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Dear Readers,

Spring has finally arrived. We are pleased to present you with the first edition of our newsletter for the current calendar year.

We begin this edition with a topic of utmost relevance sure to interest practitioners. Astrid Schnabel and Volker von Alvensleben from our Hamburg office will address questions regarding the remuneration of works council members. Companies often struggle when it comes to determining the remuneration of works council members based on the so-called loss of earnings principle. This is especially true for works council members who have been fully released from their duties for many years. In this context, the Federal Cabinet has submitted a draft government bill to amend the Works Constitution Act (Betriebsverfassungsgesetz, BetrVG). In their informative write-up, Astrid Schnabel and Volker von Alvensleben express significant doubts that the proposed legislative change will indeed help to solve this problem.

In his piece, Kevin Brinkmann, also from Hamburg, delves into the risks and conflicts of interest that arise when data protection officers take on additional tasks and offices within the company. He outlines what companies should consider when appointing data protection officers and how to react if a conflict of interest arises down the road.

In times of rising energy costs, short-time work and the receipt of short-time work allowance can be a way to counteract potential work stoppages in the company. In their article on short-time work allowance, Axel Braun and Christoph Corzelius from our Cologne office provide an overview of current criteria for this tool that continues to be relevant in practice.

In this edition of our newsletter, we also report on current labour law topics and developments from the unyer world. Anna Mertinz, a partner from our Austrian unyer network law firm KWR, reports in her article on a recent ruling by the Supreme Court in Vienna on cost reimbursement for work from home.

In addition to our focus topics, this edition also provides the customary overview of current decisions by the labour courts, which we believe are of particular relevance to HR work. Please let us know which topics are of particular interest to you. We look forward to your input!

We hope you enjoy reading this instalment of our newsletter.

Sincerely,

Achim Braner

Remuneration of Works Council Members – De lege lata = de lege ferenda?

While works council members are not paid separate remuneration for their council duties, the employer must pay the wages that the members would have earned had they been performing their work tasks instead of observing council duties based on the so-called loss of earnings principle. However, determining a fair and neutral salary presents significant obstacles in practice. The Federal Cabinet has therefore submitted a draft government bill to amend the Works Constitution Act.

I. The office of Works Council as an honorary position

According to Section 37 Para. 1 of the Works Constitution Act, members of the works council perform their duties unpaid as an honorary office. This is justified by the need to ensure the independence of the works council member and the council as a body. According to Section 78 Sentence 2 of the Works Constitution Act, the legislator ensures that any deviating arrangements are prohibited. Any agreements made to the contrary are void according to Section 78 Para. 2 of the Works Constitution Act in conjunction with Section 134 of the Civil Code (Bürgerliches Gesetzbuch, BGB). According to the prevailing opinion, overpaid amounts can be reclaimed through condiction without being prevented by the preclusion clause of Section 817 Sentence 2 Civil Code. Furthermore, improperly assessed works council remuneration may constitute an offence under Section 119 Para. 1 No . 3 Works Constitution Act; moreover, criminal liability for embezzlement pursuant to Section 266 Criminal Code (Strafgesetzbuch, StGB) can be considered if excessively high remuneration is at hand.

II. Remuneration according to the Loss of Earnings Principle

Under Sections 37 Para. 2 and 78 Sentence 2 of the Works Constitution Act, as well as Section 119 Para. 1 No. 3 of the same act, works council members may not be disadvantaged as a result of their position on the works council. They must be paid the wages agreed under their employment agreement even during the periods they engage in works council duties. According to Section 37 Para. 2 of the Works Constitution Act, works council members are to be released from their professional duties without any reduction of pay, providing and

to the extent such is necessary for the due performance of their tasks based on the size and nature of the operation. Once the conditions are met, the works council member is released from work without any reduction in pay, thereby implementing the so-called loss of earnings principle. If the employee is paid a fixed salary, this is straightforward. However, achieving this becomes problematic in the event of variable salary components linked to the employee's performance or company's success. Variable compensation is also calculated based on the loss of earnings principle. This calls for a hypothetical analysis to determine what salary the works council member would have earned without being exempted from work. The method selected for calculating the hypothetical remuneration should most accurately reflect the principle of lost earnings.

III. Professional Development of the Works Council Member

According to Section 37 Para. 4 Sentence 1 of the Works Constitution Act, the remuneration of works council members, including a period of one year after the end of their term, may not be less than the remuneration of comparable employees with standard professional development within the company. Significant challenges arise particularly for works council members who have been completely released from their duties for many years. To enable a comparison, the works council member must be compared to those employees who, at the time of taking office, were engaged in substantially similar activities in objective terms. To assess typical development within the company, it is examined what development employees with comparable qualifications and in comparable positions have undergone, considering the normal business and personnel development. Special, individual developments are not considered in this respect.

What is considered typical is established on the basis of the employer's consistent behaviour. The process must be so typical that one can expect such development in the majority of comparable cases based on the operational circumstances and laws. When it comes to an increase in remuneration by a certain percentage within the comparison group, the works council member is entitled to the same salary increase. If there are different salary increases within the comparison group, it depends on the extent to which the salaries of the majority of employees in the comparison group are raised. For very small comparison groups, the average of the granted salary increases may be decisive for the salary adjustment claim if this is the only way to avoid undue favouritism or disadvantaging of the works council member. If the assignment of a higher-value position is concerned, recognising business development additionally requires that the higher position should have been assigned to the works council member or that the majority of employees in the comparison group have achieved this advancement.

IV. Concrete Evidence of the Hypothetical Development

According to the case law of the Federal Labour Court (BAG), the provision of Section 37 Para. 4 of the Works Constitution Act is not exhaustive. Additionally, a claim for specific remuneration may arise from Section 78 Sentence 2 of the Works Constitution Act. For this claim, it must be demonstrated that the payment of lower remuneration constitutes a disadvantage due to the works council activities. A works council member who does not advance to a position with higher remuneration solely due to the assumption of the office may hold the employer liable for the payment of the higher remuneration. However, the payment claim based on Section 78 Sentence 2 of the Works Constitution Act requires the works council member to prove that they would have been assigned a task entitling them to the desired remuneration if not for the works council mandate. On the other hand, the development of the works council member due to their office duties, such as the acquisition of skills specifically due to carrying out works council tasks, should not be considered.

V. Future Specification

At the beginning of 2023, a decision by the Federal Court of Justice gave rise to legal uncertainties regarding the risks of criminal liability (Federal Court of Justice, ruling of 10 January 2023 – 6 StR 133/22). This led to a government draft dated 1 November 2023, to amend the Works Constitution Act. The amendments to Sections 37 Para. 4 and 78 of the Works Constitution Act are intended not to change the legal situation but to clarify it.

The following sentences will be added to Section 37 Para. 4 of the Works Constitution Act:

"To determine comparable employees according to sentence 1, the time at which the works council office was assumed is to be used as the reference point, unless there is a substantive reason for redetermination at a later point in time. Employers and works councils may regulate a procedure for determining comparable employees in a works agreement. The specification of comparability in such a works agreement can only be reviewed for gross errors; the same applies when

determining comparison persons, provided they are agreed upon consensually between employer and works council and documented in text form."

Furthermore, Section 78 Sentence 3 of the Works Constitution Act will be amended to read:

"Favouring or disadvantaging with regard to the paid wages is not at hand if the member of a representative body named in sentence 1 meets the operational requirements and criteria necessary for the payment of wages in his person and no discretion errors occurred when determining the remuneration."

Whether these changes actually serve to clarify and minimise risks is questionable. The addition of sentence 3 in Section 37 Para. 4 of the Works Constitution Act, expands on an exception recognised by the Federal Labour Court. On an exceptional basis, if the works council member can no longer rely on the originally formed comparison group at the time of taking office to justify compensation claims according to Section 37 Para. 4 of the Works Constitution Act, an adjustment of this comparison group at a later date may be permissible. The legislator develops the exception further and allows changes if there is a substantive reason. What exactly constitutes a substantive reason will then have to be decided by the courts. In any case, this is more than just a clarification. Sentences 4 and 5 added in Section 37 Para. 4 of the Works Constitution Act also raise new questions. Although a procedure for determining comparable employees has already been accepted in the past (Federal Court of Justice, decision of 18 January 2017 – 7 AZR 205/15), it must remain within the framework of the legal requirements of Sections 37 Para. 4, 78 Sentence 2 of the Works Constitution Act. Whether reviewability is limited to gross errors in this respect is not clearly recognisable in the wording of the law. According to the wording of the law, only the specification of comparability and the determination of comparison persons should be reviewable for gross errors. The classification and application of these regulations will therefore be fraught with significant problems.

In the planned addition in Section 78 Sentence 3 of the Works Constitution Act, there is no indication that remuneration must relate to specific jobs available in the company to which the works council member has, for example, applied. Apparently, in the future, the assessment of remuneration will depend solely on the abilities of the works council member and no longer on the jobs available in the company. Works council members could take on a hypothetical role in the company that is not possible, to justify a certain level of compensation that would not be granted to a colleague fulfilling contractual obligations.

VI. In Brief

Activity on the works council is conceived as an honorary office and is not remunerated separately. This principle ensures that one's mandate is executed independently, but continues to pose significant challenges in practice which can hardly be overcome. There are, however, considerable doubts that the proposed legislative amendment will indeed help to overcome these problems.

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Data Protection Officers and Conflicts of Interest: Regarding the Risk of Incompatibility with Other Tasks and Offices

Data Protection Officers must carry out their activities on an entirely independent basis, free from conflicts of interest. According to recent case law of the Federal Labour Court (BAG) (decision of 6 June 2023 – 9 AZR 383/19), a works council chairperson appointed as a Data Protection Officer does not qualify as independent under the General Data Protection Regulation (GDPR), as they would have to monitor themselves. This change in case law clarifies when additional tasks and duties are no longer compatible with the position of the Data Protection Officer. However, it also raises the question of which positions and offices in a company are incompatible with simultaneous appointment as a Data Protection Officer.

I. Requirements for Data Protection Officers as Neutral Corporate Data Protection Supervisors

The Data Protection Officer, as a neutral entity, must monitor compliance with data protection law within the company. Although it is legally possible for the Data Protection Officer to perform other tasks and duties, the observed tasks and duties must not lead to a conflict of interest as defined in Article 38 Para. 6 Sentence 2 GDPR. According to the European Court of Justice (CJEU) (decision of 9 February 2023 – C-453/21 [X-FAB]), a conflict of interest may exist if a Data Protection Officer is assigned other tasks or duties that would lead them to determine the purposes and means of processing personal data at the controllers or their processors. Therefore, the functional independence of the Data Protection Officer must always be assessed on a case-by-case basis to ensure it is maintained. Their monitoring task must not be influenced by other aspects that could lead them to "overlook" certain issues.

II. Offices and Positions with Potential Conflicts of Interest

Works council chair: A Data Protection Officer who has been involved in determining processing procedures as a works council chair and must now perform their monitoring duties amid a conflict between their functional interests and tasks, the independence needed to guarantee the statutory protection of data is lacking. The chairperson of the works council is tasked with external representation of the committee's binding decisions, while also having to verify their

conformity with data protection legislation. This structural proximity and absence of neutrality result in a conflict of interest that threatens the functional independence necessary in order for a Data Protection Officer to enforce data protection laws effectively.

Works council mandate: All members of the works council have an equal say in determining the processing of personal data provided to them in the course of their works council activities. As participants in the decision-making process, even the ordinary members lack the necessary degree of neutrality and objectivity regarding the design and execution of data processing operations. When later reviewed in the role of the Data Protection Officer, one can expect a biased examination of the facts.

Substitute membership in the works council: The mere fact of being a substitute member does not lead to a conflict of interest, as the substitute member is not involved in establishing processing principles until they temporarily or permanently move up into the committee. If such a case arises, the substitute member faces the same initial situation as the regular works council members during the representation period, leading directly to an irreconcilable conflict of interest.

Executive bodies: **Owning a company and belonging to the executive management or legal representative bodies** is incompatible with the position of the Data Protection Officer. Individuals in these positions are fundamentally responsible for complying with data protection regulations and would be monitoring themselves. Similarly, authorised signatories, whose powers enable them to take decisions concerning the processing of personal data, are also predisposed to conflicts of interest.

(Executive) Employees: As one moves further from the executive level, conflicts of interest become less clear. Each individual case must be assessed individually. **Heads of HR departments**, who are responsible for handling employee data on a regular basis, **heads of IT departments**, who are regularly responsible for selecting and implementing technical organisational measures and have overarching administrator functions, and **heads of marketing departments**, responsible for handling customer data, are also predisposed to conflicts of interest.

Reporting office under the Whistleblower Protection Act (Hinweisgeberschutzgesetz, HinSchG): Similar to the works council, the internal reporting office also organises itself independently from the employer, including in terms of processing the personal data it becomes aware of in the course of fulfilling its tasks. The same applies to the implementation of reporting channels or the selection of used software. An unbridgeable conflict of interest is to be assumed.

Anti-money laundering or compliance officers: The risk of a conflict of interest exists in situations where the Data Protection Officer performs tasks that rely on the collection of as much personal data as possible. This risk area includes, for example, the anti-money laundering officer and the compliance officer. A situation can quickly arise in which they would have to neutrally assess their own actions.

Consulting Solicitors: At least in the area of data protection, solicitors providing advisory services are prone to conflicts of interest (data protection-related). Their expert advice significantly influences, on a regular basis, decisions relating to the processing of personal data by responsible entities. There is a justified concern about a lack of objectivity in later assessments in the role of a Data Protection Officer.

External IT Service Providers: In connection with their duties to ensure adequate protection and/or compliant processing of personal data, if also holding the position of Data Protection Officer, they would need to objectively monitor their own work, which naturally leads to an irreconcilable conflict of interest.

III. Conclusion

A common risk involves the assumption of additional tasks and offices within a company leading to conflicts of interest with the office of the Data Protection Officer. It must be ensured that Data Protection Officers do not act as “judges in their own cause.” Before naming or appointing, it must be carefully checked whether conflicts of interest exist or could arise. If there is even a slight semblance of a conflict of interest due to specific tasks and duties with the additional role of the Data Protection Officer, naming or appointing should be avoided. Should a conflict of interest arise during tenure as a Data Protection Officer, the relevant person must be immediately dismissed in favour of effective data protection and to avoid any risk of sanctions.

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Is the next crisis looming? Past and Recent Developments in short-time work allowance

In mid-2023, the temporary special regulations for short-time work allowance during the COVID-19 pandemic expired while inquiries from companies on the topic of short-time work have recently increased again: reason enough to revisit this topic and examine the criteria for it.

I. Basic Requirements

Since the end of the pandemic, the receipt of short-time work allowance has followed general parameters again. Entitlement fundamentally requires that there be a significant, temporary reduction in work accompanied by a loss of income. Certain operational and personal conditions must be met. Furthermore, the reduction in work must be reported to the Employment Agency in a timely manner or, in the case of an unavoidable event, immediately. A “significant” reduction in work is at hand if it is due to economic reasons or an unavoidable event, is temporary, unavoidable, and affects at least one-third of the employees in the company with a loss of income of more than 10% of their monthly gross income in that calendar month. The loss of income can also be as much as 100% of the monthly gross income.

II. Relaxed Criteria in a Crisis

During the pandemic, the conditions for accessing short-time work allowance were significantly eased – a situation that could return in the future as the result of a new regulation from the federal government. According to Section 109 Para. 5 Social Code Book III (Sozialgesetzbuch III, SGB III), in the event of “extraordinary conditions on the labour market” three central modifications can be made without the approval of the Bundesrat: lowering the quorum for employees affected by work shortages from one-third to as low as 10%, foregoing the use of vacation entitlements to counteract lost work hours, and refraining from the use of accumulated working time credits. Additionally, through regulatory authorisations, the employer may be reimbursed for social security contributions while receiving short-time work allowance, and, on the employee side, earnings from marginal employment may not be deducted. In the face of new economic crises, the legislator can also address the associated burdens through short-term measures in this way.

III. Duration of the Entitlement

During the pandemic, the federal government increased the maximum entitlement period for short-time work allowance to 28 months, but generally, a duration of up to twelve months applies. This is based on a company-specific perspective – not the individual employee affected by short-time work. The period may be extended by months during which no short-time work allowance was paid intermittently. If no short-time work allowance are received for three months, the twelve-month period begins anew.

IV. Economic Reasons and Unavoidable Events

The substantive core criterion for entitlement to short-time work allowance is a significant reduction in work for economic reasons or as the result of an unavoidable event. According to the case law of the Federal Social Court, economic reasons must relate to the entirety of ongoing production and consumption processes, which specifically means that they depend on external economic processes and their cyclical phases as well as the structural elements responsible for them, such as economic and extra-economic conditions. This explicitly includes the economic effects of political decisions. A cyclical and structural disruption of the overall economic situation is necessary. On the other hand, an unavoidable event is an objectively ascertainable event that cannot be averted even if the utmost care required under the circumstances is taken by the employer or his employees. It must therefore be temporally limited and extraordinary and act from outside on the operation. A classic historical example is extreme weather events.

V. Consequences of the Current Energy Policy

Since the beginning of the Russian war of aggression against Ukraine, and also due to the German nuclear phase-out and the general inflation situation, the question has arisen as to whether the sudden increase in energy costs opens the possibility of receiving short-time work allowance. Naturally, energy-intensive sectors, such as the chemical industry or the trades sector, are particularly affected. Although this issue was discussed in the Bundestag in autumn 2022, laws have not been amended as a result. Even if general conditions apply, however, it can be argued that economic reasons are at hand substantiating a claim for short-time work allowance. The sudden increase in energy costs does not have an origin specific to the company and attributable to an individual company, while the economic effects also depend on political decisions.

VI. Employer Instruments

Under the general regulations for short-time work, employers are obliged to use potential employment law options beforehand. For instance, any existing unilateral right to issue directives – whether by individual contract or through a works agreement – must be used to compensate for the reduction in work through the buildup of negative hours in the workforce. However, there is no obligation for the employer to establish a legal basis for this if it does not yet exist. At the same time, particular influence can be exerted in shaping work time provisions, for example, by altering the number of allowable negative hours on a work time ledger. Within the framework of works agreements for the introduction of short-time work, corresponding provisions are conceivable in principle; however, they should be compatible with the legal concept and the company's working time regulations.

In addition, granting leave can also be considered to avoid the reduction in work. However, prioritised holiday wishes of the employees must not oppose the granting of leave. Particularly in the case of possible short-time work towards the end of the year, employees cannot be required to take their remaining holiday by the end of the current holiday year to avoid short-time work, nor can the employer stipulate a provision regarding the start of the holiday. According to the Federal Employment Agency, however, the employer is obligated to unilaterally determine the holiday date, as otherwise no unavoidable reduction in work exists. Recently, the Federal Labour Court also decided that the employer may proportionately reduce the holiday entitlement for each month of short-time work.

VII. Conclusion

Even without action on the part of the legislator, in light of energy policy developments, potential work stoppages in companies can be addressed with the instrument of short-time work. Whether the conditions for entitlement exist is, however, a question of the individual case. Companies are advised to evaluate the possibility of receiving short-time work allowance in the event of financial difficulties resulting from increased energy costs, provided a significant part of the workforce is affected and thus the necessary thresholds are reached.

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■ DECISION REVIEWS

Objection to a Business Transfer – Content of the Notification Letter

Prior to the transfer of a business, it is essential that information be provided on whether collective bargaining standards will apply to the new owner of the business; but it is not required to inform employees who are not subject to collective bargaining agreements about such agreements if they are not applicable either normatively or by reference.

Federal Labour Court, decision of 29 June 2023 – 2 AZR 326/22

Case

In the context of a business transfer, the claimant employee objected to the transfer of his employment relationship to a new business owner. He had been working as an employee not subject to collective bargaining agreements for the defendant and its legal predecessors since 2004. In the same year, the parent company of the employer, the defendant in said action, concluded a collective agreement for the socially responsible accompaniment of personnel adjustment measures. This applied to all employees bound by the collective bargaining agreement of the group. For employees not subject to said agreement, the application of the collective agreement was to be ensured by the group. The defendant subsequently decided to transfer the IT services previously provided in-house, effective 1 February 2017, to an external service provider, as well as all operating assets of the existing data centres. The plaintiff was informed of this by letter dated 2 December 2016. On 13 May 2019, he formally objected to the transfer of his employment relationship. The Labour Court dismissed the lawsuit, while the Regional Labour Court upheld it.

Details of the Decision

The Second Senate of the Federal Labour Court upheld the defendant's appeal. No employment relationship existed between the parties because it had been transferred via the business (part) transfer under Section 613a Para. 1 Sentence 1 Civil Code to the new business owner. In principle, he had a right to object under Section 613a Para. 6 Sentence 1 Civil Code, yet he had not effectively objected to the transfer of his employment relationship. This must occur within the one-month period beginning upon receipt of due notification by the employer under Section 613a Para. 5 Civil Code. The objection was therefore untimely.

The employer's notification was properly executed and was neither unclear nor incomplete. The employee is to be informed in a way that allows him to comprehend the nature of the business transfer (or partial transfer), the identity of the new owner, as well as the circumstances mentioned in Section 613a Para. 5 Civil Code. This generally includes the applicability of collective bargaining standards and to what

extent collective agreements and works agreements applicable at the transferor are superseded by collective agreements applicable at the new business owner. However, these details are not necessary if, due to a lack of coverage under collective bargaining or a reference clause at the seller of the business, no collective agreement applies to the employee.

Our Insights

Drafting of notification letters prior to a business transfer regularly poses significant challenges for employers, as incorrect notification can have far-reaching consequences: In particular, the one-month period for objection under Section 613a Para. 6 Sentence 1 Civil Code is only initiated by way of proper notification. In this case, the Federal Labour Court confirms the content requirements of a notification letter. A standard letter for all employees continues to suffice, although any specific features of the employment relationship must be captured. Nevertheless, the employer is not obliged to point out that the "non-applicability" of collective agreements existing before the business transfer will continue thereafter. Declaratory notes on legally evident aspects of an employment relationship are not necessary. Overall, it is sufficient if the employee can recognise the legal consequences arising in the specific business transfer.

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No Co-Determination of the Works Council in the Introduction of a Smartphone Ban during Work

If the employer prohibits the private use of smartphones during working hours to ensure due performance of work, the works council does not have a co-determination right under Section 87 Para. 1 No. 1 Works Constitution Act, as the ban does not concern rules of conduct.

Federal Labour Court, decision of 17 October 2023 – 1 ABR 24/22

Case

The employer is a business that manufactures car parts. By means of a notice to the employees posted in the workplace, the employer prohibited any private use of mobile phones/ smartphones during working hours. The notice, titled “Rules for the Use of Personal Mobile Phones during Work Hours”, included, in addition to the absolute ban, a warning of consequences under employment law in the event of a violation. The background to this measure being taken were occasional interruptions to work in production as well as in shipping and receiving; during these times, employees were sometimes reassigned or expected to perform ancillary tasks such as tidying their workspace or replenishing supplies without specific instructions for each instance.

The works council was of the opinion that it had a co-determination right in connection with this order under Section 87 Para. 1 No. 1 Works Constitution Act, because the ban affected the rules of conduct of employees in the company. After having unsuccessfully demanded that the employer immediately revoke the ban, it continued to pursue the injunction through summary proceedings. The Labour Court and the Regional Labour Court dismissed the application.

Details of the Decision

The First Senate of the Federal Labour Court confirmed the rulings of the lower courts and dismissed the works council’s legal complaint as unfounded. It has no co-determination right when the employer prohibits employees from using smartphones privately during working hours to ensure proper work performance. The Erfurt judges focused on distinguishing the regulation of rules of conduct requiring co-determination from that of work behaviour not requiring co-determination. The fact that a measure by the employer affects not only work behaviour but also rules of conduct does not automatically lead to a co-determination right. The decisive factor is rather the predominant regulatory purpose of the measure. The assessment is based on qualitative weighting of all objective circumstances of the individual case; the subjective intentions of the employer are irrelevant.

Work behaviour includes measures that directly specify and demand the employee’s duty to work. This includes instructions that do not directly specify the activity but nevertheless ensure its performance. The Federal Labour Court interpreted the essence of the ban as a regulation of work behaviour exempt from co-determination: The primary uses of mobile phones – in particular, making calls, reading and writing short messages, and using social media – require active operation of the device, which restricts the employee’s attention for at least a short time. This can lead to work interruptions, inattentive and deficient work behaviour. For a co-determination right, it is also irrelevant whether the use of mobile phones and smartphones is considered socially adequate and whether a corresponding ban is individually legally impermissible or violates the right to privacy due to its scope.

Our Insights

The decision illustrates that a co-determination right under Section 87 Para. 1 No. 1 Works Constitution Act is determined by the predominant regulatory purpose of a measure. For instructions that involve both work behaviour not subject to co-determination and rules of conduct subject to co-determination within the organisation; it is imperative that each individual case be considered with due care. If the measure can be devised so as to predominantly affect the employment relationship, measures can be implemented without the co-determination of the works council.

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Part-Time Work during Parental Leave – Employer's Refusal to Consent

Based on a list of names in a reconciliation of interests, the presence of urgent operational reasons that could oppose a part-time request during parental leave according to Section 15 Para. 7 No. 4 of the Bundeselterngeld- und Elternzeitgesetz (BEEG, Federal Parental Allowance and Parental Leave Act) cannot be assumed.

Federal Labour Court, decision of 5 September 2023 – 9 AZR 329/22

Case Details

The employee bringing the action has two children and took parental leave following the birth of his first child in 2016, during which he was employed part-time by the employer, who was the defendant in the action. In the summer of 2019, the employer concluded a reconciliation of interests with the general works council, which included a list of names and social plan indicating that the plaintiff's job would be made redundant. A month later, following the birth of his second child, he again requested part-time employment. The defendant denied this request citing urgent operational reasons, prompting the plaintiff to legally seek employment for the desired part-time hours. He also claimed that he had applied for an extension of the parental leave for his first child and had a right to continue the part-time work unchanged, extending the initially requested part-time period. The defendant believed they were justified in refusing consent due to opposing operational reasons. The Labour Court dismissed the claim, but the Regional Labour Court granted it on appeal from the plaintiff.

Details of the Decision

The Federal Labour Court largely dismissed the defendant's appeal. The Regional Labour Court correctly assumed that the defendant was obligated to consent to the requested part-time work. The conditions of Section 15 Para. 7 Sentence 1

nos. 1, 2, 3, and 5 BEEG were met, while no urgent operational reasons as defined by Section 15 Para. 1 Sentence 1 No. 4 BEEG opposed the request. The presence of such reasons is also not to be presumed under Section 1 Para. 5 Sentence 1 of the Employment Protection Act (Kündigungsschutzgesetz, KSchG). In case of operational changes as per Section 111 Works Constitution Act, if employees who are to be dismissed are named in a reconciliation of interests between the employer and the works council, it is presumed according to the statute that a dismissal subsequently pronounced is necessitated by urgent operational requirements. However, due to the clear wording, this is restricted to dismissals that are pronounced against an employee named individually in the reconciliation of interests. If the pronouncement of a dismissal is therefore absent for legal reasons, the provision cannot be interpreted in such a way that the presence of urgent operational reasons, which could oppose a part-time request, is also to be presumed.

An analogous application of Section 1 Para. 5 sentence 1 KSchG is also ruled out. Neither a plan-wise regulatory gap nor comparability are at hand. Neither, according to the principle of equality nor to prevent contradictions in legal principles, is it necessary to apply the legal consequence mandated by Section 1 Para. 5 Sentence 1 of the KSchG beyond the case regulated there. Even linguistically, there is a significant difference, as the provision speaks of urgent operational requirements, while Section 15 Para. 7 Sentence 1 No. 4 BEEG requires urgent operational reasons. Additionally, from a systematic perspective, the KSchG requires that continued employment of the affected employees is permanently impossible. In contrast, the law on parental part-time work aims at whether urgent operational requirements oppose temporary employment at the desired reduced working hours. The reference object is thus the extent of employment and not the employment as such.

Our Insights

Two aspects of the decision warrant attention: On one hand, consent to a request for part-time work during parental leave cannot be refused based on a reconciliation of interests with a list of names; on the other hand, an extension of parental leave according to Section 16 Para. 3 BEEG always requires the employer's consent. Such a situation is not presumed (refer to this configuration in Federal Labour Court, decision of 29 September 2016 – 9 AZR 435/18). When an extension of parental leave is requested simultaneously with a part-time job during parental leave, the provision for presuming consent under Section 15 Para. 7 Sentence 5 of the BEEG cannot be applied as a whole.

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Termination of Employment as a Prerequisite for Disability Pension Benefits

Simply granting additional benefits within the framework of an occupational pension plan without meeting the stipulated prerequisites does not, upon subsequent application, establish an entitlement to the repeated receipt of benefits from the same supplementary provision.

Federal Labour Court, decision of 10 October 2023 – 3 AZR 250/22

Case Details

The parties dispute the existence of a claim by the employee bringing the action for the payment of an occupational disability pension before the legal termination of employment. The plaintiff had been employed by the defendant, a Chamber of Industry and Commerce, since 1979. Based on an additional regulation ("ZVO") from 1981, the defendant granted a supplementary pension. This stipulated, among other things, the issuance of the pension commitment as well as the types of benefits and their respective prerequisites. Section 7 Para. 4 of the ZVO stipulated that employees eligible for benefits, who receive a pension due to occupational or total disability from the statutory pension insurance and depart from the services of the Chamber, receive a pension according to the ZVO.

In 2004/2005, the plaintiff received a temporary pension for partial disability. Although the employment relationship had not ended, the defendant paid him an occupational pension in the form of a pension according to the ZVO. In January 2021, the plaintiff was again granted a temporary pension for full disability from the statutory pension insurance, retroactive to 1 November 2020, until 31 August 2022. He subsequently approached he defendant and applied for the re-granting of the supplementary pension. The defendant, however, now refused to pay the pension on the grounds that the plaintiff had not left the services of the Chamber. The plaintiff consequently terminated his employment contract with effect on 31 March 2022, and sought retroactive payment of the pension from January 2021. In his opinion, the granting should not depend on the legal termination of the employment relationship; moreover, he argued that Section 7 Para. 4 of the ZVO was invalid due to insufficient clarity under Section 305c Para. 2 Civil Code and additionally unreasonably disadvantaged him. The Labour Court dismissed the lawsuit, as did the Regional Labour Court on the plaintiff's appeal.

Details of the Decision

The Third Senate of the Federal Labour Court also dismissed the plaintiff's revision. According to the Erfurt judges, the plaintiff is not entitled to payment of the occupational pension from Section 7 Para. 4 ZVO for the time prior to the termination of his employment. The interpretation of the regulation under the control of general terms and conditions revealed that the term "occupational and total disability" should be understood in the sense of social insurance law. If the employer had

intended a different meaning, it would have been obligated to make this clear in the provisions of the ZVO. Moreover, the wording "departure from the services of the Chamber" should be understood not as a mere temporary suspension, but as the final termination of the employment relationship. The uncertainty regulation of Section 305c Para. 2 Civil Code did not oppose this, as the regulation was clear.

Moreover, a unreasonable disadvantage was not at hand under Section 307 Para. 1 Sentence 1, Para. 2 Civil Code, as it was up to the affected employee to create the conditions for the granting of the disability pension according to the ZVO by terminating the employment relationship. The interest balancing required under Section 307 Para. 1 Civil Code also did not lead to a different conclusion. The employer's interest in avoiding double payments was at least equal to the employee's interest in receiving a disability pension despite the continuation of the employment relationship.

Our Insights

The decision demonstrates how important it is that pension regulations be worded clearly and unequivocally. Where legal terms (here from social insurance law) are referenced, the clause user must accept these in their traditional meaning. If they wish to avoid this, a different definition must be included in the pension order. Moreover, the granting of a benefit – despite the absence of the prerequisites – does not bind the employer if the benefit is subsequently reapplied for. The employee must then anticipate that the employer may lawfully refuse to grant the benefit after having duly reviewed the conditions. Finally, linking the granting of benefits to the employee-initiated termination of the employment relationship does not constitute an unreasonable disadvantage for the employee – at least not when the employee is assured of receiving the promised benefits after termination of employment.

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Effective Termination despite Faulty Mass Dismissal Notification?

The Sixth Senate of the Federal Labour Court intends to abandon its jurisprudence that a termination as a legal transaction violates a statutory prohibition under Section 134 Civil Code and is therefore invalid if, at the time of its declaration, there is no effective notification as required under Section 17 Para. 1 and 3 Employment Protection Act. After querying the Second Senate on whether it will abandon its diverging case law, said senate referred the query to the CJEU as to whether such an understanding is compatible with Union law.

Federal Labour Court, Preliminary Ruling Request of 14 December 2023 – 6 AZR 157/22 (B) and 1 February 2024 – 2 AS 22/23 (A)

Case Details

The employee bringing the action had been working at a trading company since 1994. At the end of 2020, insolvency proceedings were initiated upon the company's assets, and the defendant was appointed as the insolvency administrator. The employer subsequently terminated all remaining employment contracts, including more than five employees within a 30-day period, without prior mass dismissal notification. For this reason, the plaintiff holds the view that the termination of his employment relationship is void. The Labour Court and Regional Labour Court upheld the corresponding wrongful dismissal lawsuit.

The Decision(s)

The Sixth Senate of the Federal Labour Court resolved to abandon its case law that a termination as a legal transaction violates a statutory prohibition under Section 134 Civil Code if

it is declared without effective notification under Section 17 Para. 1 and 3 Employment Protection Act. It now holds the view that the provisions in Section 17 Para. 1 and Para. 3 Employment Protection Act are not prohibition laws, as they lack the necessary prohibitive character of employer obligations in the notification process. Even if the provision could be considered a prohibition law, the purpose of the law does not demand the nullity of terminations due to violations of notification obligations. It is considered a regulation embodying a purely organisational function, viewing the termination as an unobjectionable legal transaction, merely setting procedural obligations of a purely labour-market nature prior to termination. The assumed nullity of a termination constitutes an intrusion into the employer's decision-making freedom and goes beyond the objective of the notification process to mitigate the socio-economic effects of mass dismissals.

The nullity of the termination also does not arise from Section 18 Para. 1 Employment Protection Act. Mass dismissals are not subject to state approval. With its blocking period notice, the labour administration decides only on the duration of the blocking period. The nullity consequence also does not serve the intended purpose of notification of mass dismissal notification. The corresponding disadvantages for affected employers are no longer proportionate to the benefits achieved for the labour market policy objectives pursued by the legislator with the notification requirement. The differing sanction system for errors in mandatory and optional information under Section 17 Para. 3 Employment Protection Act does not contradict this due to a lack of consistency.

Upon querying the Second Senate whether it maintains its previous case law that a termination declared without the necessary prior mass dismissal notification is invalid, the Second Senate stated it would align with the Sixth Senate's legal view. However, it could not assess whether Article 4 of the Mass Dismissal Directive 98/59/EC (MERL) requires the 'irremediable' invalidity of the termination in the case of a mass dismissal without prior notification under Section 17 Para. 1 Employment Protection Act. Therefore, it referred the query to the CJEU.

Our Insights

The decisions were preceded by a CJEU decision on a referral from the Sixth Senate, indicating that at least Article 2 Para. 3 MERL does not grant individual protection (CJEU, Decision of 13 July 2023 – C-134/22 [G GmbH]). It is highly encouraging that the two competent Federal Labour Court Senates are revising their legal opinions, as it has become increasingly difficult for employers to implement workforce reduction measures without stumbling over one of the many pitfalls of the mass dismissal procedure. However, the fundamental clarification of the compatibility of the desired interpretation with Union law is still necessary. The jurisprudential change to the effect that mere errors in the notification procedure under Section 17 Para. 1 and 2 Employment Protection Act do not lead to the invalidity of the termination under Section 134 Civil Code would greatly facilitate the error-prone mass dismissal procedure.

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Undermining the Credibility of Sick Leave Certificates

The credibility of a sick leave certificate is undermined if it corresponds exactly to the duration of the notice period following an employer-initiated dismissal.

Federal Labour Court, decision of 13 December 2023 – 5 AZR 137/23

Case Details

The employee bringing the action had been working as a helper at the defendant, a temporary employment agency, since March 2021. The weekly working hours amounted to 35 hours and the defendant no longer deployed the plaintiff after 21 April 2022. On 2 May 2022, the plaintiff submitted a sick leave certificate for the period from 2 May to 6 May 2022. Again, on 2 May 2022, the defendant terminated the employment contract effective 31 May 2022. The plaintiff continued to submit follow-up certificates up to the termination date. As of 1 June 2022, he was fit for work and started a new job. The defendant then refused to continue paying wages for the period in question, citing doubts about the validity of the sickness absence. The plaintiff contends that the credibility of the sick leave certificates was not compromised, as he had originally reported sick before the defendant issued the dismissal. The Labour Court and the Higher Labour Court upheld the claim for payment.

Details of the Decision

The Federal Labour Court, however, partially upheld the appeal. The defendant had undermined the value of the medical certificates as evidence for the period from 7 May to 31 May 2022. This can occur when the employer demonstrates and possibly proves actual circumstances that, when considered in their entirety, give rise to serious doubts about the employee's incapacity for work. Such doubts can particularly arise with medical certificates issued during an ongoing notice period if the duration of the incapacity for work corresponds to the notice period. It is irrelevant in this respect whether the notice was given by the employee or employer and whether one or multiple medical certificates were presented. A case-specific assessment of the overall circumstances is always necessary.

Consequently, the evidential value of the medical certificate from 2 May 2022 is not to be considered undermined here, but those that followed are, due to the precise alignment of the

incapacity and the end of the employment contract. This means that the plaintiff bears the full burden of proof for the existence of his medical incapacity for work. The Regional Labour Court made no determinations in this regard. The case was thus referred back for a new trial and decision.

Our Insights

The decision seamlessly aligns with the existing case law of the Federal Labour Court, and finally reinforces the position of the employer. Now, in a “classic” case of incapacity for work, the employer can deny continued payment of wages: it is not uncommon for employees to fall ill after being dismissed by the employer and “recover” just in time to start a new job. Nevertheless, the employer continues to be in a “weaker” position when faced with a certified incapacity for work. It does not have access to the medical history and can only raise doubts about the incapacity for work in specific scenarios. Using a detective to catch the employee engaging in activities that typically contradict their claimed incapacity for work is only possible under very restrictive circumstances in light of data protection considerations. Nonetheless, grounds for scepticism may emerge from, among other sources, social media: If the employee posts a picture of themselves skiing or engaging in other physically demanding activities while claiming to be unfit for work, this could raise doubts about their incapacity for work. The employee can only dispel these if they can demonstrate and prove that they are not bedridden due to illness and that their behaviour is not contrary to recovery.

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Rejection of a Request for Part-Time Work – Requirements for the Presentation of an Organisational Concept

For the presentation of an organisational concept, which is referred to when rejecting an employee's request to reduce working hours, it is insufficient for the employer to merely state that the tasks, according to their business objectives, must be performed by a full-time employee. Instead, the desired working time model must necessarily follow from a specific organisational concept.

Regional Labour Court Mecklenburg-West Pomerania, Decision of 29 September 2023 – 2 Sa 29/23

Case Details

The defendant employer operates a retail business with over 340 stores. In one of these stores, the plaintiff was last employed as a store manager within a full-time role, working 39 hours per week. Besides the plaintiff, five other employees work at the store. In the plaintiff's absence, one of the other employees takes over as shift leader. When the plaintiff sought a reduction in her working hours to 32 hours per week, the defendant rejected this request on the grounds that the management and organisation of a store required full-time employment. The plaintiff subsequently pursued her claim in court, particularly referencing the provisions for representation. The defendant countered that their organisational business concept required that store management be conducted on a full-time basis. Moreover, all store managers were employed full-time. The Labour Court upheld the claim.

Details of the Decision

The Regional Labour Court of Mecklenburg-West Pomerania affirmed this decision. The plaintiff has a right to reduce her working hours under Section 8 Part-Time and Temporary Employment Act (Teilzeit- und Befristungsgesetz, TzBfG). The defendant failed to present sufficient facts to demonstrate opposing business reasons as required under Section 8 Para. 4 Sentence 1 Part-Time and Temporary Employment Act. It is not sufficient for the employer to justify the rejection solely on the basis of their divergent business conception of the "proper distribution of working hours". The defendant's presentation did not disclose a comprehensible organisational business concept. Merely stipulating that the position of store management can only be performed full-time does not constitute an organisational concept. The extent to which

other store managers employed by the defendant are involved should also be considered. The exercise of personnel responsibility and the overall responsibility for a store are relative to the size of the store and the number of employees. The defendant employs only one store manager full-time, regardless of the size and number of employees in the store. Given this context, it is incomprehensible why the plaintiff should not be able to manage and direct her five subordinates in a reduced workweek of 32 hours in the same way that a store manager is expected to oversee 20 full-time employees within 39 hours.

Our Insights

Case law imposes stringent requirements on the presentation required of an employer in order to justify the rejection of a request to work part time for conflicting operational reasons. Due to the onus of proof and presentation resting on the employer, they must detail the business reasons and, if necessary, extensively outline the negative consequences the implementation of the part-time request could have on the business. The existence of a significant impairment has been recognised in case law, for instance, in a case where the employer's sales concept necessitated that customers be attended to by one specific salesperson in particular. For employers, it is crucial to be aware early on of the steps to take in response to a request for part-time work. The legislature has set strict guidelines regarding deadlines and requirements for justification that employers must adhere to. In the context of the indefinite reduction of working hours under Section 8 Part-Time and Temporary Employment Act, the employer must discuss the desired reduction of working hours with the employee with the aim of reaching an agreement. If the employer fails to fulfil this requirement, they will be unable to subsequently present reasons for refusal that could have been addressed during such a discussion with the employee. If no agreement is reached, the employer must reject the request for part-time work in writing at least one month before the desired start date. Otherwise, the working hours will be reduced to the extent desired by the employee by statutory regulation.

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Virtual Works Council Meetings – Entitlement to Provision of Tablets or Notebooks?

The works council can request the provision of a tablet or notebook for each member for the purpose of conducting virtual meetings. This generally presumes that the works council has established a set of rules defining the conditions for such participation while ensuring the priority of face-to-face meetings.

Regional Labour Court Munich, decision of 7 December 2023 – 2 TaBV 31/23

Case Details

The three-member works council at a branch of a nationwide textile retail company petitioned to the labour court that the employer be obligated to provide three tablets or notebooks with a minimum display size of 7.9 inches and internet access. After the claim was dismissed, the works council amended its rules of procedure and continued its claim by way of appeal. It contended that conducting virtual works council meetings, as provided for under Section 30 (2) Works Constitution Act, was at its discretion and necessitated the provision of the requested equipment. The employer argued that the mere possibility for the works council to regulate virtual meetings in its rules of procedure did not alone justify the need for such equipment. Rather, a specific operational need was required.

Details of the Decision

The Munich Regional Labour Court upheld the appeal. The works council has, according to Section 40 Para. 2 in conjunction with Section 30 Para. 2 Works Constitution Act, a claim for the provision of the required devices, as these constitute necessary material resources in the form of information and communication technology to the extent

required under Section 40 Para. 2 Works Constitution Act. However, the claim of the works council necessarily presupposes that it has established a set of rules under Section 30 Para. 2 Sentence 1 No. 1 Works Constitution Act. In such rules, it must be stipulated under which conditions individual members can participate virtually in a works council meeting and under which conditions a meeting can be held entirely virtually. It is insufficient if the rules merely delegate the decision on whether and how virtual works council meetings are conducted to the chairperson. The chairperson can only act based on and in accordance with a set of rules. The amended rules of procedure of the works council here meet these requirements, as they envisage face-to-face meetings as the standard and conducting of virtual works council meetings as an exception.

In other respects, it is the works council's unique decision, guided by the intent and systematic framework of the law, to opt for and arrange virtual works council sessions. Therefore, the works council cannot be referred to the (cost-saving) conduct of a face-to-face or telephone conference. This does not constitute impermissible favouring of works council members under Section 78 Sentence 2 Works Constitution Act if they merely make use of the legally granted option of participating in works council meetings via video conference as provided for in Section 30 Para. 2 Works Constitution Act. The principle that works council members must be present at the workplace during their contractual working hours is limited for the duration of participation in a virtual works council meeting under Section 30 Para. 2 Works Constitution Act.

Our Insights

The works council can thus independently decide whether to utilise the provision under Section 30 Para. 2 Works Constitution Act to conduct virtual works council meetings and request the necessary technical equipment, provided that the stipulations of Section 30 Para. 2 Works Constitution Act are met. It is particularly important for the works council to ensure that face-to-face meetings are prioritised. Furthermore, any claim by the works council for the provision of information and communication technology is limited to what is necessary. It is ultimately the employer's responsibility to decide which brand or model to provide to the works council.

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■ BRIEF OVERVIEW OF CASE LAW

Coherent Ban on Headscarves also for Employees without Customer Contact

CJEU, decision of 28 November 2023 – C-148/22 (Commune d'Ans)

An internal rule within a municipal administration that prohibits visible signs of ideological or religious beliefs at the workplace is permissible if the employer aims to create a completely neutral administrative environment and the prohibition applies indiscriminately to all employees.

Case Details

The complainant worked for a municipality in Belgium. In her role, she had no public contact. Approximately five years after having been hired, she requested permission from her employer to wear a headscarf at work. Her employer rejected her request, and subsequently, the municipality amended its employment rules to include a clause obligating employees to adhere to the principle of neutrality prohibiting conspicuous signs indicative of ideological or religious beliefs. This applied both to public-facing roles and in dealings with supervisors and colleagues. The employee contested this, leading the Tribunal du travail de Liège to recognise potential unjustified discrimination, in particular because the prohibition also applied to employees without "public contact". The case was then referred to the CJEU to determine if such a ban is compatible with the Employment Equality Framework Directive 2000/78/EC.

Details of the Decision

The CJEU reaffirmed its existing case law that a prohibition of religious, philosophical, and ideological signs does not constitute direct discrimination under Article 2 Para. 2 Subsection a) of Directive 2000/78/EC if it stems from an employer's comprehensive desire for neutrality towards customers and is applied equally to all beliefs and employees. Indirect discrimination under Article 2 Para. 2 Subsection b) of the Directive is possible; however, the interest in neutrality constitutes a legitimate aim for the prohibition. However, the desire for neutrality required for justification on the part of the employer must meet an actual need, the imposition of the prohibition must be consistent and systematic; it must be confined to what is strictly necessary to prevent possible disadvantages; a simple desire for neutrality is inadequate.

Total prohibitions even for employees without external contact are justified in this case by the principle of neutrality in the public sector or public service in "their specific context". The final decision on the permissibility of the prohibition is subject to national law. Additionally, the goal of "exclusive" – that is, complete – neutrality in public administration must be pursued coherently and systematically. Thus, there should be no visible manifestations of belief allowed when employees are interacting with the public or among themselves in such settings. The CJEU continues to assert its coherence requirement, meaning that in countries where preemptive complete prohibitions are (still) permissible, there should be no differentiation based on the "intensity" of the symbol or garment, nor on whether there is contact with the public. Since the CJEU has made no distinctions for public services, this applies all the more in private companies.

No Prohibition on the Use of Statements from Private Chat Groups

Federal Labour Court, decision of 24 August 2023 – 2 AZR 17/23

In cases involving derogatory, xenophobic, and contemptuous comments regarding employees in a private chat group, there needs to be a specific explanation as to why an employee might legitimately expect that their remarks would not be shared with third parties by any participant. The fact that the statements occur within a private exchange involving several colleagues does not imply a prohibition on presenting or using the evidence in court.

Case Details

The plaintiff, employed since 1999 in the warehouse logistics of the defendant company, participated in a Whatsapp chat group with colleagues. Discussions in the group often included offensive, xenophobic, sexist, and degrading comments regarding supervisors and colleagues, and even incitements to violence against them. In late 2020, a former colleague temporarily joined the chat group and forwarded the chat history to an employee of the defendant. The chat then reached the company's HR manager through the works council, leading to the plaintiff's employment being terminated extraordinarily and, in the alternative, with notice. The plaintiff challenged the dismissal, arguing that the chat history should not be legally admissible as it was part of a private conversation. The Labour Court and Regional Labour Court upheld the claim.

Details of the Decision

The Second Senate of the Federal Labour Court upheld the employer's appeal, affirming that the Regional Labour Court correctly found that the plaintiff's statements in the chat group were not subject to a prohibition on presenting evidence. The processing of personal data, which can be established by the legal basis of EU member states under Article 6 Para. 1 Subpara. 1 Subsection e), Para. 3 Sentence 1 Subsection b), Para. 3 Sentence 4 GDPR in pursuit of an objective in the public interest, should be deemed acceptable as long as it is proportionate to the pursued legitimate aim, when civil and thus labour courts exercise the judicial powers conferred upon them by national law. A prohibition on presenting or using evidence is only considered if ignoring the submissions or evidence is compellingly required due to a legal position protected by EU law or Article 2 Sentence 1 in conjunction with Article 1 Sentence 1 Basic Law (Grundgesetz, GG).

In exceptional cases, a court may be prohibited from utilising pleadings and evidence obtained in the course of processing personal data in a manner that infringes an employee's right to informational self-determination. Neither the Code of Civil Procedure (Zivilprozessordnung, ZPO) nor the Labour Courts Act (Arbeitsgerichtgesetz, ArbGG) contain provisions restricting the usability of findings or evidence that a party to an employment contract has obtained, possibly (if applicable, unlawfully). Nevertheless, a prohibition on use may arise if such a prohibition is mandatorily required due to a constitutionally protected position.

However, this is not the case here. The judicial use of the chat statements does not constitute an unconstitutional infringement of the plaintiff's general right to privacy. The statements made do not concern his untouchable intimate sphere but at most his private sphere. In expressions made in a chat group consisting of several people, the plaintiff obviously had only a limited subjective intent to maintain confidentiality; his contributions did not have a highly personal character but were aimed at denigrating, ridiculing, and insulting others. To the extent that the use of the statements affects the plaintiff's privacy, the respondent's claim under Article 103 Para. 1 of the Basic Law to have its pleadings considered prevails. The Regional Labour Court erroneously assumed for constitutional reasons that the expressions could not constitute an important reason as defined by Section 626 Para. 1 of the Civil Code, as they were part of a confidential communication. Therefore, the matter was referred back to it. The mere fact that statements are made within a private chat group does not mean that they can be categorically exempted from being considered a breach of contractual obligations, especially if they pertain to supervisors and colleagues and thus relate to workplace circumstances. Consequently, the plaintiff must specifically explain why, given the size and composition of the involved group, he could legitimately expect his statements not to be disclosed.

Scope of On-call Work without Contractual Agreement

Federal Labour Court, decision of 18 October 2023 – 5 AZR 22/23

If on-call work has been agreed between an employer and an employee but the duration of weekly working hours has not been contractually specified, then in general, to fill this gap in the regulations, a working time of 20 hours per week is considered agreed as per Section 12 Para. 1 Sentence 3 of the Part-Time and Temporary Employment Act. Exceptions to this interpretation are rare.

Case Details

The plaintiff has been employed since 2009 by a company in the printing sector as an "on-call helper for insertions". No specific weekly working hours for on-call work were defined in her employment contract. In her claim, she sought remuneration for the use of her labour from 2017 to 2019. She had been called to work an average of 103.2 hours per month during this period, which she argued should be compensated as working hours. Additionally, she demanded back pay for the period from 2020 onwards due to acceptance delay, as she had been called to work less than what was owed. The Labour Court determined that the duration of the contractually owed weekly working hours amounts to 20 hours, and thus partially granted the payment claim. The remaining part of the claim was dismissed. The plaintiff's appeal against this decision was rejected by the Regional Labour Court of Hamm.

Details of the Decision

The plaintiff's subsequent appeal remained unsuccessful. Under the on-call work agreement, e.g., work adjusted according to the workload, Section 12 Para. 1 Sentence 2 Part-Time and Temporary Employment Act typically mandates that a specific duration of weekly working hours must be contractually established. If this determination is omitted, the Federal Labour Court indicates that Section 12 Para. 1 Sentence 3 Part-Time and Temporary Employment Act fills

this legislative gap, deeming a working time of 20 hours per week as legally agreed. Only in rare exceptional cases should a different duration of weekly working hours be considered via supplementary contractual interpretation if the statutory fiction does not constitute an appropriate regulation in the employment relationship, and there are objective indications that the employer and employee would have agreed on a higher or lower number of hours at the time of contract if they had been aware of this regulatory gap. Although the gap in the contract regarding the duration of weekly working hours is initially filled with the statutory fiction at the commencement of the employment relationship, parties are nonetheless free to explicitly or implicitly regulate otherwise subsequently. Neither the employer's on-call behaviour alone nor the employee's acceptance conduct over an extended period would suffice for such an assumption. Such behaviour does not imply a legal declaration of commitment to a longer duration.

Duty to Offer an Alternative Appointment for an Interview to a Severely Disabled Person

Federal Labour Court, decision of 23 November 2023 – 8 AZR 164/22

The duty of public employers to invite severely disabled individuals to an interview includes the obligation to offer an alternative appointment if a sufficiently significant reason for the inability to attend is communicated and arranging an alternative appointment is reasonable for the employer.

Case Details

The parties are in disagreement about a claim for compensation under Section 15 Para. 2 General Equal Treatment Act (Allgemeines Gleichbehandlungsgesetz, AGG) due to alleged discrimination on the grounds of gender and disability. The severely disabled plaintiff, who was born intersex and identifies as a hermaphrodite, applied for a job advertised by the defendant city for "Case Managers in Residence Law" and requested to be addressed as "Dear Mr F*" in the selection process. This form of address was not used by the city in the invitation to the interview. Consequently, the plaintiff declined the scheduled appointment citing "another appointment" and requested an alternative date. As assembling a comprehensive selection panel was necessary for the interview, an alternative appointment could not be offered, which the defendant communicated using the desired salutation. The plaintiff perceived the use of the gender star in the job title and the failure to offer an alternative appointment as discrimination. The lower courts dismissed the claim.

Details of the Decision

The Federal Labour Court also reached the same decision. Job advertisements must be directed towards individuals of all genders. Using the so-called gender star expresses this gender neutrality. While the duty of public employers to invite severely disabled job applicants to an interview according to Section 165 Sentence 3 Social Code Book IX (Sozialgesetzbuch IX, SGB) is not fulfilled merely by offering a single appointment if the disabled individual notifies of their unavailability before the appointment, citing a sufficiently significant reason, and it is reasonable for the employer to offer an alternative appointment. Whether an alternative appointment should be offered depends on the specifics of the case. The evaluation of the relevant facts by the Higher Labour Court is only subject to limited scrutiny in the revision proceedings.

Deviations in Employment Contracts from the Contents of Referenced Collective Bargaining Agreements

Federal Labour Court, decision of 28 June 2023 – 5 AZR 9/23

If an employer subject to a collective bargaining agreement uses an unrestricted reference clause for a collective agreement in a standard-form employment contract, special indications are required to assume that additional provisions in the employment contract are intended to deviate from the collective bargaining agreement content in a constitutive manner.

Case Details

The parties dispute a potential additional monthly payment. The plaintiff, employed since 1989 as a member of the ground staff at Munich Airport by the defendant employer, has a contract stating that "rights and duties […] arise from the respective valid collective agreements, works agreements, and service regulations". Additionally, it was contractually stipulated that "remuneration is paid 13 times a year by bank transfer". A collective agreement applicable to the employment relationship has, since the start of the plaintiff's employment,

included provisions for an annual Christmas and holiday bonus amounting to half a basic salary, payable in May and December, respectively. At the end of 2020, the defendant concluded a "Collective Agreement to Manage the Corona Crisis for Ground Staff", effective from 10 November 2020 to 31 December 2021, which among other things stipulated that no holiday or Christmas bonuses would be paid during this period. In November 2020, May 2021, and November 2021, the plaintiff thus received neither a holiday nor a Christmas bonus. A further, e.g., 13th monthly salary was never paid by the defendant during the employment relationship. Nonetheless, the plaintiff contended that he was entitled to such based on the provisions of his employment contract or that said contract guaranteed the collective claim for holiday and Christmas bonuses. The subsequent lawsuit was dismissed by the Labour Court, as was the plaintiff's appeal by the Regional Labour Court.

Details of the Decision

The Federal Labour Court also dismissed the plaintiff's revision. According to the contents of the employee's contract, he has no independent claim to payment of a "13th monthly salary" independent of the collective arrangement. The contractual provision discussing the 13th annual payment is purely declaratory, establishing neither an independent claim nor a guarantee for collective social benefits. While the clause is not worded unequivocally, the reference to bank transfer argues against an independent basis for claims. Additionally, the contract's overall system and context suggest that the employment relationship, including special payments, was intended to be governed by the applicable collective agreements in their respective valid versions. The provision regarding non-cash payment merely pertains to the payment modalities and informs about the total remuneration under prevailing collective regulations.

If an employer subject to a collective agreement incorporates the applicable collective agreement into the employment relationship by way of an unrestricted reference clause in a standard employment contract, it is clear that the employment is to be comprehensively governed by the respective collective bargaining regulations. Consequently, special indications are required to assume that further clauses in the employment contract are intended to constitute better or worse conditions compared to the collective provisions. Such indications are not evident here, nor are there any other limitations to the extent of the reference. Not least, the plaintiff, prior to the validity of the pandemic-related collective agreement, had at no time challenged the modalities and total amount of his annual remuneration or demanded payment of a 13th (in total 14th) payment.

Scope of Emergency Services during Industrial Action in Essential Services

Baden-Wuerttemberg Labour Court, Decision of 18 July 2023 – 4 SaGa 3/23

The staffing and timing of emergency services during a strike at an essential services employer must be oriented towards the purpose of the service but limited to the essential extent necessary to uphold the strikers' right to industrial action, guaranteed by Article 9 Para. 3 Basic Law.

Case Details

In the context of an interim injunction procedure, the parties dispute the extent of emergency services required during industrial action. The employer, a subsidiary of a university hospital, provides technical services for the hospital. Said services include operating an IT-driven system for automatic transport of goods such as sterilised equipment, medications, or medical supplies to various locations and wards. The defendant union has organised several strikes at the employer's facility since April 2022 and, in early July, called for further strikes on 12, 18, and 21 to 28 July 2023. Following failed negotiations on establishing emergency services, the union issued a unilateral emergency service declaration, which did not include emergency staffing for malfunctions in the transport system. The employer subsequently sought a court order requiring the union to permit an emergency service for the system, staffed with two technically qualified individuals during morning and late shifts. The union argued that transport could be carried out by other means, such as cars or electric tugs, such that an emergency service was unnecessary. The Labour Court upheld the employer's application.

Details of the Decision

The Regional Labour Court partly upheld the union's appeal. While the employer may demand the establishment of emergency services for rectifying malfunctions in the transport system, it cannot insist on the staffing levels and operating hours it initially requested. The claim for setting up the emergency service is valid, and issuing an interim injunction in industrial disputes is permissible in this context. Urgency exists when industrial action is imminent. The parties agree

that emergency services are fundamentally necessary at the employer's establishment. During industrial action, the performance of emergency work may be required – services that ensure the supply of essential goods and services to the public. Strike actions in the essential services sector are not inherently illegal as a general prohibition against industrial action would conflict with Article 9 Para. 3 Basic Law. The dispute here, however, is limited to the scope and specifics of the emergency service. If a union establishes an emergency service that the employer deems insufficient and which compromises public welfare, the employer must be able to seek a court order to restrict the scope of the strike through an interim injunction.

The nature of the emergency service to be established must reflect its purpose yet be minimised to maintain the freedom to strike guaranteed by Article 9 Para. 3 Basic Law. The emergency service should not be used to keep the operation running as usual but rather should focus on providing minimal essential services. In this case, alternative transport methods would pose a serious risk to patient care, yet the extent of the emergency service for malfunctions requires only one skilled and one non-skilled individual, as confirmed by the employer's managing director. In terms of hours, the emergency service should be limited to the core time from 07:00 am to 17:00 pm, during which most activities occur at the hospital.

■ INTERNATIONAL NEWSFLASH FROM UNYER

Austria: Expense Reimbursement for Work from Home?

The Supreme Court of Austria (OGH) recently addressed for the first time since the enactment of regulations governing work from home in 2021, the issue of compensation for employees performing such remote work.

Following the closure during the COVID-19 crisis, an employee temporarily worked from home. From April 2020, no office space was available, so she had to work permanently from her home. The employee refused to sign an agreement that would have provided her with a monthly remote work allowance of EUR 250.00 gross. The employer provided the employee with a laptop, a mobile phone, and an office chair. The employee demanded compensation amounting to EUR 250 net per month. The Supreme Court found in its decision (decision dated 27 September 2023 – 9 ObA 31/23h) that employers are obliged to provide the necessary work equipment for performing tasks from home. If the employer fails to provide these, the employee is entitled to compensation. This claim for home office compensation includes not only the additional costs incurred by remote work but also a proportionate share of costs for electricity, heating, and rent. The decision necessitates adjustments in Austria, prompting employers to review and possibly revise their current home office or remote work agreements regarding the provision of work tools and compensation for expenses.

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■ GENERAL INFORMATION

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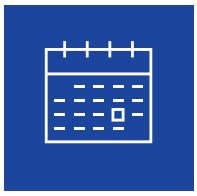
Events, publications and blog



You will find an overview of our events here.

You will find a list of our current publications here.

You will find our blog here.

Legal information

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