Short-time Work vs. Vacation: "0:0"? – Accruing Claims to Vacation While on Short-time Work

INTRODUCTION

Given the ongoing pandemic situation, short-time work continues to be one of the dominant topics in employment law. Recent comments by the Robert Koch Institute (RKI), however, have been fostering the hope that we have at least reached the "final, third period" of the pandemic. As the situation increasingly normalizes, the need for actual manpower, in particular in those industries most heavily affected by the pandemic, will rise again. Employees will then be needed in the workplace with their work performance to avert further economic damage. Then, at the latest, the very practical question of the amount to which employees have earned vacation time during their previous phases of short-time work, will have to be dealt with in addition to the already existing headaches facing employers. The Higher Labor Court of Düsseldorf has very recently spoken on this issue in an important decision.

THE DECISION OF THE HIGHER LABOR COURT OF DÜSSELDORF OF MARCH 12, 2021 (FILE NO.: 6 SA 824/20)

The subject of the decision was a conflict between a company in the gastronomy sector and an employee who had been employed there since 2011 as a part-time shop assistant (3-day week). Under the applicable agreements, the plaintiff was generally entitled in 2020 to a claim of 14 days of annual vacation (based on her part-time status). Starting in April of 2020, repeated temporary layoffs (short-time work "zero hours") applied for the plaintiff due to the Corona pandemic. This was the case for the entire months of June, July and October of 2020.

Over the course of 2020, the defendant gave the plaintiff 11.5 days of vacation. A dispute arose with regard to the question of whether the plaintiff was additionally entitled to 2.5 days of vacation for 2020. The employee was of the opinion that even phases of short-time work ("zero hours") could not have any influence of the scope of her claim to annual vacation because the short-time work caused by the economic situation did not occur at her request but in the interests of the employer. She furthermore noted that she was subject to reporting duties during the short-work time and that the short-time work was thus by no means leisure time. In addition, the employer had had the opportunity to prematurely end the short-time work, which is why she was not able to freely plan her time off, which is typical for vacation time.

In the litigation, the company put forth the opposite view that the claim to annual vacation was to be reduced accordingly because there had been no duty to work at all during the parts of the year when there had been short-time work "zero hours".

Both the Labor Court of Essen as the court of jurisdiction in the first instance, and, most recently, the Higher Labor Court of Düsseldorf have decided this litigation in favor of the employer and are assuming that the phases of short-time work "zero hours" leads to a proportionate reduction in the claim to vacation. As yet, the decision of the Higher Labor Court of Düsseldorf is only available as a press release and not in a fully argued form. However, one may already recognize from the press release that the Higher Labor Court is assuming that no claims to vacation days whatsoever accrued to the plaintiff for the months of June, July and October of 2020 under Sec. 3 Federal Vacation Act because there was no obligation to work during those months. According to the court, the claim to vacation was to be reduced by 1/12 for each full month of short-time work "zero hours". Of particular interest, in fact, is a sentence in the press release that sounds mundane, at first: "In light of the fact that vacation has the purpose of allowing one to relax, this requires that one had a duty to work". In other words: Only those who work or are at least obliged to work have an entitlement to relaxation from this work.

The circumstance that this question is not quite as mundane as the above sentence would suggest is illustrated by the fact that the Higher Labor Court of Düsseldorf has allowed for a second appeal to the Federal Labor Court. The litigation has thus not yet concluded, and one can, indeed, anticipate that the Federal Labor Court will be dealing with this question, which is very controversially discussed in the literature.

CONSEQUENCES OF THE DECISION FOR PRACTITIONERS

The decision by the Higher Labor Court of Düsseldorf is certainly welcome because it would be yet another blow to companies if they were confronted with considerable, (full) vacation claims of employees after the end of the Corona crisis, although these employees had only worked to a very reduced extent or not at all in some cases in the preceding period. However, from a legal standpoint the decision is not quite as obvious as it would appear at first glance. First, unlike

those cases in which parental leave (Sec. 17 (1) Parental Allowance and Leave Act [BEEG] or leave to care for family members (Sec. 4 (4) Care Leave Act [PflegeZG] is taken, there is no express, statutory provision regarding an (automatic) reduction of vacation or at least a possibility for employers to reduce vacation days in the case of short-time work. Furthermore, it has become recognized in the meantime in cases of long-term work incapacity, for instance, that claims to vacation can, indeed, accrue although no work is performed and there is thus no relaxation as such from work, and that these claims will not necessarily lapse if the work incapacity continues (see on this our **Client Newsletter 04/2012**). The latter situation is also addressed by the Higher Court of Düsseldorf in its press release, but the court ultimately assumes that the cases involving short-time work cannot be compared to the situation of work incapacity.

The decision of the Higher Labor Court of Düsseldorf thus offers a viable standpoint at the present time for addressing the question of the accrual of vacation claims during periods of short-time work “zero hours”. As far as we can see, the decision of the Higher Labor Court of Düsseldorf can also be usefully applied in arguments for reducing vacation claims in other cases of short-time work (e. g. if short-time work has “only” meant that an employee who usually has a 5-day work week has only worked on 2 days during part of the year). It will still remain important, however, to keep an eye on how this and similar litigation proceeds and to particularly see whether the Federal Labor Court shares the view of the Higher Court of Düsseldorf. The already existing rulings of the Federal Labor Court (see, for instance, the judgment of March 19, 2019, File no. 9 AZR 406/17 on the reduction of vacation in the case of special, unpaid leave) provide hope that the decision will prevail, but it cannot be ruled out that the European Court of Justice will ultimately be dealing with this question.

Practitioners must always additionally examine whether there are any collective bargaining, company or contractual provisions that could form the basis to evaluate the situation differently than the Higher Labor Court of Düsseldorf. Section 9 (1) of the Collective Bargaining Agreement to Regulate Short-time Work for the Alliance of Municipal Employer Associations (TV COVID) explicitly provides that vacation days will not be reduced by periods in which short-time work is performed. These types of provisions, as rules favoring employees, are undoubtedly permitted in relation to the provisions of the Federal Vacation Act and may result in different findings wherever such provisions have been negotiated.

Should you have questions surrounding the topic of short-time work and vacation or any other employment law questions during the COVID-19 pandemic, please feel free to contact us at any time.

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