GÖRG

YOUR BUSINESS LAW FIRM

LEGAL UPDATE LABOUR AND EMPLOYMENT LAW

Cologne, 04. October 2023

No right to be unavailable outside working hours

Dr Hanna Jansen

Contacting employees in their free time is vital for employers in many cases to ensure the flexibility of operational processes. In its judgement dated 23 August 2023 (5 AZR 349/22), the Federal Labour Court (Bundesarbeitsgericht, BAG) dealt with the issue of whether employees are obligated to accept information regarding changes to the shift plan or to accept instructions from employers specifying their working hours in their free time. This fortunately resulted in a practical solution and the court ruled that employees do not have the right to be unavailable in their free time. Even if the reasoning for the decision is not yet known, the judgments from the first and second instances have already provided important indications for employment law in practice.

Facts of the matter

The claimant is an emergency paramedic employed by the respondent, which provides emergency services for five districts in Schleswig-Holstein.

A Works Agreement regulating various aspects of planning working hours (hereinafter referred to as the "Planning Working Hours Works Agreement" or "PWHWA") was in force at the respondent's business. Section 4 (6) of the PWHWA regulates the allocation of individual floater shifts. These are binding when specific shift allocations are confirmed no later than four days beforehand. If it is not possible to confirm specific shifts at this point, unconfirmed day, late and night shifts are assigned. Section 4 (8) PWHWA further states that unconfirmed assigned floater shifts for day and evening shifts may be confirmed in the shift plan up until 20:00 on the day before the shift. Employees have the ability to access the shift plan at any time on the internet on the SelfService portal set up by the respondent.

The claimant worked his shift as usual on a Tuesday in April 2021. At the end of the working day at 19:00 the claimant was still assigned to an unconfirmed floater shift on the following Thursday, 8 April 2021. On Wednesday, when the claimant did not come to work due to his child being ill (authorised absence), the respondent altered the claimant's shifts in the shift plan at 13:28. Instead of reporting for his usual shift at 07:30 on the Thursday, the claimant was now scheduled to report for a shift at another ambulance station at 06:00.

The respondent attempted to contact the claimant by telephone on the Wednesday to inform him that his shift had been confirmed, but failed to reach him and then sent him a text message. The claimant did not attempt to find out whether his unspecified floater shift had been confirmed,

including via the online portal and therefore first reported for his usual shift on the Thursday at 07:30. The respondent gave the claimant an informal warning and recorded that a day in lieu was owed in his working time account.

The claimant was allocated to the "short notice floater" shift in the shift plan for 15 September 2021 and this was specified as a day shift on 10 September 2021. On 14 September 2021 at 09:15 the respondent updated the shift again to start at 06:30 in P. The claimant first contacted the manager in charge of his working hours by telephone at 07:30. He first started his shift in P. at 08:26. The respondent gave the claimant a final formal warning and did not credit the time from 06:30 to 08:26 to the claimant's working time account.

The claimant petitioned the court to credit the unworked hours to his working time account and for the final formal warning to be removed from his personnel file. The claimant stated that he had not seen the changes to the service plan that were made by the respondent in the claimant's free time and he had not received the calls and the text message from the respondent on his private mobile phone. He is of the opinion that in his free time he is neither obligated to check whether there have been any changes in the shift plan since the end of his previous shift nor to accept any instructions from the respondent regarding working hours.

Decision of the Elmshorn Labour Court

The Labour Court (Arbeitsgericht, ArbG) (judgment dated 27 January 2022 – 5 Ca 1023 a/21) dismissed the claimant's claim. It held that the claimant did not have any further claim to remuneration as the respondent had to adjust his working time account. Likewise, the claimant was unable to demand the removal of the final formal warning from his personnel file due to his unauthorised absence.

The ArbG initially assumed that the respondent had bindingly confirmed the unconfirmed shifts for the claimant on the basis of the provisions of the PWHWA. In addition, the ArbG came to the conclusion that the claimant was subject to a secondary contractual obligation related to the primary contractual obligation which was to serve the preparation, proper implementation, safeguarding and enhancement of the primary obligation, and exists so that the employee can obtain actual knowledge of the shifts he is to work in good time.

The ArbG compared the issue at hand with the employee's obligations related to his work place to which he is still subject to during his free time. The employee is also subject to unquestionable obligations in other areas to take precautions in his free time to ensure he properly carries out his work. The ArbG then first named the obligations with which the employee must comply outside of his working hours in order to ensure that he reports in good time to begin his shift at the correct location. The court stated that he must also check in his free time whether, for example, strikes or certain weather conditions would prevent him travelling to work by public transport and if necessary to try to travel to work by a different method. Likewise, if the employee is unable to work he must inform the employer of this and the expected duration without delay, even without an existing work obligation. Finally, in the opinion of the ArbG, Section 130 (1) sentence 1 of the German Civil Code (Bürgerliches Gesetzbuch, BGB) (and access to/dismissal of an employee at home in their free time) indicates that the employee should remain available to receive communications from the employer independent of any existing obligation under employment law.

As a result, it was reasonable for the ArbG to rule that the claimant was subject to an obligation to obtain information. The online portal provided by the respondent was a time saving and uncomplicated method of communication which was available to inform the claimant of changes to his shifts.

Decision of the Schleswig-Holstein Regional Labour Court

When hearing the claimant's appeal the Regional Labour Court (Landesarbeitsgericht, LAG) evaluated the legal situation in a completely different way and ordered the respondent to credit the claimant's working time account for the hours worked on 8 April 2021 and 15 September 2021 and to remove the final formal warning from his personnel file (judgment dated 27 September 2022 – 1 Sa 39 öD/22).

The LAG rejected the idea that the claimant is subject to an obligation that meant he would have had to open and read work related text messages in order to receive information about his working hours. The court held that while the claimant did have the right to be unavailable, he did not have to interrupt his free time to receive instructions from the respondent. Reading the text messages would have been working time, regardless of the duration. He would not, however, be obligated to carry out his work during his free time. Therefore the respondent, with knowledge of the text message, could expect the claimant to report for work for the working hours made known to the him. In not reading the text message from the respondent and not having actively confirmed any changes to his shift plan via the internet, the claimant was also not acting in bad faith here, said the LAG.

The court left the question open of whether the claimant should have had to follow the instructions, if it could be proven that he was aware of them.

Decision of the BAG

The BAG (judgment dated 23 August 2023 – 5 AZR 349/22) overruled the decision of the LAG and rejected the appeal against the judgment of the ArbG. The decision is thoroughly welcomed. The BAG has rejected the idea that employees have the right to be unavailable outside of working hours and has thus enabled employers to continue to flexibly organise the working hours of their employees.

As the BAG has not issued a press release and the reasons for the decision are not yet known, it remains to be seen whether the BAG has continued to deal with interesting controversial questions – the obligation to obtain information and/or the obligation of the employee to accept instructions from their employer during their free time.

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. Hanna Jansen by email to hjansen@goerg.de or by phone +49 221 33660 534. For further information about the author visit our website www.goerg.com.

Our Offices

GÖRG Partnerschaft von Rechtsanwälten mbB

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

HAMBURG
Alter Wall 20 - 22, 20457 Hamburg
Phone +49 40 500360-0
Fax +49 40 500360-99

FRANKFURT AM MAIN
Ulmenstr. 30, 60325 Frankfurt am Main
Phone +49 69 170000-17
Fax +49 69 170000-27

COLOGNE
Kennedyplatz 2, 50679 Cologne
Phone +49 221 33660-0
Fax +49 221 33660-80

MUNICH
Prinzregentenstr. 22, 80538 Munich
Phone +49 89 3090667-0
Fax +49 89 3090667-90