Topics in our issue:

Paternity month, credit for parental leave and continued pay for disaster relief spells

Several changes in labour law important for both employees and employers became effective as of 1 August and 1 September 2019.

Entitlement to paternity month

A change in the Paternal Leave Act (Väter-Karenzgesetz; VKG), published in Federal Law Gazette I 73/2019, created a legal option, available as of 1 September 2019, for fathers to request and **take leave for a term of one month** provided they live in the same household as the child (Section 1a VKG). Contrary to the entitlement to part-time employment of parents, this entitlement is due without regard to the employer's interests and regardless of the size of the undertaking or the duration of the employee's employment.

The paternity month commences on the day following the child's birth at the earliest and may, as a rule, be claimed until such time as the mother is allowed back to work. When the mother is not entitled to parental leave, paternity leave due to childbirth may be claimed until the expiry of eight weeks after birth or, in the case of early, multiple or caesarean-section birth, twelve weeks after birth. While the father takes his paternity month the main mutual obligations of the employment contract, including but not limited to the employee's duty to work and the employer's duty to pay, are suspended. Nevertheless, the father may obtain a **"family time bonus"** subject to his meeting the relevant criteria.

When an employee intends to take up the offer of a paternity month, he needs to notify his employer of the expected commencement of his month not later than three months before the estimated date of birth (advance notice). If he misses this deadline, he may still endeavour to achieve a mutual agreement with the employer. In a second step, the employee needs to promptly inform his employer of the actual birth and notify the start of his paternal month not later than one week after birth.

OCTOBER 2019

Do you wish to receive the electronic version of our P) News?
Please send an e-mail to P-News@preslmayr.at.

PRESLMAYR RECHTSANWÄLTE

Same as with parental leave and part-time employment of parents, employees claiming a paternity month are **protected against (summary) dismissal**. This protection starts upon notification but not earlier than four months before the estimated date of birth and extends for four weeks after the end of the paternal month.

The period of such leave must be credited towards claims that depend on the period of service (see below). The entitlement to a paternity month arises additionally to the entitlement to paternity leave. Under Section 1a (4) VKG, any additional claim under a law, collective bargaining agreement or individual contract for leave at the occasion of a child's birth must not be credited towards the paternal month. According to the wording of the law, the entitlement to leave already provided for in several collective bargaining agreements would therefore need to be granted in addition to the paternal month.

Crediting parental leave periods towards claims dependent on the period of service

Changes were also made to the crediting of parental leave periods towards claims that depend on the period of service. For births on or after 1 August 2019, parental leave pursuant to Section 15f of the Maternity Protection Act (Mutterschutzgesetz; MSchG) must be fully credited for any and all legal claims that depend on the duration of service. These include the duration of the period of notice and of continued pay, the length of the holidays and payment under the old severance scheme, as well as wage/salary increments, anniversary bonuses and other entitlements under a collective bargaining agreement which depend on the period of service. The parental leave period still cannot be credited as a previous period of service for the employee's classification under the collective bargaining agreement. Parental leave periods are now credited for all such periods rather than just for the first parental leave.

Continued pay for disaster relief spells

A change that has been debated for many years entered into force on 1 September 2019: it grants employees a legal entitlement to continued pay when they are prevented from working due to being deployed as a voluntary member of a disaster relief organisation, rescue service or voluntary fire brigade in the course of a catastrophic event or as a member of a mountain rescue service, and provided that the scope and situation of the leave are agreed beforehand with the employer (Section 8 (3a) of the Salaried Employees Act (Angestelltengesetz; AngG)). A catastrophic event is defined by the law as a disaster which requires the necessary deployment of more than 100 persons in total for a continuous period of at least eight hours.

While this regulation certainly serves the public weal, it is nevertheless far removed from reality. A disaster operation requires prompt response so that any advance agreement with the employer regarding the scope and situation of the leave will in actual practice be unfeasible. Nevertheless, employers are free to continue payment even without an advance agreement.

In compensation for continued payment, employers are granted a lump-sum premium of EUR 200 per deployed employee and day, taken from the Disaster Relief Fund. This claim is, however, due only when the employee served with an approved emergency organisation in the course of a catastrophic event or was continuously deployed for at least eight hours for a mountain rescue operation (Section 3 (3) b of the Disaster Fund Act (Katastrophenfondsgesetz)). It is notable that the employee's claim for continued pay also applies to operations of less than eight hours for members of a mountain rescue service. The law does not define the meaning of an "approved emergency organisation" so that it may not always be clear whether the employer actually gets recompensed in spite of being obliged to continue the employee's pay. It needs to be seen whether legislators will clarify such issues in order to ensure legal certainty.

Mag. Nils Gröschel *is a trainee lawyer with Preslmayr Rechtsanwälte, focusing mainly on labour law and social law.*

E groeschel@preslmayr.at

Mag. Oliver Walther *is an attorney-at-law and partner of Preslmayr Rechtsanwälte, specialising in labour law and procurement law.*

E walther@preslmayr.at

EU ban on "dual food quality" creates a problem for the food industry

Just when the last EU parliamentary session was drawing to its close, EU legislators adopted a package of laws to ban branded foods being presented with an identical get-up in spite of having different compositions. This prominent ban on "dual food quality" may be well-meant and intended to prevent consumers from being misled, but in actual practice it will cause considerable trouble and a high degree of legal uncertainty for producers and retailers.

For several years there has been a heated debate at the European level on the phenomenon of dual food quality. The accusation was that branded goods – particularly those in Eastern Europe – were of worse quality and of a different composition than their Western European equivalents.

However, a study conducted by the EU Commission and published in June 2019, which involved 1,380 samples of 128 different food products from 19 EU Member States, failed to produce evidence of such an East-West gap. Just 9% of the products compared showed different compositions but identical get-up. Incidences of different compositions came from all parts of Europe. Moreover, the Joint Research Centre of the European Commission found that the differences actually detected in the composition of the tested products did not necessarily constitute a difference in the product quality.

The data currently published do not indicate any (meaningful) practical problem, but the ban has already been adopted so that the results will not have any effect. The Unfair Competition Directive will be supplemented by a ban on the identical marketing of products of different compositions in different EU Member States, if not justified by "legitimate and objective factors" (such as health reasons) which, however, need to pass case-to-case testing.

From a legal point of view, three aspects stand out as major practical problems. One is the great legal uncertainty – the wording is extremely vague und it is entirely unclear what is meant by substantial differences in composition. Frequently, brand and proprietary products are produced locally, with their composition varying slightly depending on the season and availability of raw materials. It is also questionable whether regional consumer preferences can be used for justification. After all, it is quite conceivable that people in one country tend to prefer dark chocolate while those in another country in their majority opt for milk chocolate.

Next: when is a product marketed as identical? Does the sole labelling in the relevant local language suffice to make its marketing non-identical? It may be that the producer's or retailer's logo by itself suffices to make it identical. What's more, EU legislators have chosen the form of a directive which grants Member States more leeway in their national implementation, allowing them, i.a., to implement much more rigorous provisions.

As third aspect, there is the impact of the enormous fines threatened. The provisions on dual food quality are part of a package of consumer rights, which introduces massive penalties in the aftermath of the Volkswagen emissions scandal "Dieselgate". It provides for fines of up to 4% of an undertaking's annual sales in the Member State affected or up to EUR 2m if sales figures cannot be ascertained. Once again, Member States can impose much stricter penalties.

These three aspects show that the dual food quality ban produces considerable complexity for market participants in the food supply chain. Although the EU Commission has announced that it will develop a guideline for help, national legislators are still required to implement the directive within two years of its adoption, and national government authorities and courts are challenged to reduce its complexity in order to have consumers actually profit from the ban on dual food quality and not just create legal uncertainty among the industry.

Dr. Rainer Herzig *is a lawyer and partner of Preslmayr Rechtsanwälte, specialising in company law, the law on competition and intangible property rights.*

E herzig@preslmayr.at

(October 2019)

Update on the rights of airline passengers

In C-501/17, the European Court of Justice (ECJ) had to rule on a case that involved an aircraft tyre which was damaged by a screw lying about on the airport runway and had to be changed. As a result, the flight arrived at its destination three and a half hours late. The ECJ made it clear that the damage to the tyre was an *"extraordinary circumstance"* and that the airline is released from its obligation for compensation for delay if it can prove that the delay from changing the tyre was unavoidable in spite of deploying all its reasonable resources.

Recently, the ECJ received a request to rule whether an airline is liable, on the basis of the Flight Compensation Regulation, for injuries suffered by a passenger due to negligence on the part of the hotel provided by the airline (due to the cancellation of a flight). If finding in favour, this would mean that an airline is obliged not just to provide the passenger with hotel accommodation and pay for its cost but also that it owes the passenger accommodation as such. The ECJ's decision is eagerly awaited.

Google forced to forget only within the EU

Already in May 2015, the Commission nationale de l'informatique et des libertés (CNIL) requested Google to "dereference" (i.e. remove) all links disputed by a natural person from all domains of its search engine. Google refused the request and removed links only for results displayed from search runs conducted in Member State domains. As a result, CNIL imposed a fine of EUR 100,000, which was contested by Google.

The ECJ found in favour of Google, deciding (C-507/17) that a search engine operator need not dereference links on all versions of its search engine but only on those versions of the search engine corresponding to all the EU Member States. Nevertheless, accompanying measures need to be taken that prevent or at least reliably discourage internet users who conduct a search run from an EU Member State to obtain the (dereferenced) search results from a non-EU version of the search engine. As to which measures these might be, the ECJ remained mute.

For more information, please contact: kern@preslmayr.at

P) Inside

In recent months we have been happy to welcome several **new team members**: Eszter Tóth, Nils Gröschel and Matthias Stipanitz.

We are also happy to announce the news (received shortly before the editorial deadline) that Tamara Freudemann has successfully passed the bar exam. Congratulations!

Preslmayr Rechtsanwälte OG
Universitätsring 12, 1010 Vienna, Austria
Tel: (+431) 533 16 95
office@preslmayr.at www.preslmayr.at
FN 9795f, HG Wien
UID: ATU10504104

Information on privacy:
Preslmayr Rechtsanwälte OG as Controller processes your contact data based on your consent or legitimate interests (business contact) for sending you the P) News. For this purpose your data are transmitted to a mail service provider (e.g. postal service). Your data will be processed as long as you do not withdraw your consent or as long as the legitimate interests persist.

You have the right to object at any time to the processing of your data for direct marketing purposes, the right to withdraw your consent with effect for the future, the right to request access and rectification or erasure of personal data processed by us or restriction of processing and the right to data portability as well as the right to lodge a complaint with a supervisory authority (in Austria: Datenschutzbehörde). Please send your request regarding a withdrawal of consent, an objection or any other enquiry to datenschutz@preslmayr.at or per mail to the address stated above. Please also read our Privacy Policy available at http://www.preslmayr.at/en/privacypolicy.html.