

LEGAL UPDATE ARBEITSRECHT

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BAG: Contesting the evidentiary value of a doctor's note

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In a judgment dated 13 December 2023, the Federal Labour Court (Bundesarbeitsgericht, BAG) ruled that the evidentiary value of (follow-up) doctor's notes may also be contested, if, after receiving notice of dismissal, the ill employee presents one or more follow-up doctor's notes relating to the exact duration of the notice period and the employee starts a new job straight away after the end of their employment (*BAG, judgment dated 13 December 2023 – 5 AZR 137/23 – Federal Labour Court*).

Here the BAG continued its line of case law from 2021 (*BAG, judgment dated 8 September 2021 – 5 AZR 149/21 - Federal Labour Court*). In 2021 the BAG held that if the doctor's note coincided exactly with time remaining until the end of the notice period with the employee's resignation given to the employer, the evidentiary value of the doctor's note may be contested. Until now it has been unclear to what extent this also applies to dismissal by the employer and what conditions are to be placed upon any coincidence in the timing of of the doctor's note and the period of time until the end of the notice period due to the one-off nature of this decision.

BAG judgment dated 13 December 2023 – 5 AZR 137/23

The BAG's judgment of 13 December 2023 dealt with these questions.

In the case in question, the employee who brought the action produced a doctor's note to the defending employer on Monday, 2 May 2022 which commenced on 2 May 2022 and was expected to expire on 6 May 2022. The employer dismissed the employee by way of a written notice dated 2 May 2022 with effect from 31 May 2022, which was delivered to the employee on 3 May 2022. Two follow-up doctor's notes confirmed the employee's inability to work until exactly the end of the notice period on 31 May 2022. On Wednesday 1 June 2022 the employee was able to work again and started a new job with a different employer. The defending employer refused to continue to pay the employee for their absences due to illness in May 2022, as they contested the evidentiary value of the doctor's notes.

The prior instances rejected the position of the defending employer and held that the claimant should have been continued to be paid.

The employer's appeal on a point of law was partially successful. The BAG overruled the previous instance to the extent that the employer's appeal was confirmed with regard to payment for the period of 7 May 2022 to 31 May 2022.

The evidentiary value of a doctor's note

The BAG initially based the reason for its decision on its case law on the high evidentiary value of properly issued doctor's notes. It held that the employer was able to contest the evidentiary value of a doctor's note, however, by submitting facts and, in the event of a dispute, by providing evidence that brings into question whether the employee was ill. Merely contesting the illness with a lack of knowledge would not be sufficient here. The court stated that if the employer submitted evidence contesting the evidentiary value of a doctor's note, the original burden of proof remains and the employee must provide evidence that their inability to work gives rise to their claim for the continued payment of remuneration in accordance with section 3 (1) sentence 1 of the German Continued Payment of Wages and Salaries Act (EntgFG).

Contesting the evidentiary value

The court then held that as circumstances for contesting the evidentiary value of doctor's notes it is irrelevant whether the employer or the employee gave notice or whether one or multiple doctor's notes had been presented to prove the employee was ill. It is, however, always necessary to assess the entire situation on a case-by-case basis. With the first doctor's note there was no chronological coincidence between the dismissal and the illness, as the doctor's note was issued on 2 May 2022 and therefore had been issued before the notice of termination was received. This was different with the follow-

up doctor's notes with an extension to the employee being signed off to exactly the same date as the end of the notice period and the fact that the claimant directly started a new job with a different employer the next day.

The BAG also suggested that if it can be proven that the employee was aware that their employer intended to dismiss them, for example, by being involved in a Works Council hearing, a doctor's note that expired on the last day of the notice period and they then started a new job on the following day, then the evidentiary value of the doctor's notes could be contested for the entire period in these circumstances.

Further examples

This has progressed the previous case law on contesting evidentiary value.

Alongside the aforementioned situations the evidentiary value was contested even in cases where the submission by the employee and the content of the doctor's note do not correspond (*BAG, judgment dated 26 October 2016 – 5 AZR 167/16 - Federal Labour Court*), where the issuing doctor had not examined the employee before issuing the doctor's note (*BAG, judgment dated 11 August 1976 – 5 AZR 422/75*), where the employee's absence took place after an argument with the employer (*BAG, judgment dated 4 October 1978 – 5 AZR 326/77*), where the employee had been regularly signed off sick at the beginning or end of their annual leave (*BAG, judgment dated 20 February 1985 – 5 AZR 180/83*) and where the employee pursued professional activities independently or for another employer at the time they were signed off sick (*BAG, judgment dated 26 August 1993 – 2 AZR 154/93; Rhineland-Pfalz Regional Labour Court (Landesarbeitsgericht, LAG) Rhineland-Pfalz, judgment dated 4 May 2021 – 6 Sa*

359/20 - Rhineland-Pfalz Regional Labour Court).

Practical relevance and conclusion

This recent decision of the BAG provides employers with new instructions on when to forgo the continued payment of remuneration. The further examples can also be considered as guiding principles here. However, it is always decided on a case-by-case basis so that even (supposedly) minor differences in the facts may be assessed differently by the court.

It is also important to consider that only contesting the evidentiary value of the doctor's note may not be sufficient for the claim to continued remuneration to lapse. Rather the employee may also be able to present other specific information which evidences the conclusion of an existing illness in the dispute. The employee must then, however, substantiate which ill-

nesses had occurred, which health-related restrictions had occurred or medicines which would have been prescribed by a doctor.

In light of this, it would be preferable for both parties, however, if the legislature introduced clear guidelines so costly litigation could be avoided and legal certainty increased.

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. Friederike Hoffmeister by phone +49 30 884 503-122. For further information about the author visit our website www.goerg.com.

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