

Sick Notices are not Unassailable – A Perennial Issue in Flux

BAG DECISION OF AUGUST 21, 2024 – 5 AZR 248/23

Just yesterday, on August 21, 2024, the last decision of the Federal Labor Court (BAG) for the time being was handed down on the topic of (faked) work incapacity. The finding: The line that has been taken will be continued. Where the evidentiary value of a certificate of work incapacity was virtually unassailable for many years, the case law has been taking a different tack for some time. One of the first decisions to set the ball rolling was by the Superior Labor Court of Schleswig-Holstein regarding the discrediting of the evidentiary value of so-called „dovetailed“ work incapacity certificates that corresponded exactly to the notice period following a termination notice by the employee. This was followed by numerous decisions of the local and superior labor courts with the same direction of impact, and the BAG now confirmed this reasoning in the decision yesterday. Reason enough for a short explanation.

NO CONTINUED PAYMENT OF WAGES AND TERMINATION

As is well-known, employees have a statutory claim to the continued payment of wages for the duration of six weeks in the event of work incapacity, but in the case of various illnesses this can drag on, however, for considerably longer. If an employer has justified doubts whether work incapacity actually exists, there are generally two conceivable ways to react: (i) stopping payment of wages and (ii) where appropriate, a termination (without notice) for feigning work incapacity, including elements of criminal fraud. If the employee challenges this in court, they will initially have the work incapacity certificate on their side, which is attributed a high degree of evidentiary value, even under the more recent case law.

CASTING DOUBT ON EVIDENTIARY VALUE

However, doubt may be cast on the value of evidence. This is always dependent on the sum of all circumstances and the individual case, and the following relevant categories have been developed:

„Dovetailed Work Incapacity Certificate“: This refers to the coincidental timing of the certificate and a would-be cause. In practical experience, and as in the case at hand, this is the end of the notice period when notice is given by the employee (cf. BAG decision of March 13, 2023 – 5 AZR 137/23, Superior Labor Court of Mecklenburg-Vorpommern of May 7, 2024 – 5 Sa 98/23).

Work Incapacity Certificate for more than two weeks:

Additionally, violations of the Guidelines for Issuing Work Incapacity Certificates may cast doubt on the evidentiary value of the certificate if this is related to the procedure for establishing work incapacity or to the require-

ments for issuing the work incapacity certificate; in practical experience, this is relevant, for instance, in the case of certificates issued for a period of more than two weeks if there are no special circumstances for doing so (cf. BAG decision of June 20, 2023 – 5 AZR 335/22, Superior Labor Court of Lower Saxony, April 18, 2024 – 6 Sa 416/23)

Irrespective of this, **the sum of all conditions** is decisive. Here, most recent examples of doubt being cast on evidentiary value are attendance of sports events (handball games) (Superior Labor Court of Berlin-Brandenburg of May 5, 2024 – 12 Sa 1266/23) or having to complete „annoying improvement work“ coupled with an immediately following sailing trip (Superior Labor Court of Lower Saxony of May 31, 2024 – 14 Sa 618/23).

COMMENT

We have also experienced in numerous court procedures that, in the wake of the decisions described above, the courts take justified challenges to the evidentiary value of work incapacity certificates very seriously. It remains to be seen if the involvement of the treating physician is at all necessary within the scope of an expansive consideration of evidence in evidentiary hearings and how the findings of such hearings are to be dealt with. Many lower courts refrain from the hearing of evidence if the employee is not able to sufficiently substantiate the diagnoses on which their condition is based, or to sufficiently substantiate their therapies, etc. or if they are unable to plausibly reconcile their condition with other circumstances such as the examples stated above. Although the grounds of yesterday's decision of the BAG have not yet been publicly issued, it can be expected that they will provide further insight into these issues.

Please do not hesitate to contact us if you have questions concerning this topic. If you would like to be included on our mailing list of the subscribers to our free newsletter, please send us a brief **email** with your request.

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