Luther.

FOCUS
Use of electronic signatures

Labour & Employment Law Newsletter

Issue 4 2021

unyer GLOBAL ADVISORS

Content

Dear Readers,

In the second year of the COVID-19 pandemic, we are again experiencing a special Christmas season this year due to the once again difficult circumstances. 2021 has presented us all with significant challenges. We are therefore now looking forward all the more to a merry and contemplative Christmas. Just in time for this, we can - as usual - put our newsletter under the Christmas tree for you to read.

The Christmas edition of our newsletter focuses on two current topics from our employment law practice. In times of the digitalisation of the workplace and remote working, the issue of the introduction of electronic signatures arises more and more for companies. These are already widespread in companies today. From the point of view of employment law, however, they are associated with certain risks extent and are therefore not unproblematic. In his article, Kevin Brinkmann gives you an overview of the opportunities and risks of using electronic signatures in HR departments.

In her article, our expert in the field of occupational pensions, Dr Annekatrin Veit, points out the consequences and the possible need for action for employers resulting from the lowering of the contribution assessment ceiling for pension insurance in 2022. Due to the COVID-19-related decline in gross wages in 2020, the contribution assessment ceiling for pension insurance will fall next year for the first time in more than 60 years.

In this issue, we also present a new section of our newsletter in which we report on employment law developments and topics from our global network **unyer**. Together with the French law firm FIDAL, we launched the global organisation unyer in May of this year. We are very pleased that Xavier Drouin from FIDAL in Strasbourg is opening this new section with a contribution on French fixed-term contract law.

In addition to our main topics, this issue also provides you with the usual overview of current decisions of the labour courts, which, in our view, are of particular relevance to human resources work.

Despite the difficult circumstances, we wish you a peaceful and reflective Christmas season, peaceful days between the years and a happy, healthy and prosperous New Year in 2022.

Have a good start to the new year and stay healthy!

Yours’

Achim Braner

Use of electronic signatures – opportunities and risks for employers

The advances made in digitalisation do not stop at HR departments. It is clear that the conclusion of employment contracts can be streamlined and made more effective through the use of an electronic signature. However, the statutory formal requirements should not be disregarded.

The electronic form as a replacement for the written form

As early as 2001, the legislator had introduced the electronic form for legal transactions as an alternative to the classic written form with Section 126a of the German Civil Code (*Bürgerliches Gesetzbuch,* BGB). It was stated at that time in the explanatory memorandum to the law that the written form as stipulated under Section 126 BGB can only be replaced by the electronic form by using a qualified electronic signature (QES) and only if the electronic form is not explicitly excluded.

A simple or advanced electronic signature is not sufficient. If an electronic text file only has a simple or advanced electronic signature, it can be changed at any time and its author is not clearly identifiable. These significant disadvantages compared to the written form can only be offset by a qualified electronic signature.

The technical requirements that an electronic signature must meet are set out in Regulation (EU) No 910/2014 on electronic identification and trust services for electronic transactions in the internal market and repealing Directive 1999/93/EC

(eIDAS Regulation). Article 3 (12) of the eIDAS Regulation defines the 'qualified electronic signature' as '*an advanced electronic signature that is created by a qualified electronic signature creation device, and which is based on a qualified certificate for electronic signatures*'.

The definition set out in the Regulation initially raises more questions than it answers. Details will only emerge from the further definitions and annexes of the eIDAS Regulation, which describe the technical requirements in detail.

For the end user, it will generally not be relevant what the technical requirements for the qualified electronic signature are in detail, as long as they are met. There are already some providers on the market that offer a qualified electronic signature and the necessary infrastructure. The use of such a service is advisable, since very few companies will have the technical "know-how" in-house.

General principle: Freedom of form

In principle, employment contracts are not subject to any formal requirements and can therefore be concluded in any form. The contracting parties are free to agree on the desired form (oral, text form, written form, electronic form using any form of signature). The same applies to additions or amendments.

Only the Act on Written Evidence of the Essential Conditions Applicable to an Employment Relationship (*Nachweisgesetz, NachwG)* stipulates that the essential contractual terms must be recorded in writing and given to the employee no later than one month after the agreed commencement of the employment relationship, Section 2 (1) NachwG. The electronic form is expressly excluded (Section 2 (1) sentence 3 NachwG). Although a breach of this law does not lead to the invalidity of the employment contract, it may lead to claims for damages (e.g., where any claims are time-barred due to an "unknown" period of limitation).

The European legislator has already recognised the need for a digital solution. Directive (EU) 2019/1152 on transparent and predictable working conditions in the European Union states in Article 3 that proof of the essential terms and conditions of employment can in future also be transmitted in electronic form, provided that the information is accessible to the worker, that it can be stored and printed, and the employer retains proof of transmission or receipt. The Directive must be transposed into national law by August 2022.

Written form requirement for fixed-term agreements

Section 14 (4) of the German Act on part-time work and fixed-term employment contracts (*Gesetz über Teilzeitarbeit und befristete Arbeitsverträge*, TzBfG) provides for an exception regarding the freedom of form for fixed-term employment relationships. Compliance with the written form is required for the limitation in time to be effective. As the electronic form is not explicitly excluded, the use of a qualified electronic signature is permissible as a suitable replacement for the handwritten signature according to the prevailing view in the literature.

In addition to the written form requirement for "classic" fixed-term employment contracts, it is often overlooked that the retirement clause contained in most open-ended employment contracts also requires the written form for the agreement to be effective.

The Federal Labour Court made clear in its judgment of 25 October 2017 (7 AZR 632/15) that the written form requirement under Section 14 (4) TzBfG also applies to the agreement of a retirement clause. This is the only way to ensure that, in addition to the warning function, the evidentiary function of the written form also comes into effect. There is no room for an interpretation of the norm that reduces its scope of application due to the clear wording of the provision.

An exception to the written form requirement could only be made in cases where a collective agreement applicable to the employment relationship as a whole provided for the term of the agreement to end with the retirement age (Federal Labour Court, judgment of 23 July 2014 - 7 AZR 771/12). This is because the balanced interests inherent in a collective agreement make the warning function of the written form requirement unnecessary, especially insofar as the collective agreement as a whole is applicable due to the declaration of general applicability, the fact that the collective agreement is binding or references to the employment contract.

As a result, the use of a simple or advanced electronic signature is generally not sufficient for the limitation in time of the employment relationship to be effective. If the written form is to be replaced by the electronic form, the fixed-term employment contract or the "open-ended" employment contract containing a retirement clause must be signed using a qualified electronic signature.

Case law

One can search in vain for the case law of the highest court in particular regarding the requirements for a qualified electronic signature. However, with the increased use of electronic signatures in legal transactions in general and in concluding employment contracts in particular, it is to be expected that case law will have to deal with the unresolved issues relating to the use of electronic signatures in the near future.

The Berlin Labour Court recently decided (judgment of 28 September 2021, 36 Ca 15296/20) that a fixed-term employment contract signed by both parties in electronic form does not satisfy the formal requirements in any case if it was not signed by means of qualified electronic signatures. The employment contract in dispute is therefore deemed to have been concluded for an indefinite period.

In the underlying case, the employee and the employer had concluded a fixed-term employment contract for a mechatronics engineer not by signing the contract personally, but by using an electronic signature. However, according to the Labour Court, the electronic signature used did not satisfy the written form requirement. Even if one were to assume that a qualified electronic signature within the meaning of Section 126a BGB is sufficient for the effective agreement of a fixed term, such signature was not used in the case to be decided.

The Berlin Labour Court stated that the system used for a qualified electronic signature requires certification under Article 30 of the eIDAS Regulation. The system used does not have such certification from the Federal Network Agency, which is the responsible body for this under Section 17 of the Trust Services Act (*Vertrauensdienstegesetz*). Accordingly, the agreement of the time limit was already invalid due to non-compliance with the written form requirement.

Since it was crucial for its decision, the Berlin Labour Court did not make a final statement on the fundamental permissibility of the use of a qualified electronic signature, but did clarify which **minimum requirements a qualified electronic signature** must meet in order to be able to replace the written form.

In addition, twelve actions against fixed-term contracts are currently pending before the Berlin Labour Court (20 Ca 8498/21; 20 Ca 8500/21 inter alia). The employees of the food delivery service ‘Gorillas’ claim that the written form required for the limitation in time of their employment contracts, which are due to expire shortly, to be effective was not complied with through the use of the electronic system, DocuSign. Should the written form not be observed, this would result in the invalidity of the fixed term and an open-ended employment relationship would have been created. A decision is expected at the beginning of 2022, unless an amicable agreement is reached between the parties before then.

Combination of signature and qualified electronic signature

A combination of a manual signature and an electronic signature is generally permissible, provided that an identical document is signed in writing by one contracting party and signed by the other contracting party using a qualified electronic signature. The signed documents must be received by the contracting parties. Both declarations of intent in themselves therefore satisfy the required form.

The legislator has also recognised that this combination does not in principle meet the requirements and is also not in line with the typical practice in electronic commerce, since the advantages of an electronic declaration of intention were lost as a result of the change in media. However, in individual cases, it cannot be ruled out that such a “split form” will have to be used when concluding a contract, for example if one of the contracting parties were not able to use an electronic signature for a declaration subject to a deadline because of temporary technical difficulties (e.g. with its hardware or with electronic transmission) and would therefore have to resort to the traditional written form and transmission by post.

Opportunities and risks in practice

As long as the employment contract only contains provisions not subject to any form requirement, the electronic form with any type of signature can be used without reservation. This eliminates the need to send the document by post, and it can be stored directly in the electronic personnel file without having to print it out, sign it and scan it in again. The amount of work required for the process and the personnel costs incurred are reduced. Last but not least, resources and time are saved and the environment is protected.

However, as soon as the written form is required by law - even for individual provisions of the employment contract - the only alternative to the handwritten signature is the qualified electronic signature.

In the vast majority of cases, the employment contract will contain a retirement clause. At the latest at this point it is strongly advised that the qualified electronic signature be used or alternatively to revert to a manual signature.

Although a signature using a simple or advanced electronic signature would not lead to the invalidity of the employment contract in its entirety, the employment relationship would not be effectively limited to the retirement age. In the case of fixed-term contracts, there is also no way around the qualified electronic signature, as otherwise an open-ended employment relationship is concluded as a result of the invalidity of the fixed-term arrangement.

If the employer then seeks to terminate the employment relationship, the usual means of termination (notice of termination, termination agreement) must be used. This usually leads to increased costs and personnel expenditure. Negotiations with the employee concerned take time and usually result in a severance payment in unfair dismissal hearings or through a corresponding arrangement in the termination agreement.

Conclusion

The invalidity of fixed-term clauses can be avoided by complying with the formal requirements. If the electronic form is to be used, the qualified electronic signature is the most legally secure option. It alone can replace the written form. Nothing then stands in the way of concluding contracts in a fast, uncomplicated, seamless - and above all effective - manner.

Author

Kevin Brinkmann LL.M.

Luther Rechtsanwaltsgesellschaft mbH
Hamburg

Need for action in case salary is converted into a contribution to a company pension plan – lower contribution assessment ceiling in 2022

Why two euros per month less can be a problem

Reduction in the BBG

The contribution assessment ceiling (*Beitragsbemessungsgrenze,* BBG) for pension insurance (Western Germany) will fall for the first time in 2022 from EUR 85,200 p.a. (2021) to EUR 84,600 p.a. (2022). This is an unusual situation, as it has been increasing every year for over 60 years. The reason for the reduction in the BBG is the decline in gross wages in 2020 due to the COVID-19 pandemic.

Significance of the BBG for salary conversion

The BBG plays a major role in pension insurance in the context of the conversion of part of the salary into a contribution to a company pension plan (salary conversion, or in German "*Entgeltumwandlung*"). Several relevant parameters are directly related to the BBG, such as the amount of the conversion entitlement (Section 1a of the German Company Pensions Act (*Gesetz zur Verbesserung der betrieblichen Altersvorsorge,* BetrAVG)) and the entitlement guaranteed by the PSVaG in the first two years in which salary is converted (Section 7(5) BetrAVG), but, above all, the exemption of the converted salary from tax and social security contributions. The converted salary is tax-free up to 8% of the BBG (this is EUR 568 per month in 2021 and will be EUR 4 per month less at EUR 564 in 2022) and non-contributory up to 4% of the BBG (EUR 264 per month (2021) compared to EUR 282 per month (2021).

Need for action

Employers are required to review whether they need to amend the salary conversion agreement between themselves and their employees. Such a need for adjustment may arise,

- if collectively agreed remuneration is converted, but the collective agreement limits the conversion of the salary to a percentage (usually 4%) of the BBG. If the previous level of salary conversion is maintained, the employer faces a claim of the employee for repayment of EUR 2 per month if the 4% has been fully utilised to date. This amount would not then be covered by the opening provision in the collective agreement regarding the use of collectively agreed remuneration for salary conversion;
- if taxation and contributions exceeding 4% or 8% of the 2022 BBG are to be avoided. When making this decision, it should be borne in mind that if the previous contribution is maintained, there will also be changes in the taxation and contributions for later pension benefits, insofar as these are based on excess contributions;
- if tax consequences are to be avoided where a pension fund is used as the mechanism. Approval of a reduction in converted salary by the fiscal authorities requires a change in the employment contract;
- if, where a form of insurance is used, the contribution under the insurance contract is linked to the contribution assessment ceiling. Then the contribution automatically decreases, which must be reflected accordingly at the employment law level;
- to adjust the employer's allowance of 15% (Section 1a (1a) BetrAVG) to a reduced salary conversion or decreasing social security savings.

We will be happy to support you in determining the specific need for action and implementing any necessary changes.

Author

Dr Annekatrin Veit

Luther Rechtsanwaltsgesellschaft mbH
Munich

■ JUDGMENT IN REVIEWS

Right of a severely handicapped employee to be exempt from on-call time ordered as stand-by duty

Severely disabled employees may refuse to spend time on call if this entails overtime. According to the Federal Labour Court the term overtime under Section 207 of the German Social Code (*Sozialgesetzbuch*, SGB), Book IX, is to be understood as any working time in excess of eight hours per working day pursuant to Section 3 (1) of the German Working Time Act (*Arbeitszeitgesetz, ArbZG*).

Federal Labour Court, judgment of 27 July 2021 – 9 AZR 448/20

The case

The parties are in dispute about an exemption from on-call time ordered as stand-by duty because of a severe disability. The claimant is employed by the defendant, a municipality, as a water master with a regular working week of 39 hours spread over five days. He is considered to be equivalent to a severely disabled person. The claimant is responsible for, amongst other things, maintaining the drinking water supply. The defendant uses on-call time ordered as stand-by duty on the basis of the Collective Agreement for Public Service Regulation (*Tarifvertrag für den öffentlichen Dienst-Verordnung, TVöD-V)* and the employment contract. The claimant wishes to be released from this on-call time on medical advice and submits requests to be exempt with regard to this. The defendant only partially complies with the exemption request.

In his action, the claimant seeks in the principal claim a declaratory judgement that he is wholly exempt from any on-call

duties and, in two alternative claims, a declaratory judgement that he is exempt from on-call duties, firstly, after the daily working time from 7.15 a.m. on Monday, to 2.45 p.m. on Friday and, secondly, from on-call duties on Sundays. He is of the opinion that on-call time should be consistently classified as working time.

The decision

After the lower courts dismissed the action, the successful appeal regarding the alternative claims resulted in the action being referred back to the Higher Labour Court.

The claimant was unsuccessful in his principal claim for a declaratory judgement that he should be exempt from any form of on-call duties. The possibility of ordering on-call duties is restricted in the case of severely disabled employees by Section 207 SGB, Book IX, which, pursuant to Section 151 (3) SGB, Book IX, also applies to employees considered to be equivalent to severely disabled persons. The provision allows a severely disabled employee to be exempt from overtime upon request. The Federal Labour Court falls back on the existing understanding of overtime set out in Section 3 sentence 1 ArbZG for the definition of overtime within the meaning of Section 207 SGB, Book IX. Overtime is therefore defined as working more than eight hours a day. The ArbZG assumes a six-day week. Since the claimant works a five-day week, it would also be conceivable to order him to be on-call for a sixth day for eight hours. As a global claim, the principal claim also includes this potentially permissible scope of on-call duties and is therefore subject to dismissal.

The Federal Labour Court reviewed and rejected Section 164 (4), sentence 1, no. 4 SGB, Book IX, as a further restriction on ordering on-call duties for severely disabled employees. This provision allows for exemption from on-call duties as part of the right to the disability-friendly organisation of work and working time. To do so, however, the claimant would have had to show and prove, in accordance with general principles, that he was unable to perform the on-call duties because of his disability. In this respect, the claimant did not submit to what extent he is unable to carry out the on-call duties ordered as a distinct form of work, even in view of the fact that the defendant promised that other employees would support the claimant.

In making a legal assessment of the claimant's alternative claims, it is crucial whether on-call time ordered as stand-by duty is to be regarded as working time as a whole. A distinction must be made between on-call time, which is regarded as working time under employment law irrespective of whether the employee actually works, and stand-by duty, which is regarded as working time only during the time when the employee works. In the case of regular on-call time, the employee must start work immediately and is therefore subject to residence restrictions, whereas in the case of stand-by duty, the employee is free to choose where he wants to stay and is thus able to pursue his own interests. According to CJEU case law (judgment of 9 March 2021 - C-344/19, "Radiotelevizija Slovenija"), a significant impairment of the freedom to manage time is incompatible with the nature of stand-by duty. This is the case, for example, if only a short reaction time is given for starting work or if stand-by duty is ordered on an excessively frequent basis. The Federal Labour Court criticised the Higher Labour Court's insufficient judicial assessment of these aspects and referred the case back for the court to make the requisite amendments to its findings.

Our comment

On-call time can only be ordered for severely disabled employees within very narrow limits, as this decision shows. A major restriction in this respect is Section 207 SGB IX, which opens up the possibility of severely disabled employees being exempt from working overtime. According to Federal Labour Court's now established case law, overtime in the sense of disabled persons law is worked, if the statutory standard working hours laid down in the ArbZG of eight hours per working day are exceeded. This rigid interpretation has been criticised in isolated cases from both the employee and the employer perspective. From the employee's point of view, criticism can be levied that exceeding the regular collectively agreed or individually agreed working time is irrelevant and thus, for example, part-time employees can be called upon to perform on-call time to a greater extent. From the employer's point of view, a lack of flexibility due to the link to the regular working time of eight hours is criticised. Ultimately, however, the approach adopted by the Federal Labour Court concerning overtime is to be welcomed, as it provides for clear conditions.

In addition to the definition of the concept of overtime in Section 207 SGB IX, which is nothing new, the decision is also interesting because it deals with the distinction between stand-by duty and on-call time. It is crucial for an assessment of the claimant's alternative claims whether the on-call time ordered as stand-by duty is actually stand-by duty. The CJEU recently commented in the "Radiotelevizija Slovenija" case on the relevant definition criteria. The Federal Labour Court takes the opportunity to recite the principles of the CJEU on the definition of stand-by duty and on-call time. However, the application of these principles in this case is reserved for the highest court judging the facts, since the Federal Labour Court lacks the necessary information concerning the facts of the case to make a final decision.

Author

Lukas Beismann

Luther Rechtsanwaltsgesellschaft mbH
Hanover

Minimum wage for foreign care workers in private households

Foreign care workers posted to a private household in Germany are entitled to the statutory minimum wage for time spent on call.

Federal Labour Court, judgment of 24 June 2021 – 5 AZR 505/20

The case

The claimant is a Bulgarian national resident in Bulgaria who was employed by the defendant - a company established in Bulgaria - as a 'social assistant' with a weekly working time of 30 hours on the basis of a Bulgarian employment contract. The weekend was meant to be off. The claimant is seeking differential compensation from the defendant employer in the amount of the statutory minimum wage for the time above the contractually agreed weekly hours when she actually worked or had to be available for work. She was employed by a person over 90 years of age in Berlin, in whose household the claimant also occupied a room. She was posted under a service contract concluded between the defendant and the person to be cared for, which specifically provided for "*24-hour care/nursing*" as the assignment. The subject of this service contract was the provision of care services in the household of the person to be cared for, which included household activities as well as general assistance (dressing, personal hygiene, etc.) and social tasks.

The claimant alleged that she had to work 24 hours a day or at least be ready for work, especially at night. The defendant claimed that all duties could have been performed within the agreed 30 hours per week and that on-call time had neither been agreed nor ordered by the defendant.

The Higher Labour Court upheld the action for the most part and awarded the majority of the almost EUR 43,000.00 applied for. This was based on an estimate made by the court of the working time of 21 hours per working day.

The decision

Upon appeal by the defendant and cross-appeal on points of law by the claimant, the Federal Labour Court set aside the decision of the Higher Labour Court and referred the case back to the Higher Labour Court for a new hearing and decision. The Federal Labour Court found that the action was well-founded on the merits, but that it was not possible to determine the amount of on-call time actually provided and for which remuneration was payable.

First of all, the Federal Labour Court established the international jurisdiction of German courts under Section 15 sentence 1 of the German Employee Secondment Act (*Arbeitnehmerentsendegesetz* - AEntG), as employees posted to Germany may also bring an action before German courts.

The German minimum wage legislation is also applicable under Sections 1 (1), 20 of the German Minimum Wage Act (*Mindestlohngesetz,* MiLoG*)*, even if the parties to the employment contract had agreed on a choice of law in favour of the law of another country (in this case Bulgaria). Under Section 20 MiLoG the obligation to pay the minimum wage also expressly includes employers based abroad. Furthermore, the provisions laid down in MiLoG are in any case mandatory provisions within the meaning of Article 9 (1) of the Rome I Regulation, which apply irrespective of the choice of law.

A claim to differential compensation only exists if the employee does not receive at least the gross wage provided for in Section 1 (2) sentence 1 MiLoG for the hours worked in the payroll period. It is therefore necessary to demonstrate in precise terms that less than the statutory minimum wage was paid for each calendar month, such that just an average of the hours actually worked was not sufficient. Although the adjudicating court may estimate the working time in accordance with Section 287 of the German Code of Civil Procedure (*Zivilprozessordnung,* ZPO), which requires a substantial degree of probability based on a secure foundation for the court to have any conviction in its judgement. The Court of Appeal was unable to establish the relevant facts in this case.

Following its previous case law and that of the Court of Justice of the European Union, the Federal Labour Court further stated that periods of on-call time are working hours and entail remuneration at least at the minimum wage level. On-call time refers to periods during which the employee must be available at a place determined by the employer in order to start work on his/her own initiative or on request if necessary. The readiness to work and on-call time are not only working time under occupational health and safety legislation, but also work that is subject to remuneration under national law. The Federal Labour Court sees strong evidence suggesting that on-call time was at least implicitly ordered by the defendant - and will be accordingly subject to remuneration. However, the Federal Labour Court was not itself able to determine the exact extent of the actual (on-call) working time, such that it referred this issue back to the Higher Labour Court.

Our comment

The Federal Labour Court remains true to its previous case law and exactly addressed an issue that has been pointed out since the introduction of the statutory minimum wage. In an increasingly ageing society with a growing need for nursing care, the Federal Labour Court ‘s decision puts the economic viability of nursing care in people’s own homes to a severe test and has even been described at times as an “Armageddon” for this model of care.

However, it will still take time before a limit is placed on these additional remuneration costs. Although it is recognised that on-call time can be remunerated at a lower rate than full time work, such a differentiation requires action by the legislator and cannot be made by the courts. It is also by no means clear whether such a differentiation by the legislator - as already exists in Section 2 (6) of the Care Work Conditions Regulation (*Pflegearbeitsbedingungenverordnung,* PflegeArbbV) for nursing care companies - would undercut the statutory minimum wage pursuant to Section (1) MiLoG. Limiting the remuneration risk through contractual arrangements is not possible in any case due to Section 3 (1) MiLoG.

Only the employee’s burden of production and proof can be considered as a lifeline here: the conviction of the court must be based on sufficient - undisputed or proven - facts. Only diligent employees will be able to provide a substantiated account of their (extra) working and on-call time. However, this is not a line of defence on which to build.

Author

Dr Christoph Corzelius

Luther Rechtsanwaltsgesellschaft mbH
Cologne

Warning issued to an editor on a breach of the duty to disclose secondary employment

A breach of the duty to disclose secondary employment may justify a warning. This also applies to editors employed at newspapers, as the carefully reasoned decision of the Federal Labour Court shows having regard to the fundamental rights of the parties to the employment relationship.

Federal Labour Court, judgment of 15 June 2021 – 9 AZR 413/19

The case

The claimant, who had been employed as an editor at the defendant magazine for many years, took part in the opening of a new site of a German company in the U.S. as part of a business trip, on which he was to report to the defendant. The defendant published an abridged version of the claimant's report in September 2017. The abridged version no longer contained a passage concerning the claimant himself, in which he described an incident at the evening buffet between the businesswoman hosting the event and himself. The claimant described that, in the presence of other editors of other magazines, the businesswoman pinched his hip after he said he did not want to eat anything as "he had too much fat above his belt".

In December 2017, the claimant asked his editor-in-chief whether the full article could still be published by the defendant as part of the #MeToo debate. The editor-in-chief refused. In view of the claimant's announcement that he intended to publish the article elsewhere, the editor-in-chief also drew the claimant's attention to the non-competition provision in the collective agreement and the employment contract and asked the claimant to talk to the head of the personnel and legal department at the defendant.

Unimpressed by this, the claimant published an article with the headline "Ran an den Speck" about the incident at the buffet in March 2018 - without having informed the defendant of this in advance - in a national daily newspaper, without, however, naming the time and place of the incident or the name of the businesswoman. The article was accompanied by a note stating that the defendant regularly reports on economic topics as a journalist. However, as the claimant himself admitted, it was not difficult for interested parties to research the specific incident on the Internet with this information.

The defendant issued a written warning to the claimant on 14 March 2018. In the warning letter the defendant complained that the claimant had published the article without the written consent of the editor-in-chief and threatened to terminate the employment relationship in the event of a repetition.

In his action, the claimant sought to have this warning removed from his personnel file. The claimant argued that reserving the right of permission for other publications violated his fundamental rights. Furthermore, it had not been necessary to obtain the consent of the editor-in-chief, since the editor-in-chief had already finally rejected the publication and it had not been reasonable for him to sue for consent for reasons of time. In any case, however, the warning was disproportionate in view of the long and trouble-free employment relationship.

The decision

The claimant was unsuccessful before both the Labour Court and the Higher Labour Court. His appeal on points of law against this was also unsuccessful.

The claimants' conduct about which the defendant complained as such was not in dispute between the parties. The only question to be decided was whether the warning was based on an incorrect legal assessment on the defendant's part and/or whether the warning violated the principle of proportionality. In the opinion of all courts, this is not the case.

The Federal Labour Court first deduces that the claimant, with his unauthorised publication, used news that had become known to him while working for the defendant elsewhere. The fact that the claimant himself was part of the incident described does not change this. Based on this, the claimant was obligated to obtain the defendant's written consent prior to the intended publication elsewhere. While the claimant is in principle free to work for himself outside his working hours, he may not do so in breach of his contractual non-competition agreement and, in particular, may not support the defendant's competitors. Therefore, the defendant's interest in preventing the claimant from supporting competitors through the publication of guest articles, if the guest article uses news that the claimant became aware of while working for the defendant, regularly prevails. In this context, the duty of disclosure - also taking into account the claimant's fundamental rights (his right of personality and freedom of the press were affected in this case) - is crucial, as it is only through the duty of prior disclosure that the defendant is able to determine whether the intended publication is contrary to its interests and whether it wishes to exhaust its legal options to prevent publication.

As a rule, it is irrelevant whether the claimant would have had a right to be granted consent, when viewed objectively, unless in exceptional cases, having regard to all the circumstances of the individual case, there is a particularly heightened interest in using the news. Since the duty of disclosure was therefore not - as the claimant thought - a "mere formality", and the claimant deliberately disregarded the duty of disclosure despite being advised to do so by the editor-in-chief, the warning was also proportionate. The defendant was entitled to warn the claimant and, in this way, to make it clear that it would not tolerate similar breaches of duty.

Our comment

The decision of the Federal Labour Court is convincing. A ban on secondary employment generally includes a right to withhold permission and thus consists of two separate components. On the one hand, it has to be determined whether secondary employment as such can be refused due to the employer's overriding interests. On the other hand, where there is a right to withhold permission, the employee is subject to a duty of prior disclosure, the breach of which may in itself justify a warning - and in the case of repetition, possibly also dismissal. If this duty of disclosure is breached by the employee, he/she often uses the argument in practice that, when viewed objectively, permission for secondary employment should have been granted anyway as a defence against the warning and is therefore a mere formality. In view of the Federal Labour Court's decision, this strategy will be regularly doomed to failure, even if the employee - as in this case - can put forward weighty arguments that his/her fundamental rights are affected.

Author

Joschka Pietzsch

Luther Rechtsanwaltsgesellschaft mbH
Hamburg

Time needed to change clothes and travel time within the workplace are part of working time and are subject to remuneration

Federal Labour Court, judgment of 21 July 2021 – 5 AZR 110/21

In principle, the time needed to change clothes and travel time within the workplace are working time, such that there is a claim to remuneration. However, provisions in collective agreements - as in this case - may contain deviating provisions, such that the employee has no claim to remuneration.

The case

The claimant is employed as a tool mechanic in a press shop in Lower Saxony by the defendant, which produces motor vehicles in several plants in Germany. He is a member of the IG Metall trade union. The claimant is required to put on conspicuous and substantial personal protective equipment, i.e. special clothing, before starting work. For this purpose, he has to travel distances within the workplace to the changing rooms and lockers. These changing and travel times are not included in the actual working hours and are not remunerated by the defendant.

Pursuant to Section 12 of the framework collective agreement (*Manteltarifvertrag*) concluded between the defendant and IG Metall, work performed and the readiness to work is paid unless other provisions are stipulated in collective agreements. Section 28 of the aforementioned collective agreement stipulates those employees who carry out particularly dirty work receive paid washing time of up to 20 minutes per day, which is within the working time.

The claimant sought, inter alia, remuneration for the time needed to change clothes and the travel times within the workplace or, alternatively, paid time off from work duties for the amount of time needed to change clothes and the travel time within the workplace. The lower courts dismissed the action.

The decision

The claimant's appeal on points of law was also unsuccessful. The Federal Labour Court concluded that a claim to remuneration for the time needed to change clothes and travel time within the workplace was excluded by the collective agreement. Although the time needed to change clothes and the travel time involved within the workplace are in principle working time that is subject to remuneration within the meaning of Section 611a (2) of the German Civil Code (*Bürgerliches Gesetzbuch,* BGB*)*, a separate remuneration provision for work other than the actual work - and therefore also for the time needed to change clothes or the travel time within the workplace - could be agreed under an employment contract or collective agreement. It was precisely such a deviating remuneration provision that had been stipulated in this case by the provisions laid down in Sections 12 and 28 of the collective agreement. The wording of Section 12 of the collective agreement, which uses the term "work performed", already suggests that this is to be understood as limited to the specific activity of the respective employee. It then follows from the overall context of the collective agreement that the parties to the collective agreement did not wish to include an obligation to pay for related activities such as changing clothes or travelling within the workplace under the term "work performed" and therefore wished to exclude remuneration for this. This is demonstrated by the provision set out in § 28.2 of the collective agreement, under which employees who carry out particularly dirty work are granted a washing period within their working time, the actual duration of which is determined by the type of work. The fact that the collective agreement only stipulates an obligation to pay for this one non-value-added activity of washing, but not for other activities directly related to the work, demonstrates that the parties to the collective agreement did not wish to agree an obligation to pay for putting on personal protective clothing and necessary travelling within the workplace.

The exclusion of remuneration for putting on personal protective clothing under the collective agreement also does not violate Section 3 (3) 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 Act prohibits the employer from imposing the costs of occupational health and safety measures on the employee. Even if one were to assume that putting on and taking off personal protective clothing as well as the associated travel time within the workplace, constituted an occupational health and safety measure, this would not impose any costs on the employee. The term "costs" only covers expenses for material resources, but not the disposition of the employee's time. Nor does EU law require a different approach, since the concept of costs under European Union law does not cover the remuneration of working time necessary to use the means of protection provided at the workplace.

Since a claim to remuneration for changing and travel times was excluded by the collective agreement, the claimant was also not entitled to paid time off work for this.

Our comment

The Federal Labour Court's decision is well-founded and not particularly surprising. In its decision, the Federal Labour Court first of all confirms its established case law, under which the time needed to change into conspicuous work clothing or PPE and the travel time needed for this are in principle subject to remuneration if no deviating provisions have been made in a collective agreement or employment contract. The "particularly conspicuous" working clothes form the core of this case law. According to the Federal Labour Court's case law, "particularly conspicuous" means such work clothing which makes the employee "readily recognisable in the public sphere as an employee" or makes it possible to associate him/her with a certain profession or a certain industry sector. If, on the other hand, the prescribed work clothing can be put on at home and - without being particularly conspicuous - can also be worn on the way to work, there is no obligation to pay remuneration. The fact that, in this case, the parties to the collective agreement had excluded an obligation to pay for putting on PPE and the travel involved was justified by the Federal Labour Court through a convincing interpretation of the wording and logic of the collective agreement.

Author

Nadine Ceruti

Luther Rechtsanwaltsgesellschaft mbH
Frankfurt a.M.

Inclusion of pay supplements for late and night work in collectively agreed pension schemes

Federal Labour Court, judgment of 24 June 2021 – 5 AZR 529/20

When calculating the pension amount in accordance with the provisions of the framework collective agreement for employees in the metal and electrical industry in North Württemberg/North Baden (*Manteltarifvertrag für Beschäftigte in der Metall- und Elektroindustrie in Nordwürttemberg/Nordbaden*), pay supplements for late work and night work are only included if the work on which the pay supplements are based is part of the employee's regular work duties.

The case

The parties are in dispute about the pension amount under a collective agreement. The defendant is a supplier to the automotive industry and a member of the Verband der Metall- und Elektroindustrie Baden-Württemberg e.V. The claimant has been employed by the defendant since 1998 and, under the contractual agreements, is required to work normal shifts and shift work. Furthermore, the respective collective agreements for the metal industry of North Württemberg and North Baden apply as referred to in the employment contract. The defendant initially employed the claimant on shift work and paid him supplements for late and night work. The claimant suffered a work-related injury in July 2014, as a result of which he became unfit for work until 21 September 2014. After resuming work, the defendant only employed the claimant on normal shifts. The claimant was only used as a replacement on the late or night shift as part of a parental leave replacement system from 23 February 2017 to 1 March 2018 and during the periods of 4 March to 9 March 2018, 19 March to 23 March 2018 and 15 April to 20 April 2018, and received the appropriate pay supplements. On 1 May 2018, the claimant became eligible for the income protection scheme under the collective agreement, which is available to employees who have reached the age of 54. The defendant calculated a retirement benefit amount that did not include pay supplements for late and night work. In support of this calculation, the defendant relied on the provision in Section 6.4.1.1 of the framework collective agreement regarding the collective agreement remuneration framework (*Entgeltrahmen-Tarifvertrag,* ERA-TV) for employ-

ees in the metal and electrical industry of North Württemberg/ North Baden, which reads as follows: *"The work underlying the above supplements and allowances must be part of the employee's regular work duties (e.g., gatekeepers, fire fighters)."*

After he was unsuccessful in asserting his claim in out-of-court proceedings, the claimant requested in his action that the pension amount be recalculated with the inclusion of pay supplements for late and night work. The Labour Court dismissed the action, the Higher Labour Court changed the first-instance judgment and found that the defendant be required to recalculate the pension amount including the pay supplements for late and night work.

The decision

The Federal Labour Court allowed the appeal and decided that the defendant had not been obliged to include the average pay supplements for late and night work earned by the claimant in the last 12 calendar months prior to the claimant becoming eligible for the income protection scheme when calculating the pension amount. The reason for this was that the work on which the pay supplements were based did not form part of the claimant's regular work duties. It is already clear from the wording of the provision (§ 6.4.1.1) that such duties must be those that occur at the same intervals, i.e. repetitively. The claimant would therefore normally have had to perform his work in shifts. This understanding would also be supported by the examples of gatekeepers and fire fighters mentioned in the provision. They usually carry out work for which allowances and/or supplements are paid because the work usually has to be carried out in shifts or in difficult circumstances, as is the case with fire fighters. Even if the purpose of the provision, which is to protect workers from a loss of income caused by the age-related decline in their physical strength, is taken into account, no other conclusion can be reached. The claimant could not have expected that the pay supplements for late or night work would be included in the pension scheme, since he only worked on a late or night shift in exceptional situations.

The tariff logic would also support this interpretation. This was also not precluded by the fact that, under Section 6.4.1.3 MTV ERA, pay supplements and allowances could be included in the pension amount even after the start of the income protection scheme. This would merely ensure that such work to be performed on a permanent basis after the start of income protection scheme would be included. Insofar as the Higher Labour Court had based its decision on this provision on the fact that the employer, where the work remains constant, was in a position to influence the inclusion of shift supplements in the pension amount by unilaterally determining the extent of the working time in a possibly abusive manner, the Federal Labour Court pointed out that this was an atypical situation for which there were no indications in this case. Abusive behaviour on the part of the employer should rather be examined in the specific individual case.

Our comment

One has to agree with the Federal Labour Court's judgment. As it correctly explained, this results both from the wording of the provision and from the purpose of the pension scheme under a collective agreement. The pension scheme under a collective agreement is intended to ensure that employees can continue to maintain their previous standard of living, i.e., it is guaranteed as a minimum income. Given this purpose, only such pay supplements and allowances can be included in the calculation of the pension amount as the employee could legitimately expect to receive on the basis of his work performance to date. In the case of pay supplements for night and late shift work, this only applies if the employee has regularly worked the night or late shift in the last 12 months before he/she becomes eligible for the income protection scheme. The mere fact that employees are contractually obliged to do so or, in exceptional cases, e.g., when other employees are absent, perform their work on a replacement basis during the night or late shift, is not sufficient for this purpose. Otherwise, the provision agreed by the parties to the collective agreement would be redundant. Therefore, when drafting collective agreements, care must be taken to ensure that pay supplements and allowances are consistently taken into account in the context of pensions.

Author

Dr Anna Mayr

Luther Rechtsanwaltsgesellschaft mbH
Hamburg

■ CASE LAW IN A NUTSHELL

Proof of receipt of a notice of termination by registered mail

Baden-Württemberg Higher Labour Court, judgment of 28 July 2021 - 4 Sa 68/20

There is prima facie proof of receipt of a registered letter sent by post if a copy of the proof of delivery is also submitted in addition to the proof of posting. The submission of the mere delivery status is not sufficient proof of receipt.

Reasons for the decision

The Baden-Württemberg Higher Labour Court had to decide, inter alia, in an unfair dismissal hearing whether the carrying out of the company integration management process (*betriebliche Eingliederungsmanagement, bEM*) had been properly initiated.

The employee, who had been employed for many years, had been unable to work for more than six weeks within a year due to illness. The defendant employer took this as an opportunity and initiated the company integration management process governed in Section 167 of the Social German Code IX (*Sozialgesetzbuch, SGB*) in order to avoid or at least reduce periods of disability in the future. This was followed by the issuing of an illness-related notice of termination by the employer.

It was disputed in this case whether the claimant employee had received an invitation to an interview as part of a company integration management process. The letter was posted as a registered letter at the post office. The delivery status indicates that the letter had been delivered. Proof of delivery could not be provided.

The Labour Court upheld the action, and the employer's appeal against it was unsuccessful. In any event, the dismissal did not prove to be socially justified under the required weighing of interests. Despite the need for carrying out a bEM the defendant did not initiate or did not properly initiate such a bEM. The Higher Labour Court in fact emphasises in its reasons for the decision that the implementation of the bEM is not a formal precondition for a dismissal to be effective. However, Section 84 II SGB IX sets out the principle of proportionality in concrete terms.

The Higher Labour Court further stated in its decision that, in the case of a registered letter sent by post, prima facie proof can be established if the proof of posting is submitted together with a copy of the proof of delivery. In this case, these documents would indicate that the item sent was delivered by posting it in the letterbox or post box, provided that the procedure for registered letters was followed.

This is not the case if, in addition to the proof of posting, only a delivery status is submitted. The delivery status does not indicate the name of the carrier nor does it contain a technical reproduction of the original of the deliverer's signature certifying that the letter has been posted.

Lawyer fees in appeal proceedings - appropriate legal action

Berlin-Brandenburg Higher Labour Court, judgment of 8 September 2021 – 26 Ta (Kost) 6166/21

On the issue of whether fees are incurred as a result of appeal proceedings due to work carried out by the attorney of record in the Court of First Instance after receipt of the Court of First Instance's judgment, a distinction must first be made as to whether the work performed constitutes a single other activity or is still part of the first instance proceedings. If the latter applies, this work is remunerated with the procedural fee according no. 3100 of the fee schedule of the Act on the Remuneration of Lawyers (*Rechtsanwaltsvergütungsgesetz,* VV-RVG).

Reasons for the decision

The defendant, who was unsuccessful at first instance, filed an appeal against the first instance judgment in a timely manner. The written submission does not contain any applications or grounds, but includes a note to the effect that an attorney should not yet be appointed. After the claimant's written submission was delivered, a notice of representation and application to dismiss the appeal was submitted to the Higher Labour Court by the claimant's lawyer at first instance.

After the appeal was withdrawn by the defendant, the claimant sought a 1.1 procedural fee under no. 3201 of the VV-RVG as part of the assessment of costs.

The Berlin Labour Court rejected this. The immediate appeal lodged against this was unsuccessful.

In the Higher Labour Court's opinion, a procedural fee was not to be paid to the claimant by the defendant, since the work carried out by the attorney of record at first instance still belonged in part to the first instance proceedings.

After receipt of the first instance judgment, a distinction must be made as to whether the work carried out is still part of the first instance proceedings and is therefore covered by the procedural fee under no. 3100 of the VV-RVG or whether it constitutes a single other activity that triggers a separate procedural fee. According to the Higher Labour Court's decision, the receipt and forwarding of the appeal still belonged to the first instance proceedings, so that a fee could not be considered for this. On the other hand, a single other activity triggers a fee if the attorney of record at second instance reviews the prospects of success of the appeal against denial of leave to appeal on behalf of the opponent and deals with it in an objective manner.

The Higher Labour Court further stated that a fee was not to be reimbursed for the notice of representation and application to dismiss. The claimant's attorneys of record were to be treated as its attorney in the appeal proceedings in any event due to their representation during the proceedings at first instance (Section 87 of the Civil Code of Procedure (*Zivilprozessordnung,* ZPO). The application to dismiss was also not supported by the absence of any grounds of appeal. A proper review of the appeal had not been possible in the absence of any grounds of appeal.

These measures were not necessary for appropriate legal action and violated the obligation to keep the legal defence costs as low as possible.

No invitation to interview if person not suitable

Nuremberg Higher Labour Court, judgment of 20 May 2021 – 5 Sa 418/20

A public employer does not have to invite a severely disabled person to an interview under Section 165 sentence 3 of the German Social Code (*Sozialgesetzbuch*), Book IX, if it is established that the job applicant is not personally suitable for a newly advertised position.

Personal unsuitability can result, for example, from the fact that the applicant was employed by the same employer shortly before and was terminated without notice during the probationary period for reasons of conduct.

Reasons for the decision

The parties were in dispute over claims for compensation asserted by the severely disabled claimant because his application for the position as employee at the building authority advertised by the defendant was not considered.

The claimant was a severely disabled person who was employed on a temporary basis by a local authority in its finance department in the area of contributions/fire services. However, at the beginning of his employment, he had numerous disputes with the defendant employer and his colleagues. This was followed by summary dismissal during the probationary period for severe disruption of peace at the workplace. The claimant then brought an action for unfair dismissal. During the proceedings the parties reached a settlement terminating the employment relationship.

The claimant subsequently applied for another position advertised by the defendant as an administrative assistant at the building authority. The claimant's application was rejected without him having been invited to an interview. The claimant then brought an action for compensation due to discrimination, which was dismissed by the Labour Court. The Higher Labour Court upheld the decision of the Labour Court. Although the statutory obligation to invite severely disabled applicants to an interview is intended to enable such applicants to convince the employer of their suitability, this obligation does not apply according to the Court if their qualifications are not at issue, but rather if the severely disabled employee is personally not suitable for a newly advertised position. In this case, there had already been an employment relationship with the same employer within the past year, which was terminated during the probationary period for reasons of conduct. According to the Court decision, there was no entitlement to be invited to an interview for a new position, since the claimant's lack of personal suitability had been demonstrated. It was not possible for the applicant to convince the employer of his personal suitability, which is why the obligation to issue an invitation would be purely formal.

Validity of a flat-rate remuneration agreement for overtime

Mecklenburg-Western Pomerania Higher Labour Court, judgment of 14 September 2021 – 2 Sa 26/21

A provision in an employment contract under which 10 hours of overtime per month are included in the agreed salary is valid.

Reasons for the decision

The parties were in dispute over overtime pay. The claimant worked for the defendant in the payroll and financial accounting area and received a monthly gross salary of EUR 1,800.00 for this. The regular working hours were 40 hours per week. Under the employment contract, the salary also covered "any overtime in excess of the normal working hours, up to a maximum of ten hours per month".

In the first instance proceedings the claimant sought an order that the defendant pay overtime for 92 hours. The claimant submitted that the regular working hours were not 40, but rather 42 or 44 hours per week. The provision in the employment contract concerning overtime pay was surprising and therefore invalid.

The Labour Court dismissed the claim, and the appeal filed against this decision was unsuccessful.

According to the Higher Labour Court, the provision was valid. It does not constitute a surprising provision within the meaning of Section 305c of the German Civil Code (*Bürgerliches Gesetzbuch,* BGB).

This provision was included under the heading "Remuneration" in the employment contract and was therefore not in an unusual place in an employment contract where such a provision is not to be expected.

The flat-rate remuneration agreement was also sufficiently transparent. At the time the contract was concluded, the claimant had already been able to understand what was expected of him and which maximum level of services he would have to provide for the agreed remuneration. From the wording of the provision, it was clear to the claimant that, for the agreed gross remuneration of EUR 1,800.00, he would have to work up to 10 hours of overtime per month, if necessary, without any additional remuneration. The wording of the provision is therefore clear and comprehensible and therefore transparent, the court held.

The claimant's objection that he had been deceived about the actual regular working hours was not accepted. According to the Court, this had no bearing on the issue of the transparency of the provision agreed and, furthermore, did not give rise to any reason for invalidity. The defendant did not make any statement in the employment contract regarding the frequency of the overtime worked. The provision related solely to the remuneration to be paid.

No further suspension of an unfair dismissal hearing during ongoing criminal proceedings

Berlin-Brandenburg Higher Labour Court, judgment of 06 October 2021 - 11 Ta 1120/21

If an employee is dismissed on suspicion of having committed homicide, the unfair dismissal hearing initiated by her may not be suspended in view of the still ongoing criminal proceedings.

Reasons for the decision

The Berlin-Brandenburg Higher Labour Court had to decide whether the unfair dismissal hearing concerning an employee working in the field of caring for the handicapped should be continued.

The employer is an institution that provides participation programmes for children, adolescent and adults with disabilities. When four residents were killed and another person injured, the caregiver employed there was suspected of committing the homicides. The employer then terminated the employee's employment relationship without notice, against which she brought an action for unfair dismissal.

The Potsdam Labour Court had suspended the unfair dismissal hearing and referred to the ongoing criminal proceedings and an expert opinion on the employee ordered in the criminal proceedings to determine her criminal responsibility.

The employer immediately filed an appeal against the suspension before the Berlin-Brandenburg Higher Labour Court.

The Higher Labour Court reversed the decision to stay the proceedings. In its reasoning, it stated that a reason for a stay only existed if the criminal investigations were relevant for the Labour Court's decision. However, it is not a question of criminal responsibility. It is irrelevant for the decision in the unfair dismissal hearing whether the employee's criminal responsibility is established in the ongoing criminal proceedings. What would be much more important is the breach of the duties laid down in the employment contract and a related breach of trust.

Criminal responsibility would not in any event be relevant for dismissal on personal grounds in addition to dismissal based on conduct. Even in the absence of criminal responsibility the employee would not in any event have the necessary suitability for the job in the sense that there are person-related grounds for dismissal. Continued cooperation with the employee was neither reasonable for the employer nor for the other employees.

Employer liability for failure to claim state allowances - commuter allowance due to the COVID-19 pandemic

Mecklenburg-Western Pomerania Higher Labour Court, judgment of 28 September 2021 – 5 Sa 65/21

The employer's duty of consideration may require it in individual cases to claim a state allowance that benefits the employee. However, this obligation is not infringed if there is legal uncertainty as to whether all the conditions for payment of the allowance have been met. The employer need not expose itself to the risk of liability to the provider of the allowance.

Reasons for the decision

The parties were in dispute as to whether the employer was obligated to claim and pay a state allowance for additional expenses incurred by commuters from Poland that was introduced because of the COVID-19 pandemic.

The claimant was employed by the defendant as a bus driver until April 2020 and commuted 37 kilometres daily from his home in Poland to his place of work in Germany.

Because of the coronavirus pandemic, the Ministry of Economic Affairs of Mecklenburg-Western Pomerania issued an administrative regulation in March 2020 that provided for a commuter allowance of a flat rate of EUR 65.00 per day. This was intended to finance additional expenditure incurred on accommodation and meals by commuters with their main place of residence abroad and a place of work in Mecklenburg-Western Pomerania as a result of pandemic-related entry restrictions and quarantine regulations. This allowance had to be applied for by the employer and then paid to the employee. Although the defendant applied for and received the allowance for the claimant, it did not pay it to the claimant but reimbursed it to the competent state authority. The defendant justified the reimbursement on the basis that it was not sure whether it might not be required to provide proof of the actual additional accommodation expenses incurred. The defendant was unable to produce such proof.

In the claimant's view, the employer's failure to pay the commuter allowance constituted a breach of duty giving rise to damages, and he brought an action for payment of the allowance.

While the action before the Stralsund Labour Court was successful, the Mecklenburg-Western Pomerania Higher Labour Court dismissed the appeal filed against the judgement. The Court considered that, under the commuter allowance directive, it could not be ruled out that assisted undertakings would subsequently have to provide proof of the actual additional expenditure incurred by their commuting employees.

According to the Higher Labour Court, the employer should not have to expose itself to the associated risk of having to reimburse an allowance.

■ INTERNATIONAL NEWSFLASH FROM OUR GLOBAL NETWORK UNYER

Fixed-term employment contracts under French employment law

In France, the conclusion of fixed-term employment contracts is only possible in certain cases. In principle, the employee should be hired under a permanent employment contract, and it is very difficult to enter into a fixed-term contract.

According to Section L 1242-1 of the French Labour Code (*Code du Travail*), a substantive reason is required. Six substantive reasons are listed in this Section, but only three substantive reasons are applied for the most part:

- temporary increase in the usual activity;
- seasonal work (restaurants, etc.);
- replacement of another employee, especially in the case of illness or pregnancy.

In the case of a temporary increase in work, the maximum duration of the fixed term is limited to 18 months. However, since the Macron reforms of 2017, collective agreements can set a different maximum duration. If the contract is for less than 18 months, it may be renewed twice up to a total duration of 18 months (L 1242-8-1 Labour Code). The contract ends on the expiry of the contractually agreed term.

In other cases, the contract ends on the return of the replaced employee or upon completion of the seasonal work.

Upon expiry of the fixed-term contract, the employee is entitled to a bonus amounting to 10% of the total gross remuneration received (exception in the case of seasonal employment contracts).

The employment contract must contain the substantive reason for and the duration of the fixed term.

In the event of non-compliance with the written form or an incorrect substantive reason, the employment contract is deemed to be for an indefinite period. In this case, the employee is entitled to severance pay, compliance with the notice period and damages for unfair dismissal.

According to a study by the French National Institute of Statistics and Economic Studies (INSEE) of 2 July 2019, the rate of fixed-term contracts in companies with at least 10 employees has increased from 30% to 90% in 20 years despite these obstacles.

Author

Xavier Drouin

FIDAL
Strasbourg

Together with the French law firm FIDAL, we launched the global organisation unyer in May. Four months after its formation, unyer has already expanded into Italy and welcomed the renowned Italian law firm, Pirola Pennuto Zei & Associati, as a new member. unyer is a global organisation of leading international professional services firms. unyer is open not only to law firms but also to other related professional services, particularly from the legal tech sector, enabling advice to be provided on all matters and across all jurisdictions under one international umbrella brand. In this issue, we therefore present a new section of our newsletter in which we report on developments in employment law and topics from unyer.

■ GENERAL INFORMATION

Authors of this issue

Achim Braner
Lawyer, Certified Specialist in Employment Law, Partner
Frankfurt a. M.
T +49 69 27229 23839
achim.braner@luther-lawfirm.com

Dr Annekatrin Veit
Lawyer, Tax Advisor
Partner
Munich
T +49 89 23714 12913
annekatrin.veit@luther-lawfirm.com

Nadine Ceruti
Lawyer, Certified Specialist in Employment Law, Counsel
Frankfurt a.M.
T +49 69 27229 24795
nadine.ceruti@luther-lawfirm.com

Dr Anna Mayr
Lawyer, Certified Specialist in Employment Law, Senior Associate
Hamburg
T +49 40 18067 12195
anna.mayr@luther-lawfirm.com

Lukas Beismann
Lawyer, Associate

Lukas Beismann
Lawyer, Associate
Hanover
T +49 511 5458 24925
lukas.beismann@luther-lawfirm.com

Kevin Brinkmann LL.M.
Lawyer, Associate
Hamburg
T +49 40 18067 11184
kevin.brinkmann@luther-lawfirm.com

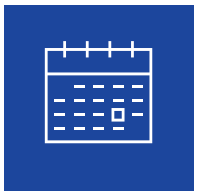
Dr Christoph Corzelius
Lawyer, Associate
Cologne
T +49 221 9937 24628
christoph.corzelius@luther-lawfirm.com

Joschka Pietzsch
Lawyer, Associate
Hamburg
T +49 40 18067 12189
joschka.pietzsch@luther-lawfirm.com

FIDAL Strasbourg

Xavier Drouin
Senior Associate
Strasbourg
T +33 3 90 22 06 30
xavier.drouin@fidal.com

Events, publications and blog



You will find an overview of our events here.

You will find a list of our current publications here.

You will find our blog here.

Legal information

Published by: Luther Rechtsanwaltsgesellschaft mbH
Anna-Schneider-Steig 22, 50678 Cologne, Germany
Telephone +49 221 9937 0
Fax +49 221 9937 110, contact@luther-lawfirm.com
Responsible for the content (V.i.S.d.P.): Achim Braner
Luther Rechtsanwaltsgesellschaft mbH
An der Welle 10, 60322 Frankfurt am Main, Germany
Telephone +49 69 27229 23839
achim.braner@luther-lawfirm.com

Disclaimer

Although this newsletter has been carefully prepared, no liability is accepted for errors or omissions. The information in this newsletter does not constitute legal or tax advice and does not replace legal or tax advice relating to individual cases. Our contact persons at the individual locations are available for this purpose.

Luther.

Bangkok, Berlin, Brussels, Cologne, Delhi-Gurugram, Dusseldorf, Essen, Frankfurt a.M., Hamburg, Hanover, Kuala Lumpur, Jakarta, Leipzig, London, Luxembourg, Munich, Shanghai, Singapore, Stuttgart, Yangon

You can find further information at:
www.luther-lawfirm.com
www.luther-services.com

unyer GLOBAL ADVISORS