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EMPLOYMENT BULLETIN

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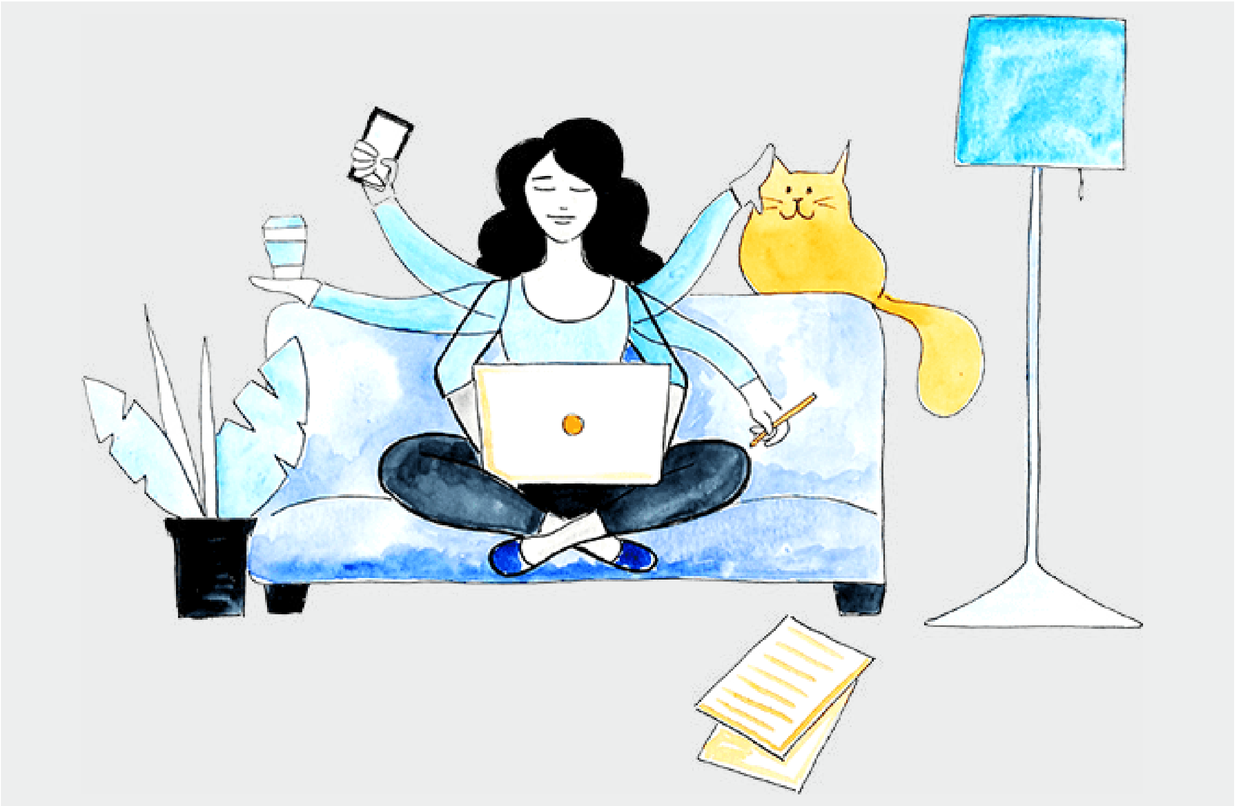

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NEW AUSTRIAN HOME OFFICE LAW

(BGBl 2021/61)

Written by Hans Georg Laimer & Lukas Wieser

Accelerated by the Covid pandemic, the Austrian legislator enacted, for the first time, a specific home office law. Hereinafter, we give you an overview of the main provisions and cornerstones of the implemented provisions, which have to be seen against the background of a (not very well done) political compromise, rather than a sophisticated legislative act.

The law came into force earlier this year, and now has to be applied. The employment law provisions are, in contrast to the tax law provisions concerning home office, not limited in time.

SOURCE

The individual employment law provision is located in Section 2h of the Act on the Adjustment of Labour Law (*Arbeitsvertragsrechts-Anpassungsgestz*, AVRAG). The collective provision providing the possibility to conclude a home office shop agreement with the works council can be found in Subsection 97(1) no 27 of the Labour Constitution Act (*Arbeitsverfassungsgesetz*, ArbVG).

DEFINITION OF HOME OFFICE

Home office is the regular performance of work in the employee's home (Subsection 2h(1) AVRAG).

The legal definition of home office covers all possible places of residence of the employee, such as apartments, flats, dwelling houses, secondary residences, residence of the companion, etc. However, it does not cover any public spaces such as co-working spaces, coffee shops, etc. Thus, the law does not apply to all kind of tele or mobile work, but only applies to working from home.

INDIVIDUAL AGREEMENT

Pursuant to the law, home office has to be agreed between the employer and the employee (Subsection 2h(2) AVRAG). Thus, there is neither an obligation nor an entitlement to work from home without such an agreement.

The law further states that such an agreement has to be in writing for reasons of proof. Hence, the written form is not an absolute prerequisite for a home office agreement. Such agreements, therefore, can also be concluded verbally or even implicitly. However, a written agreement is, in any case, recommended.

RESOURCES

The employer has to provide the digital resources required for regular work in the home office or – if agreed with the employee – bear the reasonable and necessary costs for them (Subsection 2h(3) AVRAG). These costs can also be compensated as a lump sum.

LIABILITY

The liability reductions of the Employee Liability Act (*Dienstnehmerhaftpflichtgesetz*, DHG) also apply to household members of the employee, in case the employer is harmed by them in connection with work in the home office (Subsection 2(4) DHG).

OCCUPATIONAL SAFETY

Home office does not release the employer from its occupational safety obligations, although not all of them are applicable to such an external workplace. It has also been laid down by law that the labour inspector is not allowed to enter the employee's home without the employee's permission (Subsection 4(1) Labour Inspectorate Act; *Arbeitsinspektionsgesetz*, ArbIG).

TERMINATION

Pursuant to the law the home office agreement may be terminated with a one-month notice period to the end of a calendar month with cause (Subsection 2h(4) AVRAG). The home office agreement may also include a fixed term or notice provisions. Despite this statutory provision, a termination of the home office agreement with immediate effect by either party may, in our view, be enforceable if a continuation is not reasonable anymore.

SHOP AGREEMENT

The framework conditions for working in the home office may be agreed upon with the works council, if any, in a shop agreement. As the respective shop agreement is a volunta-

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ry, non-enforceable one, it is not a precondition for implementing home office with the individual employees. It also cannot be enforced by any of the parties of a shop agreement.

Subject matter in such a shop agreement, is solely framework conditions, but not individual agreements of home office. Thus, such a shop agreement does not substitute an individual home office agreement with each employee. These framework conditions may include, inter alia, the provision of resources (mobile phone, notebook, internet, etc) and their private use, a right to return from home office and regulations concerning the (lump sum) cost reimbursement.

The shop agreement, thus, may be used by employers to implement a transparent home office policy in their operations.

For additional information and queries, please contact hans.laimer@zeilerfloydzad.com or lukas.wieser@zeilerfloydzad.com

Additional content on this topic:

SALES REPRESENTATIVES MUST NOT VISIT A TANNING SALON DURING THEIR WORK TIME

Written by Andreas Tinhofer

Sales representatives regularly enjoy a high degree of autonomy with regard to managing their working time. In most cases, they arrange their face-to-face meetings with (potential) customers themselves, although they will have to see a certain number of customers within a specific period of time. Further, working mainly outside the employer's premises, sales representatives are not supervised as closely as their colleagues working in the office. Of course, this lack of supervision could be compensated by technical means. However, at least in European countries, the right to privacy also applies to the workplace and puts rather narrow limits to what employers may do to monitor their workforce.

However, the increased degree of autonomy of sales representatives comes with a special duty of loyalty vis-à-vis the employer. This principle is well illustrated by a recent decision of the Austrian Supreme Court (8 ObA 116/20x) turning on a sales representative that has been terminated summarily because of "breach of trust".

According to the findings, the pharmaceutical sales representative being employed in the field service had to submit a visit report on personal physician contacts serving as proof of performance at least once a week. When the employer heard about a rumor that the sales rep was pursuing a side activity as an assistant in the medical practice of her former husband, he engaged a private detective to monitor her on two consecutive working days. It turned out that on those two days the sales representative had documented the visit of a number of physicians although, she had not met a single one of these people on these days or spoke to them on the phone. Instead, she went about numerous private pursuits (such as getting a prom dress or visiting a tanning salon) during her recorded work time.

Nevertheless, when the managing director asked the employee whether she had seen these customers on those days she confirmed that she had done so. As the managing director knew from the detective report that this was not true, he summarily dismissed the insincere employee.

In the following court case, the employee argued that she had not been obliged to meet any customers on those two days since under the employment contract she was free to schedule her duty time. However, pursuant to the Supreme Court that did not change the fact that the plaintiff faked work performance that she did not perform. Therefore, her conduct was quite suitable for obtaining a remuneration without corresponding consideration.

In addition, the Supreme Court saw the persistent dishonesty of the plaintiff, as a reinforcement of the intensity of guilt. In view of the special position of trust as a sales representative this was held to be unacceptable, even if, in other cases, an untruthful statement by an employee in order to conceal a misconduct might be excused.

To sum it up, as sales representatives regularly are free to schedule their working time, they enjoy a special position of trust with their employer. If they are caught "time stealing" the employer generally has the right to terminate their emp-

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loyment with immediate effect. However, as soon as there is sufficient evidence for the employee's misconduct the employer must act. Otherwise, the employer's right to declare a summary dismissal will be forfeited.

For additional information and queries, please contact andreas.tinhofer@zeilerfloydzad.com

Additional content on this topic:

AN UBER RESULT FOR UBER DRIVERS

Uber BV and others v Aslam and others – UK Supreme Court judgment

Written by Shannen Trout

In February 2021, the UK Supreme Court ruled that Uber drivers are workers, as opposed to being self-employed. This was a big triumph for those working for the driving app, who had been battling it out with Uber since 2016. The decision left the ride-hailing app facing a large compensation bill and has much wider consequences for the gig economy.

BACKGROUND FACTS

In 2016, former Uber drivers, James Farrar and Yaseen Aslam, took Uber to an Employment Tribunal arguing that they worked for Uber. Uber's position was that its drivers were self-employed. The Employment Tribunal held that the drivers were "workers" under employment legislation. The result being that Uber were under an obligation to grant their drivers holiday pay, minimum wage and to grant them certain protections from unauthorised deductions to pay and discrimination.

Uber appealed the Tribunal's decision in 2018, but it was upheld. The company then took the decision to the Court of Appeal, who also upheld the ruling in 2018. Both the Court of Appeal and Appeal Tribunal dealt with concerns over the drivers' working hours and how they would be used to calculate wages. The Court of Appeal decided that the drivers were working, for these purposes, when they were driving and when they were waiting for rides whilst the app was open.

UBER'S FINAL ATTEMPT AT APPEAL

In February of this year, it was Uber's final chance at an appeal of the decision. In a blow to Uber, the Supreme Court unanimously dismissed Uber's appeal. They said Uber were not an intermediary party and, supporting the position in the Court of Appeal, stated that the drivers should be considered to be working, not only when they are driving, but whenever they are logged into the app.

The key elements considered by the Supreme Court can be summarised as follows:

- Uber sets the fare – As Uber sets the fare for the drivers and the journey's they take, they dictate how much money the drivers can earn.

  Uber has the power to fix the fare for each trip and decides how much service should be deducted from the fares. When there is a complaint, Uber also has the power to decide how much of the fare is refunded to the passenger.

- Contract terms – Drivers have no say in the contractual terms set by Uber.

  One of Uber's arguments was that there were separate contracts between Uber and the driver, and Uber and its customers. This meant they were not directly employed when driving under the app.

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The Supreme Court disagreed with this, and also noted that the starting point should not be the contractual terms but the legislation. This was because the legislation is more important as it served to protect workers. Although contractual terms are important, it is often that large companies and their workers have unequal bargaining powers and so the actual circumstances of the workers had to be considered in the decision.

- Penalising drivers – Uber has the power to deal with the ride request and drivers can be penalised for rejecting too many rides.

  Drivers are not made aware of the location of passengers before they accept the rides, and so drivers have no power to accept/decline based on destination. In addition to penalising the driver for not accepting enough rides, the company has the power to log the driver out for up to ten minutes if performance does not improve.

- Star ratings – Uber driver's services are monitored by Uber via the star rating system. If a driver has repeated warnings after receiving bad star ratings Uber has the capacity to terminate the relationship.

  There are a number of things that can affect the drivers rating outside of general performance and relationships with the customer. For example, the app sets the route for the driver to take without consulting the driver. The driver is able to divert from the chosen route, but this often results in lower ratings for the drivers from customers.

- Customer contact – Uber restricts the communication lines between the passenger and the driver.

  This means that no relationship can develop between the driver and passenger beyond that one journey. Uber handles all complaints and further interactions on the drivers' behalf.

Looking at these factors the Supreme Court decided that the drivers were employed . The basis for that being that the drivers were in subordination to Uber. The only way they could increase their earnings would be to drive more hours.

WHAT DOES THIS MEAN FOR UBER DRIVERS AND OTHER GIG ECONOMY WORKERS?

The key element that has arisen from the ruling is that the control a company exercises over people's labour has a direct effect on the rights and responsibilities of those companies, for both working conditions and the workers wellbeing.

The result may be that companies which offer these 'gig economy' roles will have to increase their prices charged to customers to cover the additional costs required to engage workers. Unfortunately for the likes of Uber, their rise in popularity is linked to its low prices. These low prices are a major selling point and are fundamental to Uber's business structure.

Alternatively, apps like Uber could relinquish some control over their drivers to remove a "worker" status and maintain low costs as a result of self-employment. However, this could increase concerns over the safety of using the app and bring into question the effectivity of Uber's services.

Moving forward, the case sets a good precedent for tribunals which have to deal with these points in the future. Establishing the employment status of a person's employment should weigh up a number of different factors, and it is clear that a high degree of control over the person will favour an argument that the individual is likely a worker.

For additional information and queries, please contact shannen.trout@zeilerfloydzad.com

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INDIRECT DISCRIMINATION IN OCCUPATIONAL PENSION SCHEMES

(ECJ 24.09.2020, C-223/19, *YS/NK AG*)

Written by Hans Georg Laimer & Melina Peer

An indirect discrimination against men on grounds of sex in occupational pension schemes may be justified if there are sufficient objective factors, such as social-policy objectives.

FACTS

NK, a limited liability public company in which the province of Lower Austria holds a participation of approximately 51% agreed with their employees on an occupational pension. These occupational pensions were granted in the form of a direct, defined benefit pension which was financed from the employer's reserves. Additionally, an index-linking clause according to which, the pension benefits would increase by the same percentage as that of the increase in the salaries of the highest category of employment, as provided in the collective agreement, applicable to the employees of the Austrian undertakings in the relevant industry was concluded. One of NK's employees who agreed on such an occupational pension retired in April 2010 and received the agreed direct defined benefit pension as of December 2010.

In 2015, Austria adopted diverse legal measures to reduce imbalances created by "special" pensions, which are supplementary pensions outside ordinary pension schemes and to ensure the long-term funding of retirement benefits. However, these measures only apply if the benefit exceeds a certain threshold.

Statistics suggest that the adopted legal measures affected far more male than female recipients.

For the employee in the case at hand, these legal measures had the effect that on the one hand, the agreed index clause did not lead to an increase in the year 2018. On the other hand, part of the agreed direct defined benefit pension was withheld directly by NK as a pension security contribution as of 01 January 2015.

LEGAL QUESTION

Do the implemented legal measures lead to an indirect discrimination against men on grounds of sex?

DECISION

The Court confirmed that there is no direct discrimination as the above prescribed measures apply without distinction to male and female employees. If employees of State-controlled undertakings receive a "direct defined benefit pension", of which the amount exceeds a certain threshold, they are put at a disadvantage by the national legislation. The neutral criterion is therefore the amount of the benefit defined.

In general, the appreciation of the facts, from which it may be presumed that there has been indirect discrimination, is the task of the national court. Statistical evidence can be used by the national court to assess whether there is indirect discrimination or a purely fortuitous, short-term inequity.

Nevertheless, in case the national court concludes that an indirect sex discrimination is given, the indirect discrimination can be justified by objective factors which are wholly unrelated to any discrimination based on sex.

The objectives for the national legislation measures presented in the case were, on the one hand, reducing the imbalanced created by special pensions. On the other hand, the implemented legal measures intended to ensure the long-term funding of retirement benefits. In general, budgetary considerations cannot justify discrimination on the ground of sex. However, the ECJ found that these objectives constitute legitimate social-policy objectives and could – subject to verification by the national court – justify the potential indirect discrimination in this case.

IMPACT

Case law shows that it can be challenging to introduce a non-discriminatory occupational pension scheme. This especially applies for cases of indirect discrimination as these are not easy to identify. Nevertheless, indirect discrimination can be justified by sufficient objective factors. For assessing whether a justification may be given, a case-by-case decision must be made based on the specific circumstances of the case. Therefore, a general statement as to when indirect sex discrimination in occupational pensions can be justified cannot be made.

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For additional information and queries, please contact hans.laimer@zeilerfloydzad.com or melina.peer@zeilerfloydzad.com

Additional content on this topic:

SECRET RECORDINGS – TERMINATION FOR CAUSE

(OGH 28.07.2021, 9 ObA 65/21f)

Written by Lukas Wieser & Melina Peer

The secret recording of a conversation between the employee and the regional director of the employer justifies an immediate termination of the employment for cause, according to a recent Austrian Supreme Court judgment.

FACTS

The employee secretly recorded a conversation with the regional director of the employer with the mobile phone. Also, the chairman of the works council took part in the conversation. In the following, the employee brought the recording to the attention of his superior, who did not take part in the conversation.

The employer immediately terminated the employment for cause based on the untrustworthiness due to the secret recordings.

The employee argued that the recordings were justified due to the unappreciative way in which the employer treated its employees and the employee's lack of trust into the works council. He thus feared that the employer wants to construe a cause for an immediate termination of the employment during the conversation. The employee further claimed that the employer unilaterally interfered with the employee's remuneration agreement several months before the conversation by reducing time factors based on a shop agreement. Thus, the recording was lawful according to the employee, based on Article 6(1) lit f GDPR, as it was necessary for the purposes of a legitimate interests pursued by the employee.

The employee challenged the termination of the employment for cause and claimed reinstatement.

LEGAL QUESTION

Was the termination of the employment for cause unjustified?

DECISION

The Supreme Court held that neither the employee's assertion that the employer wants to construe cause for a termination of the employment nor that the secret recording was a reaction of the employee into a unilateral interference into the remuneration agreement, to which the employee got carried away, were given. The secret recording of the conversation, thus, was anyhow unlawful pursuant to the Supreme Court.

Such unlawful behavior of the employee disrupts the basis of trust so severely that an immediate termination of the employment or cause by the employer is justified. Thus, the employee's claim for re-instatement was rejected and also no entitlement to damages (e.g., termination compensation, etc) was given.

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IMPACT

Secret recordings of workplace conversations by employees may justify an immediate termination of the employment for cause. As the claimed justifications for the recording (construction of a cause, unilateral interference with the employee's remuneration) were not given, the Supreme Court did not have to answer if in such a case a termination of the employment for cause may or may not be justified.

However, secret recordings (and their use) may especially be unlawful under civil law and/or data protection law and/or criminal law. Accordingly, they may justify an immediate termination of the employment for cause by the employer.

For additional information and queries, please contact lukas.wieser@zeilerfloydzad.com or melina.peer@zeilerfloydzad.com

Additional content on this topic:

EVENTS

| UPDATE ARBEITSRECHT
"Aktuelle Rechtsprechung und gesetzliche Neuerungen"
With Hans Georg Laimer, Andreas Tinhofer and Lukas Wieser
Thursday, 7 October 2021
09:00 Central European Time
Register here

| DISPUTES FOR BREAKFAST | INTELLECTUAL PROPERTY
"The Human Factor – Creation, Ownership and Infringement of IP Rights in the Age of AI"
With Alexander Zojer and Lukas Hutter
Thursday, 18 November 2021

| DISPUTES FOR TEA | LITIGATION
"US Class Action and European Representative Action Compared"
With Edward Floyd and Alfred Siwy
Thursday, 9 December 2021

SPEAKING ENGAGEMENTS

| "Digitalisierung und Globalisierung der Arbeitswelt – Brauchen wir ein neues Arbeitsrecht?"
Conference by University of Salzburg & University of Vienna
With Andreas Tinhofer
Thursday-Friday, 23-24 September 2021
Register here

| "Die Arbeitswelt nach Corona"
MANZ Unternehmensjuristenkongress 2021
With Hans Georg Laimer
Tuesday, 12 October 2021
Register here

| "Webinar Intensivtagung Fehl- und Abwesenheitszeiten"
MANZ Rechtsakademie
With Hans Georg Laimer & Lukas Wieser
Thursday, 18 November 2021
Register here

CONTRIBUTORS TO THIS BULLETIN

Hans Georg Laimer
Partner | Rechtsanwalt (Wien)

T +43 1 890 10 87-81
M +43 664 889 287 81
E hans.laimer@zeilerfloydzad.com

Andreas Tinhofer
Partner | Rechtsanwalt (Wien)

T +43 1 890 10 87-95
M +43 664 187 80 05
E andreas.tinhofer@zeilerfloydzad.com

Lukas Wieser
Counsel | Rechtsanwalt (Wien)

T +43 1 890 10 87-72
M +43 664 889 287 72
E lukas.wieser@zeilerfloydzad.com

Shannen Trout
Associate | Solicitor (England and Wales)

T +44 203 405 0037
M +44 79 7465 7708
E shannen.trout@zeilerfloydzad.com

Melina Peer
Junior Associate | Rechtsanwaltsanwärterin

D +43 1 890 10 87-79
T +43 1 890 10 87
E melina.peer@zeilerfloydzad.com

ZFZ | ZEILER FLOYD ZADKOVICH

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