

Doctor's notes are not a free pass

Dr Ulrich Fülbier

Background

It is often the case in practice that doubts arise regarding the illness stated in doctor's notes certifying incapacity for work (DNs) submitted by employees, for instance because the DNs regularly include the period directly before or after weekends and annual leave as they are back dated or because an employee has previously openly announced that they are going to "take sick leave" (for example after a request for annual leave is rejected). Although many employers feel that they are in a defenceless position in these situations, this is not actually the case. Reasonable doubts regarding the illness may weaken the evidentiary value of a doctor's note and justify an employer's decision to withhold pay for the concerned period. This was once again confirmed by the Federal Labour Court (Bundesarbeitsgericht, BAG) in [a recent decision dated 8 September 2021 \(AZ: 5 AZR 149/21\)](#).

Ruling

In that particular case the employee gave notice to terminate her employment contract and then submitted a doctor's note certifying incapacity for work to the employer that was indicated as an initial certificate and dated the same day as the termination notice. The employer refused to continue to pay the employee, asserting that the evidentiary value of the doctor's note certifying incapacity for work was weakened by the fact that it exactly covered the remainder of the employee's notice period when the employee had given notice voluntarily. In contrast the employee claimed that she had been properly signed off sick and was facing burn-out.

The BAG upheld the employer's decision despite lower courts finding in favour of the application for continued payment of wages for the period covered by the doctor's note.

The presentation of the specific circumstances of the employee being signed off sick weakened the evidentiary value of the doctor's note certifying incapacity for work. It was then the employee's task to evidence their incapacity for work, in particular through the testimony of the treating physician (after releasing them from their confidentiality obligation). This was not sufficiently specifically satisfied here by the employee.

Practical consequences

It has been once again shown that the powerlessness felt by many employers in these types of situations is unfounded. A doctor's note is not a free pass. It is often worth taking a more in-depth look at the circumstances surrounding the illness and throwing out the submitted DN in this situation because reasonable doubts about the alleged incapacity for work can weaken the evidentiary value of the doctor's note. The employee could have easily also taken the opportunity in this case to evidence her incapacity for work by naming her treating physician or by submitting further evidence. If there actually was no illness or personal contacts were used to sign an employee off sick, the employee would/should think twice about whether they should actually involve the treating physician in the legal dispute in order to satisfy their procedural obligation to present their case and the burden of proof.

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. Ulrich Fülbier unter +49 89 3090667-62 or by email to ufuelbier@goerg.de. For further information about the author visit our website www.goerg.com.

Our Offices

GÖRG Partnerschaft von Rechtsanwälten mbB

BERLIN

Kantstraße 164, 10623 Berlin
Phone +49 30 884503-0, Fax +49 30 882715-0

COLOGNE

Kennedyplatz 2, 50679 Köln
Phone +49 221 33660-0, Fax +49 221 33660-80

FRANKFURT AM MAIN

Ulmenstraße 30, 60325 Frankfurt am Main
Phone +49 69 170000-17, Fax +49 69 170000-27

HAMBURG

Alter Wall 20 – 22, 20457 Hamburg
Phone +49 40 500360-0, Fax +49 40 500360-99

MUNICH

Prinzregentenstraße 22, 80538 München
Phone +49 89 3090667-0, Fax +49 89 3090667-90