



DUISBURG LABOR COURT: RISKS OF SMOKING – TIME FRAUD

HEADNOTE Employees who take smoking breaks without clocking out run the risk of being dismissed without notice (Labor Court (Arbeitsgericht) – Duisburg, 14 September 2009, 3 Ca 1336/09).

FACTS The employee who brought the action, who had been with her employer for many years, regularly interrupted work to take smoking breaks. The employer's enterprise used a time recording system, and company rules required that employees "clock out" to take smoking breaks. The claimant had already violated this rule several times in the year 2008 and received a formal written warning for that reason. Despite her misconduct, she took smoking breaks on three consecutive days in the spring of 2009 without recording the time not worked. Since she also failed to submit a corrected time sheet subsequently, she was ultimately dismissed without notice.

DECISION The Duisburg Labor Court dismissed the claim for unfair dismissal, finding that she was dismissed without notice for good cause (Section 626 of the Civil Code). The Labor Court held as follows: The company rule requiring that employees clock out to take smoking breaks was binding and applicable to the employment relationship, but the claimant repeatedly and persistently violated the rule. Despite issuance of a formal written warning, she did not change her conduct. Her misconduct was of a serious nature, and due to the loss of trust and confidence, continuation of the employment relationship would have been unreasonable.

COMMENTS At first glance, the judgment would seem to be consistent and comprehensible since it does reflect the case law of the Federal Labor Court on time fraud. Nevertheless, it is always necessary to examine each case individually to determine whether irregularities in time recording actually do suffice for dismissal (without notice). In the present case, the claimant had

already been given a corresponding warning. In such cases, for reasons of precaution, notice of dismissal based on an employee's misconduct should – after consulting the works council in the matter – also be given. Had a formal written warning not been given, the employee's claim would likely have been upheld. Moreover, it is also always necessary to determine whether time records actually have a bearing on compensation. For example, in its meticulously grounded judgment of 24 June 2009, the Düsseldorf Higher Labor Court upheld the claim of an employee who interrupted work to take a half-hour coffee break. He did not record these interruptions on his time sheets. However, the time sheets were used only for internal purposes and were irrelevant in respect of his compensation. Finally, in the case of the use of working time accounts, it is necessary to ascertain whether time fraud can even result in a loss for the employer in the first place. Works council agreements are often formulated so that deficit hours at the end of a period need not be made up. On the basis of this situation, the claim of an employee who had indeed manipulated his working time account to gain an hour but whose account was, however, running a significant "deficit," was successful before the Cologne Labor Court. In this case, the interests of the employee were found to outweigh those of his employer.