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Dos and Don´ts to Enforce Equal Working Conditions

Dear Reader,

Before the "summer break", we would like to inform you of two recent labor court decisions that should be of practical importance to many employers.

I. Entitlement of Mini-Jobbers to Equal Pay – Federal Labor Court, Judgment dated January 18, 2023 - 5 AZR 108/22

The plaintiff in this decision of the Federal Labor Court ("BAG") worked as a paramedic for the defendant as part of a marginal employment (so-called mini-job). Among other things, the defendant provided emergency rescue and ambulance services. For this purpose, it employed so-called "full-time" paramedics in full and part time as well as so-called "part-time" paramedics without fixed working hours.

Unlike the full-time paramedics, the part-time paramedics functioned as a "deployment reserve" or "floater" with agreed minimum monthly working hours, but without a concrete shift schedule. They could also name desired dates for their respective assignments, which, however, did not have to be taken into account. Rather, the defendant informed the part-time paramedics of vacant shifts that still needed to be filled and asked them to take over the corresponding duty times with short-term requests in the event of the absence of full-time paramedics.

Because the part-time paramedics were only "reserve" or "floater" employees, the defendant compensated them at a lower hourly rate than comparable full-time or part-time employees.

Thus, the plaintiff received an hourly remuneration of EUR 12.00 gross. Full-time colleagues were paid an hourly rate of EUR 17.00 gross.

In his lawsuit, the plaintiff demanded further compensation for the period from January 2020 to April 2021 in the amount of the difference between the compensation paid to him and the compensation paid to his full-time colleagues.

The defendant argued that the difference in remuneration was objectively justified due to the greater planning certainty and the lower planning effort for full-time paramedics.

They also received a higher hourly rate of pay because they were required to report for specific duties as instructed.

The BAG ruled that the respective employees must be treated equally in terms of remuneration and upheld the plaintiff's claim.

Lower hourly pay for mini-jobbers and other part-time employees with comparable qualifications and performing the same job violates the prohibition of discrimination under Section 4 of the Part-Time and Fixed-Term Employment Act (TzBfG).

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The increased planning effort for part-time employees claimed by the defendant does not constitute an objective reason to justify unequal treatment.

In addition, the employees who form a "deployment reserve" are also not free to organize their working hours, because they are not entitled to be assigned the desired shift times either in terms of location or time, but are only allowed to express "wishes".

Employees from the "deployment reserve" are also subject to the limits imposed by the Working Hours Act with regard to the duration of working hours and the observance of rest breaks.

ADVICE: To avoid any claims for back pay against your company, check - preferably before hiring - whether part-time employees / mini-jobbers receive the same hourly wage as full-time employees with comparable qualifications and activities.

In addition, it is advisable to include an effective preclusion period / forfeiture period clause in your current employment contract template.
If the employment contract in the case described above had contained such a provision, the claim for back pay would only have been limited to a period of three months.

II. Justification of an extraordinary Dismissal in the case of a so-called "Wildcat Strike" – Higher Labor Court Berlin-Brandenburg, Judgment of April 25, 2023 - 16 Sa 868/22 et al.

Another decision of practical relevance was made a few weeks ago by the Berlin-Brandenburg Higher Labor Court.

The background to this decision was the media-effective protests by employees at the delivery service Gorillas in October 2021, in which a large number of courier drivers (so-called "riders") gathered during working hours to protest in front of individual branches of the delivery service. In particular, they blocked access to the affected branches or turned delivery bikes upside down in protest.

The strike lasted four days and was aimed at achieving an improvement in employment conditions - including on-time pay and the provision of rain gear.

The delivery service itself classified the action as a "wildcat" strike and issued around 350 extraordinary and summary dismissals to those involved.

Two employees who were demonstrably actively involved in the preparation and implementation of the protests were extraordinarily terminated.

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In its decision, the Berlin-Brandenburg Higher Labor Court confirmed the effectiveness of the extraordinary dismissals. It found that participation in a "wildcat strike" constituted a significant breach of work duties. This was also not protected by the freedom of association under Article 9 para. 3 sentence 1 of the German Constitution, because a "wild" dispute is precisely not organized in a trade union and therefore does not fall within the scope of this fundamental right. Nothing else would result even taking into account the Revised European Social Charter.

Since the employees' participation in the "wildcat" strike had completely destroyed the relationship of trust, a prior warning was also not necessary.

The evaluations of the Berlin-Brandenburg Higher Labor Court can be generalized to a large extent and can also be applied to other cases of "wildcat" strikes, taking into account the particularities of the individual case.

Our "Employment Law" newsletter is now going into its summer break. However, our employment law team will of course be happy to answer any questions you may have during the summer months. Enjoy the summer!

Your employment law team

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