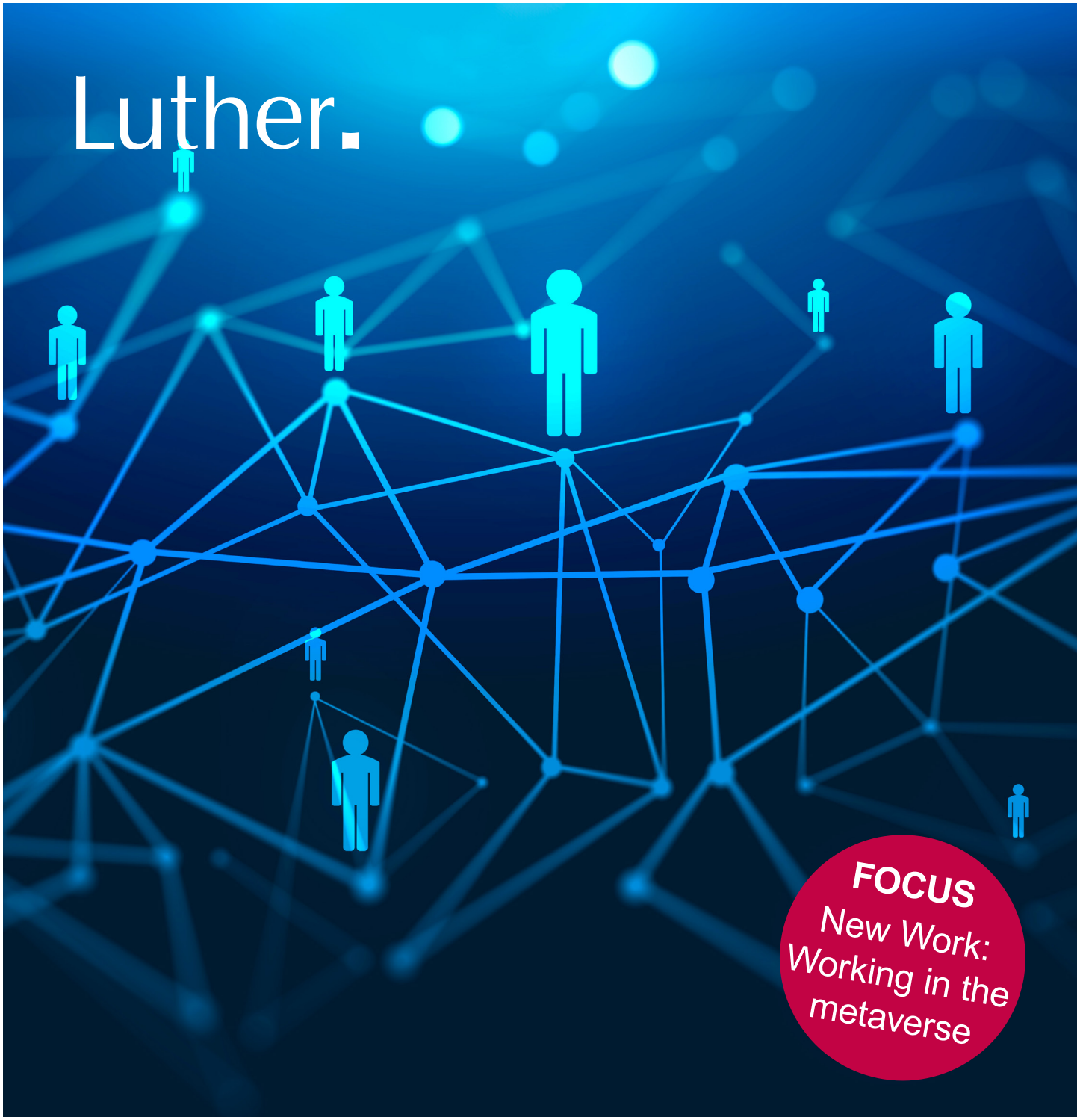

Labour & Employment Law Newsletter

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unyer GLOBAL ADVISORS

Content

Dear readers,

The term “metaverse” is currently being talked about by everyone. Even though it is mostly associated with online games, the world of work itself is also becoming increasingly familiar with this term. But what exactly is it? How does it affect the way we work? Will work soon shift to the virtual world as well? Some are already calling the metaverse “the next big thing”. Reason enough for us to take a look at this topic and its impact on the world of work. Even if their own company is not represented in the metaverse, employers will not be able to avoid this topic, especially with regard to business relationships with customers and suppliers who operate in the metaverse. A closer look quickly shows that labour law issues regarding the metaverse are multi-faceted; the establishment of codes of conduct will also play a central role in addition to occupational health and safety and data protection. Nadine Ceruti and I provide a first outlook in this issue of our newsletter.

The amendments to the Act on Written Evidence of the Essential Conditions Applicable to an Employment Relationship (Nachweisgesetz) entered into force on 1 August 2022. The Act has led to an acute need for action by employers and has presented them with significant challenges. The first two months of the new legislation are behind us. Time for an initial detailed review. In this issue, Dr Eva Rütz therefore looks at the initial practical experience gained in implementing the new law. In doing so, she provides recommendations for action for companies regarding issues that are relevant in practice.

In this issue of our newsletter, we are of course once again looking at developments in case law. We hope that we have selected topics that are of a particular interest to you.

As always, we look forward to receiving your feedback on our topics. Please feel free to contact our authors directly if you have any suggestions or questions.

We hope you enjoy reading this issue!

Yours’

Achim Braner

New Work: Working in the metaverse

The world of work is subject to constant change. We are currently seeing a shift to hybrid working models in many places. Work could also soon shift to the virtual world – to the metaverse. What is being seen by some as “the next big thing” is considered by others as an overhype. What is certain is that most people are likely to have a somewhat nebulous understanding of the metaverse. Only a few people can imagine working in the digital world, let alone what labour law issues may arise in this connection.

What is meant by the metaverse?

The term metaverse is mostly associated with online games. However, the metaverse is now no longer only relevant for gaming; other industries also want to tap into the metaverse. This is true even for more conservative industries, such as banks. A few weeks ago, a Swiss bank opened its first branch in the metaverse. The metaverse is a digital space in which people can interact with each other using virtual reality (VR) technology. For companies, this means two things: They can open their store for customers in the metaverse, for example, as well as make their office available for employees. Each employee creates an avatar, their own identity in the virtual world, which can contact other avatars. This usually requires VR goggles and two controllers for the hands. Augmented reality (AR) hardware is already being used in some areas of work. By enriching reality with virtual “things”, for example, several people can work simultaneously on workpieces in 3D optics. The appearance of a company in the purely virtual world, the metaverse, is particularly interesting for e-commerce and the hotel and real estate industry. They can show their customers products and rooms there in a vivid way. Currently, there is not yet “the one metaverse,” but there are various tech groups, such as Meta/Horizon, Decentraland or The Sandbox, that offer their own virtual version of a metaverse.

The workplace in the metaverse

Once the employee has created an avatar, he or she can customise the virtual office and meeting rooms. Nothing would then stand in the way of working in the South American jungle. VR glasses would have to be used for team meetings or even customer consultations. This allows employees from all over the world to sit together at a virtual table using their avatars. Motion sensors mimic head and hand movements in real time. The virtual features are said to eliminate the video conferencing fatigue that many complain about. VR technology is also well suited for familiarisation and training. High travel and material input costs, for example, can be saved and situations that endanger safety can be circumvented.

When creating the avatar, the question arises as to what extent the employer may or even must specify the appearance

or whether it can even require the employee to create an avatar. Does the avatar have to look like the employee, a photocopy of himself/herself? Or should the employee be able to give free rein to his/her fantasies in the virtual world? If the employee decides to have a different skin colour, gender or wear traditional clothing, this gives rise to new problems. His/her appearance might offend other employees or even cross the line into cultural appropriation. From the employment law perspective, the employer's right to issue instructions on the one hand and the protection of the employee's general personality right on the other therefore play a key role in the metaverse. Employers will presumably have to establish their own principles of conduct for the metaverse, which go beyond the previously known regulatory content of a code of conduct. In this context, it will be crucial to establish ethical and moral principles at an early stage in order to prevent misuse, conflicts and violations of the rules. This is also against the backdrop of the employer's duty of care. What will be fascinating here is the area where on-duty and off-duty life mix in the virtual world, as the boundaries here are even more fluid than in reality.

Occupational health and safety

Occupational health and safety protection will also play a key role in the metaverse. The employer is obliged to take the necessary occupational health and safety measures taking into account the circumstances that affect the health and safety of its employees, Section 3(1) Sentence 1 of the German Act on the Implementation of Measures of Occupational Safety and Health to Encourage Improvements in the Safety and Health Protection of Workers at Work (Arbeitsschutzgesetz, ArbSchG). This obligation also applies to the employer in the virtual world. The same standards of protection must exist there as in the physical working world. The employer must first perform a risk assessment in order to be able to take effective measures. What dangers exist in the virtual world? Numerous potential risks will arise as soon as the employer uses the metaverse not only as an internal platform for conferences, but also when employees come into contact with other users or potential customers. There may be threats of violence, insults, racism, bullying, assault or sexual harassment in the virtual space. Similarly to how such hostility occurs on social media, the metaverse is not safe from the spread of harmful content and behaviour. For example, shortly after the launch of the new VR platform Horizon Worlds, the virtual avatar of a beta tester was touched inappropriately by an anonymous user. Because virtual spaces are designed to mimic the real world, harassment there triggers similar negative psychological reactions in those affected. One of the most important protective measures that the employer will have to take will be to make it possible for employees to interact safely with other (anonymous) users. This may include introducing spacing rules for the avatars among themselves. Technical precautionary measures can also include setting up a quick blocking and reporting function for disruptive co-users. Creating responsibilities within the company for risk analyses of and monitoring the metaverse makes it possible to identify risks and dangers at an early stage and to take appropriate protective measures. Employees should also receive training regarding the use of the metaverse and their behaviour.

Working in a virtual space can also lead to health problems for employees. Wearing VR glasses for a longer period of time may cause (short-term) eye problems and nausea. Under the currently prevailing technical conditions employees can hardly be expected to work in the metaverse for several hours. Last but not least, employers should bear in mind that a lack of physical social interactions can lead to psychological problems for employees.

Employee monitoring / privacy and data protection

Another particular problem is that employees in the metaverse can be monitored differently than those who work from the office. The avatars can be observed working virtually without interruption. In addition, personal data is produced in unimaginable quantities in the metaverse. Every movement, every look, every conversation can be traced and stored. The location of the employees can also be recorded, the screen or even the time recording can be monitored. It will be the employer's responsibility to adequately protect all employee and customer data from theft or misuse. This means that the employer must establish a suitable security system for the (personal) data that is collected.

Co-determination rights of the works council

Questions of the co-determination of the works council also play a major role when working in the metaverse. Of particular relevance here, of course, is the right of co-determination on the introduction of technical devices (Section 87 (1) No. 6 of the Works Constitution Act (Betriebsverfassungsgesetz - BetrVG), since - as already explained above – the employee's performance and behaviour in the metaverse can easily be monitored due to the large amount of data that is created and stored. In addition to co-determination on the introduction of technical equipment under No. 6, co-determination rights are

conceivable in the design of mobile work, in particular by means of information and communication technology (No. 14), with regard to the organisation of working time (No. 2) and with regard to health protection issues in the metaverse (No. 7). Due to the complexity of the matter and the numerous subsequent questions relating to co-determination law, it is advisable to involve the works council at an early stage if work in the metaverse is envisaged.

Artificial intelligence in working life

In the future, it will also be interesting for employers how other new technologies will change the world of work. Artificial intelligence (AI) is particularly worth mentioning here. AI systems are already being used in companies. Individual sub-areas in which AI is used can be differentiated. This includes personnel analyses, which, inter alia, are used for hiring employees or analysing their work performance and productivity. The systems check application documents for the suitability of the candidate and conduct initial interviews with the help of Chat-Bots. Automated coordination and control tasks for employees and other classic management tasks can also be managed with the help of AI. This is implemented through the use of intelligent algorithms (algorithmic management). Last but not least, tasks will be automated (task automation). The typical example is the use of robots. From an employment law perspective, the participation rights of the works council must be taken into account when using AI technology. If the AI system collects personal data, it must be adequately protected. Furthermore, persons may not be discriminated against, particularly in the job application process, on the basis of a distinguishing characteristic listed in Section 1 of the German General Equal Treatment Act (Allgemeines Gleichbehandlungsgesetz, AGG).

Outlook

It is too early to predict at this point in time whether the metaverse will become widespread in the working world. The technical hurdles are currently still quite high, but further development will also accelerate these processes. Some companies will certainly be drawn to the metaverse in the near future. Moreover, it is already clear that the employment law issues are manifold and that – e.g. with a view to business relationships with customers and suppliers operating in the metaverse – one will not be able to completely avoid the topic, even if one's own company is not represented in the metaverse. Since technical progress in the metaverse is far from complete, other employment law issues will probably emerge that we cannot even guess at the moment. These are exciting times.

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Report on the experience gained regarding amendments to the Act on Written Evidence of the Essential Conditions Applicable to an Employment Relationship

The legislator had taken advantage of the summer recess to enact amendments to the Act on Written Evidence of the Essential Conditions Applicable to an Employment Relationship (Nachweisgesetz, NachwG) that entered into force as of 1 August 2022. The main new features were an extension of the scope of application to include (almost) all employees (including those employed for a short period; in principle also trainees), a comprehensive expansion of the list of conditions that need to be proven and the introduction of a fine of up to EUR 2,000 per violation.

The last point in particular, the fine per violation, had caused a great deal of unrest at first glance – especially at companies with large numbers of employees. Nevertheless, our message – after having spent a lot of time on providing detailed advice this summer - is that “things are not as bad as they seem!” and above all: “Don’t panic!”

Ultimately, the situation can be summarised as follows. There is a new legal regulation in the form of a pure extension of the scope of the law that results in particular in additional administrative expenditure of a temporary nature. Admittedly – this is a nuisance and sometimes, depending on how seriously the company has taken the already existing requirements of the NachwG, also time-consuming. However, it is – now the good news - a legally solvable problem. Furthermore, a sense of proportion must certainly be kept with regard to the form of implementation. The new law should not be applied in too much detail, especially as there is no specific case law on key points.

We would like to present the most important points to be considered, which have emerged as advisory focal points in the past months.

Amending the employment contract vs. notification letter

The starting point for discussions with clients where they want to incorporate the new legal requirements was always the discussion of the question – shall we amend all employment contracts? Do we use this as an opportunity to revise them anyway? Or do we switch overall to a one-page notification letter outlining the essential working conditions set out in the new list of conditions that need to be proven?

In the case of very conservative companies, where all employment contracts, including supplementary and amendment agreements, are concluded in writing anyway, the decision was usually made to incorporate the key adjustments directly into the employment contracts, whereas companies that were, for example, strongly digital and “only” signed their employ-

ment contracts digitally (except for fixed-term employment contracts) (e.g., via DocuSign) tended to develop a detailed sample notification letter that was then delivered to employees in the required written form (where necessary with electronic proof of delivery with regard to the response). A power of attorney is possible in the case of such a notification letter; the original of the power of attorney document does not have to be attached because it is a declaration of knowledge and not a declaration of intent. It cannot therefore be rejected.

Both approaches have their advantages and disadvantages. If the required changes are integrated into the employment contract, the contract will be up to date. We do not share the fear regarding restrictions of the right to issue instructions due to the amendments to the NachwG, because these clauses can also be formulated in such a way (e.g., with regard to working time) that the right to issue instructions is not restricted even by the descriptive provision in the employment contract. The only thing that needs to be ensured is that amendments and supplement agreements are also concluded in writing (this is particularly important in the case of salary increases, which must be communicated in writing in any case). The advantage of the notification letter is that it provides the option of unilaterally submitting a pure declaration of knowledge (without being legally binding, but which certainly would have a factual and procedural binding effect). Management of the process of the administrative conversion lies with the company; Only proof of receipt must be ensured. Furthermore, it is possible to work on a centralised basis with a sample letter that can be adapted in each case (depending on the type of contract and job descriptions).

Relevant amendments that are key in practice

Some specific cases have emerged that represent the key points relating to the amendments to the employment contract (or focus in the notification letter). This relates to the description of the remuneration components, the possibility of and conditions for ordering overtime and the description of the termination process. Otherwise, the other points have typically already been formulated in a relatively comprehensive manner in the employment contracts – at least from the point of view of compliance with the requirements of the NachwG.

We are currently opting for a restrictive approach with regard to the description of the termination process (description only of the written form, the time limit – without “copying the text of the law”, mention of the deadline for bringing an action), because a great deal is still currently acceptable at least now (which is ultimately relevant for the question of the imposition and the amount of the fine). This description should be kept as streamlined as possible and, in our opinion, should also only be given for the action for unfair dismissal variant (and not the action to terminate a fixed-term employment contract).

Otherwise, in the case of one point, it may be advisable as an exception to even use a separate notification letter for reasons of practicality - simply because of the volume of text. According to the inquiries we have received, this relates in particular to the point regarding the description of a shift system, insofar as this is complex and, as an exception, is not governed in a works agreement.

Please note with regard to company pension schemes that explanations only have to be provided in this case, if a pension fund is used. In all other cases, the employer is not subject to the obligations to provide written information, because they require the pension provider itself to do so under insurance law aspects.

References should be used extensively where possible to avoid having to provide lengthy explanations. This is also possible to a large extent – especially in the case of existing collective bargaining arrangements. However, in cases that touch cross-border issues (especially overseas postings), please note that the possibility of using a blanket reference is then severely limited.

Dealing with old cases

All advice provided by us has mainly dealt with cases where new employees have joined the company from 1 August 2022 onwards, solely because of the time urgency involved. It should be noted above all in this regard that we consider uniform notification at a single point of time (and not in a possible staggered form, as the law would generally allow) to be practicable; all the more so if notification is provided via the written employment contract. Written information provided at different points in time only creates superfluous additional work; the environment will also thank you for streamlining the process.

If a notification letter has been used, it is a good idea to use it for old cases as well, i.e., for existing employees who now need to be notified under the amended NachwG. It may therefore also be advisable to draft such a notification letter in addition to an amended employment contract as a precautionary measure for these cases.

However, in our opinion, it should be considered from a cost perspective as to whether such a notification letter should be drafted in addition to amending the employment contract only because of the existing employees. At any rate, we are not aware of any case to date in which an employee has actually made such a request under the new legal regulation. If he/she did so, the employer would nevertheless have to comply with this request within seven days. It is possible that such a wave of information requests could be triggered, for example, by works councils or trade unions. We have not yet been able to identify this in practice; especially since the works council elections have in any case taken place in the meantime for the current election period in most cases in a legally unassailable manner. This request for information from existing employees is probably more of a theoretical threat.

Other to-dos

One should also not expect the formal procedure too hastily in the event of a request to become a permanent employee or for a change in working time or an application from a temporary worker to conclude an employment contract. Ultimately, in these scenarios - as is otherwise known from part-time and fixed-term employment law or also from the Temporary Employment Act – requests are not deemed to granted (Fiktionswirkung) if certain deadlines or justification requirements are not met. If the company is faced with such a request for the first time, it will be sufficient to address this issue then, rather than out of anticipatory obedience.

In our opinion, only one material question will be relevant: which probationary period is appropriate for a fixed-term employment relationship. This must be reasonable, otherwise the probationary period is invalid; which, of course, still does not eliminate the requirement of the six-month waiting period for the applicability of the Protection against Dismissal Act (Kündigungsschutzgesetz - KSchG). If the probationary period were unreasonably long, the only consequence would be that the regular notice period would apply instead of the shortened probationary period notice period. This is a manageable “penalty.”

There are therefore two rules of thumb to keep in mind: The easier the job, the shorter the probationary period must be. In the case of a fixed-term contract without a material reason, which can be agreed for a maximum of two years, a probationary period of six months is only justified in the case of the maximum fixed-term period (and in any case if the work is of a certain complexity). We consider a maximum of three months to be appropriate for a fixed-term contract (initially) of one year. In our opinion, anything with a duration less than that should have a probationary period of one to two months at the most - but two months only for somewhat more complex activities.

Conclusion

Please remain calm in particular and only make preparations for those points that have to be immediately dealt with from a legal perspective. This is essentially the question of how to deal with new hires. In our view, the request for notification from existing employees is secondary. Concrete preparations regarding templates etc. should only be made here when this request is actually made. In all other respects, sample texts, e.g. for requests from temporary staff to become permanent employees, requests from employees under fixed-term contracts to become permanent employees, etc., are also desirable, but are not mandatory given the fact that in the event of violations by the employer requests are not deemed to be granted. At most, employers should be concerned about the question of the appropriateness of the agreed probationary period in the case of fixed-term contracts, because in the event of termination, a shorter period is significantly more favourable from an economic point of view.

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■ JUDGMENT IN REVIEWS

Formal validity of an electronic document submitted via the special electronic mailbox for lawyers (Besonderes elektronisches Anwaltspostfach, beA)

In its decision of 25 April 2022, the Federal Labour Court made a fundamental decision regarding the effective submission of electronic legal documents and the remedying of any formal defects. According to this decision, the format requirements for electronically submitted documents in effect up to 31 December 2021 were invalid.

Federal Labour Court, decision of 25 April 2022 – 3 AZB 2/22

The case

After the claimant was unsuccessful at the first instance with an action for the adjustment of her company pension, the claimant's lawyer of record filed an appeal with the Hessian Higher Labour Court in June 2021 using the special electronic mailbox for lawyers (beA) and provided the grounds of appeal in July 2021. All files were submitted in PDF format and were printed, stamped and added to the paper file by the Court upon receipt. On 5 October 2021 the Hessian Higher Labour Court identified defects in the electronic documents submitted and advised the parties concerned that the appeal and the statement of the grounds of appeal had been received in the wrong file format because the files could not be searched nor copied, and not all fonts were embedded. However, the defects could be remedied retroactively under Section 130 (6) sentence 2 of the Code of Civil Procedure (Zivilprozessordnung, ZPO). On the same day the claimant's lawyer of record again submitted the appeal and the statement of the grounds of appeal via the beA as a PDF file and had "given an assurance pursuant to Section 130a (6) Sentence 2 ZPO" in a statement that these documents were identical in content to the documents previously submitted. The resubmitted documents, which could be copied and searched but in which not all fonts were embedded still, were also printed out by the court and added to the paper file. However, the Hessian Higher Regional court then announced that it intended to dismiss the appeal as inadmissible, because the legal documents had not been submitted in the required file format. The claimant's lawyer of record then resubmitted the most recently submitted PDF files, together with an assurance from the lawyer that the documents were identical in content to the previously submitted documents. The Hessian Higher Labour Court dismissed the claimant's appeal as inadmissible. The claimant objected to this by filing an appeal on points of law which the Hessian Higher Regional Court allowed.

The decision

In its decision of 25 April 2022, the Federal Labour Court reversed the decision of the Hessian Higher Labour Court and referred the matter back to the Hessian Higher Labour Court for a hearing and decision. The Hessian Higher Labour Court was wrong to dismiss the appeal as inadmissible. The claimant's lawyer of record had in any event complied with the requirements applicable under Section 130a (6) sentence 2 ZPO by submitting the documents in response to the Court's first notice on 5 October 2021, together with an assurance that their content was identical to that of the documents previously submitted. The initial formal defect had therefore been remedied. At the time the deadline expired, the versions of Section 130a ZPO and the Electronic Legal Transactions Ordinance (Elektronischer-Rechtsverkehr-Verordnung, ERVV) applicable in 2021 would still have applied. These stipulated in Sections 2 (1), 5 (1) No. 1 ERVV in conjunction with No. 1 sentence 1 of the Electronic Legal Transaction Notice 2019 (Elektronischer-Rechtsverkehr-Bekanntmachung, ERVB) as an absolute requirement that the files can be printed, copied and searched and that they contain all the contents necessary for the presentation of the document (especially graphics and fonts). This means that the fonts should have been embedded. However, the

Federal Labour Court first took the consideration into account that all documents submitted electronically continue to be printed out and added to the paper file at the Hessian Higher Labour Court. In the case of a main paper file, there was evidence that the exclusion of printable electronic documents could no longer be justified on factual grounds and would unreasonably restrict access to the next court of appeal. As it was possible to print out the documents submitted, they were in principle suitable for processing by the Court. Furthermore, the ERVB 2019 – even if it were regarded as a legal norm – cannot provide the necessary legal basis for the requirement of embedding all fonts, as there are no prerequisites laid down in Article 80 of the Basic Law (Grundgesetz, GG) regarding this. Lastly, the subsequently submitted files would have been suitable for processing by the Court within the meaning of Section 130a (2) sentence 1 ZPO. This is crucial in this case, the Court held.

Our comment

The decision was based on the old legal framework, as the deadlines in the underlying case had expired in 2021 and therefore the old law still applied. In this respect, however, the decision becomes significant in currently pending reinstatement cases in which electronic submissions were not accepted by courts due to alleged non-compliance with format requirements.

Furthermore, under the current legislation, the requirements regarding the "suitability" of electronic documents within the meaning of Section 130a(2) ZPO are less strict. This has been clarified by the legislator. The only thing that matters is that the document can be read and processed by the Court. These requirements are met if the document is submitted in PDF format. However, it is no longer required that the document can be printed, copied or searched (cf. Section 2(1) Sentence 1 ERVV, as amended). According to the relevant provisions, further technical requirements for the electronically submitted files "shall" only be met as "technical framework conditions" (Section 130a(2) Sentence 2 ZPO, as amended) or "technical standards" (Section 2(2) ERVV, as amended). Nevertheless, the general use of the PDF/A format, which also meets all the "technical framework conditions" and "technical standards", still makes sense. This significantly reduces the risk of any disputes over formal defects.

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Leave not time-barred in the event of a breach of the employee's obligation to provide information

In its ruling of 22 September 2022, the Court of Justice of the European Union (CJEU) agreed with the Advocate General's opinion and decided that leave not taken is only time-barred after three years if employers have put employees in a position to actually take their leave by meeting their obligations to provide encouragement and information. In light of previous CJEU case law, they must play their part in ensuring that the leave does not expire. The employee must be informed of the leave outstanding and the relevant time limits. Otherwise, the leave does not expire or become time-barred, which can lead to a significant accumulation of leave and a high level of subsequent claims by employees.

Judgment of the Court (Sixth Chamber) of 22 September 2022, case C-120/21

The case

The claimant requests allowance in lieu of leave. She was employed by the defendant as a qualified tax clerk and financial accountant from 1 November 1996 to 31 July 2017. She was entitled to 24 working days of leave in the calendar year. The defendant certified in a letter dated 1 March 2012 that her leave entitlement outstanding of 76 days from the 2011 calendar year and previous years would not expire on 31 March 2012, because she had not been able to take the leave due to the heavy workload at her firm. The defendant granted the claimant a total of 95 days of leave for the period from 2012 to 2017. The claimant did not take her statutory minimum leave in

full. The defendant did not ask the claimant to take more leave nor did it point out that leave not applied for could expire at the end of the calendar year or carry-over period. At first instance, the claimant sought allowance in lieu for 101 days of annual leave from 2017 and previous years that she had not taken prior to the termination of her employment relationship. The defendant took the view that the leave in question had lapsed. It could not have been aware of nor complied with its obligations to notify and request that the leave be taken, because the case law of the Federal Labour Court did not change until after the termination of the employment relationship with the decisions of 19 February 2019. It was also not required to pay leave compensation because the leave entitlements for which the claimant could seek compensation were time-barred.

At first instance, the Labour Court ordered the defendant to pay for the leave outstanding from 2017. It dismissed the remainder of the action. On appeal by the claimant the Higher Labour Court ordered the defendant to compensate her for 76 days of leave from 2013 to 2016. It found that the claimant's leave had neither lapsed under Section 7 (3) of the Federal Leave Act (Bundesurlaubsgesetz, BUrlG) nor could it be time-barred under the general statute of limitations provisions of Sections 194 et seqq. of the German Civil Code (Bürgerliches Gesetzbuch, BGB) because the defendant had not put the claimant in a position to take the leave.

The defendant brought an appeal on a point of law before the Federal Labour Court. The latter in turn referred the matter to the CJEU for a preliminary ruling (submission decision of 29 September 2020 - AZR 266/20 (A)).

The core problem

Under Section 7 (3) BUrlG employees must generally take their leave in the current calendar year or, as an exception, within the first three months of the following year at the latest to prevent it from expiring.

The defendant raised the defence of the statute of limitations under Sections 194 and 195 BGB. It follows from these provisions that an obligee's claims become time-barred three years after the end of the year in which the claim arose. It was previously unclear whether – and if so, under what conditions – claims for paid annual leave that could not expire under Section 7 (3) BUrlG may become time-barred. The commencement of the limitation period generally requires the obligee's knowledge or grossly negligent ignorance of the circumstances giving rise to the claim. The Federal Labour Court previously tended to be of the opinion (as was the Federal Government) that leave entitlements were also subject to this general limitation period and that the employee could no longer claim his/her leave at the latest three years after the end of the leave year, since the employee was aware of his/her leave entitlement from the law and collective or individual contractual agreements

However, the Federal Labour Court recognised a possible conflict with CJEU case law. On the basis of the case law resulting from the judgments Kreuziger (CJEU, judgment of 6 November 2018 - C-619/16) and Max-Planck-Gesellschaft zur Förderung der Wissenschaften (CJEU, judgment of 6 November 2018 - C-684/16) the claimant's entitlement to paid annual leave for the years 2013 to 2016 could arguably not be forfeited pursuant to Section 7 (3) BUrlG, since the defendant did not request the claimant to take her leave and did not inform her clearly and in time that the leave would expire at the end of the calendar year or carryover period, if it was not taken by her.

Like the CJEU, the Federal Labour Court assumes that an extinguishment of entitlements to paid annual leave in cases where the employee was unable to take the leave can only be considered in exceptional cases, namely if special circumstances exist which would justify the forfeiture of the leave. However, this would require that the defendant put the claimant in a position to take the leave from the years 2013 to 2016 by meeting the defendant's obligations to provide encouragement and information.

The question referred for a preliminary ruling

The Federal Labour Court sought clarification regarding the issue of the relationship between the general limitation provisions of Section 194 et seqq. BGB and Section 7 BUrlG in light of current CJEU case law. The application of the national limitation rules to the leave entitlement in a situation such as that at issue in the main proceedings could infringe Article 7 of directive 2003/88 and Article 31(2) of the Charter of Fundamental Rights of the European Union under this case law.

Against this backdrop, the Federal Labour Court decided to stay the proceedings and to refer the following question to the CJEU for a preliminary ruling:

"Do Article 7 of [directive 2003/88] and Article 31(2) of the [Charter] preclude the application of national legislation such as Paragraph 194(1), in conjunction with Paragraph 195, of the [BGB], under which the entitlement to paid annual leave is subject to a standard limitation period of three years, which starts to run at the end of the leave year under the conditions

set out in Paragraph 199(1) of the BGB, if the employer has not actually enabled a worker to exercise his or her leave entitlement by accordingly informing him or her of the leave and inviting him or her to take that leave?"

The judgment

According to the CJEU (judgment of 22 September 2022, Case C-120/21), Article 7 of directive 2003/88/EC of the European Parliament and of the Council of 4 November 2003 concerning certain aspects of the organisation of working time and Article 31(2) of the Charter of Fundamental Rights of the European Union must be interpreted as precluding national legislation under which the right to paid annual leave acquired by an employee in respect of a given reference period is time-barred after a period of three years which begins to run at the end of the year in which that right arose, where the employer has not actually put the employee in a position to exercise that right.

In its reasons, it states that it is for the member states to lay down, in their domestic legislation, conditions for the exercise and implementation of the right to paid annual leave, by prescribing the specific circumstances in which workers may exercise that right. However, it had already found in this regard that national legislation which provides for arrangements for the exercise of the right to paid annual leave expressly conferred by that directive, which would even cover the loss of that right at the end of a reference period or a carry-over period, does not preclude directive 2003/88/EC only on the condition that the employee, whose right to paid annual leave has expired, was actually given the opportunity to exercise the right conferred on him by that directive. In this regard, it decided that, in the event of the employee being unfit for work during several consecutive reference periods, national provisions or practices which provide for a carry-over period of 15 months, after the expiry of which the entitlement to annual leave expires, and which thereby limit the accumulation of annual leave entitlements, are compatible with directive 2003/88/EC.

The right to paid annual leave enshrined in Article 7 of directive 2003/88/EC could thus only be limited under "specific circumstances". Although the directive itself does not regulate the limitation period, the general statute of limitations under Section 195 BGB constituted a limitation of the employees' right under Article 31(2) of the Charter. Fundamental rights enshrined in the Charter may be limited only, if the strict conditions laid down in Article 52(1) of the Charter are complied with, i.e. such limitations must be provided for by law, respect the essence of the right in question and, subject to the principle of proportionality, are necessary and genuinely meet objectives of general interest recognised by the European Union. First, the limitation period is governed by law; second, the application of the limitation rule does not affect the substance of the right to paid annual leave insofar as it merely makes the possibility for the employee to assert his or her right to paid annual leave subject to a three-year time limit, provided that the employee has become aware of the circumstances giving rise to his/her right and of the identity of his/her employer.

While the pursued purpose of legal certainty was not objectionable and the taking of leave by employees at the latest three years after their leave entitlement arose also serves to achieve the objective of providing for rest, the burden of ensuring that the right to paid leave is actually exercised should not rest fully on the employee as he/she is the weaker party to the employment contract, while the employer may, as a result thereof, avoid meeting its own obligations by arguing that no request for paid annual leave was submitted by the employee.

It follows that the entitlement to paid annual leave may be lost at the end of a reference period or a carry-over period only on condition that the employee concerned had actually had the opportunity to exercise that entitlement in good time.

If the employer may rely on the limitation period in respect of the employee's entitlement without having actually put him/her in a position to exercise this entitlement, this would, under these circumstances, be condoning conduct by which the employer would be unjustly enriched to the detriment of the very purpose of Article 31(2) of the Charter, which is to protect the health of the employee.

In circumstances such as those of the case in the main proceedings, it is for the employer to protect itself against late requests in respect of periods of paid annual leave not taken by complying with its obligations to provide the employee with information and encouragement, which will have the effect of ensuring legal certainty, without limiting the fundamental right enshrined in Article 31(2) of the Charter.

Our comment

The CJEU follows its employee-friendly line and does allow leave entitlements to become time-barred only, if employers have sufficiently met their obligations to inform and encourage. If they fail to do so, they may subsequently find themselves faced with extensive (subsequent) claims for leave or related compensation.

More than ever, employers are therefore advised to take their obligations to inform and encourage seriously and to fulfil them in a conscientious manner.

Under CJEU case law, employers must provide the following information to each employee

- in a clear, timely and individual manner,
- how much leave he/she is entitled to and,
- if applicable, when this expires.

This information must also be linked to an urgent request that the leave be taken in a timely manner.

For the purpose of any evidence that may be required at a later date, the information should be provided in text form and receipt should ideally be acknowledged by the employee. Employers bear the full burden of production and proof in any potential legal proceedings before the labour courts that they have adequately met their obligation to encourage and provide information. If sufficient information and encouragement is not provided, leave entitlements outstanding or claims for allowance in lieu of leave can accumulate to a considerable amount over the years in the event of termination of the employment relationship.

According to existing CJEU case law, leave entitlements do not automatically become time-barred after three years. Employees could then, under certain circumstances, seek compensation for their years of accrued leave, which the employer had already considered to be time-barred. The proceedings before the Federal Labour Court for which the request for a preliminary ruling was made illustrate the potential scale of the claims. The claimant is seeking a gross amount of just under EUR 20,000.00 from the defendant. The claims could quickly add up to substantial amounts where several long-standing employees file actions at the same time.

Against this backdrop, we can only urge employers once again to regularly remind employees of their leave outstanding, to duly inform them when it expires and to take demonstrable steps to ensure that the employees actually take their leave in order to avoid an accumulation of leave outstanding. Employers often simply show the leave outstanding on the pay slips or send a short note to the employees towards the end of the year, reminding them to take their leave outstanding. In light of CJEU case law, this is not sufficient to meet the requirements for any forfeiture of leave or for the right to paid annual leave being time-barred after a period of three years.

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Equal treatment where supplements are paid for night work

Different supplements paid for irregular and regular night work provided for in collective bargaining agreements need not be examined against the yardstick of EU law.

CJEU, judgment of 7 July 2022 – C-257/21 and C-258/21 (Federal Labour Court, submission decision of 9 December 2020 - 10 AZR 332/20 (A))

The case

The subject of the underlying legal disputes is the payment of night work supplements on the basis of a collective bargaining agreement. The collective bargaining agreement differentiates between regular night work, which is performed as part of shift work, and irregular night work, which employees are only called upon to perform occasionally and is not part of the shift schedule and which is generally overtime. According to the provisions of the collective bargaining agreement, higher supplements are paid for irregular night work than for regular night work. The claimant employees, who performed night work as part of shift work and received the corresponding night work supplements for it, are seeking payment of the difference between the remuneration received and the remuneration when the supplements provided for irregular night work are applied. They are of the opinion that the different remuneration for night work is not compatible with the principle of equality under Article 3 of the Basic Law (Grundgesetz, GG) and Article 20 of the Charter of Fundamental Rights of the European Union (CFR). They submitted that regular night work is associated with significantly higher health hazards and disruptions to the social environment than night work that occurs only occasionally. The employer argued that irregular night work occurs to a much lesser extent than regular night work. The higher supplement was justified by the fact that it typically involved overtime. Furthermore, irregular night work is also associated with greater interference with the employees' free time and social life, according to the employer.

The claims were dismissed by the Labour Court but were upheld in part on appeal to the Higher Labour Court. In response to the appeals filed by the defendant employer, the Federal Labour Court suspended the proceedings and referred the matter to the CJEU for a preliminary ruling. In the preliminary ruling proceedings, the Federal Labour Court asked whether the unequal treatment of regular and irregular night work resulting from the provisions of the collective bargaining agreement was compatible with Article 20 CFR.

The decision

The CJEU found that the CFR is not applicable to the legal disputes submitted by the Federal Labour Court. Under Article 51 (1) Sentence 2 of the CFR this applies to the Member States only when they are implementing Union law. If the national regulation comes under an area in which the EU also has competence this does not mean that Union law is implemented. This is only the case when the Union law provisions impose specific obligations on the Member States with regard to a certain situation. In this respect, the CJEU states that the Working Time directive 2003/88/EC concerning certain aspects relating to the organisation of working time – with the exception of the special case of paid annual leave – does not apply to the remuneration of employees. Instead, the Working Time directive is limited to certain aspects of the organisation of working time in order to ensure the protection of the safety and health of employees. Since the directive does not govern the remuneration of employees for night work, it does not impose any specific obligations on the Member States in relation to the facts at issue in the main proceedings. The case does not therefore fall within the scope of the CFR. The CJEU thus did not have to rule on the question relevant to the main proceedings, namely whether the unequal treatment of regular night work in relation to irregular night work resulting from the collective bargaining agreement is compatible with the principle of equal treatment laid down in Article 20 CFR.

Our comment

The proceedings now pending before the Federal Labour Court have a longer history. It has been the practice over decades to pay different amounts for night work under collective bargaining agreements. In a 2018 judgment (Federal Labour Court, judgment of 21 March 2018 - 10 AZR 34/17), the Federal Labour Court decided that such differentiation is not compatible with the principle of equality under Article 3 GG. The Federal Labour Court justified this by stating that collective bargaining agreements are also subject to the principle of equality under Article 3 (1) GG and that any differentiation in remuneration therefore requires objective justification. The Court did not see this in the arrangements in question, since the compensation for the adverse impact on health caused by night work intended by such arrangements applies to both regular night work and occasional night work. The burden on employees is even higher in this case due to the frequency of regular night work. As a result, the higher pay supplements that previously had to be paid for only a small portion of night work also had to be paid to other night workers.

According to the CJEU's decision, the question of whether differentiation clauses with regard to pay supplements for night work are permissible in collective bargaining agreements must be measured against national law, in particular the principle of equal treatment under Article 3 (1) GG. As the question which the Federal Labour Court referred to the CJEU for a preliminary ruling was relevant to the decision in the two original proceedings, it is to be expected that the Federal Labour Court will dismiss the claims for further remuneration in the two legal disputes. According to the claimants in these proceedings, the objective reason for the differentiation lies in the particular burden of irregular night work and in the fact that this additional work, which is usually overtime, cannot be planned.

However, it does not necessarily follow from this that collectively agreed differentiation clauses are permissible per se. In a legal dispute based on another different collective bargaining agreement, the employer had already been required to take into account the inability to plan irregular night work when planning the additional night work and the inability to plan could therefore no longer be used as a reason for differentiating between the supplements paid for night work. The claimants who brought an action for the payment of additional supplements for night work on this basis were therefore unsuccessful in their actions. The specific collective bargaining agreement provision must therefore be reviewed to determine which burdens of irregular night work were taken into account in the collective bargaining agreement and which aspects can therefore be used to justify the differentiation. Despite the CJEU's decision, differentiation clauses in collective agreements may constitute a violation of the principle of equality under Article 3 (1) GG. It is to be expected that this issue will continue to keep the courts busy.

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No entitlement to have an expression of thanks and best wishes included as the closing remarks of a job reference

Employees are not entitled to receive a job reference that includes an expression of thanks and best wishes. This applies even if the employer and the employee agree in the action for unfair dismissal that a favourable and above-average reference be given. The Federal Labour Court thus continues to follow its previous case law under which the closing remarks do not form part of the mandatory content of the reference.

Federal Labour Court, judgment of 25 January 2022 – 9 AZR 146/21

The case

The parties initially disputed the validity of the employee's termination in an action for unfair dismissal. To settle this legal dispute, the parties reached a settlement which, inter alia, also stipulated that the employer provides the employee with a favourable, qualified reference. The settlement did not contain a provision regarding the formulation of the closing remarks. The employer then issued a slightly above-average reference, but without closing remarks thanking the employee for the work performed and wishing him all the best and much success for the future. The employee then sued for the issuance of a corrected reference with appropriate closing remarks. After the Labour Court initially dismissed the action, the Higher Labour Court agreed with the claimant on appeal. However, the employer's appeal on points of law against this decision was successful before the Federal Labour Court, which upheld the judgment of the Labour Court (which dismissed the action).

The decision

Despite the well-founded decision of the Higher Labour Court, the Federal Labour Court adheres to its contradictory case law (cf. Federal Labour Court, judgment of 20 February 2001 - 9 AZR 44/00). In essence, this states that the inclusion of closing remarks in job references, which is a widespread practice, does not serve to achieve the purpose of the reference (performance and conduct assessment), but merely repeats the employer's assessment in a formulaic manner. According to the Federal Labour Court, the employer merely expresses thoughts and feelings in closing remarks, which does not allow any conclusions to be drawn about the performance and / or conduct of the employee. The Federal Labour Court reaches this conclusion based on the weighing of the fundamental rights concerned. Even though the freedom of the employee to pursue an occupation or profession under Article 12 (1) of the Basic Law (Grundgesetz, GG) must be taken into account, since a reference with closing remarks is likely to increase the employee's prospects when applying for a job, the Federal Labour Court is of the opinion that the employer's freedom to issue a negative opinion under Article 5 (1) of the Basic Law carries more weight, since the employer cannot be forced to express thoughts and feelings about the employee if this does not achieve the purpose of the reference.

Our comment

The decision will affect settlement negotiations between employees and employers in and out of court. Employees are advised to make the complete text of the reference, including closing remarks, the content of the settlement. In the absence of an agreement to this effect, employers still do not have to include closing remarks in the reference in order to satisfy the right to receive a reference.

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Unsuccessful constitutional complaint: Federal Constitutional Court regarding the vaccination and proof requirements specific to institutions and companies

Hospitals, doctors' surgeries and nursing homes in particular have been in a continuous state of uproar since Section 20a of the German Act on the Prevention and Control of Infectious Diseases in Humans (Gesetz zur Verhütung und Bekämpfung von Infektionskrankheiten beim Menschen, IfSG) entered into force in mid-December 2021. Since 16 March 2022, there has been an institution-specific (indirect) vaccination requirement in Germany, which is codified in Section 20a (1) IfSG and triggers further organisational problems as well as numerous factual and legal questions for the health care institutions concerned – in addition to staff shortages and supply gaps that already exist. A constitutional complaint was filed against this legal provision in summary and main proceedings, but the Federal Constitutional Court denied the unconstitutionality of the standard because of the special need to protect vulnerable groups and also rejected a (partial) suspension of the law. To the extent that the regulations interfere with fundamental rights, such interference is constitutionally justified.

Comment on the Federal Constitutional Court decision of 27 April 2022 – 1 BvR 2649/21

The case

The Federal Constitutional Court had to review Sections 20a and 73(1a) Nos. 7e to 7h IfSG (i.e. Article 1 Nos. 4 and Article 9 lit. a) aa) Nos. 7e to 7h of the Act to Strengthen Vaccination Prevention against COVID-19 and to Amend Other Regulations in Connection with the COVID-19 Pandemic of 10 December 2021 (Gesetz zur Stärkung der Impfprävention gegen COVID-19 und zur Änderung weiterer Vorschriften im Zusammenhang mit der COVID-19-Pandemie, ImpfPrG); Federal Law Gazette I page 5162).

Section 20a (1) Sentence 1 IfSG stipulates that only persons who have been vaccinated or have recovered may work in health and care institutions or companies from 16 March 2022. All persons who are to work in the institution or company after 15 March 2022, other than on a very temporary basis (for a few minutes at a time, at most), must present proof of vaccination or recovery or a doctor's certificate regarding the existence of a medical contraindication to vaccination against COVID-19. This obligation to provide proof applies in principle to "all" persons (employees, temporary workers, external service providers such as craftsmen or medical device sales representatives, etc.), with only a few exceptions (e.g., in particular patients and visitors, parcel delivery drivers, taxi drivers).

Section 20a (2) sentence 1 IfSG, in the version valid until 18 March 2022, initially referred to Section 2 of the Ordinance regulating simplifications and exceptions to protective measures to prevent the spread of COVID-19 (COVID-19-Schutzmaßnahmen-Ausnahmenverordnung, SchAusnahmV) with regard to the requirements for proof of vaccination and recovery. Section 2 of the SchAusnahmV then again referred to the website of the Paul-Ehrlich-Institut (proof of vaccination) or the Robert Koch Institute (proof of recovery). This proof is now governed by Section 22a IfSG and the "dynamic reference" has been deleted.

The institutions/companies concerned are required – if the proof is not presented or if there are doubts about the authenticity of the proof – not to employ the person and to inform the competent health authority. The health authority then issues a public-law order prohibiting the person in question

from entering or working in the institution/company. A violation of the obligations laid down in the IfSG constitutes an administrative offence for the person concerned and the institution/company.

The decision

The constitutional complaint was unsuccessful in both the summary and main proceedings. The Federal Constitutional Court had already decided in the summary proceedings on 11 February 2022 that a law would only be temporarily suspended under Section 32 of the German Act on the Federal Constitutional Court (Bundesverfassungsgerichtsgesetz, BVerfGG) if the reasons for issuing the temporary injunction clearly prevail, which was not the case here in view of the continuing specific infection dynamics with a high number of cases. If the institution- and company-related obligation to provide proof were not enforced, this would give rise to an increased risk that the persons working there would become infected and then in turn transmit the virus to vulnerable persons. It must therefore be expected that – until a decision is made on the constitutional complaint – more (vulnerable) persons will become infected, seriously ill or die than if the interim order were not issued.

Accordingly, the Federal Constitutional Court then decided in April 2022 that interference with fundamental rights was justified under constitutional law and that the legislator had struck within its margin of appreciation an appropriate balance between the protection of vulnerable persons from infection with the SARS-CoV-2 coronavirus and interference with fundamental rights. Despite the high intensity of the interference, the interests of the complainants working in the health and care sector, which are protected by fundamental rights, would ultimately have to take a back seat.

The legislator pursued a legitimate purpose insofar as it wanted to protect very old people as well as people with pre-existing diseases, a weakened immune system or with disabilities (so-called vulnerable groups) from infection with the SARS-CoV-2 coronavirus. At the time the law was adopted, the legislator could assume that the pandemic situation would worsen and that elderly and people with pre-existing diseases would be particularly at risk. Furthermore, the assumption that these vulnerable persons are particularly at risk continues to be tenable. The obligation to provide proof is also suitable for achieving the purpose and could in any case contribute to protecting the lives and health of vulnerable persons. There would also be a necessity, as it is not constitutionally objectionable that the legislature had assumed that there were no equally effective means available that restricted the fundamental rights concerned less severely. Ultimately, the indirect obligation to vaccinate or provide proof is also proportionate in the narrower sense. Section 20a IfSG does not establish mandatory vaccination that can be enforced by the state and the provision leads to the persons concerned being de facto faced with the choice (which affects their occupational freedom) of either giving up their previous work or consenting to harming their physical integrity. After comparing the conflicting rights, the legislative decision to give priority to the protection of vulnerable persons over a decision to vaccinate that is voluntary in every respect is not constitutionally objectionable. This is because “vulnerable persons in many cases cannot effectively protect themselves through vaccination, nor can they avoid contact with those working in the health and care sector, as they typically rely on their services. Ultimately, the very low probability of serious consequences resulting from vaccination must be weighed against the significantly higher probability of harm to life and limb of vulnerable persons.”

Our comment

The protection of vulnerable groups takes precedence. This was the main finding of the Federal Constitutional Court, which it justified in textbook fashion in the main proceedings. “Mandatory vaccination” is in principle an appropriate means to protect these groups and is also to be regarded to be a priority. The Federal Constitutional Court clarified correctly and importantly that, at the time of the promulgation of the law (December 2021), the pandemic situation, after a brief easing in the fourth wave of infection, was once again characterised by a particular infection dynamic, which was accompanied by an increasingly greater likelihood of infection and thus had a particularly adverse effect on vulnerable persons.

In our opinion, also in view of the special protection of vulnerable groups correctly emphasised by the Federal Constitutional Court, it is justifiable to release an employee from work without pay, especially in the case of existing employees, if proof is not provided (the handout on vaccination prevention in relation to facility-based activities “Handreichung zur Impfprävention in Bezug auf einrichtungsbezogene Tätigkeiten” of 22 March 2022 presents a different opinion, which is a violation of the principle of separation of powers). The Giessen Labour Court in any case affirmed on 12 April 2022 (case reference: 5 Ga 1/22) the possibility of releasing from work an employee who has not

been vaccinated against COVID-19 in the first labour law decision nationwide concerning this. The claim to employment of an employee under an institution-related vaccination obligation is opposed by the employer's overriding interest in wanting to protect the vulnerable persons in its care from harm to life and limb.

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Unsuccessful constitutional complaint due to denial of collective bargaining capacity

There are no constitutional concerns regarding the benchmarks applied by the labour courts to assess the organisational strength of an employee association.

Federal Constitutional Court, non-admission decision of 31 May 2022 - 1 BvR 2387/21

Summary of the facts

The constitutional complaint of an employee association (the "Complainant") pertains to the labour court's determination that it no longer has collective bargaining capacity (Tariffähigkeit). The Complainant was originally established for merchant assistants. After it expanded its area of professional responsibility several times, it claimed that it also had collective bargaining responsibility for, inter alia, banks, the retail trade and the meat industry. At the beginning of 2020, the organisational area concerned had approximately 6.3 million employees. According to information provided by the employee association it counted 66,826 members.

The labour courts found that the Complainant had lost its original existing collective bargaining capacity due to the significant expansion of its area of professional responsibility. It lacked the required assertiveness. This is usually determined based on the number of members in relation to the organisational area selected. The decisive factor was not the negotiation of collective bargaining agreements, but the existence of sufficient social power. However, only an insignificant number of employees is organised in the association which represents less than or around one percent of the total number of employees, and the collective bargaining agreements concluded by it are also not of decisive importance.

The Complainant filed a constitutional complaint alleging a violation of its fundamental right to freedom of association under Article 9(3) of the Basic Law (Grundgesetz). The requirements laid down by the Federal Labour Court for the criterion of social power were disproportionate. These would have an unconstitu-

tional effect on the formation and activities of an association. The assertiveness required by the Federal Labour Court in the sense of a balance of power is also incompatible with Article 28 of the Charter of Fundamental Rights and Article 11 of the European Convention on Human Rights in the view of the association. The Federal Labour Court had also disregarded the constitutional limits with respect to the further development of law by judges and had violated the principle of certainty enshrined in the rule of law.

The decision

The Federal Constitutional Court did not admit the constitutional complaint for decision. It lacked any fundamental constitutional importance.

The constitutional complaint is inadmissible insofar as the Complainant alleges a violation of the rule of law and of effective legal protection, the Court held. There is a lack of sufficient discussion of the fact that the labour courts are authorised and required to define collective bargaining capacity in greater detail in light of Article 9(3) of the Basic Law, provided that the legislature has not laid down the conditions for union membership and collective bargaining capacity.

Moreover, the decision of the labour court does not violate the rights of the Complainant under Article 9(3) of the Basic Law.

It is compatible with the freedom of association enshrined in Article 9(3) of the Basic Law to allow only those associations to participate in the autonomy of collective bargaining that are able to meaningfully shape the freedoms of working life that exist in the legal system. The requirements regarding collective bargaining capacity ensured that only associations with a minimum level of negotiating power and assertiveness vis-à-vis the social counterpart participated in shaping working life. Neither the Collective Bargaining Unity Act (Tarifeinheitsgesetz) nor the Minimum Wage Act (Mindestlohngesetz) would conflict with these minimum requirements. The situation would be different where requirements would lead to a disproportionate restriction on the formation and activities of an association and would undermine the rights under Article 9(3) of the Basic Law.

The labour courts have not violated these principles, the Court held. Instead, the Federal Labour Court made an overall assessment that is friendly to fundamental rights in order to assess the membership strength. Fixed arrangements or percentages would therefore not be required, nor would significant membership levels be required for all areas of responsibility. Instead, a sufficient membership level would suffice for a not insignificant part of the area of responsibility. The Federal Labour Court also took into account the various social counterparts of the union and their economic and social importance. Finally, the conclusion of collective bargaining agreements that confirm a significant volume and a certain continuity will be taken into account as evidence of assertiveness. However, this evidentiary effect diminishes as the membership level decreases, since the collective bargaining capacity does not result from the conclusion of collective bargaining agreements but is a prerequisite for them.

Our comment:

The decision of the Federal Constitutional Court strengthens the jurisdiction of the non-constitutional courts. With its non-admission decision, the Court clarifies the lack of constitutional importance and confirms the benchmarks applied by the Federal Labour Court.

The Federal Constitutional Court reaffirms the criterion of social power with regard to enforceability in collective bargaining negotiations to ensure that the freedom left by the legislature is used sensibly. In view of the special enshrining of the freedom of association in Article 9(3) of the Basic Law, the confirmation that collective bargaining capacity is to be determined on the basis of an overall assessment is to be welcomed. It enables decisions to be made that are appropriate to the area of responsibility and social counterparts. Consequently, the Federal Constitutional Court emphasises collective bargaining capacity as a prerequisite for concluding collective agreements. From a practical perspective, this position is to be welcomed, as the criterion of social power serves to ensure adequate negotiating partners. The emphasis on collective bargaining capacity supports a definition of the negotiating partners and protects social counterparts from collective bargaining with insignificant employee associations.

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■ CASE LAW IN A NUTSHELL

Requirement to inform the works council of the number and names of severely disabled persons

Baden-Württemberg Higher Labour Court, decision of 20 May 2022 – 12 TaBV 4/21

Pursuant to Section 80 (2) Sentence 2 of the Works Constitution Act (Betriebsverfassungsgesetz - BetrVG) the works council must be informed by the employer in a timely and comprehensive manner in order to carry out its statutory tasks. The works council is legally required to promote the integration of severely disabled persons pursuant to Section 176 Sentence 1 of the German Social Code, Book IX (Sozialgesetzbuch, SGB IX). This requirement and the fact that the election of a representative for severely disabled employees was planned meant that the employer had to provide the works council with data on the severely disabled employees working in the company.

Reasons for the decision

The local works council of a waste disposal company with several sites requested that the employer provide it with sensitive employee data. It requested information on all severely disabled persons or persons of equal status employed by the company. Pursuant to Section 163 (1) SGB IX the employer must maintain a list of severely disabled persons and persons with equivalent status. The works council demanded a copy of the same. The list contained the first and last names, date of birth, gender, type of employment and information on the severe disability or equal status or degree of disability of the employees concerned.

On the one hand, the works council required the information in order to be able to elect a representative for severely disabled persons at the election meeting planned by the works council under Section 177 (1) Sentence 2 SGB IX. On the other hand, the data was required to integrate severely disabled persons into the company under Section 176 Sentence 1 SGB IX. Since not all severely disabled employees consented to the data transfer, the employer refused to provide the information due to data protection concerns. The Karlsruhe Labour Court, however, required the employer to disclose the names of the severely disabled persons and persons with equal status.

The appeal filed by the employer was unsuccessful before the Baden-Württemberg Higher Labour Court. The works council has a right to information regarding such data under Section 80 (2) Sentence 1 BetrVG. It would have to be informed in a timely and comprehensive manner in order to carry out its duties. This would also include such circumstances where it must first be reviewed whether the works council has to take action. It is impractical to have the employees' severe disability checked for the first time at the election meeting. Performance of the duties of the works council is also not dependent on the consent of the employees. The works council must take appropriate technical and organisational measures within the meaning of Section 22 (2) of the Federal Data Protection Act (Bundesdatenschutzgesetz, BDSG) to protect sensitive data. The data protection concept it submitted was sufficient for this purpose. The appeal on points of law to the Federal Labour Court was not allowed.

Termination for sexual harassment only effective after warning

Hamm Higher Labour Court, judgment of 23 February 2022 – 10 Sa 492/21

Termination for sexual harassment is a termination based on conduct. Firstly, all milder responses must be exhausted taking into account the circumstances of the individual case. This also includes a relevant warning from the employer.

Reasons for the decision

In the action against unfair dismissal, the Hamm Higher Labour Court had to deal with the allegation of repeated sexual harassment against the dismissed claimant employee. The employee was employed as a technical manager by the defendant employer since 2014 and received an average monthly remuneration of EUR 12,000. Three female employees claimed that he often physically approached them so closely that they had to try to avoid him. He had asked them to sit next to him at meetings in his office to show them something on the PC and had touched them several times on the thigh. He had stared at them in a harassing manner and touched them on the arm, shoulder or buttocks. He had asked one of the female employees whether they could meet privately. He reacted to her rejection in an ignorant manner and later told her that she was lying and had made false promises to him. After interviewing the claimant, the female employees and the works council, the employer terminated the employment relationship in June 2020 without notice (alternatively with due notice) as a termination due to gross misconduct and suspicion of sexual harassment.

In the proceedings, the employee submitted private WhatsApp correspondence and e-mails from which it was claimed that the relationship between the employee and female employees was relaxed, light-hearted and personal. The Bocholt Labour Court found the employer's evidence to be insufficient because the claimant's breaches of duty had not been specifically set out. It also criticised the fact that a warning had not been issued beforehand. Although the termination of the employment relationship due to sexual harassment without prior warning could be considered in individual cases, such an exception would not apply here. Overall, the termination was therefore disproportionate both without notice and with notice. This view was confirmed by the Hamm Higher Labour Court in its decision. However, it rejected the claimant's application for continued employment and, at the employer's request, terminated the employment relationship with a severance payment of a gross amount of EUR 80,000. The reason for the termination was the threat from the claimant's side to disclose a detective's report, which would reveal the alleged relationship between the managing director and one of the female employees. Further cooperation was no longer possible under these circumstances.

In its judgment, the Hamm Higher Labour Court referred to the case law of the Federal Labour Court that it is not important that the harassed person expresses his or her rejection. However, it depends on the circumstances of the individual case whether sexual harassment constitutes an absolute reason for termination.

Payment of corona bonus even in the event of prolonged illness

Berlin-Brandenburg Higher Labour Court, judgment of 24 March 2022 - 5 Sa 1708/21

The corona bonus for care workers is paid to anyone who has worked in a care institution for at least three months during the pandemic period pursuant to Section 150a (1), (4) SGB XI. There is an entitlement even if the required working time was performed with frequent and lengthy interruptions. It is sufficient that at least 90 days were worked in the assessment period.

Reasons for the decision

The parties are in dispute about the payment of the corona bonus pursuant to Section 150a (1), (4) SGB XI for the year 2020. There is an entitlement if at least three months were a person worked for an approved care institution during the period from 1 March 2020 up to and including 31 October 2020. The claimant care worker was an employee in an approved care institution during the assessment period. Her working time had been interrupted by several periods of sick leave lasting more than 14 days during eight months of the relevant period. However, her total working time amounted to 90 working days. The employer was of the opinion that the care worker would have to have worked continuously for three months in order to receive the corona bonus. It therefore refused to pay the special bonus. Shortly after the employee filed suit with the Berlin Labour Court, she died, resulting in the litigation being continued by an heir.

The Berlin-Brandenburg Higher Labour Court then decided that the three months of work in the assessment period did not have to be performed continuously. The three-month period does not restart if the care worker is absent due to illness. This view was justified by the purpose of the bonus. It was intended to express appreciation for the special demands relating to the pandemic. It is irrelevant whether the difficult working conditions occur in one continuous period of employment or in several periods of employment separated by time. A month is to be counted as 30 days, so that the working time must comprise a total of 90 days in the assessment period. In total, the claimant had worked the required 90 days. The claim against the care institution was valid and could be passed on to heirs, such that the care institution was ordered to pay the corona bonus to the heir. The Higher Labour Court did not allow an appeal to the Federal Labour Court.

Non-recording of smoking breaks justifies dismissal

Thuringia Higher Labour Court, judgment of 3 May 2022 – 1 Sa 18/21

Those who do not clock out and in as required when taking smoking breaks are committing working time fraud. Violations of the documentation requirement and frequent working time fraud justify ordinary termination without prior warning.

Reasons for the decision

The parties are in dispute about the validity of an ordinary termination without prior warning. The employee had been employed for over 30 years at a Jobcenter in Thuringia and at its legal predecessors, respectively. A service agreement on flexible working time at the Employment Agency (Agentur für

Arbeit) was concluded between the Chair of the Executive Board of the Agency and the Staff Council. It was stipulated in this agreement that, inter alia, all employees must record their working time. The working time is to be documented each time the employee enters or leaves the premises. This also applies to the recording of breaks (smoking breaks, breaks in the canteen and in the social rooms or at the workplace). The employee was properly instructed on how to record break times correctly. She nevertheless failed to clock off when she took smoking breaks. Up to seven smoking breaks per day were taken as working time in the calendar month of January. She was subsequently terminated in February 2019 without prior warning. The employee was of the opinion that the employer was required to give her a warning before issuing the notice of termination.

The Labour Court and the Higher Labour Court of Thuringia took a different view. Working time fraud, where an employee pretends to have worked for a period of time when this was not the case, constitutes a serious breach of duty. The claimant's reference to the fact that she suffers from a nicotine addiction has no effect on the action. She is not accused of misconduct with regards to taking smoking breaks. However, she is accused of deliberately misrepresenting her working time and breaching the duty to keep proper documentation. They lead to a significant loss of trust on the part of employers. The breach of trust constituted a compelling reason within the meaning of Section 626 of the German Civil Code (Bundesgesetzbuch, BGB) and justified termination without a warning. The disregard of the instruction to clock off smoking breaks can also justify extraordinary termination. The claimant had previously assured the defendant at the hearing that she would change her behaviour in the future. The assurance about future behaviour would therefore give rise to the expectation that there would be no further breaches of duty. However, in the opinion of the Higher Labour Court, the breaches of duty would affect the area of trust, which the employer did not have to accept. An assurance about future behaviour would then not matter.

Submission of proof of vaccination cannot be enforced by means of a fine

Lüneburg Higher Administrative Court, decision of 22 June 2022 – 14 ME 258/22

Unvaccinated care workers cannot be forced by the health authorities to provide proof of vaccination against the coronavirus within a certain period of time by means of a regulatory fine. The institution- and company-related requirement to provide a vaccination certificate does not create an obligation on part of the individuals concerned to be vaccinated against the coronavirus. The requirement to provide a vaccination certificate only makes it possible to prohibit unvaccinated care workers from entering or working in the affected areas.

Reasons for the decision

The parties dispute the effectiveness of imposing a fine for failing to provide proof of vaccination against the coronavirus. The applicant is an employee in a retirement home and has not been vaccinated against the coronavirus. When the administrative district (Landkreis) learned from her employer that she had not been vaccinated against the coronavirus, it imposed a fine, if she did not submit proof of vaccination to the health authorities within 14 days. Proof of a second vaccination should be provided within a period of another 42 days.

The Administrative Court of Hanover considered the threat of a fine to be invalid. The Lüneburg Higher Administrative Court also rejected the administrative district's appeal. The threat of a fine does not only involve the submission of proof. The threat of a fine in fact contains an indirect obligation to be vaccinated against the coronavirus within the specified period. Such an obligation is not justified by the institution- and company-related obligation to provide proof of vaccination pursuant to Section 20a (2) Sentence 1 of the German Act on the Prevention and Control of Infectious Diseases in Humans (Gesetz zur Verhütung und Bekämpfung von Infektionskrankheiten beim Menschen, IfSG). The legislator wanted to maintain the voluntary nature of the vaccination. Vaccination is not mandatory; the decision is ultimately up to the individuals themselves. The requirement to provide a vaccination certificate merely provides the basis for health authorities to immediately prohibit unvaccinated staff from entering and working in the institution or company. Employees are in effect being given the choice of pursuing an occupation other than their previous one or suffering the adverse effects caused by being vaccinated against the coronavirus. Although the regulation provides that failure to submit the vaccination certificate can be punished with a fine, this would not establish the right to impose a fine. The purpose of protecting the most vulnerable from being infected with the coronavirus would therefore be achieved. This legal provision was found to be constitutional by the Federal Constitutional Court. The Senate's decision cannot be appealed.

Works councils' right of co-determination in setting wages

Cologne Higher Labour Court, decision of 20 May 2022 – 9 TaBV 19/22

If the works council has refused to introduce an attendance bonus, the employer may not make any arrangements in this regard. However, it may refer the matter to the conciliation committee. Its decision may replace the works council's lack of consent.

Reasons for the decision

The parties are in dispute about the establishment of a conciliation committee for the purposes of concluding a works agreement regarding the company wage structure. The employer operates a warehouse for the provision of logistical services and for the pre-assembly and assembly of supplier parts for the automotive industry and has 158 employees (FTE). Negotiations and talks regarding a redundancy programme were held with IG Metall in the context of a collective redundancy programme due to planned staff reductions of 49 full-time positions. At the same time, there had been a significant level of sick leave since the beginning of 2022. The accompanying concern that it would not be able to meet its contractual obligations resulted in the employer wanting to introduce an attendance bonus. The works council rejected the proposal. It feared that employees who participate in strikes to enforce the redundancy programme could be financially disadvantaged. This would constitute a violation of the principle of equal treatment under labour law. The attendance bonus is a strike-breaking bonus because it encourages employees by payment not to participate in industrial action. The employer thereupon declared that the negotiations had failed and applied to the Labour Court to set up a conciliation committee under Section 100 of the German Labour Court Act (Arbeitsgerichtsgesetz, ArbGG). The works council was of the opinion that the conciliation committee should not decide "whether" an attendance bonus should be introduced, but only on its form.

The Cologne Higher Labour Court now found that the conciliation committee was rightly appointed. It is also responsible for the works agreement regarding the granting of an attendance bonus. This follows from Section 100 (1) Sentence 2 ArbGG. The right of co-determination also includes the setting of wages, including non-statutory benefits for employees. This would include the introduction, the structure of the bonus and its relationship to other remuneration benefits provided by the employer. The employer may therefore not make any arrangements without the participation of the works council, whereas it may refer the matter to the conciliation committee. The employer does not have to comply with the decision of the conciliation committee, but if it does, it has to comply with it with regard to the structure of the payment determined by the conciliation committee.

Proportionality of termination in the event of minor carelessness

Saxony Higher Labour Court, judgment of 7 April 2022 – 9 Sa 250/21

Warnings issued prior to an ordinary termination must meet the proportionality test in exactly the same way as the termination itself. However, a warning is therefore not in principle disproportionate because the conduct for which a warning was issued involves minor carelessness.

Reasons for the decision

The parties are in dispute about the validity of an ordinary termination based on conduct. The female employee had been employed at the defendant as a loan officer. The working instructions "Procedure for Information Security in the Workplace and Clean Desk Policy" had been implemented at the defendant employer. This stipulated, inter alia, that sensitive or confidential information may not be seen by third parties. This applied in particular when leaving the workplace. The claimant was also aware of the working instructions. There were several violations during her employment. First, she received two warnings for returning a case she had been handling despite not achieving an adequate outcome. In addition, she had not correctly marked an assignment she had processed as processed. This had adversely affected the work of her supervisor and other colleagues in the team. When, two months later, she failed to properly log off from the IT system she was using after the second warning, she received her first warning. There was a risk that data could be accessed without authorisation. She was subsequently given three further warnings. She left documents on the desk in an unsecured manner and did not log out of the system properly. Work assignments were recorded incorrectly by her, as a result of which she received another warning. When the defendant moved it was discovered in the claimant's office that her desk was unlocked, and sensitive customer data was freely accessible. The defendant terminated the employment relationship with due

notice because of this breach of duty. The action against unfair dismissal brought by the claimant was successful before the Leipzig Labour Court.

However, the Saxony Higher Labour Court overturned the judgment on appeal on points of law. All in all, these constituted serious breaches of duty which had led to disruptions in the defendant's operations. It was unreasonable to expect the defendant to issue further warnings that would show no improvement. Otherwise, the warning function of the warnings could be lost. The employer may issue warnings for minor breaches of duty. Nonetheless, they must not be disproportionate.

■ GENERAL INFORMATION

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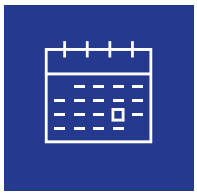
Events, publications and blog



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