Quarantine, termination and continued payment of wages

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While Covid-19 cases are falling the frequency of labour law decisions regarding the Covid-19 pandemic are on the increase. A number of decisions from the labour courts will be outlined below which provide example situations that employers and employees could be exposed to during the Covid-19 pandemic and can therefore serve as a yardstick for answering employment law questions.

1. Coughing on a colleague can justify extraordinary termination

We would like to start by looking at a decision of the Düsseldorf Regional Labour Court (Landesarbeitsgericht, LAG) (decision dated 27 April 2021 – 3 Sa 646/20), which is currently only available as a press release. As can be inferred from this there was a hygiene policy at the defending employer which stipulated that the employees were supposed to maintain sufficient distance from each other and when coughing or sneezing were supposed to sufficiently cover their mouth and nose. The Claimant, being aware of this policy, had breached the corresponding rules on several occasions. Finally he was said to have coughed on a colleague at close range and then stated that he hoped the colleague would get "corona". The problem in this case was, however, that these exact circumstances were disputed and the Claimant put forward a completely different version and in the end was able to successfully defend himself against the termination.

This decision is still of great interest as the Düsseldorf LAG heard evidence of the exact occurrence and according to the press release stated that if events had taken place in the version presented by the employer this would justify extraordinary termination as in this case it would be an infringement of the consideration obligation inherently present in every contractual relationship between employer and employee and every employee ought to have been aware of this in March 2020. It would not have called for a written warning as the Claimant had also stated that he was not prepared to follow the occupational health and safety regulations.

The decision shows that the intentional breach of the hygiene policy may be suitable "in itself" to represent a good cause for extraordinary termination.

2. Dismissal of an employee who is quarantined

With its judgment dated 15 April 2021 (Az.: 8 Ca 7334/20), the Cologne Labour Court (Arbeitsgericht, ArbG) held that the dismissal of an employee who could not perform their obligation to work because they were quarantined was invalid. This also applies if the quarantine was only imposed verbally and the employee cannot initially provide evidence of their obligation to observe the quarantine. The dismissal was declared to be invalid even though the employee worked in a small company and therefore could not claim protection against dismissal under the Protection Against Unfair Dismissal Act (Kündigungsschutzgesetz, KSchG). The dismissal would not have withstood the tighter controls of social justification under the Protection Against Unfair Dismissal Act under any circumstance.

3. Remuneration in default of acceptance when shut down by the authorities

The Niedersachsen Regional Labour Court (Landesarbeitsgericht, LAG) (Niedersachsen LAG, judgment dated 23 March 2021 – 11 Sa 1062/20) and recently also the Düsseldorf Regional Labour Court (Landesarbeitsgericht, LAG) (Düsseldorf LAG, judgment dated 30 March 2021 – 8 Sa 674/20 - press release) decided that in the event that a company was shut down by the authorities due to the Covid-19 pandemic the employer would still be liable to pay the contractually agreed remuneration of its employees as it would be in default of acceptance. Assuming that neither of the parties to the employment contract are to blame for the circumstances that result in the contractually owed work performance not being able to be rendered/accepted, this decision first seems strange.

This decision was based on the so-called business risk doctrine (Betriebsrisikolehre) where the employer assumes the risk in circumstances that externally affect the company and prevent the continued operation of the

company so that the employer cannot accept the work performance. Both LAGs classified the fact that the company was shut down by the authorities due to the Covid-19 pandemic as a case of business risk. A decision on the issue has not yet been made at the highest level of the judicature by the Federal Employment Court itself (Bundesarbeitsgericht, BAG). The tendency of the case law at lower-court level is so far quite clear however. It remains to be seen whether other LAGs follow this decision and/or whether the BAG decides otherwise in the end.

4. No continued payment of wages for employees when ordered to quarantine by the authorities?

The decision of the Münster Regional Labour Court (Landesarbeitsgericht, LAG) dated 15 April 2021 (8 O 345/20) that has also been discussed in the press is interesting in connection with the above decision. The court ordered the state of North Rhine-Westphalia to reimburse the wages that the football club SC Paderborn had paid to a player who was ordered to quarantine by the authorities (isolation). This decision is interesting from an employment law perspective as the condition for reimbursement in accordance with the North Rhine-Westphalian Prevention of Infection Law (Infektionsschutzgesetz NRW) is the employee's loss of earnings.

The Münster LAG had initially described in great detail why the obligation to continue to pay wages had lapsed based on the "no-work-no-pay" principle. Deviating from the company shutdown situation described above in section 3, the LAG then stated that the provisions regarding default of acceptance necessitating the continued payment of wages did also not apply as the condition for that was that the employee was prepared to perform their contractually owed work and was able to do so. This was not precisely the case here due to the isolation order issued to the employee by the authorities. The Münster LAG also dismissed the notion that the entitlement to wages continued to apply on the basis of Section 616 German Civil Code (Bürgerliches Gesetzbuch, BGB). In accordance with Section 616 BGB, the employee is not deprived of their claim to remuneration if prevented from performing their work for a relatively trivial period of time for personal reasons. A "relatively trivial period of time" is only present in accordance with the Münster LAG's judgment if the absence only lasts a few days, which is no longer the case in the event of a two week isolation period.

The decision of the Münster LAG is very persuasive. The clear statements on the relation of Section 616 BGB to the reimbursement entitlement under the Prevention of Infection Law are welcome. The statements as to why the regulations regarding default of acceptance do not apply in the event of quarantine ordered by the authorities are also welcome. Despite everything this decision cannot be seen as a free pass to deduct wages in the event of quarantine ordered by the authorities or for claims in accordance with the Prevention of Infection Law. One reason for this is that the matter has also not yet been clarified at the highest level of the judicature. Another reason is the fact that the LAG expressly addressed the question of whether the player may or may not have been able to perform his work from quarantine. It is precisely this question which is likely to need to be considered on a case by case basis, especially with a view to the recently introduced obligation to offer the ability to work from home.

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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