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German Tax and Legal News

Inability to work during exemption from work duties after dismissal - Instruction right with respect to compensation of extra hours

Deduction of extra hours in case of an exemption from the work duties during dismissal notice period remains unaffected by later inability to work

The higher labour court of Rheinland-Pfalz confirmed on November 19, 2015 (5 Sa 342/15) that the unilateral exemption of the employee from his work duties during the dismissal notice period, deducting extra hours, does fulfill his claim to paid compensation even in case of illness during this period.

Facts of the case
The employment agreement of the plaintiff, an industrial mechanic, was terminated by the employer with notice. For the duration of the dismissal notice period, the plaintiff was irrevocably exempted from his work duties, deducting existing vacation claims as well as plus hours on his working time account. This exemption was confirmed again by the defendant in writing during the following dismissal protection proceedings. After an amicable agreement on the termination of the employment relationship could not be reached, the employer revoked the dismissal and requested the plaintiff to reassume his work. The plaintiff provided a certificate of incapacity for the time period between the confirming exemption letter until the day the dismissal declaration was revoked and continued to be on sick leave thereafter. The employer shortened the credit on the working time account for the duration of the exemption from the work duties despite the existing inability of the plaintiff to work. In the following, the plaintiff sued for crediting 66.75 plus hours on his working time account.

The LAG dismissed the case, same as the previous instance, and did not allow an appeal.

Judgement of the LAG
The LAG bases its decision on the entitlement of the employer to unilaterally compensate the plus hours on the working time account by paid time off, making use of the general instruction right of the employer in accordance with sec. 106 Industrial Code (GewO). Therefore, it was irrelevant whether or not the contractual exemption clause was valid. Generally, extra hours have to be financially compensated for, however, it is also possible to agree on a compensation by paid time off, in this case in terms of the working time account. Reasonable discretion was used exercising the instruction right, since - after issuing a dismissal with notice - the defendant had a legitimate interest to compensate the extra hours credited on the working time account by granting paid time off until the lapse of the dismissal notice period. Making reference to the jurisdiction of the Federal Labour Court (BAG) (judgment as of September 11, 2003, 6 AZR 347/02), the LAG denied an analogous application of sec. 9 Federal Vacation Act (BUrlG), which provides that during days of inability to work, the vacation claim does not become extinct. Different from the granting of vacation, the compensation by paid time off does not serve an additional need for recovery, but the compliance with the contractual working time. Furthermore, a breach of the Continued Remuneration Act (EFZG) may not be determined, since the EFZG protects the remuneration claim of the employee against its loss as a consequence of inability to work, however, it does not protect the use of his spare time.

Practical advice
The LAG strengthens the employer's instruction right with respect to the timing of the working time, confirming that the employee's entitlement to compensation for extra hours by time off may be fulfilled by an irrevocable revocation from his work duties, deducting vacation claims and other claims for compensation by time off despite the inability of the employee to work. A deduction of credit on the working time account is possible despite the inability to work and leads to the credit on the working time account becoming extinct. Should an employee be exempted from his work duties, having a positive balance on his working time account, in any case a deduction of this positive balance should be declared.

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