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Legal Webcast Update Labour Law 2023

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Your Speakers

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Content Overview – What to expect over the next 45 minutes

Selected Current Topics from Labour Law / Current Case Law

- Holiday
- Information Duties in the Event of Transfer of Business § 613a BGB
- Recording of Working Time
- Termination Agreements
- News on the Mass Dismissal Notification
- (Special) Protection Against Dismissal
- Remuneration, Minimum Wage, Target Agreements
- Home Office
- Video Surveillance in the Workplace

Holiday

Current Case Law

Holiday entitlements are not subject to the statute of limitations

ECJ of 22.9.2022 - C-120/21

If employers do not comply with their duty to inform beforehand, workers' holiday entitlements are not time-barred. (Art. 31 para. 2 of the Charter of Fundamental Rights of the EU Health Protection)

The BAG thus implements the requirements of the ECJ on the basis of the preliminary ruling (see above 22.9.2022/ C-120/21):

The employee's statutory claims to paid annual leave are subject to the statutory limitation period (3 years pursuant to § 214 para. 1, 194 para. 1 BGB: Commencement at the end of the calendar year in which the employer informed the employee about his specific holiday entitlement and the expiry periods and the employee nevertheless did not take the holiday of his own free will) so also BAG of 20.12.2022- 9 AZR 266/20

A forfeiture of leave pursuant to section 7 subsection 3 sentence 1 BUrlG at the end of the calendar year or a permissible carry-over period pursuant to section 7 subsection 3 sentence 3 BUrlG shall not be considered in the absence of a notice by the employer.

Current Case Law

Precautionary granting of leave in the event of extraordinary dismissal

BAG of 25.8.2020 - 9 AZR 612/19

Facts:

The defendant terminated the employment relationship with the plaintiff without notice for exceptional reasons, alternatively with due notice.

The letter of termination also contained the note **that in the event that the termination without notice was invalid, the plaintiff would have to take his remaining leave. At the same time, the defendant unconditionally assured the plaintiff of holiday pay for the period of leave.**

The plaintiff was of the opinion that the precautionary granting of leave in the event that the extraordinary termination was invalid had not been permissible. The lower courts dismissed the action.

Decision:

1. In connection with the issuance of a termination without notice, the employer may grant the employee leave as a precautionary measure in the event that the extraordinary termination does not terminate the employment relationship.

2. For this purpose, the employer must release the employee unequivocally and definitively from the obligation to work in order to fulfil the entitlement to recreational leave and either pay the holiday pay before the start of the leave or unconditionally promise to pay it.

Current Case Law

Precautionary granting of leave in the event of extraordinary dismissal

BAG of 25.8.2020 - 9 AZR 612/19

Conclusion:

- If leave is still outstanding and the employer issues an extraordinary, alternatively ordinary notice of termination, the employer can avoid the financial risk of having to pay holiday compensation in the end in addition to the notice period for the ordinary notice of termination, if only the ordinary notice of termination is effective.
- To be recommended to be included as standard in a.o. notice pattern.
- Care must be taken to ensure that the leave is granted unambiguously and definitively. In addition, it must be ensured that the holiday pay is unconditionally promised.

Current Case Law

Reduction of leave in case of short-time work zero and calculation of leave

BAG dated 30.11.2021 - 9 AZR 225/21

Facts:

The worker was employed 3 days/week as a sales assistant. Her annual holiday entitlement was 14 working days. Due to the Corona pandemic, she was completely exempt from compulsory work for June, July and October 2020 due to short-time work. In November and December 2020, she also worked a total of only 5 days. The employer recalculated the employee's holiday due to the short-time work and **reduced the** holiday days for the months of short-time work by 2.5 days. The employee objected to this, arguing that a reduction of leave days due to short-time work was not permissible.

Decision:

1. A short-time absence of whole working days justifies a **recalculation (reduction) of the holiday entitlement during the year**. Pursuant to section 3 (1) BUrlG, the aim is to ensure an equivalent duration of leave for all employees. The formula for this is: 24 working days (in case of a 6-day week) x number of days with compulsory work divided by 312 working days (in case of a 6-day week).

2. The formula also applies accordingly to contractual additional leave if no deviating provision has been agreed between the parties to the employment contract.

3. In this case, the holiday entitlement reduced by the months of short-time work amounted to only 10.5 days. The action was therefore unsuccessful.

Current Case Law

Reduction of leave in case of short-time work zero and calculation of leave

BAG dated 30.11.2021 - 9 AZR 225/21

Conclusion:

- The absence of entire working days due to short-time work leads to a redistribution of working time, as a result of which **leave** must be recalculated.
- The working days lost due to short-time work are not to be equated with periods of compulsory work when calculating the amount of leave.
- Principle: **"Only those who work also need rest"** (exception: AU, occupational accident, maternity leave)
- Recommendation: If there is zero short-time work, the employees' leave days should be recalculated.

Current Case Law

Crediting of leave days in case of quarantine during recuperation leave

LAG Hamm of 27.01.2022 - 5 Sa 1030/21, Revision BAG - 9 AZR 76/22 =>Submission ECJ preliminary ruling proceedings ECLI:DE:BAG2022:160822.B.9AZR76.22A.0

Facts:

The worker was granted 8 days' leave. Due to contact with a person infected with COVID-19, a domestic quarantine was ordered against the worker, which also covered the entire period of his leave. The employee immediately informed the employer about the quarantine. He requested the employer to credit his leave account with the 8 days of leave that fell within the period of quarantine.

Decision LAG:

The employee receives **credit for the days of leave for** the period of quarantine, as a comparable situation exists with an employee who is incapacitated for work during the leave (**section 9 BUrlG analogously**).

Conclusion: **Until clarification by the ECJ or then the BAG,** it **remains disputed** whether the holiday entitlement is also reduced by those days of holiday that fall into the period of quarantine without incapacity for work.

Other courts of instance have ruled to **the contrary** and rejected an (analogous) application of § 9 BUrlG (e.g. LAG Düsseldorf, 15.10.2021 - Case No. 7 Sa 857/21; LAG Köln, 13.12.2021 - Case No. 2 Sa 488/21; LAG Schleswig-Holstein, 15.02.2022 - Case No. 1 Sa 208/21; LAG Baden-Württemberg, 16.02.2022 - Case No. 10 Sa 62/21).

Information Duties in the Event of Transfer of Business § 613a BGB

Current Case Law

The period under section 613a VI BGB does not start to run if **information under section 613a V BGB has** not properly reached the employee. This includes in particular the concrete designation of (further) applicable collective agreements. These explanations must also be comprehensible to a non-lawyer (LAG Düsseldorf, NZA-RR 2022, 570).

LAG Düsseldorf Urt. v. 26.7.2022 (8 Sa 68/20)

The one-month period under section 613 a VI 1 BGB for objecting to the transfer of an employment relationship as a result of the transfer of an undertaking does not begin to run not only in the case of incorrect information of the employee, but also not in the case of incomplete information.

If it is a question of the (continued) validity of a collective agreement with the acquirer, which is difficult to assess from a legal point of view, and if this circumstance is obviously of importance for the exercise of the right of objection, the transferor of the business and/or the acquirer of the business must declare this expressly and in a manner that is comprehensible to non-lawyers.

Recording of Working Time

Current Case Law

(Electronic) working time recording (1/3)

BAG of 13.9.2022- 1 ABR 22/21

Guiding principles

1. Employers are obliged under section 3(2)(1) of the ArbSchG to record the beginning and end of the daily working time of workers for whom the legislature has not adopted a provision derogating from the provisions of Articles 3, 5 and 6(b) of Directive 2003/88/EC on the basis of Article 17(1) of that Directive.

2. The works council does not have a right of initiative - enforceable by means of a conciliation board decision - to introduce an electronic system to record the daily working time of such employees.

<u>Wording of the law § 3 para. 2 no. 1 ArbSchG:</u>

§ 3 para. 2 no. 1 ArbSchG: In order to plan and implement the measures according to paragraph 1 [basic obligations of the employer for occupational safety and health], the employer shall, taking into account the nature of the activities and the number of employees

1. to ensure appropriate organisation and to provide the necessary means [...].

Current Case Law

(Electronic) working time recording (2/3)

BAG of 13.9.2022- 1 ABR 22/21

The wording of § *3 para. 2 no. 1 ArbSchG, interpreted in conformity with European law, also includes the employer's obligation to introduce a system with which*

the beginning and end and thus the duration of the working hours including overtime are recorded in the enterprise (margin note 19)

The BAG further refers to Art. 3 and Art. 5 of the European Working Time Directive (2003/88/EC), according to which all member states must take the necessary measures to ensure that every worker is granted a minimum rest period of eleven consecutive hours within a 24-hour period and a continuous minimum rest period of 24 hours plus a daily rest period of eleven hours within a 7-day period.

Furthermore, Art. 6 b of the Working Time Directive (2003/88/EC) obliges an upper limit for the average weekly working time (including overtime) of 48 hours.

Current Case Law

(Electronic) working time recording (3/3)

BAG of 13.9.2022- 1 ABR 22/21

In order for the Working Time Directive to be fully effective and with reference by the BAG to the principles set out by the ECJ on the limitation of maximum working time and on daily and weekly rest periods (Case C-344/19 and Case C-585/19) as well as to the decision of the ECJ in the so-called "time clock ruling" of 14 May 2019 (Case C-55/18), it is also necessary for employers to establish reliable systems to measure the daily working time of each employee. According to the Court of Justice's decision of 14 May 2019 (Case C-55/18), it is also necessary for employers to establish reliable systems to measure the daily working time of each employee in order to protect the safety and health of workers.

In the process, these suitable time recording systems must:

- Objective (no subjective counting of the working time of the employee himself unilaterally/self-employed)
- reliable (system must be capable of preventing any exceeding of the weekly maximum working hours. It must be functional and resilient in order to document working hours continuously and comprehensibly).

and

- accessible (employees and supervisory authorities must have reasonable access to the data collected, regular insight into the working time account must be granted or account statement must be produced).

Accordingly, the following are not sufficient: estimates, lump sums, approximate information, mere "making available".

Termination Agreements

Current Case Law

Termination agreement

BAG dated 24.02.2022 - 6 AZR 333/21

Facts:

On 22.11.2019, the managing director and his RA held a meeting with the plaintiff in the managing director's office.

The employer accused the plaintiff of unjustifiably changing or reducing purchase prices in the defendant's computer system in order to **simulate a higher sales profit** (allegation essentially undisputed).

After a **break of** about **ten minutes,** during which everyone sat in silence at the table, the plaintiff signed the **termination agreement** prepared by the defendant. This provided, inter alia, for a mutually agreed termination of the employment relationship as of 30 November 2019. The further details of the course of the talks remained in dispute. The **plaintiff challenged the termination agreement in a declaration dated 29 November 2019 on the grounds of unlawful threat.**

She claimed that she had been threatened **with extraordinary dismissal and the filing of criminal charges if she did not sign**. Her request to be given a **longer period to think it over and to be able to seek legal advice had** not been granted. The defendant had thus violated the **requirement of fair negotiation.**

The ArbG allowed the action, the LAG dismissed it on appeal by the defendant.

Current Case Law

Termination agreement

BAG dated 24.02.2022 - 6 AZR 333/21

Decision:

1. The plaintiff's appeal before the Sixth Senate of the Federal Labour Court was unsuccessful.

2. Even if the course of the conversation described by the plaintiff is assumed to be in her favour, the **alleged threat is not unlawful** because:

   In the present case, a reasonable employer could seriously consider both the declaration of an extraordinary dismissal and the filing of criminal charges.

3. the defendant did not negotiate unfairly.

The plaintiff's freedom of decision was not violated by the fact that the defendant only submitted the termination agreement for **immediate acceptance in** accordance with section 147 (1) sentence 1 of the Civil Code and that the plaintiff therefore had to decide on the acceptance immediately.

Current Case Law

Termination agreement

BAG dated 24.02.2022 - 6 AZR 333/21

Conclusion:

- Conclusion of a termination agreement may be made dependent on immediate (only short reflection period) acceptance of the offer.
- No advance notice of the content of the conversation is required.
- No grant to obtain legal advice required.
- **BUT:** BAG dated 07.02.2019 - 6 AZR 75/18: **Requirement of fair negotiation violated if**
  - unannounced visits to the employee's home for the purpose of concluding a termination agreement (taking him by surprise) or
  - taking advantage of a physically weakened condition (illness) of the employee
- **BUT: Threat of (extraordinary) dismissal only lawful if** the employer may assume that the dismissal is **very likely to** stand up to judicial review, i.e. if the threatener himself believes in its justification or his legal position is justifiable (BAG of 28 November 2007 - 6 AZR 1108/06).

News on the Mass Dismissal Notification

Current Case Law

News on the mass dismissal notification

BAG of 27.01.2022 - 6 AZR 155/21 (order for reference to the ECJ)

§ Section 17 (2) sentence 1 KSchG: *If the employer intends to make dismissals subject to notification under subsection 1, he shall provide **the works council with the** relevant information in due time and inform it in writing in particular about*

1. *the reasons for the planned redundancies,*
2. *the number and occupational groups of workers to be dismissed,*
3. *the number and occupational groups of workers usually employed,*
4. *the period during which the dismissals are to be made,*
5. *the criteria envisaged for the selection of workers to be dismissed,*
6. *the criteria provided for the calculation of any severance payments.*

§ section 17 subsection 3 sentence 1 KSchG: *The employer shall **at the same time** send a **copy of** the notification to the works council to the **employment agency**; it must contain at least the information prescribed in subsection 2, sentence 1, nos. 1 to 5.*

Current Case Law

News on the mass dismissal notification

BAG of 27.01.2022 - 6 AZR 155/21 (order for reference to the ECJ - C-134/22)

Question posed by the BAG to the ECJ:

- Is a dismissal therefore **invalid** if the Employment Agency was not notified in advance?
- ECJ to clarify which protective purpose the transmission obligation serves

Conclusion:

- Until this legal issue is clarified, it **is essential to** send the notification of the works council to the employment agency at the **same time as** informing the works council.

Current Case Law

News on the mass dismissal notification (decision May 2022)

BAG dated 19 May 2022 - 2 AZR 467/21

Facts:

*§ Section 17 subsection 3 sentence 5 KSchG: Furthermore, in agreement with the works council for the employment agency, the notice **shall include** information on the sex, age, occupation and nationality of the employees to be dismissed.*

In the specific case, this had not been done.

Decision:

The absence of the so-called target information pursuant to section 17 (3) sentence 5 KSchG does **not in** itself lead to **the invalidity of a mass dismissal notification** by the employer to the Employment Agency.

Conclusion:

The lower court (LAG Hessen Urt. v. 18.6.2021 - 14 Sa 1228/20) had decided otherwise. This has now been clarified for employers.

(Special) Protection Against Dismissal

Current Case Law

Start of special protection against dismissal for pregnant women

LAG Baden-Württemberg dated 01.12.2021 - 4 Sa 32/21

§ Section 17 (1) sentence 1 MuSchG: *Dismissal against a woman is inadmissible*

1. *during her **pregnancy**, (...)*

Decision:

- The beginning of the prohibition of dismissal is to be calculated with the help of the expected day of childbirth.
- The LAG BW calculated **266 days** back for the beginning of pregnancy.
- The BAG, on the other hand, bases the start of pregnancy on a retroactive accounting period of **280 days.**
- The BAG assumes the **greatest possible protection for pregnant women** and thus the **earliest possible time of pregnancy,** while the opposing view sees this as an "overstretching" of the period of protection.

Update:

- **BAG of 24.11.2022 - 2 AZR 11/22 has overturned the judgement of the LAG Baden-Württemberg** (full text of the BAG decision is not yet available).

Current Case Law

The **protection against dismissal of the (mandatory) data protection officer** under sections 38, 6 IV 2 BDSG also covers dismissals that are not related to the activity as data protection officer (BAG, NZA 2022, 1457, following referral decision of the ECJ, NZA 2022, 1111).

Guiding principles:

1. The special protection against dismissal of the compulsorily appointed company data protection officer standardised by the BDSG is compatible with EU law and national constitutional law.
2. § Section 38 I 1 and II in conjunction with. § Section 6 IV 2 BDSG do not impair the realisation of the objectives of the GDPR.
3. The fundamental rights examination of the special protection against dismissal standard for the in-house data protection officer and its application must primarily be carried out against the yardstick of the fundamental rights of the Basic Law.
4. The encroachment on the scope of protection of the employer's freedom to exercise his profession under Article 12 I GG by Section 6 IV 2 BDSG is proportionate.
5. For an extraordinary termination to be effective, it is not sufficient that a good cause for it "objectively" existed if only an ordinary termination was given

Current Case Law

In the opinion of the BAG, a **dismissal for leaving a** religious **community** before the start of an employment relationship with a religious institution is invalid due to a violation of negative freedom of religion and, in this regard, the decision of the ECJ regarding the compatibility with the Framework Directive on Equal Treatment and Art. 21 of the Charter of Fundamental Rights of the European Union (Charter) (BAG, BeckRS 2022, 26058).

The BAG has referred the question to the ECJ for a decision pursuant to Art. 267 TFEU with the question:

Is it compatible with Union law, in particular Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation (Directive 2000/78/EC) in the light of Article 21 of the Charter of Fundamental Rights of the European Union (Charter), for a national regulation to provide that a private organisation, whose ethos is based on religious principles,

(a) deem unsuitable for employment in its services any person who has left a particular religious community prior to the establishment of the employment relationship; or

(b) may require persons working for them not to have left a particular religious community before the employment relationship is established; or

(c) may make the continuation of the employment relationship conditional on a person working for it who left a particular religious community before the employment relationship was established rejoining that community, if it does not otherwise require persons working for it to belong to that religious community?

Current Case Law

The general protection against dismissal in §§ 1, 23 KSchG is not determined by EU law. In this respect, the national concept of employee remains as it results from § 611 a I BGB. A general extension of the **concept of employee in § 23 I 3 KSchG to** outside directors of a GmbH - irrespective of whether they are exceptionally employed as employees - is not constitutionally required (BAG, NZA 2021, 857).

Guiding principles of the BAG, Urt. v. 27.4.2021 (2 AZR 540/20) on this:

1. The negative fiction of section 14 I no. 1 KSchG, according to which the provisions of the first section of the Protection Against Dismissal Act do not apply to members of executive bodies of legal persons authorised to represent them, is not applicable to
   § Section 23 I 3 KSchG does not apply.

2. A GmbH managing director being bound by instructions to such an extent that it suggests a status as an employee can only be considered in **extremely exceptional cases.**

3. The general protection against dismissal in §§ 1, 23 KSchG is not determined by EU law. In this respect, the national concept of employee remains as it results from § 611 a I BGB.

4. A general extension of the concept of employee in § 23 I 3 KSchG to outside directors of a GmbH - irrespective of whether they are exceptionally employed as employees - is not constitutionally required.

Remuneration, Minimum Wage, Target Agreements

Current Case Law

Burden of proof and presentation in overtime compensation proceedings

BAG of 04.05.2022 - 5 AZR 359/21

- The **employee** bears the burden of proof:
  - that he or she has performed work in excess of normal working hours, or
  - has made himself available for this purpose on the instructions of the employer.
- **The employee** shall submit further evidence,
  - that the employer has expressly or impliedly ordered, tolerated or subsequently approved the overtime worked.
- These rules of explanation and burden of proof are not changed by the case law of the ECJ of 14.05.2019 - C-55/18. The provisions of EU law from which the ECJ had inferred an obligation to introduce an objective, reliable and accessible system of recording working time concern aspects of the organisation of working time in order to ensure the protection of the safety and health of workers. However, they do not, in principle, apply to workers' remuneration.

Current Case Law

Obligation to pay for changing and set-up times of a guard police officer

BAG of 13.10.2021 - 5 AZR 295/20

Facts:

One of the issues in dispute is the obligation of the defendant Land to pay for changing and set-up times. The plaintiff is employed as a guard police officer in the central security service. He has to go on duty in his uniform together with personal protective equipment (PPE) and a service weapon ready for use on patrol. He does not have a locker at his disposal at the place of deployment. However, he is provided with a weapons locker by the defendant. He is allowed to keep the service weapon at home and puts it on and takes it off there, as well as the uniform and the PPE.

Decision:

1. An obligation to pay for **changing clothes was** affirmed. The plaintiff is obliged to wear the uniform and the PPE. He can only comply with this instruction if he puts on and takes off the uniform and PPE in the domestic area, as there is no locker available to him at his place of work. Thus, the plaintiff did not decide on his own to put on and take off his uniform and PPE at home instead of at work.

2. The times of **arming the service weapon,** on the other hand, are **not working hours subject to remuneration within the** meaning of § 611 a II BGB. § 611 a II BGB. The plaintiff independently decided, without instructions, to make use of the possibility to take the service weapon home and to put it on and take it off there, although he had a service weapon locker at his disposal at the police station near his home. The storage of the service weapon at home was therefore not exclusively for the benefit of others.

Current Case Law

Obligation to pay for changing and set-up times of a guard police officer

BAG of 13.10.2021 - 5 AZR 295/20

Conclusion:

- The BAG continues its case law on the remuneration of changing and set-up times.
- Ultimately, it depends on **whether the** activity in question is of **benefit to oneself or to others.**
- **Excursus: As a rule, commuting times** between home and the workplace are **not subject to remuneration,** as they are part of the private lifestyle and are not performed in the sole interest of the employer. The employee must offer his work performance at the place of the owed performance, i.e. at the workplace. The journey to work is therefore in principle private.
- However, the situation may be different if the employee has to perform his activity **outside the enterprise.** If the economic objective of the overall activity is to visit various customers - whether to provide services there or to arrange or conclude business for the employer - driving to the external place of work is one of the main contractual duties (examples: field worker, fitter) and is thus working time subject to remuneration.

Current Case Law

The default of acceptance wage within the meaning of section 615 of the German Civil Code (Bürgerliches Gesetzbuch - BGB) cannot be subject to an **exclusion period/exclusion clause,** at least up to the amount of the statutory minimum wage (BAG, NZA 2022, 1465).

Guiding principles:

1. If an employee's entitlement to remuneration is maintained under section 615 sentence 1 of the Civil Code for periods without work performance, the minimum wage under section 1 II 1 of the Minimum Wage Act is to be included as a monetary factor in the calculation of the remuneration, so that it cannot be forfeited in this respect under a collective agreement or other preclusion period provision because of section 3 sentence 1 of the Minimum Wage Act (marginal no. 17).

2. The employee's will to perform, which is required for the employer's default of acceptance under section 297 of the German Civil Code, is an internal fact, for the external expression of which mere "lip service" is generally not sufficient (marginal no. 28 ff.).

Current Case Law: Agreement On Objectives (1/2)

Insofar as a remuneration claim depends on the bilateral **agreement of targets**, the employee is entitled to compensation if no agreement is made. If the employer has a **unilateral right of determination,** Section 315 of the German Civil Code (BGB) (equitable discretion) applies, which is subject to judicial review (BAG, NZA 2022, 268; LAG Baden-Württemberg, BeckRS 2022, 23296).

Guiding principles of the BAG:

1. The direct and mandatory effect of works agreements under section 77 IV BetrVG is directed at the organisational unit of the establishment. Employees are therefore only subject to the provisions of a works agreement if they are integrated into the establishment or part of the establishment for which the works agreement was concluded (para. 45 f.).
2. Company agreements are to be interpreted in relation to the company. It depends on the prevailing understanding in the enterprise. If the parties use fixed legal terms, it must be assumed that they know their meaning and want to use them in this sense (para. 71 f.).
3. If the payment of remuneration presupposes that targets have been agreed and achieved, a claim for performance is excluded if the parties to the employment contract have failed to agree on targets in due time. A claim for damages by the employee may then be considered. From a procedural point of view, this is a different subject matter than the claim for performance (margin no. 55, 129).

Current Case Law: Agreement On Objectives (2/2)

Insofar as a remuneration claim depends on the bilateral **agreement of targets**, the employee is entitled to compensation if no agreement is made. If the employer has a **unilateral right of determination,** Section 315 of the German Civil Code (BGB) (equitable discretion) applies, which is subject to judicial review (BAG, NZA 2022, 268; LAG Baden-Württemberg, BeckRS 2022, 23296).

Guiding principles of the BAG:

(4) If the employer has to unilaterally determine a performance-related remuneration and to exercise equitable discretion, the discretion of the courts of fact in applying the indeterminate legal concept of equitable discretion is subject to only limited review under the law of review. The review court checks whether the appellate court has misunderstood the legal concept itself, whether it has violated the laws of reasoning or general principles of experience when subordinating the facts to the legal norm, whether it has taken into account all essential circumstances and whether the judgement is free of contradictions. On the other hand, it is subject to unrestricted review by the appellate court whether it has correctly determined the limits of its equitable discretion, e.g. by interpreting a works agreement without an error of law (paras. 64, 98).

(5) Limits to the exercise of equitable discretion may arise for the person entitled to make a determination under section 315 of the Civil Code because he has bound himself. In order to be able to assume a self-binding, there must be special indications from which a certain degree of bindingness results. If these conditions are met and the person entitled to make a determination deviates from his or her original decision without special circumstances, he or she is behaving inconsistently and is in breach of § 242 BGB (marginal no. 103).

(6) If a due date has been fixed for a performance which is to be determined at equitable discretion, it may also be decisive if the performance is determined by the court within the meaning of section 315 III 2 BGB. In this case, the performance does not only become due when the discretionary judgment becomes final (marginal no. 125).

Home Office

Current Case Law

There is no general entitlement to a **home office**; if the employer grants the employee the right to work from the home office by means of instructions, the employer may withdraw the home office instruction if operational reasons exist (LAG München, NZA-RR 2021, 629).

Reasons for the decision of the LAG Munich (judgement of 26.8.2021)

1. If an employer allows an employee to perform his or her work as a graphic designer from home, he or she is entitled to change his or her instruction pursuant to section 106 sentence 1 of the Trade, Commerce and Industry Regulation Act (GewO) if operational reasons later emerge that speak against the completion of work in the home office.

2. In principle, an employee has no right to perform the work owed under his or her employment contract at his or her place of residence.

3. There is no urgency in a work-from-home rule if the applicant for the injunction fails to enforce his application promptly in the main proceedings and the now scheduled hearing in the main proceedings, which has been rescheduled twice at the request of his counsel, takes place in eight weeks, of which the applicant for the injunction, who has been vaccinated twice, has three weeks of leave and works in a single office at a low incidence of the SARS-CoV-2 pandemic.

Video Surveillance in the Workplace

Current Case Law

Video surveillance may **not** regularly be used to monitor working time (LAG Niedersachsen, BeckRS 2022, 26626).

Guiding principles of the LAG Niedersachsen, Urt. V.6.7.2022 (8 Sa 1148/20)

1. If the employer undertakes in a works agreement not to carry out a personal evaluation of data obtained through the use of card readers, the individual employee may also rely on this. (para. 48)

2. If the employer declares in an operational concept or on a signage of a video surveillance system that the data obtained from this will only be kept for 96 hours, an employee can base on this the legitimate expectation of privacy that the employer will only have access to video files which - when viewed for the first time - are not older than 96 hours. (para. 51)

3. As a rule, a video surveillance system at the entrance gates of a company's premises is neither suitable nor necessary for the purpose of monitoring working hours. (para. 64 - 66) 4 The - first-time - access to video recordings dating back more than one year is generally not appropriate for the purpose of uncovering alleged working time fraud. Such data are subject to a ban on the use of evidence in unfair dismissal proceedings. (para. 67)

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