

Reducing annual leave entitlement for “zero” short-time work

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There is a growing number of court decisions that are related to the introduction and implementation of short-time work. Currently, in our [Newsletter](#) an article dated 9 March 2021 discusses [a decision at first instance](#) which dealt with the question of remuneration in default of acceptance during invalidly ordered short-time work.

Now there is a [Press Release](#) regarding a decision of the Düsseldorf Regional Labour Court (Landesarbeitsgericht, LAG) dated 12 March 2021 (Az.: 6 Sa 824/20) which addresses the equally intensively discussed question of the effect of “zero short-time work” (where working hours are reduced to “zero”) on annual leave entitlement.

Background

With regard to the introduction of “zero short-time work” and “annual leave” the question regularly arises whether the statutory annual leave entitlement is also reduced accordingly as a result of the “zero short-time work”. The background for this is that while paid leave for recuperation is a fundamental entitlement of employees and has to be granted every year, the amount/extent of the annual leave entitlement should depend on how many days per week the employee is contractually obligated to work.

The Federal Annual Leave Act (Bundesurlaubsgesetz, BUrlG) does not provide a direct answer to the question of reducing annual leave entitlement during zero short-time work. The extensive and complicated case law at the highest level of the judiciary regarding annual leave entitlement has also not yet directly dealt with answering this question. It is therefore all the more appreciated that the Düsseldorf LAG “has shed some light” on the matter with its decision and came to the welcome conclusion that at least for periods of “zero short-time work” annual leave entitlement is reduced accordingly.

Facts of the matter

According to the press release the case was about a Claimant who was employed part time by the Defendant for three days a week. As a result of the Covid-19 pandemic, the Defendant repeatedly introduced “zero

short-time work” from 1 March 2020 which the Claimant was also directly affected by. Out of the 14 days of annual leave she is entitled to annually she only took a total of 11.5 days of annual leave since the first introduction of “zero short-time work”

With her claim the Claimant sought the determination that her full annual leave entitlement in the amount of 14 days was owed to her for the year 2020. To substantiate her argument the Claimant referred, among other things, to the fact that differently from taking annual leave, short-time work does not take place at the wish of the employee but is in the interest of the employer. It didn't constitute free time as the employee was after all subject to reporting duties during short-time work and the short-time work could have been ended at any time by the employer which meant that free time could not be planned.

Decision of the Düsseldorf Regional Labour Court

Even if the decision has to date only appeared in a press release, some of the important arguments made by the LAG can already be ascertained. The LAG's main argument is that the purpose of statutory annual leave is to recuperate from working. This makes it necessary that there is a fundamental obligation to work which is simply not the case in the event of “zero short-time work” due to both parties suspending their performance obligations. The case law surrounding annual leave entitlement in the event of inability to work because of illness where, despite being unable to work due to illness for the entire year, employees are still entitled to claim their full annual leave allotment is not contrary to this decision according to the LAG. In fact, this decision is in line with European law as according to the case law of the Court of Justice of the European Union during the period of zero short-time work the minimum annual leave entitlement does not accrue and it is unforeseeable that German law would seek to introduce an arrangement that is more beneficial for the employee.

Outlook

The decision is to be welcomed. In particular following the case law of the Court of Justice of the European Union on "annual leave" and "zero short-time work" as well as the BAG's case law on annual leave entitlement during a sabbatical, good arguments for the decision of the LAG should not be difficult to find. At the same time clarification of this issue at the highest level of the judicature is pending and therefore legal uncertainties remain.

It remains to be seen whether any conclusions about the issue of annual leave entitlement can be drawn from the decision if the short-time work is not "zero", but rather the obligation to work is merely reduced to a lesser extent.

Note

This overview is solely intended for general information purposes and may not replace legal advice on individual cases. Please contact the respective person in charge with GÖRG or respectively the author Dr David Sundermann unter +49 221 33660-541 oder dsundermann@goerg.de. For further information about the author visit our website www.goerg.com.

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