LEGAL UPDATE
Labour and Employment Law
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Right to full pay during invalidly ordered short-time work

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Short-time work has worked well for many companies in Germany since the beginning of the Covid-19 pandemic. However, short-time work may not be unilaterally implemented but requires a basis under individual or collective employment law. If such a basis is lacking and short-time work is thereby invalidly implemented, companies could not only trigger recovery claims from the Federal Employment Agency (Bundesagentur für Arbeit) for governmental short-time allowances that had been provisionally granted. As shown in a judgment of the Siegburg Labour Court (Arbeitsgericht, ArbG) dated 11 November 2020, companies must also expect salary claims from those employees affected by short-time work.

The decision of the Siegburg Labour Court

The Siegburg Labour Court ordered the defending employer to pay the claimant's current salary in full for the months of March to June 2020 inclusive. The employer had only paid the employee a lesser amount in these months designated as "short-time allowance". As short-time work had been introduced without a contractual basis and had therefore taken place unilaterally, the employer was found to be in default of acceptance. Therefore the claimant should have retained their right to their entire salary. The court upheld the claimant's claim in full.

Facts of the matter

The claimant was employed as bus driver by the defendant earning a monthly gross salary of €2,100.00. The company did not have a Works Council. In a letter dated 16 March 2020 the defendant notified the claimant that short-time work was being implemented in various areas of the company. The claimant did not agree to this. There was no prior contractual basis to introduce short-time work. The first phase of short-time work followed from 23 March 2020. Although the claimant offered their entire work performance, they only received a reduced salary for the following months until June inclusive of between approximately €1,100.00 and €1,500.00. The claimant eventually terminated their employment contract themselves on 14 June 2020 without giving notice.

In their claim the claimant requested that they be paid their entire salary for the months in question and to receive the corrected electronic income tax statements.

The court's judgment and its practical significance

The court ordered the defendant to pay the unadjusted salary for the months of March to June 2020. In addition, it ordered the defendant to issue and hand over a new electronic income tax statement. In spite of/thanks to the straightforward reasons for the decision, they clearly show what went wrong when short-time work was introduced.

Prior legal basis required to introduce short-time work

Short-time work may only be ordered unilaterally if it is permitted by an individual contract, a Works Agreement or by collective agreement. In other words, a valid legal basis is required. Without such a basis, the company has no right to claim short-time allowance from the Federal Employment Agency. At the same time, the employee's fundamental right to receive their full salary from the employer remains. As there was no agreement entered into under individual or collective employment law regarding the introduction of short-time work in this case, the employer could also not unilaterally order it. The defendant was in default of acceptance as the claimant had offered to continue to provide the performance owed under the employment contract.

Legal basis requirements

The (already invalid) short-time work order was also announced to the employee as "probable short-time work". The "probable" short-time work did not constitute a valid agreement. As per the case law of the Federal Employment Court (Bundesarbeitsgericht, BAG), the contractual parties must in fact ensure clarity regarding the rights and obligations during short-time work. The minimum requirements are the commencement and duration of short-

time work, provisions regulating the location and distribution of the working hours and the number of affected employees (BAG, 18 November 2015 on Works Agreements).

Short-time work may also not be announced from one day to the next. However the case law does not (yet) state any specific lead times. It is clear, however, that short-time work introduced without a notice period is invalid (cf. Berlin Brandenburg Regional Labour Court (Landesarbeitsgericht, LAG) 7.10.2010). The affected employees must be able to adjust to the change of circumstances. Notice periods of a minimum of five working days up to three entire weeks have been declared valid. Generous notice periods should therefore be agreed to be on the safe side when introducing short-time work.

Co-determination of the Works Council

If the company has a Works Council it must be involved as per section 87 (1) no. 3 Works Council Constitution Act (BetrVG). The Works Council is entitled to exercise its right of co-determination in the event of any temporary reduction of the hours normally worked in the establishment. Returning to the hours normally worked in the establishment is not subject to the co-determination process. According to the settled case law of the BAG, this does not represent a change to regular working hours or working conditions. The rights of the Works Council to participate are limited here.

Outlook

In the matter of short-time work, the court's decision throws light on payment entitlements arising from the employment contract between the employer and the employee for the first time. It's foreseeable that the judgment will only be one of many. However, this is inextricably linked to the possible recovery claims that may be filed by the Federal Employment Agency against companies that have been paid short-time allowances. If short-time work has been invalidly introduced and consequently no right to claim short-time allowances existed, these allowances can and will be reclaimed. If possible, companies should make financial arrangements to prepare for this eventuality.

Note

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