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Labour & Employment Law Newsletter

Issue 3, 2020

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Dear Readers,

On 5 October 2020, the Federal Ministry of Labour and Social Affairs (BMAS) presented a bill for a “Mobile Work Act”. Even if it seems very doubtful in view of the clear criticism it has received whether the bill presented by the Federal Minister of Labour Hubertus Heil will be implemented in this form, the topic of mobile work is nevertheless currently on top of the agenda in companies. In the time of the coronavirus crisis and rapidly advancing digitisation and the resulting dramatic changes in work organisation, employers must be flexible. Even though mobile work is technically possible from almost all places nowadays and already seems to be commonplace in some industries, a wealth of legal questions and issues arise in this context. In our current issue, therefore, Michael Rinke devotes himself comprehensively to the practical issues facing employers.

Crowdworking is another current topic of our modern working world, which we deal with in this issue. We all know platforms like Uber, Deliveroo and Clickworker. But how can the activities of crowdworkers be legally classified? Crowdworking raises a number of legal issues, especially with regard to labour and social law. The Federal Labour Court will deal with the question of whether a crowdworker is an employee in December 2020. Katharina Gorontzi and Jana Voigt will therefore present an outlook and highlight the main issues related to crowdworking.

Naturally, we will also consider the latest developments in jurisdiction in this newsletter. We have again made a selection that we hope will be of 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!

Stay healthy!

Yours

Achim Braner

■ EDITORIAL

Mobile working – opportunities, risks and options for employees and companies

Mobile working is not really a new phenomenon. According to a survey conducted by the IT industry association Bitkom at the beginning of 2019, 39% of the companies already used mobile working in 2018; in 2014 only 22% of the companies did so. However, participants of the survey were only asked whether "individual employees" were granted this option; the survey did not provide any information on the total number of employees allowed to work as mobile workers.

In the course of the coronavirus crisis, according to another Bitkom survey in March 2020 (i.e. at the beginning of the crisis), which is not necessarily statistically verified, approximately 50% of the employees questioned stated that they worked entirely or partially in the "home office". This percentage is likely to have risen significantly, at least temporarily, due to the need for childcare while nurseries and schools were closed. In addition, social distancing was (and still is) required to slow down the spread of the SARS-CoV-2 virus. For this reason, working from home is advocated and supported by many companies as well, at least at present, for precautionary reasons. The legal issues arising in connection with mobile working are manifold. The following article therefore focusses on questions that are frequently asked by our clients in the course of our consulting activities.

Definition of relevant terms

The term "mobile working" has not yet been defined by law.

The law only uses the term telework (e.g. Section 5 (1) sentence 1 of the German Works Constitution Act (*Betriebsverfassungsgesetz*, BetrVG), Section 2 (7) of the German Workplace Ordinance (*Arbeitsstättenverordnung*, ArbStättV). According to this, one (only) speaks of teleworking if:

- a computer workstation permanently installed by the employer, including furniture, is available in the employee's private home; and
- the employer has agreed with the employee the weekly working time and the length of time the teleworking space is to be used.

The concept of mobile working goes considerably further than that of "telework" and covers – with the exception of business trips – any activity of the employee outside the employer's premises. In principle, this can be carried out either in the employee's private home or in any other place (e.g. private home of a third party, public transport, coffee shop, public park, etc.); in terms of time, the employee may be a mobile worker permanently or temporarily.

The differentiation between teleworking and mobile working reflects the (previous) view of the legislator. In the explanatory memorandum to the new version of the Workplace Ordinance (Bundesrat printed paper 506/16 of 23 September 2016), "telework in the strict sense" and "occasional work from home or while travelling and work at home without a computer workstation set up" are differentiated from each other. Mobile working – according to the explanatory memorandum to the new version of the Workplace Ordinance – is not the same as (permanent or alternating) telework.

Furthermore, the definition of these terms is not simply an academic issue, but also has considerable implications for occupational health and safety law, in particular (see below).

Legislative framework

A comprehensive legal regulation of mobile working does not yet exist.

On 5 October 2020, the Federal Ministry of Labour and Social Affairs (BMAS) presented a bill for a "Mobile Work Act" (*Mobiles-Arbeiten-Gesetz*, MAG); whether the bill will actually be passed in this form seems rather doubtful in view of the harsh criticism it has received, especially from members of the Christian Democratic Union and industry, as well as the upcoming elections to the German Bundestag in 2021.

Employee entitlement / instructions issued by employer / agreement / termination

Pending any special statutory regulation and subject to deviating provisions in collective bargaining agreements or voluntary works agreements, the following applies:

1. Employee entitlement

In accordance with Section 106 of the German Industrial Code (*Gewerbeordnung*, GewO), the employer decides on the content, place and time of the work performance at its own reasonable discretion.

The employer can therefore reject an employee's request for mobile working, provided that the employer exercises its discretion without error. This is the case, for example, if the presence of a minimum number of employees at the employer's premises is absolutely necessary to fulfil the purpose of the company. The same applies if mobile working would be associated with financial/technical expenditure; an example here would be procuring mobile devices for employees usually working on a desktop PC or increasing the number of VPN accesses.

As a rule, therefore, the employee is not entitled to be granted authorisation for mobile working under Section 241 (2) of the German Civil Code (*Bürgerliches Gesetzbuch*, BGB) in conjunction with Section 106 GewO (Rhineland-Palatinate Higher Labour Court, judgment of 18 December 2014 - 5 Sa 378/14 - for family reasons). As a rule, this also applies to severely disabled employees basing a corresponding claim on Section 164 of the German Social Code, Book IX (SGB IX): Cologne Higher Labour Court, judgment of 24 May 2016 – 12 Sa 677/13-).

It is questionable whether a different assessment is necessary during the coronavirus pandemic. In our opinion, this is usually to be rejected.

The current pandemic crisis situation is a special one: For employees who belong to a risk group, there are considerable health risks when performing work at the employer's premises due to the risk of infection both at the workplace and during travel to/from the workplace if public transport has to be used. Schools and nurseries are repeatedly closed temporarily due to quarantine measures, and alternative childcare options (e.g. by grandparents or private initiatives) are no real alternatives.

However, all this does not change the fact that here too the employer must be reserved the right to decide on how it organises its operations; conflicting operational reasons and duties of consideration towards other employees therefore remain relevant for the exercising of discretion granted to the employer. In our opinion, a "reduction of discretion to zero" will only be possible in very rare exceptional cases.

However, if the employer is in principle prepared to allow employees to work as mobile workers either fully or in part, the employer will at least have to check, when exercising the discretion granted to it under Section 106 GewO, whether employees with pre-existing conditions can be given preferential treatment because of the high priority of the protection of physical integrity.

In operational practice, the question occasionally arises as to whether the employer can exclude individual employees from the option of mobile working for "conduct-related" reasons. These might include employees whose performance has already given cause for criticism in the past (e.g. breaches of working hours, poor performance) and whom the employer is concerned that they might use mobile working as a means of no longer performing their work to the desired extent.

In our opinion, the employer can also take such aspects into account when exercising the discretion granted to it, provided that the poor performance was verifiably recorded in the past, the employee was reprimanded for such poor performance and it is relevant for mobile working. However, when balancing the different interests, the interests of the employee must also be taken into account here.

2. Instructions issued by the employer

Conversely, just as employees have no right to mobile working, the employer cannot force its employees to perform their work in their private homes. Such an instruction is not covered by the right to issue instructions (Berlin-Brandenburg Higher Regional Court, judgment of 14 November 2018 - 17 Sa 562/18).

3. Agreement

A corresponding agreement can be made explicitly or tacitly. It may be assumed that the parties entered into such an agreement tacitly, if – as has been observed during the coronavirus pandemic, particularly in companies without a works council – the employer "orders" mobile working and the employee accepts the offer tacitly by performing the work at a place outside the company premises (usually the employee's private home).

4. Termination

If the employer has agreed to an employee's request for mobile working, the employer has thereby exercised its right to issue instructions in accordance with the employee's request. There is dispute over the question whether the employer may end mobile working in the same way – i.e. by again exercising its right to issue instructions – and again determine the company premises as the sole place of work; in our opinion, this is the case. This renewed exercising of the right to issue instructions is generally not ruled out even by prolonged unconditional practice of mobile working.

However, the employer must take adequate account of the employee's interests here - as is true whenever it exercises its right to issue instructions. An instruction issued without adequate consideration of the employee's interests is invalid and the employer is in default of acceptance (Section 297 BGB), i.e. in the worst-case scenario, the employer must remunerate the employee without receiving the work owed. This applies in the same way if an agreement exists.

If the employer has reserved the unconditional right to revoke the agreed mobile working, then this clause is invalid, at least in the opinion of Dusseldorf Higher Labour Court (judgment of 10 September 2014 - 12 Sa 505/14). Insofar as the literature suggests that the reasons for revocation should be included in the agreement, this does not seem very practicable.

In our opinion, the only option until a decision is made by the superior court of justice is to state the requirements of Section 315 and Section 106 GewO in general form in a revocation clause and to observe them when exercising the revocation.

Co-determination of the works council

The introduction of mobile working as such (whether at the employee's request or on the basis of an explicit or tacit agreement) is exempt from co-determination, as the works council has no right of co-determination in the case of instructions issued by the employer specifying the duty of work.

Nevertheless, the works council may have various co-determination rights in connection with the implementation of mobile working.

It is conceivable, for example, that the employer may wish to regulate the beginning and end of working time, including breaks, as well as availability during working time, in deviation from the provisions otherwise applicable at the company's premises (Section 87 (2) nos. 2 and 3 BetrVG).

Furthermore, the works council may have a right of co-determination in matters of occupational health and safety (Section 87 (1) No. 7 BetrVG), in particular concerning the risk assessment (Section 5 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).

If no agreement can be reached on this in companies with a works council, the works council's request for the establishment of a conciliation committee in accordance with Section

100 of the German Labour Court Act (*Arbeitsgerichtsgesetz*, ArbGG) would generally have to be granted, since this does not "obviously" lack jurisdiction (Mecklenburg-Western Pomerania Higher Labour Court, decision of 25 February 2020 - 5 TaBV 1/20 -).

Recording of working time

The question of recording working time can be a problem with mobile working.

According to the case law of the Court of Justice of the European Union (CJEU), it is a violation of EU law if the employer completely refrains from recording working time. However, the EU Member States have discretionary powers in the design of public-law provisions on recording working hours.

The German legislator has not amended Section 16 (2) of the German Working Time Act (*Arbeitszeitgesetz*, ArbZG) so far. According to our findings, the authorities responsible for compliance with the Working Time Act (in North Thine-Westphalia: trade supervisory authority) continue to apply Section 16 ArbZG in its current version, without any guarantee that this will remain so.

However, mobile working (especially in the employee's private home) has its own special features. The parcel service ringing at the door, the loading and unloading of the washing machine or the children suddenly standing in the room are just a few examples of interruptions that do not occur in this form at the employee's workstation at the company premises. Outside of mandatory telephone/video conferences and the like, however, many employers will not care exactly when the employee does his or her work. In the event of such interruptions, the employee would in principle have to regularly record these times as interruptions in order to avoid consequences under labour law. It is doubtful that this always happens. Conversely, the time between first log-in and last log-out when working from home often exceeds the regular contractual average daily working time. In our experience, however, it is wrong to speak automatically of overtime or even of a "blurring of the separation of work and private life".

Until the Working Hours Act is amended or mobile working is regulated by special legislation, we believe it might be worth considering, for example, encouraging employees to record the start and end of their work on a mobile basis, explicitly allowing them to interrupt their work without having to "clock in and out" again, and making the occurrence of overtime dependent on the prior express approval of their supervisor. Although this gives the employees more sovereignty over working hours and admittedly also involves the risk of abuse by the employee, it should be possible to counteract this risk by random checks on work performance (see below).

Performance and conduct control

The sovereignty over working time associated with working from home in the event of physical absence from the company premises brings with it, according to general life experience, the risk of misuse of recording working time.

Quite a few employers are therefore considering surveillance measures.

In principle, the collection, storage and processing of working time recording data as well as data on IT use (log files, browser history) is justified by Section 26 (1) sentence 1 of the Federal Data Protection Act (*Bundesdatenschutzgesetz*, BDSG) ("for carrying out the employment contract").

According to the case law of the Federal Labour Court, open surveillance measures do not require an initial suspicion in the sense of Section 26 (1) sentence 2 BDSG; they are also not limited to the detection of criminal offences. In the opinion of the Federal Labour Court, open surveillance measures which are carried out according to abstract criteria and do not place any employee under particular suspicion and which are intended to prevent violations of duty are permissible even without initial suspicion. In order to avoid psychological pressure to adapt, random checks are to be carried out in place of comprehensive monitoring. For example, the employer can announce that it will check the e-mail and Internet activities of logged-in computers for unusual processes, e.g. missing activities over a longer period of time. Further measures such as the examination of a user's concrete activity patterns, however, should only be permissible if there is a concrete initial suspicion in the sense of Section 26 (1) sentence 2 BDSG.

If a works council exists, such control measures are subject to co-determination pursuant to Section 87 (1) No. 6 BetrVG.

Health and safety at work

Another difficult question is exactly which obligations the employer has to fulfil in connection with the authorisation of mobile working and, above all, how it should fulfil them.

The Workplace Ordinance as amended on 3 December 2016 (ArbStättV) also applies – albeit to a limited extent – to telework

stations. However, Section 2 (7) ArbStättV stipulates that only “VDU workplaces in the private sector permanently installed by the employer” are considered to be teleworking workplaces; such a workplace is only “permanently installed” if the employer has installed, among other things, furniture and work equipment in the employee’s private home.

In other words: The employer can avoid the application of the ArbStättV if, for example, it dispenses completely with the provision of office furniture and only provides the employee with a laptop or allows the employee to bring a desktop with visual display unit home temporarily.

It might also be conceivable to allow the employee to take along e.g. office chairs at his or her own discretion for the duration of the pandemic, without the employer being involved in transportation and installation.

Such a procedure also corresponds with the intention of the legislator when amending the ArbStättV, as can be seen from the corresponding Bundesrat printed paper.

However, the provisions of the Occupational Safety and Health Act remain applicable, especially the risk assessment according to Section 5 ArbSchG.

The health risks in the workplace and in the private environment can differ; this starts with the size of the display of a laptop compared to a monitor and ends with ergonomics, lighting and ventilation of the workplace chosen by the employee in his or her home. The dispute is over whether the employer is obliged to have the employee grant the employer a right to access his or her private home. We do not consider this to be necessary in view of Article 13 of the Basic Law (*Grundgesetz*, GG) (inviolability of the home). At present, this applies all the more to the risk of infection associated with workplace inspections, both for the employee and the inspector. The employer may therefore confine itself to carrying out the risk assessment on the basis of a questionnaire to be completed by the employee, which as a rule already exists for company workplaces. However, both parties often have little interest in this, especially since the question arises as to what remedial measures the employer should take if it recognises risks which do not occur in this way in the workplace. The only option that would remain in this case would be the obligatory return of the employee to the company premises, which is, however, of no interest to either party.

The instruction according to Section 12 ArbSchG depends on the result of the risk assessment. In any case, advice should be given on compliance with the Working Hours Act and on ergonomics when working in a private environment.

Statutory accident insurance

In principle, there are no special features with regard to statutory accident insurance for mobile working.

Teleworking is insured in the statutory accident insurance scheme (Section 2 (1) no. 1 SGB VII). Whether an accident in the private home is an accident at work depends very much on the individual case. In principle, case law is rather reserved here for the classic cases (fall on the way to the toilet or kitchen), even if the same incident would have been insured had it happened at the company premises.

Outlook

Mobile working creates considerable freedom for employees to reconcile work and private life. It is therefore to be welcomed that the coronavirus pandemic, in addition to its many negative effects, as a positive effect has created an increased willingness on the part of many employers to make more use of this instrument than before.

Our impression is that many companies will continue to practice mobile working in a much more comprehensive form than before, in line with the wishes of their employees, even after the end of the coronavirus pandemic.

At present, the provisions on the recording of working time and occupational health and safety, in particular, have not yet been sufficiently adapted to this new form of work. It is doubtful whether the “Mobile Work Act” launched by the BMAS in its known form to date is suitable for simplifying mobile working, reducing bureaucracy and thus being a real help for employers and employees.

Until then, employers, employees and – if there are any – works councils are called upon to find practicable solutions together, even if final legal uncertainties cannot always be avoided.

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Crowdworking: between self-employment and dependence

Due to increasing digitisation – also and especially during the coronavirus pandemic – new forms of employment are becoming increasingly popular. This also includes what is known as crowdworking, which raises questions, in particular, of labour and social law. Activities include, for example, food deliveries, transport services and mystery shopping. Platforms like Uber, Deliveroo and Clickworker are well-known.

In December 2020, the **Federal Labour Court** (BAG) will deal with the question of whether a crowdworker is an employee. If this is the case, the crowdworker will fall within the scope of the German Protection against Dismissal Act (*Kündigungsschutzgesetz*, KSchG), if the other conditions of the Act are met, among other things. This gives rise, in particular, to the obligation to make payments to the social security schemes and contribution arrears will have to paid. It is also important to bear in mind that it is a criminal offence under Section 266a of the German Criminal Code (*Strafgesetzbuch*, StGB) if an employer withholds employees' contributions to social security schemes.

The proceedings now pending before the Federal Labour Court are based on the following case:

The defendant provides a platform through which companies can award certain contracts. The defendant places the orders on its platform and contractors registered with the defendant can then accept these orders. The defendant and the contractors, in this case the plaintiff, enter into a so-called "Basic Agreement". The General Terms and Conditions of Business and Use have been accepted and the required app for the smartphone has been downloaded.

The "Basic Agreement" between the plaintiff and the defendant platform could be terminated at any time. The General Terms and Conditions of Business and Use stipulated, among other things, that only upon acceptance of an order is a contractual relationship established between the platform and the crowdworker. There was no contractual relationship between the crowdworker and the principal (so-called indirect crowdworking). The orders were to be carried out according to detailed specifications. After correct execution of the order, the crowdworker receives the agreed remuneration. A system based on different levels was implemented, according to which more lucrative orders could be accepted as the level increased. The crowdworker was always free to accept or reject an order. There was no contractual entitlement to order offers. There were no specifications regarding place of work or working hours, but project-related content and time specifications had to be adhered to in accordance with the respective order. For years, the plaintiff worked on average 20 hours per week via the defendant platform. His average monthly remuneration was approximately EUR 1,750. It was usually the task of the plaintiff to carry out checks on the presentation of goods, e.g. at petrol stations, to take a photo and send it to the principal within a specified period of time.

After the plaintiff received an e-mail that he would not be offered any more orders via the platform to avoid future disagreements and that his account would be closed, he sued for a declaratory judgment that an employment relationship existed between him and the mediating platform.

The **Munich Higher Labour Court** decided that the plaintiff was not to be classified as an employee (judgment of December 4, 2019, case reference 8 Sa 146/19 in: NZA 2020, 316). The underlying contractual arrangement is typical for crowdworking. That is why it is also relevant for us. The Federal

Labour Court will decide on the appeal on points of law allowed against the judgment on 1 December 2020 (case reference 9 AZR 102/20).

The Munich Higher Labour Court justified based its decision essentially on the grounds that no employment contract had been established on the basis of the Basic Agreement. According to the Basic Agreement, there was generally no obligation to perform work. The plaintiff was free to accept orders. The plaintiff was not able to demonstrate and prove anything to the contrary, the Court held.

The Basic Agreement is merely a framework agreement which reproduces the conditions of the individual 'employment contracts' which are still to be concluded. In addition, nothing else follows from the factual execution of the orders, in particular, as the plaintiff has not shown that a permanent employment relationship can be assumed. The Munich Higher Labour Court further stated that the comparatively high number of orders alone was no basis for assuming a different "true" business content than that provided for in the Basic Agreement. There was no obligation to accept orders. The plaintiff was also not integrated into the business of the platform operator, according to the Court.

The plaintiff had argued that he was dependent on the income generated by the activity. In this respect, however, the judges in Munich pointed out to him that the concept of employee is based on personal, not economic, dependence. The Munich Higher Labour Court did not see any relevant evidence of personal dependency due to the implemented level system anyway, because no downgrading took place if orders were not accepted. An obligation to act against one's will due to the technical possibility of "tracking" the whereabouts of the crowdworkers is ultimately incomprehensible. In the case at hand, tracking was used to provide offers within a certain area.

Munich Higher Labour Court could leave open whether a fixed-term employment relationship was established in each case by the acceptance of the order and its execution within the agreed time frame. The written form provided for in Section 14 (4) of the German Act on part-time work and fixed-term employment contracts (*Gesetz über Teilzeitarbeit und befristete Arbeitsverträge*, TzBfG) was not observed, so that it is possible that an employment relationship for an indefinite period of time was concluded with each individual micro-order. However, the plaintiff had missed the deadline of Section 17 TzBfG (action to check the fixed term (*Befristungskontrollklage*)) so that Munich Higher Labour Court did not have to decide this issue.

The **Hesse Higher Labour Court** has also denied the employee status in a comparable case (decision of 14 February 14 2019, case reference 10 Ta 350/18, NZA-RR 2019, 505) . The Court also based its decision on the general criteria of Section 611a (1) of the German Civil Code (*Bürgerliches Gesetzbuch*, BGB) in order to determine the legal status. The case concerned a bus driver who, without owning his own vehicle, had applied to a bus company for only one bus journey via a platform. The judges ruled that the bus driver was not an employee. It would tend to be contrary to employee status if the business relationship was to last only a few days and the bus driver had not been integrated into the client's business operations. No economic dependence is apparent.

Against this background, the decision of the Federal Labour Court is eagerly awaited. We assess this decision below against the backdrop of current discussion and then consider the possible consequences:

What is crowdworking?

In "typical" crowdworking, companies can use a web-based platform as an agent to offer work orders that one or more contractors (freelancers) can accept and perform according to predefined specifications, regardless of location. Joining the platform does not constitute a right to be assigned an order, nor an obligation to perform any work.

What is typical for crowdworking is a triangular relationship between crowdworker, client and agent. In any case, the agent maintains a contractual relationship with the crowdworker and the principal (usually via a framework agreement) and usually the client pays the agent commissions. If an order is accepted, an individual order for the commissioned activity is simultaneously concluded. This forms the basis for the fee claim. Of particular interest is external crowdworking. Work orders are placed with external persons via a platform. In the case of so-called "direct crowdworking" the platform serves only as an agent. The contractual relationship (individual order) is entered into between the crowdworker and the principal. In the case of "indirect crowdworking" there is a contractual relationship between the platform and the crowdworker (framework contract and individual order). The platform is therefore the sole contractual partner of the crowdworker. The case to be decided by the Federal Labour Court is based on such an arrangement.

Legal starting point

It is still unclear whether crowdworkers are actually self-employed or whether they have established an employment

relationship with the principal or the agent. Determining the status of the crowdworker is therefore essential, as this has far-reaching legal consequences.

Employment law

a) Employee

It is commonly known that an employee is a person who, on the basis of a private law contract, is obliged to perform externally determined work in personal dependence in the service of another person and is bound by instructions, and this has been codified at least since the adoption of Section 611a (1) sentence 1 BGB. The right to issue instructions may concern the content, execution, time, duration and place of the activity. The person who is not essentially free to organise his or her activity, working hours and place of work is an employee.

The degree of personal dependence depends on the specific nature of the activity. According to the Federal Labour Court's case law, personal dependency is characterised by work to be performed personally, bound by instructions, and integration into the employer's organisation. An employee is bound by instructions if he or she is not essentially free to determine his or her activity, working hours, duration of work and place of work. This means that the employee is predominantly not self-determined.

But what about crowdworkers? The main characteristic of this group of people is that they

- are free to choose their work orders, working hours and place of work;
- are regularly not subject to instructions, but general conditions and individual orders specify their tasks;
- are not integrated into the business of the platform operator and/or the principal;
- are not provided with work equipment free of charge;
- have no entitlement to holidays or continued remuneration; and
- do not have to perform the work personally.

In principle, a crowdworker is therefore predominantly self-determined, as he or she is not obliged to accept any orders at all. This means that there is no obligation to work and no personal dependence. Furthermore, the crowdworker is not subject to any instructions in terms of place or time. He or she is free to choose the place of work and working hours in which he or she would like to fulfil orders. Even the requirement to execute the order within a short time frame does not contradict the crowdworker's independence. This merely specifies the activity for the order. Another argument against employee status is the possibility of using own employees. An employee, by contrast, is obliged to provide services in person.

Even if Section 611a (1) BGB does not expressly provide for integration into an external form of work organisation, it must nevertheless be taken into account. This is a further indication that the crowdworker is not an employee. The crowdworker is not integrated into the business of the platform operator or that of the principal. As a rule, the crowdworker will not use an office or other work equipment of the platform or the principal. Nor will the crowdworker be involved in work processes in an organisational or hierarchical way. The fact that the use of an app or platform is required for order acceptance is not sufficient in itself. As early as 2000, the Federal Labour Court ruled in the case of a broadcasting employee who designed the programme that the mere fact that he was instructed to use technical equipment was not sufficient in itself for him to be considered an employee (judgment of 19 January 2000, case reference 5 AZR 644/98).

If a crowdworker is nevertheless classified as an employee, this would have far-reaching consequences. In principle, it can be assumed that German labour law applies insofar as the work is performed in Germany. This would mean that the crowdworker would not only have to pay social security contributions, but also that the crowdworker would be subject to numerous employee protection rights (e.g. Minimum Wage Act, Federal Leave Act, Continued Payment of Wages and Salaries Act, Protection against Dismissal Act and Works Constitution Act). Whether the principal or the platform operator would then be regarded as the employer depends on the individual case.

b) Employee-like persons

However, the absence of employee status does not exclude the crowdworker from being qualified as an *employee-like person.* As a result, there would, in particular, be an entitlement to a statutory minimum wage, statutory holiday entitlement and protection under the Occupational Safety and Health Act. This group of persons are self-employed persons who are not personally but economically dependent. A person is considered to be economically dependent if he or she depends on the utilisation of his or her labour and the income from his or her services to secure his or her livelihood. The amount of contractually agreed remuneration often results in the person's need for social protection and treatment as an employee.

In principle, the crowdworker has different principals, so that he or she is not economically dependent on them – when looking at them individually. It is possible, however, that the crowdworker is economically dependent on the platform establishing the contact between the crowdworker and the principal, so that a position similar to that of an employee could not be completely ruled out. Then it would have to be further investigated whether the crowdworker is a homeworker according to the German Homeworking Act (*Heimarbeitsgesetz*, HAG) in the individual case.

c) Fixed-term employment relationship

In addition, whether the German Act on part-time work and fixed-term employment contracts (TzBfG) is relevant must be examined if the person is an employee. In the case of very short assignments, in case of doubt the Act will not be applicable since the person is not considered to be an employee. Nevertheless, great caution is required here. If, contrary to expectations, the employee status is affirmed, the written form of Section 14 (4) TzBfG will usually not be observed. This then has the consequence that a permanent employment relationship exists.

Social law

In addition to questions of labour law, crowdworking always involves questions of social law. The risks are obvious due to the threat of having to pay social security contributions.

The respective individual order (either with the platform operator or with the principal) can be considered as the employment relationship to be evaluated, since no work obligation can be derived from the framework agreement alone. The situation could be assessed differently if the crowdworker is obliged to accept a certain number of orders.

It cannot be ruled out that in this case there are some contractual elements that speak in favour of a dependent employment relationship within the meaning of Section 7 (1) of the German Social Code, Book IV (SGB IV). On the one hand, the already mentioned use of an app for order management could be understood as integration into the business. On the other hand, the implementation of certain control mechanisms (production of photos/screenshots as proof of order fulfilment, tracking of GPS data during food delivery, etc.) as well as the wearing of uniforms (e.g. food delivery) are rather untypical for a self-employed activity. Nevertheless, being bound by instructions remains a central element of dependent employment. This is difficult to affirm for a crowdworker. Nevertheless, the Deutsche Rentenversicherung (German Statutory Pension Scheme) currently tends to interpret this element very broadly. In case of doubt, it should therefore be assessed whether it could be reasonable to request the "Clearing Office" of the Deutsche Rentenversicherung to determine the status of the crowdworker as a self-employed person (*Statusfeststellungsverfahren*) pursuant to § 7a SGB IV. This is all the more true as relevant social court case law on crowdworking does not yet exist. There is indeed case law on comparable "freelancers". However, this does not yet paint a uniform picture. In any case, the German Federal Social Court noted in a marginal note that it might be necessary to consider all kinds of contractual relationships in the case of digitally influenced arrangements (Federal Social Court, judgment of 14 March 2018, case reference B 12 KR12/17 R, in: BeckRS 2018, 14960, para. 22).

Data protection law

We do not want to go into detail here about the extent to which data protection law affects crowdworking. In principle, it can be assumed that personal data will be processed in any case during the performance of the order and that the data may be stored on the crowdworker's private mobile phone. It is recommended that the crowdworker be comprehensively obliged to comply with the data protection regulations and to implement technical and organisational measures, especially if commissioned data processing is involved in the sense of Article 28 (3) EU GDPR.

EU law

The Directive (EU) 2019/1152 of the European Parliament and of the Council of 20 June 2019 on transparent and predictable working conditions in the European Union is intended to replace Council Directive 91/533/EEC of 14 October 1991 on an employer's obligation to inform employees of the conditions applicable to the contract or employment relationship. Among other things, the new Directive is intended to grant more rights to crowdworkers, making their employment more predictable. Crowdworkers should be able to refuse a work assignment without consequences and receive compensation in case of late cancellation of an agreed work assignment. However, the new Directive has not yet been transposed into German law.

Our attorney Klaus Thönißen has written a detailed blog article on the new Directive in the *Expertenforum Arbeitsrecht*, which can be found here: https://efarbeitsrecht.net/crowdworking-neue-eu-richtlinie/ [available in German only].

Conclusion

We very much welcome the decision of Munich Higher Labour Court. On the basis of clear criteria, it comes to the conclusion that there is no personal dependency and no obligation to follow instructions in the case to be decided.

However, for the judges in Erfurt, the fact that Munich Higher Labour Court left the question open, whether the crowdworker could be classified as an employee-like person, could open the door to judicial assessment. In any event, the plaintiff had submitted that he was dependent on the income from the activity. Since the plaintiff had not filed an action to check the fixed term (*Befristungskontrollklage*) within three weeks from the date the order was placed - as provided for in Section 17 TzBfG - Munich Higher Labour Court did not examine whether an employment contract could have been entered into between the crowdworker and the principal. However, the court stated that the framework agreement "*only reflects the terms of the employment contracts still to be concluded*".

In any case, it is clear that ultimately the legislator will have to act. The task of the legislator will be to achieve a balancing act between creating socially acceptable working conditions and the rapidly growing, flexible working world 4.0. As long as there are no clear guidelines, it is advisable in any case to structure contractual relationships in such a way that prevents risks under labour and social law, in particular. For example, individual orders should be placed in writing before the start of the activity. Thus, the written form of the TzBfG is complied with - if one assumes an employee status. Furthermore, the orders must be formulated so precisely that no further instructions are required. Then no personal dependence exists. Regardless of this, however, the question of the obligation to pay social security contributions must be assessed. In any case, it will not be possible to readily transfer the decision of the Federal Labour Court to social security issues. Therefore, one should consider establishing the status of the crowdworker as a self-employed person in a status determination procedure (*Statusfeststellungsverfahren*) if high remuneration or a longer-term activity is involved (and thus the increased risk of substantial social security contributions).

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■ **JUDGMENT REVIEWS**

Working time subject to remuneration – travel time

The travel time of a sales representative from home to the first customer or from the last customer to home is generally working time that is subject to remuneration. Within the scope of a collective bargaining agreement that does not contain an opening clause, no deviating company regulations are possible.

Federal Labour Court, judgment of 18 March 2020 – 5 AZR 36/19

The case

The parties were in dispute about the obligation to pay remuneration for the plaintiff's travel time. The latter is employed by the defendant as a sales representative. The plaintiff drives – as is typical of the defendant's field staff – from his home to the first customer every working day and returns to his home from the last customer. The employment relationship is governed by a collective bargaining agreement. According to its regulations, the basic remuneration agreed in the collective bargaining agreement shall cover all activities for the fulfilment of the main contractual obligations. In addition, a works agreement applies to the employment relationship. The works agreement provides for travel time to the first customer and from the last customer only to be counted as working time if it exceeds 20 minutes in each case. The plaintiff, however, is of the opinion that the travel time as a whole is working time subject to remuneration.

The decision

After the plaintiff lost his case before the local Labour Court and the Higher Labour Court, the Federal Labour Court finally proved him right. Two main aspects can be derived from the decision:

a) Working time subject to remuneration

The Federal Labour Court first of all presents in detail that the plaintiff's travel time between his place of residence and the first customer or from the last customer to his place of residence is working time which is in principle subject to remuneration. This is because the services promised by the plaintiff within the meaning of Section 611a (1) of the German Civil Code (Bürgerliches Gesetzbuch, BGB) include not only the actual activity, but any other activity related to the actual activity that is part of the mutual obligations. The employer is thus obliged to remunerate all services which he demands from the employee on the basis of his right to give instructions under the employment contract. If the employee has to carry out his work outside the enterprise, driving to the off-site location is one of the main contractual obligations, as it forms an inseparable unit with the other journeys (from the first customer to the second customer, etc.). It does not matter whether the journey starts and ends at the employer's premises or at the employee's home.

b) Different rules in works agreement

However, the fact that the travel time of a sales representative is basically working time that is subject to remuneration does not yet establish anything about how this time is to be remunerated. The parties may also completely exclude remuneration for travel time (subject to compliance with the statutory minimum wage).

In this respect, the Federal Labour Court first examined whether the works agreement excluded the employee's claim to remuneration for the first 20 minutes of the journey time. The wording of the works agreement does not directly regulate the employee's claim to remuneration. However, the meaning and purpose of the works agreement – according to the Federal Labour Court – aims at this, among other things, because the regulation also has an influence on the remuneration of overtime.

On this basis, the question arose as to whether the works agreement is partially invalid due to the precedence of the collective bargaining agreement (Section 77 (3) of the German Works Constitution Act (Betriebsverfassungsgesetz, BetrVG). The Federal Labour Court is of the opinion that this is the case, as the collective bargaining agreement applicable to the employment relationship conclusively regulates the remuneration and also does not contain an opening clause for company regulations.

Our comment

Against the backdrop of a previous decision of the 1st Senate of the Federal Labour Court, the decision of the 5th Senate of the Federal Labour Court is surprising. In its decision of 10 October 2007 - 1 ABR 59/05 in a similar case, the 1st Senate held that a works agreement on the recognition of certain travel times of a field staff member as working time was neither a remuneration regulation nor a regulation on the duration of the weekly working time and that the works agreement in dispute therefore did not violate Section 77 (3) BetrVG that gives precedence to collective bargaining agreements. However, the 5th Senate of the Federal Labour Court disregards this, as both decisions were based on different works agreements and different collective bargaining agreements.

In practice, the consequence of the decision of the 5th Senate of the Federal Labour Court is that works agreements within the scope of a collective bargaining agreement generally cannot exempt travel time from the working time for which remuneration is payable, unless the collective bargaining agreement contains an opening clause in exceptional cases.

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Group works agreement continues to be valid after the company leaves the group

A group works agreement continues to be valid as an individual works agreement in normative terms if, as a result of the transfer of the shares of a group company (share deal), an associated entity leaves the group and is not covered by the scope of a works agreement with the same subject matter that applies in the new group.

Federal Labour Court, decision of 25 February 2020 – 1 ABR 39/18

The case

The works council and the employer are arguing about the continued validity of a group works agreement. In 1988, the former German public limited company M-AG concluded a group works agreement on company pension schemes with the group works council set up at the company, which provided for pension benefits for employees of the M Group. The entity S belonging to MK AG which in turn belongs to the M Group fell within the scope of the group works agreement.

Between 1997 and 1999 the shares of MK AG were successively transferred to a company not belonging to the M Group by means of a share deal. In 2001, the employment relationships of the employees of the S entity were transferred to the defendant employer as a result of an asset deal through transfer of business (Section 613 a of the German Civil Code (Bürgerliches Gesetzbuch, BGB). The employer initially continued the pension scheme for the employees taken over and finally terminated the works agreement vis-à-vis the new works council formed at the employer.

With its motion the works council requests a declaratory judgment that after MK AG's departure from the M Group and the transfer of the employment relationship with the S entity to the defendant employer, the group works agreement continued to be valid as an individual works agreement until its termination and therefore also established claims for the employees who had newly joined the company up until the termination. The first and second instance courts granted the works council's motion.

The decision

The Federal Labour Court upheld the decisions of the lower instances. Neither the transfer of the shares in MK AG to the company not belonging to the M Group nor the subsequent transfer of the business to the defendant employer precluded the normative continuation of the group works agreement as an individual works agreement in the business S.

In the Federal Labour Court's opinion, group works agreements continue to apply directly and mandatorily (Section 77 (4) Sentence 1 German Works Constitution Act (Betriebsverfassungsgesetz, BetrVG) if the contractual employer leaves a group of companies and a works agreement on the same subject matter does not exist in a new group of companies or the employee's business does not fall within the scope of application of such a works agreement. Like individual and general works agreements, a group works agreement, in terms of its content, also exclusively governs the collective organisation of the businesses covered by it, the Court held. It is therefore irrelevant for the continued validity of a group works agreement that it has been concluded by a legal entity other than that the legal entity of the undertakings concerned, unlike individual or general works agreements. The fact that the group works agreement applies at the same time in other businesses does not alter its normative effect in relation to the business.

The normative continuation of a group works agreement after a share deal does not cease either because the group works council responsible up to now no longer represents the interests of the employees of the businesses concerned when the company leaves the group. The continued existence or continuing responsibility of the (central) works council which has concluded a (general) works agreement in the past is not a mandatory prerequisite for the continued validity of the company rules created by it at the same time. The same applies to

group works agreements. If several businesses belong to the company leaving a group, the group works agreement continues to apply as a general works agreement. If the company leaving the group consists of only one business, the group works agreement continues to apply in this business as an individual works agreement.

The fact that the matter covered by the group works agreement is related to the group in terms of its content does not prevent its continued existence in the business or businesses of the company leaving the group either. The company's interest in a possibly necessary modification of the regulations is sufficiently taken into account by the fact that it can make company-related adjustments to the works agreement with the responsible employee representation or with the help of opportunities for conflict resolution under the Works Constitution Act. According to these principles, the continued validity of a group works agreement can only be ruled if its content makes belonging to the previous group of companies a mandatory prerequisite or if it loses its basis once the company has left the group of companies.

In the opinion of the Federal Labour Court, the transfer of the employees of the business S in the course of the transfer of business to the defendant employer in 2001 also does not change anything about the normative continued validity of the works agreement. The business had been continued as an economic unit within the meaning of Section 613a (1) BGB and the identity of the business had been preserved.

Our comment

As expected, the Federal Labour Court is now consistently confirming its previous case law on the normative validity of individual and general works agreements also for group works agreements.

If, in the course of a share deal or a transfer of a business, e.g. triggered by an asset deal, a business belonging to the company retains its identity unchanged, individual, general or group works agreements previously valid in this business continue to apply in the acquiring company, unless the acquiring company has company agreements on the same subject matter or the business transferred does not fall within the scope of such an existing company agreement. This applies to works agreements on company pension benefits as well as to other contents. According to the case law of the Federal Labour Court, this also applies in the case of the transfer of a part of a business, provided that this part is not merged with another business.

Prior to an acquisition of shares or a foreseeable transfer of business, the purchaser is therefore well advised to consult the seller's current works agreements and to examine within its own company the extent to which the content of existing works agreements can replace external regulations or how this might be achieved with sensible modifications, which are likely to be adopted by the company's own employee representatives in good time. If it is not possible to prevent unwanted regulations being "brought into" the acquiring company and also having an effect on new appointments, the acquiring company still has the option, subject to deviating agreements, to terminate the relevant works agreements (immediately) after the transfer of the business (as a precaution).

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Continued payment of wages in the event of illness during continued employment

There is no entitlement to continued payment of wages in the event of illness and payment of wages on public holidays if the employee who has been given notice of termination is still provisionally employed after the expiry of the notice period until the validity of the notice of termination has been established in a final and binding manner in order to avert enforcement of a title resulting from a general claim to continued employment.

Federal Labour Court, judgment of 27 May 2020, 5 AZR 247/19

The case

The parties are in dispute over continued payment of wages in the event of illness and holiday remuneration in the event of continued employment during a trial.

The plaintiff had been employed by the defendant as a metalworker since November 2010. The defendant terminated the employment relationship as of 30 September 2015. The action for unfair dismissal brought against this was successful in the first instance. The defendant was also ordered to continue to employ the plaintiff until the proceedings for protection against unfair dismissal were finally concluded. Under threat of enforcement measures, the plaintiff demanded that the defendant continue to employ him. The defendant subsequently declared that it would employ the plaintiff to avert any enforcement measures. The plaintiff resumed his employment with the defendant on 31 August 2017. The plaintiff fell ill on the same day and was unfit for work until 10 September 2017, and in the period from 27 September to 30 October 2017. The defendant compensated the plaintiff for the hours he worked, but not for the hours lost as a result of incapacity for work due to illness and on public holidays.

The parties ended the proceedings for protection against unfair dismissal in the appellate instance by means of a settlement. The parties agreed that the employment relationship ended on 30 September 2015.

In a new labour court case, the plaintiff asserts a claim for remuneration for periods of sick leave and non-working holidays during continued employment, which the defendant had not remunerated. The Labour Court upheld the action. The appeal before the Hamm Higher Labour Court was partially successful.

The decision

The Federal Labour Court dismissed the plaintiff's appeal on points of law as without merit. For the duration of the temporary continued employment in the context of a trial, the plaintiff is neither entitled to continued payment of wages in the event of illness pursuant to Section 3 of the German Continued Payment of Wages and Salaries Act (Entgeltfortzahlungsgesetz, EFZG) nor to remuneration on public holidays pursuant to Section 2 of the EFZG.

According the Court, the plaintiff was not an employee within the meaning of the EFZG during the period of continued employment. In order for the EFZG to apply, an employment relationship must exist. Whether such an employment relationship exists depends on the general regulations. Employee status requires an obligation to work in accordance with instructions on the basis of a mutual contract. No such employment contract existed during the period of continued employment. The parties had terminated the employment relationship by court settlement as of 30 September 2017.

The parties had not established a new employment relationship. No agreement was reached on an employment relationship subject to the condition subsequent of the legally binding dismissal of the action for unfair dismissal. By employing the plaintiff, the defendant merely fulfilled its legal obligations arising from the first instance decision in the proceedings for protection against unfair dismissal. The decision of the Labour Court led to a title based on a general claim to continued employment for the plaintiff. The defendant only continued to employ the plaintiff actually and expressly to fulfil this claim and to avert any enforcement measures being taken by the plaintiff.

An employment relationship does not result from the continued employment during the trial itself either. The general entitlement to continued employment only includes a claim to actual employment. If the notice of termination is invalid, the employee's employment interest in obtaining an income is secured by Section 615 of the German Civil Code (Bürgerliches Gesetzbuch, BGB) (Remuneration in the case of default in acceptance, Annahmeverzugslohn). Moreover, actual employment during the trial does not establish a factual or erroneous employment relationship. In the context of employment to avert enforcement, there is already a lack of a legal agreement on the conclusion of a (defective) employment relationship.

Also, the employer's lack of intention to enter into an employment relationship was not replaced by an enforceable claim for continued employment. In this respect, the Federal Labour Court makes a distinction between the intention to be legally bound and the employment intention. The employment intention is solely directed at the actual act of continued employment. In contrast to an intention to legally bind, the employment intention as an action that may in fact not be taken by others, cannot be replaced.

In particular, a claim does not arise from the analogous application of the legal consequences of the employee's continued employment after the works council's objection to the termination. Within the scope of the special right to continued employment pursuant to Section 102 (5) of the German Works Constitution Act (Betriebsverfassungsgesetz, BetrVG), the employment relationship continues to exist due to the works council's objection, subject to the condition subsequent of the legally binding dismissal of the proceedings for protection against unfair dismissal. In contrast, the general right to continued employment results from the preliminary sentence to actual employment giving merit to the application for dismissal protection. The fact that the regulatory purposes differ here, does not leave room for an analogous application of the legal consequences, the Court held.

An employment which was wrongly continued due to the validity of the original notice of termination must be rescinded based on the law of unjust enrichment (ungerechtfertigte Bereicherung), according to the Federal Labour Court. The employer must only remunerate the employee for the work actually performed. For periods when the employee has not worked, such as periods of incapacity for work and on public holidays, the employer has not benefited from any work performance and therefore does not have to pay compensation.

Our comment

We agree with the Federal Labour Court's judgment. By confirming its previous case law, the Federal Labour Court confirms the nature of the general claim to continued employment developed by jurisdiction. As long as the employment relationship is pending because of the ongoing proceedings for protection against unfair dismissal, the employee is granted a right to actual employment. At the same time, in the case of an already forced employment relationship, the associated burdens on the parties must be kept to a minimum. We therefore also agree with the Federal Labour Court concerning the rescission of the employment relationship under the law of unjust enrichment.

Against the background of this decision, it is advisable in practice to clearly document the purpose of the continued employment before actually continuing to employ the employee. If the continued employment serves exclusively to avert enforcement of the general claim to continued employment, this must be expressly recorded for evidence purposes. If the dismissal proves to be effective with the legally binding conclusion of the dispute on protection against unfair dismissal, the employer can refer the employee to the rescission under unjust enrichment law. At the same time, the employer can prepare for possible claims even during the continued employment in case the invalidity of the dismissal is declared in a final and binding manner. A current provision can be based specifically on the actual extent of any claims to continued payment of wages in the event of illness and remuneration for non-working holidays.

If, however, continued employment aims at reducing possible remuneration in the case of default in acceptance (Annahmeverzugslohn), this should also be clearly communicated. In this case, the employment relationship is continued under the condition subsequent of the legally binding dismissal of the action for protection against unfair dismissal. The actual employment is thereby placed on a contractual basis within the meaning of the EFZG. The regulations on continued payment of wages in the event of illness and remuneration on non-working holidays already apply during the continued employment.

Whether, in individual cases, continued employment solely to avoid enforcement or employment within the framework of an employment relationship subject to a condition subsequent in order to avoid remuneration in the case of default in acceptance (Annahmeverzugslohn) is appropriate depends on the specific circumstances of the case. This requires a balancing of risks taking into account the details of the termination and the prospects of a successful outcome to the proceedings for protection against unfair dismissal.

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Violation of reporting obligations in the case of continued illness may entitle to termination

The duty to notify in the event of incapacity for work also includes the duty to notify the employer immediately of the continuation of an illness. If this obligation is not complied with, this may in principle also entitle the employer to terminate the contract and violations of this obligation are not to be assessed differently from violations of the obligation to report (initial) illness without delay.

Federal Labour Court, judgment of 07 May 2020 – 2 AZR 619/19

The case

The plaintiff had been employed by the defendant as a warehouse clerk since October 2007 and had continuously been unfit for work from July 2016.

During his incapacity for work, the plaintiff received a total of three written warnings from the defendant, once for unexcused absence and twice for breach of the company-internal obligation to report incapacity for work. The plaintiff received the last two warnings because the defendant was of the opinion that the plaintiff had submitted his follow-up certificates late and had therefore not notified it in good time of the continuation of his illness. And he did so despite the fact that the company ensured that the reporting obligations in the event of illness are set out in company regulations in detail and the plaintiff was also reminded of these obligations in November 2016, according to the defendant.

After the plaintiff again failed to inform the defendant in good time - in the defendant's opinion – about the continuation of his incapacity for work, the defendant finally terminated the employment relationship in December 2017.

The plaintiff brought an action for protection against dismissal against this and claims that the dismissal is invalid because he

duly reported his sickness to the defendant each time (and continued to do so).

The Ulm Labour Court upheld the claim. The appeal lodged by the defendant was dismissed by the Baden-Württemberg Higher Labour Court. One of the reasons given for this was that even though an employee is generally obliged under Section 5 of the German Continued Payment of Remuneration Act (Entgeltfortzahlungsgesetz, EFZG) to notify his employer of the continuation of his incapacity for work, a possible violation of this obligation to notify would normally be less serious than a missing or delayed first notification of an illness. The employee's failure to appear does not, in this case, come as a surprise to the employer. In the event of a dismissal for conduct-related reasons, this must be taken into account when balancing interests, which is to be carried out beforehand.

The decision

The defendant's appeal on points of law to the Federal Labour Court was successful and led to the revocation of the judgment and referral back to the Higher Labour Court. In the opinion of the Federal Labour Court, in addition to various other aspects in its decision, the Higher Labour Court erred in law in particular in assuming that a violation of the obligation to immediately report the continuation of an illness is to be assessed as less serious than the failure to immediately report the first occurrence of incapacity for work when balancing interests.

In its decision itself, the Federal Labour Court first of all expressly clarifies that even a culpable violation of the obligation to immediately report the continuation of incapacity for work resulting from Section 5 (1) EFZG can in principle be suitable to constitute a reason for termination due to conduct. The statutory notification obligations are not limited to the case of a first illness. They also include the obligation to inform the employer immediately of the continuation of incapacity for work beyond the period initially notified, the Court held.

The way the reporting obligations are designed by law in the event of illness also does not readily permit a different treatment of violations concerning the initial report compared with the report of the continuation of an illness. This also applies to long-term illnesses. Contrary to the Higher Labour Court's assumption, general experience has not shown that it is less likely that an employee resumes work after a long period of incapacity for work and a large number of subsequent sick notes "without a statement to the contrary". There is therefore no reason to treat the obligation to submit a new certificate of incapacity to work less strictly in the case of long-term illness. Therefore, in principle, a case-specific balancing of interests is required for violations of reporting obligations in connection with both initial illnesses and secondary diseases.

However, the Federal Labour Court is of the opinion that it is not in a position to carry out a proper balancing of interests itself because this would require additional findings of fact, in particular with regard to the violations in question, and a related assessment by the court. It is the task of the Higher Labour Court to make up for this now, the Federal Labour Court held.

Our comment

The decision is to be welcomed from an employer's point of view. With its decision, the Federal Labour Court not only makes it very clear that the (repeated) violation of the statutory reporting obligations in the case of continued incapacity for work can also be a reason for termination. In addition, the Federal Labour Court in any case gives the employer a certain leeway in order to counteract negligence during (longer) periods of absence. It is not unusual for employees – at least after the end of the six-week continued remuneration period – to send their certificates of incapacity for work only by post or to submit them late. As a result, the employer is sometimes uncertain for days or even several weeks whether an employee is still unfit for work or what the reason for the continued absence is. Under certain circumstances, this can lead to considerable (planning) difficulties in and for the company, which the employer can only counteract effectively if he has some means left as motivation for the employees to report their availability in good time.

At the same time, however, the decision of the Federal Labour Court once again underlines the importance of carrying out a comprehensive, case-specific balancing of interests before giving notice of termination. It thus reiterates how important it generally is – in addition to the examination and assessment of the breach of duty – that the employee concerned has previously (several times) been effectively warned concerning a similar breach and has thus been given the opportunity to correct his behaviour for the future.

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Equal company pension treatment

Insofar as a company pension scheme regulated as part of an overall commitment violates the principle of equal treatment under labour law, this leads to an upward adjustment of the pension benefit.

Federal Labour Court, judgment of 3 June 2020 – 3 AZR 730/19

The case

The defendant granted its employees benefits under a company pension scheme on the basis of a set of regulations known as the "2011 Service Agreement" ("2011 Agreement"). The provisions of the 2011 Agreement should not apply to those employees who had already been promised an individual company pension. A legal predecessor of the defendant had promised the plaintiff benefits under a company pension scheme with the Bankenversicherungsverein des Deutschen Bank- und Bankiergewerbes (BVV) on the basis of an individual contract. According to this, the employer had to pay two thirds of the contributions, the plaintiff one third of the contributions. However, the value of the company pension scheme under the 2011 Agreement was higher than that of the plaintiff's company pension scheme with BVV.

Subsequently, the plaintiff asserted claims under the 2011 Agreement with the argument that the provision under which such employees who had already been promised an individual contractual pension scheme do not acquire a claim to a company pension under the 2011 Agreement constitutes a breach of the obligation of equal treatment. He took the view that his company pension scheme with BVV could not be counted towards the pension scheme under the 2011 Agreement. The Labour Court had partially upheld the action and assumed that the defendant was obliged to grant a pension under the 2011 Agreement by offsetting the BVV benefits, insofar as the BVV benefits were based on contributions paid by the defendant. The Higher Labour Court followed this legal view.

The decision

The appeals on points of law lodged by both parties were unsuccessful. The Federal Labour Court affirmed the plaintiff's claim for payment of a company pension under the 2011 Agreement and justified this with the general principle of equal treatment under labour law. However, the Federal Labour Court also limited the plaintiff's claim to the extent that the plaintiff must have his BVV pension credited in correspondence with the contribution payment of the defendant to the BVV in the period in which the plaintiff acquired entitlements under the 2011 Agreement for his periods of employment.

The Federal Labour Court first dealt in detail with the question of the legal character of the 2011 Agreement. It came to the conclusion that the 2011 Agreement – despite its designation as a "service agreement" – represented an overall commitment to the employees. The offer of a company pension scheme contained in the 2011 Agreement had thus become a supplementary contractual component of the existing employment relationships with the employees. The provision in the 2011 Agreement, according to which employees with an individual pension commitment should be excluded from the scope of application of the 2011 Agreement, violates the general principle of equal treatment under labour law, according to the Court. Such a provision is only permissible insofar as it is ensured that at least approximately equivalent individual pension commitments exist for employees falling outside the scope of the 2011 Agreement.

When it comes to general terms and conditions current case law does not permit to interpret an invalid clause in such a way that the content of an invalid clause is reduced such that the remaining content is valid (so-called "geltungserhaltende Reduktion"). The Federal Labour Court rejected the plaintiff's legal opinion, according to which offsetting his BVV pension scheme would violate the prohibition of the reduction of the content under the law relating to general terms and conditions. According to the plaintiff, the exclusion of employees with individual pension commitments in the 2011 Agreement is completely ineffective and thus there is no room for (partial) offsetting. In the view of the Court it is true that the law concerning general terms and conditions is based on the principle that wholly or partially invalid clauses do not become part of the contract, however, the principle of equal treatment under labour law contains a more specific and closed concept of regulations and legal consequences than the law concerning general terms and conditions.

Our comment

In the final analysis, one has to agree with the Federal Labour Court's judgment. Once again, however, it becomes clear that one needs to pay particular attention to detail, especially when designing pension commitments. Errors or inaccuracies in the regulation of pension commitments can have considerable economic consequences for the company in the context of company pension schemes. In times of low interest rates, when company pension commitments are already a heavy burden anyway, unforeseen additional burdens can become a stumbling block. Especially when, as in the case decided by the Federal Labour Court, a wide variety of company pension commitments exist due to numerous transfers of business, it is important to maintain an overview. Which groups of persons have acquired or are likely to acquire pension entitlements, to what amount and on the basis of which regulations, must then be examined. When designing company pension schemes, the employer must also be aware that an overall commitment already becomes effective when it is announced to the employees in a form that typically enables the individual employee to take note of the declaration. It is not important whether the employee is actually aware of it. In addition, it is not necessary to expressly accept the offer contained in the declaration. This may quickly create claims one originally did not intend to establish.

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Interpretation of a court settlement – payroll accounting

A court settlement, which provides for proper payroll accounting related to an employment relationship, generally aims at an accounting treatment based on the legal norms found outside the settlement and does not usually establish an independent payment obligation of the employer.

Federal Labour Court, 27 May 2020 – 5 AZR 101/19

The case

The parties are in dispute over wage payment and payroll claims and the interpretation of a related court settlement. The plaintiff had been employed by the defendant since 1996, most recently with a gross monthly salary of EUR 2,687.50. In a letter dated 7 September 2015, the defendant gave extraordinary notice of termination of the employment relationship with effect from 30 September 2015, or alternatively ordinary notice of termination with effect from the next possible date. In the subsequent unfair dismissal proceedings, the parties reached a settlement in March 2016, which – in addition to the termination of the employment relationship as of 31 January 2016 – provided for the following under number 2:

"The defendant will properly account for the employment relationship until its termination on the basis of a gross monthly salary of EUR 1,343.75 and pay the corresponding net amount to the plaintiff, subject to any claims transferred to third parties."

Since November 2015, the plaintiff had already been working for another employer, earning remuneration in excess of EUR 1,343.75 gross per month. After the conclusion of the settlement, the defendant did not issue any payrolls to the plaintiff and did not make any payments. In the enforcement proceedings subsequently instituted by the plaintiff, it applied for authorisation to have the payroll accounting owed under number 2 of the court settlement carried out by a tax adviser. This application was rejected by the Higher Labour Court on the

grounds that the provision had no enforceable content. It was subject to interpretation as to whether it was the intention of the parties to exclude Section 615 sentence 2 of the German Civil Code (Bürgerliches Gesetzbuch, BGB) (crediting against the employee what the employee acquired elsewhere). However, that uncertainty could not be eliminated in the enforcement proceedings.

The plaintiff is of the opinion that she is entitled under number 2 of the court settlement to remuneration of EUR 1,343.75 gross per month for the period from October 2015 to January 2016, less unemployment benefit received. In her view, the parties had, by means of the settlement, created an independent payment obligation on the part of the defendant, which did not provide for the crediting of what the plaintiff earned elsewhere.

The decision

The Labour Court dismissed the action. The Higher Labour Court upheld the plaintiff's appeal. The defendant's appeal on points of law to the Federal Labour Court has now been successful.

In the opinion of the Federal Labour Court, the provision in number 2 of the court settlement does not constitute an "independent obligation of the defendant [...] dissociated from bases for claims existing outside the court settlement, to pay the plaintiff a monthly gross salary of EUR 1,343.75 for the period in dispute, subject to the transfer of claims to third parties. "The plaintiff must therefore accept that earnings earned elsewhere are credited against her claims."

The Federal Labour Court states in this respect that the content of court settlements is to be determined by interpretation in accordance with Sections 133 and 157 BGB.

In that regard, the wording of the provision must first be taken into account. In the present case, this does not establish any legal basis for a payment obligation which goes beyond the statutory provisions and, in particular, Section 615 BGB. If the employer undertakes to perform the payroll accounting for the employment relationship in a court settlement, this does not constitute acknowledgement of an obligation to pay, but merely confirmation of the legal situation which already exists. According to the Federal Labour Court, this applies at least if the claims to which the payroll accounting obligation relates are not specified. In this respect, the "payroll accounting" refers only to actually existing claims. In the view of the Court, the wording 'proper/ly' is intended to ensure that the payroll accounting took place based on the legal provisions applicable outside the settlement.

As the employer (in this case the defendant) was in default of acceptance of the work performance in the accounting period, Section 615 sentence 1 BGB (remuneration in the case of default in acceptance) and Section 615 sentence 2 BGB therefore also applied, with the consequence that the employee (in this case the plaintiff) had to have earnings earned elsewhere credited against her claims.

According to the Federal Labour Court, neither the wording "on the basis" of the specifically calculated monthly amount nor the restriction "subject to any claims transferred to third parties" stands in the way of this result. The first wording, in connection with the term 'proper/ly', refers to the amount to be

taken into account for the calculation; the second wording refers only to Section 115 of the German Social Code, Book X (Sozialgesetzbuch X, SGB X) (passing of claims from the employee to the social insurance agency).

In addition to the wording, the circumstances outside the agreement as well as the particular interests and the purpose of the legal transaction must also be taken into account in order to determine the real intention of the parties. However, the Federal Labour Court does not see any particular indications that number 2 must be interpreted differently than described.

The fact that the amount of the agreed remuneration until the date of termination represents exactly half of the average monthly salary of the terminated employment relationship

could be understood as “an additional expression of an intentional distribution of the litigation risks resulting from the uncertainty as to the validity of the termination without notice”. In any event, no particular indication can be derived from this that would undoubtedly suggest a different interpretation.

Finally, the fact that the settlement is almost worthless for the plaintiff does not justify any other interpretation either. The plaintiff has not been able to show that the defendant was aware of the applicant’s new employment at the time the settlement was concluded. Moreover, the defendant’s risk of default of acceptance is considerably reduced as a result of the applicant’s assumption of a new employment relationship. Therefore, according to the Federal Labour Court, it is not apparent what interest the defendant should have had in promising the plaintiff remuneration without crediting other earnings earned elsewhere against it, assuming that it had knowledge of the employment relationship. If the parties had only been interested in the payment of a certain amount, it would have been more appropriate to agree on a severance payment.

Our comment

Considering that proceedings before the labour courts are very often ended by means of a court settlement, the decision of the Federal Labour Court is highly relevant. The formulation of “proper payroll accounting” “on the basis” of a quantified gross salary is almost standard in court settlements. The parties regularly assume that such wording is in itself understandable to everyone. However, especially in circumstances which are only rarely considered by the parties, such as here, for example, when the employee has already found another job long before the settlement is concluded, the provision which was initially perceived as clear suddenly becomes subject to interpretation and the different interests of the parties become apparent.

It is therefore not surprising that the formulation of “proper payroll accounting” in a court settlement has been the subject of a decision of the Federal Labour Court on several occasions.

Back in 2008, the Federal Labour Court had to decide on a case in which the plaintiff – who had already been sick and unfit for work for more than six weeks at the time of the court settlement – was irrevocably released from performing her work by way of a settlement while her employer continued to pay her wages after giving notice of termination (judgment of 23 January 2008, 5 AZR - 393/07). In this case, the plaintiff concluded that she was entitled to full payment of her salary until the date of termination due to the “proper payroll accounting” agreed in the settlement.

In its decision on the continued payment of wages, the Federal Labour Court also followed the view that the settlement did not give rise to a claim to remuneration that went beyond the statutory bases. Due to the fact that the plaintiff was no longer entitled to continued payment of her wages due to her periods of illness, such a claim also cannot be derived from the wording “proper payroll accounting” in the court settlement, the Court held.

The interpretation made by the Federal Labour Court in the present case is comprehensible and is a logical continuation of previous case law.

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■ **CASE LAW IN A NUTSHELL**

No necessecity to record working time by fingerprint

An employee may not be warned because he refuses to use a biometric time recording system. In general, the recording of working hours by means of a fingerprint is not "necessary" within the meaning of Article 9 (2) (b) EU GDPR, Section 26 (3) of the German Federal Data Protection Act (Bundesdatenschutzgesetz, BDSG).

Berlin-Brandenburg Higher Labour Court, judgment of 4 June 2020 - 29 Ca 5451/19 (final)

Reasons for the decision

The parties are in dispute about the removal of three warnings from the plaintiff's personnel file. The defendant issued two warnings because the plaintiff refused to use the time recording system newly introduced by the defendant. This system captures the minutiae (coordination of the points of intersection) of fingerprints for identification or verification. The plaintiff refused to use this system and continued to record his working hours by hand as before. The plaintiff received the third warning because he did not attend a medical check-up ordered by the defendant. The Labour Court upheld the action in full and ordered the defendant to remove the warnings.

The defendant's appeal before the Higher Labour Court was unsuccessful. The Higher Labour Court confirmed the decision of the Labour Court, according to which the warnings were to be removed from the personnel file in corresponding application of Section 242 and Section 1004 of the German Civil Code (Bürgerliches Gesetzbuch, BGB). The plaintiff did not violate any obligations under the employment contract by the conduct reprimanded in the three warnings, the Court held. Contrary to the view of the defendant, minutiae are biometric data, the processing of which for the purpose of unambiguously identifying a natural person is expressly prohibited under Article 9 (1) EU GDPR. The only possible exception under Article 9 (2) (b) EU GDPR is not relevant here. The processing of a person's biometric data is necessary within the meaning of that provision only if a legitimate purpose is pursued and there is no equally effective means of achieving that purpose which interferes less with the general personality right. The time recording system newly introduced by the defendant could also be used with the aid of an ID card reader system, which would not require the use of the employees' biometric data. The third warning must also be removed from the personnel file, as the plaintiff was not obliged to have the ordered examination performed.

Massive data protection violations justify dissolution of the works council

If the works council collects, analyses and categorises confidential procedures and subsequently makes them available to third parties for download via an Internet link for months and if it disregards the requirement of trustful cooperation between employer and works council within the meaning of Section 2 (1) of the German Works Constitution Act (Betriebsverfassungsgesetz, BetrVG), it may be dissolved in accordance with Section 23 (1) sentence 1 BetrVG due to gross breach of duty.

Iserlohn Labour Court, decision of 14 January 2020 – 2 BV 5/19 (final)

Reasons for the decision

The employers request the dissolution of the works council of their joint establishment, or they request the removal of the chairman of the works council. The joint establishment managed by the employers had a works council. After a series of economic setbacks, the employers made the business decision to close down one of the joint establishments and lay off all the employees employed there. The works council objected to the dismissals and supported the employees in the subsequent unfair dismissal proceedings. Against this background, the chairman of the works council sent an e-mail to several recipients, in particular, the law firms entrusted with the unfair dismissal proceedings, providing the recipients with a link which gave access to a folder with a file size of more than 150 MB without password protection. The contents of the folder included data in the form of transcripts of e-mails, legal documents, calendar extracts, official notices, invoices, design drawings, holiday applications, contracts and presentations. The folder with the files had been privately created by the works council in a cloud. This procedure was at least accepted by the entire works council.

The Labour Court decided to uphold the employers' request and to dissolve the works council pursuant to Section 23 (1)

sentence 1 BetrVG due to gross breach of duty. This is justified here by the massive violation of data protection regulations, the disregard of the confidentiality of personal information by passing it on to third parties and the violation of secrecy obligations. With this conduct the works council massively exceeded the authority granted to it and thus violated the principle of trustful cooperation between works council and employer in the meaning of Section 2 (1) BetrVG, according to the Court. Whether the works council culpably neglected its duties is not decisive here. Taking all the circumstances into account, the continued operation of the works council appears to be unacceptable in the present case.

Requirements for the presumption of collusion at the expense of the employer

If the employee concludes a contract in collusion with a representative of the employer, through which he allows himself to be promised benefits which cannot be justified from any point of view and which are obviously contrary to the interests of the employer, this constitutes a breach of his duty of consideration. However, the duty of consideration does not go so far as to require the employee to subordinate his own interests to those of the employer.

Mecklenburg-Western Pomerania, judgment of 11 August 2020 – 5 Sa 4/19 (final)

Reasons for the decision

The parties are in dispute, in particular, about the validity of an extraordinary termination of the employment relationship. The plaintiff was employed for many years by the defendant and other group companies or their legal predecessors. Among other things, she also worked as assistant to the management. Due to economic problems, the defendant wanted to terminate its cooperation with the previous managing directors. In this context, the employment relationship of the plaintiff was also terminated. The plaintiff entered into a termination agreement with the managing director, whom she knew very well thanks to many years of cooperation, which provided, in particular, for the payment of a severance payment. In the termination agreement, the plaintiff also waived her right to bring an action for unfair dismissal. The newly appointed management accused the plaintiff of having violated her duty of consideration under the employment contract by accepting the termination agreement, which is why she was dismissed again, this time for cause. The employee defended herself against this dismissal.

The Higher Labour Court confirmed the decision of the Labour Court, which upheld the action. The termination for cause was invalid. The employee could not be accused of having accepted the termination agreement offered to her together with the severance payment. It is true that an employee violates his or her duty of consideration if he or she enters into a contract which is concluded under collusion and allows himself or herself to be promised benefits which cannot be justified from any point of view. However, this duty of consideration does not go so far as to require the employee to subordinate his or her own interests to the interests of the employer and reject contractual arrangements which are favourable to him or her. In the present case, the agreements would indeed place an economic burden on the employer; however, the employer would also gain legal certainty regarding the termination of the plaintiff's employment relationship.

Ineffectiveness of an assignment of an inferior activity by the employer

The employee is entitled to employment in accordance with the contract. If, contrary to the provisions of the contract, personnel management responsibilities are withdrawn, this may represent a downgrading of the position. Assignment of an inferior activity is also unacceptable if the previous remuneration is still paid.

Cologne Higher Labour Court, judgment of 9 July 2020 – 8 Sa 623/19 (final)

Reasons for the decision

The parties are in dispute about the validity of an instruction of the employer. The contract of employment between the plaintiff and the defendant contains, inter alia, a provision according to which the plaintiff is employed as "Head of Finance and Accounting". In addition, the contract contains a transfer reservation, according to which the employee can be assigned another equivalent and equally paid task within the company. The employer instructed the plaintiff to take up a newly created position in the future under the title "Head of Process

Optimisation". Unlike her previous employment, however, her new position did not involve any personnel management responsibilities. The Labour Court held that the employer's instruction was invalid and ordered the defendant to re-employ the plaintiff as "Head of Finance and Accounting".

The Higher Labour Court dismissed the defendant's appeal. The employer's instruction by means of which the plaintiff was assigned the job of "Head of Process Optimisation" was rightly assessed as invalid. It was not covered by the employer's right to issue instructions under Section 106 of the German Industrial Code (Gewerbeordnung, GewO). The employer's right to issue instructions serves only to specify the content of the contractually agreed activities but does not include the right to change the content of the contract. The transfer of the plaintiff from her contractually agreed activity as "Head of Finance and Accounting" to the activity "Head of Process Optimization" is not covered by the defendant's right to issue instructions, which is restricted by the employment contract, even taking into account the reservation of the right to transfer. According to the Court, the newly assigned activity is not an equivalent task, and equivalence is assessed, in particular, on the basis of criteria such as the number of staff members reporting to the employee, the extent of decision-making powers regarding the use of material resources or staff capacity and the operational framework. The withdrawal of the management function leads to a downgrading of the activity and is therefore not covered by the right to issue instructions.

Invalidity of a termination agreement due to violation of the requirement of fair negotiations

If the employer enters into a termination agreement in violation of the principle of fair negotiations, he must, according to Section 249 (1) BGB, create the situation that would have existed without the breach of duty. The employee must then be placed in the same position as if he had not concluded the termination agreement.

Mecklenburg-Western Pomerania Higher Labour Court, judgment of 19 May 2020 – 5 Sa 173/19 (final)

Reasons for the decision

The parties are in dispute about the validity of a termination agreement. The plaintiff was employed by the defendant federal state (Land) on a fixed-term contract as a teacher at a school. Before that he had already worked in other areas for several years. After several extensions of the fixed-term employment contract and two years of employment, the plaintiff successfully applied for a permanent position at a special school in the defendant Land. The provisional headmistress attended the first lesson of the plaintiff. Immediately after the lesson, she informed the plaintiff that she intended to terminate the employment relationship during the probationary period. This caused an enormous psychological pressure on the plaintiff, which is why he was on sick leave due to his incapacity for work. On the first day of the sick leave, the inhouse legal counsel of the school board invited the plaintiff to an interview in his office. During the interview, the legal counsel repeated the announcement that the plaintiff should be dismissed during the probationary period and persuaded him to sign a termination agreement instead. He refused to grant the plaintiff time to consider the offer to enter into a termination agreement, as requested by the plaintiff. Subsequently, the plaintiff challenged the termination agreement. In his action, he successfully requested a declaratory judgment that the employment relationship had not been terminated by the termination agreement.

The Higher Labour Court upheld the decision of the court of first instance in its entirety. The termination agreement was invalid, as it had been concluded in violation of the principle of fair negotiation. The requirement of fair negotiation derived from Section 241 (2) BGB is disregarded if the contractual partner's freedom of decision is influenced in a manner that is

too critical. A negotiating situation is to be considered unfair if a psychological pressure situation is created or exploited which makes a free and considered decision by the contracting party considerably more difficult or even impossible. In the present case, the defendant Land created a psychological pressure situation in the plaintiff and used this to conclude the termination agreement, according to the Court. Furthermore, the agreement of the probationary period in the employment contract had not been permissible due to the two years of uninterrupted prior employment.

Extraordinary termination due to threat of sick leave

If the employee attempts to assert his or her interests in the employment relationship by threatening a future illness which does not yet exist at the time of the statement, such action constitutes a violation of the mutual duties of loyalty in the employment relationship even below the threshold of criminal liability.

Rhineland-Palatinate Higher Labour Court, judgment of 21 July 2020 – 8 Sa 430/19 (final)

Reasons for the decision

The parties are basically in dispute about the validity of a termination of the employment relationship by the employer. The employer considered relocating within the region. The employee, who learned of this endeavour, tried to suggest to the management a property which, in his opinion, would be suitable as a new location. In particular, he made an inspection appointment for this purpose on his own authority. The managing director of the defendant instructed the plaintiff to stop looking for office space. The situation led to tensions between the parties, which resulted in the employee being released from work. Subsequently, discussions were held on the termination of the employment relationship. In this context, the employee was requested to appear at his workplace the following day for a coordination meeting. The plaintiff stated that he did not wish to participate in such a discussion without legal counsel. The employee responded to the explicit revocation of the release from work and the renewed request to appear at the workplace the following day with the words "he could still get sick". The employer gave notice of termination of the employment relationship without notice and relied, in particular, on this statement to justify its decision. The employee filed an action for unfair dismissal against this without success.

The Higher Labour Court upheld the decision of the court of first instance. The employee's conduct constitutes a breach of contractual obligations and is suitable as good cause within the meaning of Section 626 (1) BGB to terminate the employment relationship without notice. In the view of the Court it is true that an instruction with the sole purpose of conducting a staff interview with a view to terminating the employment agreement is not covered by the right to issue instructions under Section 106 GewO. However, the issue here is not that the employee had disobeyed the instruction, but the way in which he had acted. The threat of arbitrary sick leave was also such a serious breach of duty that a warning was unnecessary, the Court held.

■ GENERAL INFORMATION

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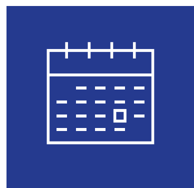
Events, publications and blog



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