychological effects on the condition of the pregnant woman. However, in order to achieve this goal, pregnancy should be assumed to begin at the earliest possible date.

The Federal Labour Court also counters the frequent accusation that its calculation method mixes up the different levels of the actual existence of pregnancy as a prerequisite for the claim and its procedural presentation and proof. The employee must continue to prove that the pregnancy exists and when the birth is expected to take place. As a rule, a medical certificate is submitted as proof. However, the employer can challenge its probative value.

This was also the case in the case under review. The claimant had submitted a doctor's certificate stating that her expected date of delivery was 5 July 2021. Based on the Federal Labour Court's calculation method, the claimant had been pregnant since 29 October 2020, so that the notice of dismissal dated 6 November 2020 violated the ban on unfair dismissal under Section 17 (1) sentence 1 no. 1 MuSchG.

However, the Federal Labour Court was unable to reach a final decision on the impact of the breach of the prohibition of unfair dismissal because of the inadequate findings regarding the actual events in the two lower courts and referred the legal dispute back in this respect. The Federal Labour Court stated that the Higher Labour Court will have to take into account in its decision that the claimant does not bear a general risk of notifying the employer of the pregnancy on a timely basis. She would also only have to accept responsibility for obstacles to transmission for which she was at fault, but not for the fault of her lawyer of record.

In the event that the claimant first became aware of the pregnancy upon receipt of the medical certificate dated 26 November 2020, the notification of the pregnancy by written communication via her lawyer to the Labour Court is to be regarded as being immediate within the meaning of Section 17 (1) sentence 2 MuSchG. In this respect, the Federal Labour Court allowed a period of six days between knowledge of the pregnancy through confirmation by a doctor and notification of the pregnancy to the lawyer of record to suffice. It is also to be assumed that, in the event of compliance with the statutory requirements for the transmission of pleadings by the court clerks, the receipt of the notification of pregnancy by the employer would be within a reasonable period of time.

Practical advice:

The decision of the Federal Labour Court is to be welcomed from the point of view of legal certainty, as the Federal Labour Court makes clear that it will not deviate from the calculation method it applies. In addition, the reference to the constitutional requirements and the objectives of the European Pregnant Workers Directive 1992 as well as the purpose of the German Maternity Protection Act provides a strong basis for the calculation method that determines the earliest possible beginning of pregnancy. The decision can only be endorsed against this background. Despite the revision of the MuSchG in 2017, the German legislator has not adopted a definition of pregnancy within the meaning of Section17 MuSchG. Taking into account the special protection of mothers and therefore pregnant women in particular that is embedded in the constitution, calculating the earliest possible date of the beginning of pregnancy for the purposes of determining the applicability of the special protection against unfair dismissal cannot be criticised. If one were to follow the approach of the Baden-Württemberg Higher Labour Court and assume an average duration of pregnancy, this would fail to comply with the statutory mandate to protect. This applies in particular in light of the fact that, especially at the beginning of a pregnancy, circumstances may exist that restrict the performance of the pregnant woman and could therefore be grounds for dismissal. However, according to the CJEU's case law, it is precisely such dismissals based on reasons arising from the condition of the pregnant woman that are to be covered by the prohibition of unfair dismissal.

For employers, this decision means the certainty that, when a medical certificate stating the expected date of birth is submitted, the early beginning of pregnancy determined by a back calculation using a period of 280 days, which is favourable for the pregnant woman, will apply and the high hurdles of casting doubt on the probative value of the medical certificate will continue to exist.

For practical purposes, it can only be advised that when the notice was served or handed over and when the notification of the existence of the pregnancy was received by the employer is documented precisely. In this respect, the receipt of the notification by the employer and the internal mail flow in particular should be borne in mind. The greater the interval between the date of dismissal and receipt of the notification of pregnancy, the more likely it is that the employee will have to plead knowledge of circumstances that make the assumption of pregnancy irrefutable. At the same time, as time passes, doubts will arise about the immediacy of the notification of

pregnancy after becoming aware of it. In the case of notification of pregnancy in a pleading during the course of legal proceedings, it is also necessary to keep track of the receipt of the pleading by the court and its forwarding to the employer.

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■ CASE LAW IN A NUTSHELL

Competence of the conciliation committee regarding pay rises where the works agreement has been terminated

Baden-Württemberg Higher Labour Court, decision of 8 December 2022 – 4 TaBV 7/22

A conciliation committee dealing with the matter of the distribution of a budget for pay increases does not become obviously incompetent because the employer announces at the same time as the budget is made available that distribution principles laid down in the works agreement that has already been terminated but is still in effect are to be applied; in any case, the matter is not settled until the pay rises are implemented.

Reasons for the decision

The parties are in dispute about the establishment of a conciliation committee.

The general works agreement governing the distribution of the budget for employee pay rises was terminated at the company by the central works council as of 31 October 2022. The works council subsequently declared the renegotiations, which in view of the current inflation rate were particularly concerned with a special arrangement for the 2023 fiscal year, to have failed. A conciliation committee dealing with the matter of the "GBV Salary System" as resolved by the works council in September 2022 was not formed due to a lack of agreement between the parties involved. The central works council initiated the present proceedings on 31 August 2022 and requested that the conciliation committee be established to deal with the matter of the "Distribution principles of the budget for pay increases for the 2023 fiscal year". In November 2022, the employer announced that the budget for pay rises was 3.5% and that it had distributed this in accordance with the provisions of the terminated general works agreement. The central works council referred to its right of co-determination under Section 87 (1) no. 10 of the Works Constitution Act (*Betriebsverfassungsgesetz*, BetrVG) and applied for the establishment of the conciliation committee. The Stuttgart Labour Court granted the motion.

The Baden-Württemberg Higher Labour Court dismissed the employer's appeal against this. Contrary to the employer's as-

sertion, the initiation of proceedings by the central works council had not failed because of the resolution of 22 August 2022. It would also be possible to approve the initiation retrospectively until the court reached its decision. Such approval had been given by the proper adoption of the resolution on 27 September 2022, so that neither the difference in the subject matter nor the absence of a member of the works council at the meeting at which the first resolution was adopted could have an impact on the effectiveness of the initiation of the proceedings. Since it was left to the subjective assessment of the works council to declare the negotiations to have failed, and this assumption was also not clearly unfounded, the Court also assumed that the central works council had a need for legal protection. In the absence of an obvious lack of jurisdiction on the part of the conciliation board, an application for its establishment is also not unfounded. By offering annual salary adjustments based on a certain system and making this dependent on a company-wide regulation, the employer had established the competence of the central works council. Its right of co-determination is set out in Section 87 (1) no.10 BetrVG. Lastly, the Court also did not assume that the matter had been settled. On the one hand, the monthly due date also allowed for subsequent adjustments to be made and, on the other hand, the pay rises had only been planned for the beginning of 2023.

Principle of equal treatment - derogation from the collective agreement in the case of temporary work

CJEU, judgment 15 December 2022 – C-311/21 (TimePartner Personalmanagement)

If a collective agreement permits unequal treatment with regard to essential working and employment conditions to the detriment of temporary agency workers, the agreement must grant corresponding advantages to compensate for this.

Reasons for the decision

The Federal Labour Court requested the CJEU to clarify how Article 5 (3) Directive 2008/104/EC is to be interpreted and what consequences this has for a collective agreement that derogates from the principle of equal treatment of temporary agency workers.

The claimant received a gross hourly wage of EUR 9.23 from the defendant, a temporary employment agency, during her temporary assignment in accordance with the relevant collective agreement for temporary agency workers. Comparable employees of the user undertaking receive a gross hourly wage of EUR 13.64 based on the collective wage agreement for commercial employees in the retail sector in Bavaria. In her action, the claimant asserts a claim for additional pay in the amount of the difference that the claimant would have received if she had been paid according to the collective wage agreement of the other employees. She is alleging a violation of Article 5 (3) of Directive 2008/104/EC.

The CJEU explains the content of the obligation to respect the overall protection of temporary agency workers provided for in the Directive, which is in contrast to the generally possible unequal treatment within collective agreements. For the determination of the content, the objectives of the Directive were to be taken into account, which consisted in the protection of temporary agency workers and the simultaneous respect of the diversity of the labour markets. It should also be possible for differing collective agreements to be subject to judicial review. However, it cannot be inferred from the provision that a level of protection is to be taken into account which is specific to temporary agency workers and which goes beyond that which is generally laid down by national law and EU law with regard to the essential terms and conditions of employment for workers. If a collective agreement allows unequal treatment to the detriment of temporary agency workers, it is sufficient for their overall protection within the meaning of the Directive if they are afforded advantages that are appropriate compensation for the unequal treatment.

Provided that the Member State concerned gives the social partners the opportunity to conclude collective agreements containing such unequal treatment, there is no obligation on the part of the national legislator to take account of the existing conditions and criteria within the meaning of Article 5 (3) of Directive 2008/104/EC in order to respect the overall protection of temporary workers. However, Member States are required to ensure, by legislative, regulatory and administrative measures, that temporary agency workers are afforded the full scope of protection of the Directive. A duty to respect the overall protection of workers also exists for Member States when they allow social partners to derogate from the Directive.

Refusal to provide a laptop for works council work

Cologne Higher Labour Court, judgment of 24 June 2022 – 9 TaBV 52/21

The digitalisation of the work of works councils was taken into

account in the Works Council Modernisation Act (*Betriebsrätemodernisierungsgesetz*). This means that employers cannot refuse to provide a laptop on the grounds that the works council can perform its works council activities at the business premises. However, the works council cannot demand that a specific model be provided, but only a certain level of equipment in so far as is necessary.

Reasons for the decision

The parties are in dispute about the provision of an additional laptop for the performance of works council tasks such as participation in works council meetings, also outside the business premises, pursuant to Section 30 (2) of the Work Constitution Act (*Betriebsverfassungsgesetz*, BetrVG).

After the employer refused to provide it with one, the works council requested the Cologne Labour Court to order the employer to provide it with a laptop and also a video projector. The works council designated in the application a specific laptop model and its equipment features. While the Labour Court found that there was no claim to the video projector, it granted the works council a claim against the employer pursuant to Section 40 (2) BetrVG for the provision free of charge of a functioning laptop, which must at least have certain performance features. However, works councils could only make a claim for equipment in so far as is necessary where material resources are available and there could be no claim for a specific laptop model. Consequently, the works council had to describe the device in general terms in order to ultimately leave it up to the employer to decide which device to provide.

The Cologne Higher Labour Court dismissed the appeals of both parties against the Labour Court's decision. The adjudged laptop is information and communication technology within the meaning of Section 40 (2) BetrVG, which the works council requires in contrast to a video projector to perform its statutory duties. Its decision to request one from the employer was within the scope of its discretionary powers. However, the Labour Court was in breach of Section 308 (1) of the Code of Civil Procedure (*Zivilprozessordnung*, ZPO) because the works council had not generally requested, as was awarded to it, a laptop with certain equipment features in so far as is necessary, but had explicitly designated a specific model in its application. However, this breach had been remedied by the appeal, since the works council had referred to the statements of the Cologne Labour Court and had therefore adopted its argumentation. Consequently, it had to be assumed that it wanted to defend at least that which had been awarded to it by the lower court and that, in addition to the specifically named device, it was now also demanding the basic provision of a device with similar features.

Dispensability of a warning – taking away food after a company party

Hessian Higher Labour Court, judgment of 4 November 2022 – 10 Sa 778/22

An unclear situation concerning the right to issue instructions can lead to the employer having to issue a warning to the employee prior to dismissal without notice for reasons of conduct pursuant to Section 626 of the Civil Code (*Bürgerliches Gesetzbuch*, BGB). Circumstances not related to the contract may also have to be taken into account when weighing up interests, albeit with less weight. This may include the employee going through adoption proceedings.

Reasons for the decision

The parties are in dispute about the validity of a dismissal without notice.

The claimant had been working at the defendant's company since 2017. After a party, the claimant took home leftover pork chops worth about 40 to 50 euros from the defendant's refrigerator for his own consumption. He had previously consulted his colleagues, but failed to obtain permission from the managing director. When the managing director of the company employing the defendant approached him about it, the claimant returned the meat the following day. Because of these events, the defendant dismissed the claimant without notice in a letter dated 30 September 2021, or in the alternative with effect from 31 October 2021. At that time, the claimant was going through adoption proceedings regarding two infants who have lived with him and his wife since birth.

The Frankfurt a.M. Labour Court only confirmed the dismissal with notice. The defendant therefore lodged an appeal with the Higher Labour Court. This was dismissed by the Higher Labour Court. The requirements of Section 626 BGB were not met, since the employer had not previously issued a warning and the dismissal was disproportionate when considering the overall circumstances. Although criminal offences related to property and assets committed by employees, even in the case of low-value items, could in themselves constitute good cause due to the associated breach of trust, the employer could reasonably have been expected to issue a prior warning in this case. In the case of a termination for reasons of con-

duct, an assessment must be made to determine whether a future change in the employee's conduct is to be expected. The fact that, in this case, the claimant only wanted to save the barbecue food from spoiling and also did this after consulting his colleagues and not secretly would have allowed a positive prognosis. In the absence of a serious breach of duty, there was in any case no exceptional case in which a warning could be dispensed with. In addition, it could also not be ruled out in the context of the weighing of interests that adoption proceedings, for which the social circumstances of the adoptive parents play a role, could be taken into account. However, in this case this circumstance was irrelevant, since the weighing of interests would in any case be in favour of the claimant.

■ INTERNATIONAL NEWSFLASH FROM OUR NETWORK

Travel time can now be paid in France

The Employment Division of the French Supreme Court (Court of Cassation) rendered a decision on 23 November 2022 (No. 20-21.924), confirmed by another decision of 1st March 2023 (No. 21-12.068), which constitutes a reversal of case law regarding the travel time of an itinerant employee.

Taking into account a judgment of the CJEU of 9 May 2021 (case C-344/19), the Court considers that the travel time between the home and the first customer and the travel time between the last customer and the home of an itinerant employee can be, in certain cases, actual working time.

In doing so, the Court of Cassation applies the principle that every national judge has an obligation to ensure that national law is interpreted in accordance with European law.

Until now, the itinerant employee could not claim payment of overtime for home/customer travel time. They only benefited from financial compensation or a form of rest.

From now on, if these travel times meet the qualification of effective working time, the employee will be able to benefit from the payment of overtime for these travel times.

As indicated by the Court of Cassation in a Press Release, the assessment of the actual working time will be done on a case-by-case basis, with regard to the "constraints to which the employees are really subject".

In the event of a dispute, the judge will have to check whether, during the travel time, the itinerant employee (commercial, technical-commercial, maintenance engineer, etc.) must be at the disposal of the employer and comply with their instructions without being able to attend to personal matters.

Otherwise, the itinerant employee may only claim the financial compensation or in the form of rest provided when they exceed the normal travel time between their home and their usual place of work.

This stoppage is important because by qualifying travel time as actual working time, it increases the risk of overtime claims.

However, this case law does not have the same impact depending on whether employees are subject to the legal duration of work, an annual flat rate in days or a flat rate in hours, whether weekly, monthly or annual.

It is therefore necessary to study the impact of this decision within your company, in order to determine whether adaptations should be considered in terms of the working hours scheme for itinerant employees or even in terms of the travel policy implemented within the company

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■ GENERAL INFORMATION

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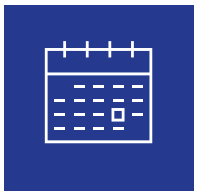
Events, publications and blog



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You will find a list of our current publications here.

You will find our blog here.

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