LEGAL UPDATE ARBEITSRECHT

Köln, 21.02.2024

Money for doing nothing?

The burden of producing evidence and the burden of proof in the event of work not being carried out when working from home

Anna Huschka, LL.M.

Over the last few years working from home has become the new normal for many employees during the Covid-19 pandemic. Even after the end of the pandemic working from home is still widespread. Working from home is particularly advantageous for employees: no commute, increased flexibility and better work-life balance. The increased level of autonomy of employees has, however, led to employers losing a certain amount of control. Occasionally employees are accused of working less effectively from home or even of not doing any work at all.

On 28 September 2023 the Mecklenburg–Western Pomerania Regional Labour Court (Landesarbeitsgericht, LAG) (5 Sa 15/23) dealt with the issue of who bears the burden of proof when an employee is accused of not doing any work.

Facts of the matter

The claimant had been employed full time as a care manager by the respondent, a daycare facility, since December 2021. She was permitted to work from home and was supposed to record her monthly working hours in a spreadsheet. According to the information in the spreadsheet she worked approximately 300 hours from home between December 2021 and March 2022, when she became unable to work due to illness. The respondent paid her wages for the months of December 2021 through March 2022 without reservation. The employment contract was then ordinarily terminated on 31 May 2022.

The claimant brought a claim for remuneration for the months of April and May 2022 as well as for compensation for her outstanding annual leave. The respondent submitted a counterclaim for the repayment of wages for the 300 hours worked from home. The employer's grounds for this were that the claimant had submitted working hours worked from home totalling 300 hours, without having provided any objective evidence of the work carried out.

Ruling

The LAG held that the claimant was entitled to the remuneration paid and she was not obligated to repay these wages.

With regard to the employer's counterclaim for the repayment of wages the LAG determined that the burden of producing evidence and burden of proof for work that has not been carried out when working from home lies with the employer. The respondent had not provided sufficient evidence that the employee had not carried out any work or less work when working from home. On the contrary, the LAG ruled that emails sent and documents attached had undeniably proven that the employee had carried out some work. It was also irrelevant whether the employee had carried out the work during the required time or to the required extent. The LAG held that it is sufficient for an employee to satisfy their obligation to carry out work if they have reasonably used their individual work capacity. A comprehensive submission would be required from the respondent showing to what extent the claimant had not fulfilled her work obligations when working from home to satisfy this. As the respondent had not demonstrated that the claimant had at least not carried out any work on individual days or hours and which days or hours this related to, the LAG held that the respondent had not sufficiently satisfied its burden of producing evidence and burden of proof.

Practical guidance

The Mecklenburg–Western Pomerania LAG's decision regarding working from home confirmed what was already established case law regarding carrying out work in a company office: the employer is subject to the burden of producing evidence and the burden of proof in relation to the employee not carrying out any work if the employer wishes to recover or retain the employee's remuneration.

This evidence is undoubtedly more difficult to provide for employees who work from home than for employees who carry out their work on the employer's premises. Employers should therefore quickly and adequately react if any doubts arise about the quality and/or quantity of work carried out by employees who work from home. This may, at best, avoid later conflicts and difficulties in providing evidence in advance.

There is a simple opportunity for the employer to react to the situation and provide the employee in question with clear instructions regarding the type and scope of tasks to be carried out, plus binding and realistic deadlines for completion, if these have not yet already been provided to the employee. If the employee does not follow these instructions sanctions under employment law may be considered. If the employee fails to carry out the work which the employer is justified in requiring from them, a formal warning may be given, and in the event of repeated refusals to carry out work, may even result in dismissal.

Another possible option for an employer to address their doubts regarding an employee's work performance is to exercise the employer's right to give instructions and order the employee to keep precise activity reports in addition to the mandatory recording of working time. Such instructions must always be treated with reasonable discretion in accordance with section 106 of the German Industrial Code (Gewerbeordnung, GewO).Therefore in cases where the suspicion that work is not being carried out or not carried out to a sufficient standard is justified and sufficiently documented, such instruction may be covered by the legitimate interests of the employer and thus correspond to reasonable discretion.

Care must be taken when introducing electronic control mechanisms, such as key loggers. Firstly, the introduction of such an IT system is always subject to co-determination in companies with a Works Council in accordance with section 87 (1) (6) of the German Works Council Constitution Act (Betriebsverfassungsgesetz, BetrVG) and secondly it

must be ensured that strict data protection regulations are complied with on an individual basis, as otherwise there may be a risk of significant sanctions. Therefore this type of monitoring is advised against.

Restricting or prohibiting the employee from working from home may also be considered as a last resort. Whether, and if by whatever means, the employer may unilaterally, and if necessary, against the will of the employee, ban them from working from home, which may result in the employee having to carry out their work on the employer's premises from then on, depends to a large extent on what legal grounds working from home is based. If there is no Works Agreement or supplementary agreement to the employment contract in place relating to working from home, the employer may require employees to return to working from its premises at its reasonable discretion. In cases of justified doubt whether the employee is actually carrying out any work, the employer generally has a legitimate interest in giving such instructions. If, however, a supplementary agreement to the employment contract has been entered into permitting working from home, then whether the employee may be recalled to work from the employer's premises depends on how this was drafted. Before granting mobile working employers should therefore think about how to stop this and draft the provisions accordingly. Every supplementary agreement granting the right to work from home should also contain the right to recall employees to work from the employer's premises to allow the employer to react to all future circumstances, such as low performance when working from home.

Hinweis
Dieser Überblick dient ausschließlich der allgemeinen Information und kann konkreten Rechtsrat im einzelnen Fall nicht ersetzen. Sprechen Sie bei Fragen bitte Ihren gewohnten Ansprechpartner bei GÖRG bzw. die Autorin Anna Huschka LL.M. unter +49 221 33660 544 oder ahuschka@goerg.de an. Informationen zum Autor finden Sie auf unserer Homepage www.goerg.de.

Wir verwenden das generische Maskulinum und sehen von einer Nennung aller Geschlechtsidentitäten ab, damit dieser Text besser lesbar ist, und meinen damit ausdrücklich jeden in jeder Geschlechtsidentität.

Unsere Standorte

GÖRG Partnerschaft von Rechtsanwälten mbB

BERLIN

Kantstr. 164, 10623 Berlin
Tel. +49 30 884503-0
Fax +49 30 882715-0

HAMBURG

Alter Wall 20 - 22, 20457 Hamburg
Tel. +49 40 500360-0
Fax +49 40 500360-99

FRANKFURT AM MAIN

Ulmenstr. 30, 60325 Frankfurt am Main
Tel. +49 69 170000-17
Fax +49 69 170000-27

KÖLN

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

MÜNCHEN

Prinzregentenstr. 22, 80538 München
Tel. +49 89 3090667-0
Fax +49 89 3090667-90