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CENTRO DE INVESTIGAÇÃO DE DIREITO PRIVADO

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CRISIS MANAGEMENT THROUGH SHORT-TIME WORK?

Wolfgang Däubler*

Summary: I. The background – II. Labour law-related prerequisites – III. Social law-related prerequisites – 1. Conditions for receiving short-time allowance – 2. Amount of short-time allowance and duration of payment – 3. Procedure – IV. Exceptions – 1. Marginal employees – 2. Apprentices – 3. Taking care of children instead of working – 4. The self-employed – 5. Exceptional cases – V. Redundancy in reduced working hours phase? – VI. Redundancy instead of reduced working hours? – VII. Conclusions

Abstract:

Germany has had rules in place on short-time work for almost one hundred years. In the current situation of the Coronavirus pandemic, these rules play a pivotal role. The basic idea is simple: For the temporary, crisis-related reduction in working hours, the workers in question receive a wage compensation payment of 60 to 70 percent of their previous net income. They keep their jobs. This is also advantageous for the employer. When the crisis is over, the employer has all the workers necessary for a return to normal operations at his or her disposal again. This system last proved its worth during the recession of 2008/2009. Nevertheless, the practical management of this situation raises a series of detailed questions. The most important of which is: Do the workers in question first have to take their annual leave and work off their time credits before they can have access to payments from the State? As long as the lack of work is of a temporary nature, reduced working hours take precedence over redundancies. Workers can only be made redundant during a phase of reduced working hours if new conditions enter into play that result in a lasting reduction in the overall workload.

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I. The background

Market regulations in both Europe and the United States have always had to deal with periodically emerging crises. One typical motive would be: Demand is no longer sufficient to maintain the current business operations. The individual enterprise, and frequently a whole industry or a large sector of the economy, is no longer able to sell the manufactured goods for an appropriate price. A reduction in operations and the resulting decrease in the supply is one of the less serious consequences; closure of the business, with or without bankruptcy proceedings, is far worse. The last crisis of this kind dates back to the years 2008 to 2010 and it affected European countries to differing degrees.

We are currently dealing with causes of the crisis that have little to do with the specific laws of the economy: One effect of the Coronavirus pandemic is that many businesses can no longer remain operating at the full level, if at all.

An outbreak of the sickness within a business may be responsible for that, but that would be a more exceptional situation. It is much more common that temporary closures of businesses are ordered by authorities, as is the case for pubs and hotels and many businesses in the area of culture. Other businesses face the frequent non-availability of primary products, as transnational supply chains become interrupted, for example.

If a business or business department is unable to continue operating, in accordance with German law the employees have a right to payment, as it is the employer who bears the so-called business risk, pursuant to Paragraph 615. 3 of the German Civil Code[1]. If such a situation were to continue, it would result in economic ruin for many businesses. In order to avoid the development of such a situation, businesses would normally announce mass redundancies. Naturally, this is a negative development for the employees in question, as it is extremely hard to find another job in a crisis. But there are also disadvantages for the employers: When the crisis is over, they can no longer fall back on a competent and experienced workforce, but have to recruit new personnel. And the business would severely miss its previous top performers in particular.

In order to avoid such a negative situation for both sides, Germany has had rules in place to regulate reduced working hours schemes and short-time allowance since 1920ies[2]. In the current situation, these measures take on pivotal importance, as they

[1] In the same vein, see, from the latest literature, M. Meyer, in: Dahl/Göpfert/Helm (Editors), Arbeitsrechtlicher Umgang mit Pandemien. [Employment Law and Pandemics]. Praxisleitfaden am Beispiel der Corona-Krise [Practical Guide Using the Coronavirus Crisis as an Example], Frankfurt/Main 2020, Ch. 1 Margin note 14 and following (with detailed reasoning) Fischinger/Hengstberger, Lohnanspruch bei pandemiebedingten behördlichen Betriebsschließungen [Right to Salary Payment in the Event of Pandemic-related Business Closures Ordered by Authorities], NZA 2020, 559 ff.

[2] After several precursors from the days of the German Empire (e.g. das Potash Mining Law of 1910), reduced working hours schemes and short-time compensation in the form we know them today were introduced for the whole economy by the "Law on Placement and Unemployment Insurance" (in short: AVAVG) of 16.7.1927. See overview in: www.handwerksjournalisten.de/pages/dokus/kurzarbeitergeld.pdf(1.11.2020)

guarantee the survival of businesses and prevent the mass unemployment that would otherwise arise.

There are two essential prerequisites for the introduction of reduced working hours. Firstly, the working hours defined in the labour contract must be reduced, which, in individual cases, can mean a reduction down to zero hours per week. As a matter of principle, the employer is obliged to pay only the remaining weekly working time (see II below). Secondly, the prerequisites for short-time allowance must be fulfilled; otherwise the reduction in the working hours would be unreasonable. The prerequisites that must be fulfilled are laid out in Paragraphs 95 ff. of the German Social Code (Book) III. Short-time allowance is a benefit that is covered by unemployment insurance (see III below).

Unemployment insurance is financed through equal contributions by the employers and the employees and is managed by the Federal Employment Agency; it has a lot of local branch offices known as "employment agencies". Where the available resources for the provision of the envisaged benefit are not sufficient, the German State makes an additional contribution which comes from taxation money.

II. Labour law-related prerequisites

The legal basis for the necessary reduction in working hours will, in many cases, be a collective bargaining agreement signed by the trade union on the one hand and the individual business or employers´ association on the other. It lays down the conditions under which a reduction in working hours can take place ("economic difficulties that are not the fault of the business", "reduction in orders", etc.) and also establishes that reducing working hours is dependent on the granting of short-time working compensation. In Germany a collective bargaining agreement applies only to trade union members per se; however, in businesses where the owner is bound by collective agreements, all employment contracts refer to the collective agreement.

Where a collective bargaining agreement does not exist, because the employer does not belong to any employers´ association, the same effect can be achieved through a works agreement between the works council, as the freely elected representative of the whole workforce, and the employer.

Should this legal basis also not be given, then the individual employment contracts must be adjusted accordingly. In practical terms, this is achieved by the employer ordering a reduction in working hours and the employees effectively working fewer hours, meaning that the latter correspondingly accept the shorter working

hours[3]. In the case of executive staff this is the only way to include them in the reduced working hours scheme, as neither collective agreements nor works agreements apply to them. Typically, conversation between the parties takes the place of an order here. A contractual clause agreed in advance, which says that the employer can order a reduction in working hours "as needed", is considered without effect due to indeterminacy[4]. Should any of a firm's top performers reject this (other persons would simply not dare), then the employer in question only has an extraordinary notification of dismissal pending a change in contract to fall back on, the admissibility of which is, however, contested in the literature; we still await a judgement by the highest courts in the land[5]. This is also a sign that, here too, the mutual agreement rule enjoys absolute priority.

From daily practice there are reports of cases where orders do indeed decrease but there is still enough work for the contractually agreed 38- or 40-hour week. This has to do with the fact that, in reality, before the new situation, the employees worked a lot more than 38 or 40 hours a week and that fact was never officially documented. Given that the reduction in orders would mean that only the informal (and unpaid) overtime no longer existed, this is not a case of a reduction in working hours, as the official working hours

[3] Bauer/Günther, Kurzarbeit zur Krisenbewältigung – Einführung durch Änderungskündigung? [Reduced Working Hours as a Form of Crisis Management - Introduction by means of Notification of Dismissal Pending Change in Contract?] NZA 2020, 419 ff.; Däubler, Arbeitsrecht [Employment Law], 13th Ed., Frankfurt/Main 2020, Margin note 983.

[4] BAG [Federal Labour Court] 27.1.1994 – 6 AZR 541/93 – NZA 1995, 134.

[5] For further details see: Bauer/Günther NZA 2020, 419 ff.; M. Meyer, in: Dahl/Göpfert/Helm, loc. cit., Chap. 2 Section 2 Margin notes 46 ff.

and remuneration remain in force.

Even if reduced working hours are introduced on the basis of a collective agreement or due to an alteration to the employment contracts, it would still require the consent of the works council. Such consent is subject to the worker co-determination regulation laid out in Paragraph 87.1.3 of the Works Constitution Act, which also says that the works council can decide to actively demand the introduction of reduced working hours. If the employer and the works council cannot come to an agreement, then the so-called conciliation committee decides: This committee is made up of equal numbers of employer and works council representatives and is chaired by a neutral chairperson agreed upon by both sides. As a rule, all parties involved are interested in a rapid decision.

In the negotiations on the content of the works agreement many aspects must be taken into consideration[6]. It is particularly important that the works agreement clearly defines the beginning and end of the reduced working hours scheme, the distribution of the (remaining) working hours and the employees (or employee groups) affected; otherwise it is unenforceable[7]. In choosing the employers to be included in the reduced working hours decision, the principal of equal treatment shall apply[8]. This is particularly important where, e.g., five or ten employees perform the same

[6] Instructive draft by Klebe/Heilmann, in: Däubler/Klebe/Wedde, Arbeitshilfen für den Betriebsrat, 4th Ed., Frankfurt/Main 2018, § 87 Margin note 23.

[7] BAG [Federal Labour Court] 18.11.2015 – 5 AZR 491/14 - NZA 2016, 565.

[8] Biere/Krebühl, in: Dahl/Göpfert/Helm (Editors), loc. cit., Ch. 2 Margin note 7.

work, which is now only to be carried out to 60%. Here one can imagine a proportional reduction in working hours for all employees in such a group, but also a regulation whereby two employees first have one full week off, while the next week may be free for two other employees when all the others work full time.

III. Social law-related prerequisites

1. Conditions for receiving short-time allowance

Reducing working hours to one half, or even to zero, is only admissible if the individual employee receives the corresponding "compensation" in lieu of salary. This compensation, known as short-time allowance (or sometimes "compensation"), is determined in accordance with Paragraphs 95 ff. of the Social Code III. A precondition for such compensation is that at least one-tenth of the workforce is affected by a reduction in working hours in one calendar month and therefore suffers a reduction in remuneration of more than 10%. Before the Coronavirus pandemic that threshold was higher: At least one-third of the workforce had to be affected. The relevant reference size is the plant or specific department, not the whole company (Paragraph 97 of the Social Code III).

The lack of work must also be temporary in nature and unavoidable. The latter is not the case where employees can be tasked with cleaning and maintenance work or where the enterprise is able to manufacture a new product, such as protective face

masks[9]. In the current situation, however, one can reasonably not expect a thorough check to be carried out by the Federal Employment Agency.

The question of whether or not an existing credit in terms of working hours must first be reduced to zero is easier to answer[10]. Paragraph 96.4 of the Social Code III affirms precisely this. However, this applies only to credits resulting from flexi-time or similar working time models. And such credits do not have to be completely reduced to zero; rather, a certain time quota may continue to exist in order to not put flexible working at risk[11]. So-called long-term credits (which, e.g., should make it possible to go into retirement at an earlier date) are not affected from the start here, in accordance with Paragraph 96.4.3.1 to 5 of the Social Code III. During the 2008/2009 crisis one could afford to be more generous, as only those credits had to be used up that were at risk of becoming invalid[12].

Before a reduction in working hours can be introduced and short-time compensation can be applied for, in the context of the existing legal possibilities it is necessary to end the use of temporary agency workers and workers, who come into the firm on a contract for work

[9] Fuhlrott/Fischer, Arbeitsrecht und Corona 2.0 [Employment Law and Coronavirus 2.0], NZA 2020, 409, 410.

[10] It is common practice in Germany for many workers to work longer hours than contractually agreed. The "time credit" that thus emerges is not paid immediately but credited to an "account". In the literature one often speaks of a "time savings bank" (see Kohte, Arbeitszeitrecht und das Leitbild der Zeitsparkasse [Working Time Law and the Concept of the Time Savings Bank] in: Däubler/Voigt (Editors), Risor Silvaticus. Festschrift für Rudolf Buschmann [Liber amicorum for Rudolf Buschmann], Frankfurt/Main 2014, p. 71 ff. The question must be asked, to what extent people are able to make sensible use of their free time after a long period of "saving".

[11] Fuhlrott/Fischer, loc. cit., NZA 2020, 410.

[12] For further detail see Däubler, Arbeitsrecht [Employment Law], loc. cit., Margin note 986.

basis. It is presumed that the tasks they perform can be done by the business's own employees. In the case of temporary agency workers, the work relationship with the agency continues. Pursuant to the new Paragraph 11a of the Temporary Employment Act, a reduction in working hours is now possible for them, too.

Are employees obliged to take their annual leave before the lack of work becomes really "unavoidable" and they are entitled to receive short-time compensation? The regulation determined by Paragraph 96.4.2.2. of the Social Code III defines this as a basic principle, but it shall only apply if there are no prevailing interests of the employees. This is the case if the leave has already been approved, which has a binding effect for both parties: The employer must consider the time in question in its planning, and the employee can no longer unilaterally reject an already chosen date because, e.g., the planned holiday trip can no longer take place; travel is exclusively a private matter. The interest of the employee to have at least a few days of leave at their free disposal can also be a "priority" interest, because the case can always arise that a few days off work are urgently needed for personal reasons; this is important if most of the annual leave has already been used up.

If the annual leave has not yet been fixed, company holidays can be taken into consideration in line with the general principles; the employer and the works council must come to an agreement on this matter. Company holidays may account, at most, for Three-fifth of the annual leave[13] and may not be called at short notice, for example within a period of one to three months, as the employees must be

[13] BAG [Federal Labour Court] 28.7.1981 – 1 ABR 79/79 - NJW 1982, 959.

able to adapt their private planning to the situation.[14] For this reason, this instrument is ruled out for the purposes of crisis management. Accordingly, the Federal Employment Agency has justifiably declared that the leave entitlement for the current year will not be taken into consideration up to 31.12.2020[15]. Only leave from previous years that has not been taken must be taken before an employee is entitled to short-time allowance. This solution also benefits from the fact that otherwise the payload for the employer could be considerable: Given that, during annual leave, work is not carried out as a result of the free time granted (and not due to the Coronavirus), and no short-time allowance is provided for said period, the employer instead has to pay the whole stipulated remuneration. In times of economic crisis this can have an unreasonable effect on the liquidity of the enterprise in question. The Federal Employment Agency also points out that, in the present situation, many employees are unable to say whether they might need the annual leave for other purposes, in particular for looking after the children. "Directive 202003015" of 30.3.2020 literally[16] says:

"*The Federal Agency shall not, up until 31 December 2020, include annual leave from the current leave year for the purpose of the avoidance of reduced working hours. This regulation is established on the basis that, in weighing the interests in terms of priority leave applications of the employee, it is impossible to tell in the current situation for what concrete purpose the employee*

[14] Fuhlrott/Fischer, NZA 2020, 349.
[15] Fuhlrott/Fischer, NZA 2020, 410.
[16] Accessible at www.arbeitsagentur.de/datei/ba146387.pdf - 1.5.2020.

wants to use, or sees themselves obliged to use, the leave (e.g., leave in order to look after children because schools and pre-schools may have closed). Due to the extraordinary circumstances, the protection afforded by the social insurance thus comes before the individual's duty to minimise losses. If reduced working hours are introduced towards the end of the leave year, or if there is any entitlement to leave carried forward from the previous leave year, it is the employer's responsibility to determine the point where existing leave entitlement can be used to mitigate the lack of work. Here too, the leave wishes of the employees may not be considered an impediment."

If the reduced working hours are introduced towards the end of the year, in November for example, then the leave dates must be clearly determined.

2. Amount of short-time allowance and duration of payment

Short-time compensation amounts to 60% of the net remuneration the employee would normally receive; if employees have at least one child in their care they receive 67%. The basis for compensation is a "standardised" net remuneration. The Federal Employment Agency provides a table for calculation of the short-time compensation online[17]. Short-time compensation has recently been increased if the working hours have been cut by at least 50% and a few months have already passed. From the fourth month of entitlement, the amount received is equal to 70% (or 77% for people

[17] www.arbeitsagentur.de/-datei/kug050-2016_ba014803.pdf.

taking care of a child) of the standardised net remuneration; from the seventh month it rises to 80% (or 87%). This is laid out in Paragraph 421c Section 2 of the Social Code III and is provisionally valid until 31.12.2020. This is seen as a way of preventing employees from sliding into material poverty, something that threatens low earners in particular. Furthermore, the social security contribution ceiling must be taken into consideration; it is equivalent to EUR 6,900.00 gross in Western Germany and EUR 6,450.00 gross in Eastern Germany. A rate of 60% will result in a maximum net amount of EUR 2,482.33, or EUR 2,222.98, so that the reduction for higher earning employees is relatively larger[18]. In some firms the works council is able to achieve an increase to 80 or 90 %, but given that the system now allows for increasing percentage rates, this is less of an urgent issue.

Pursuant to Paragraph 104.1.1 of the Social Code III, short-time compensation is guaranteed for a period of a maximum of 12 months; however, in accordance with Paragraph 109.1 of the Social Code III, the duration of receipt of compensation can be extended to 24 months by means of a legal regulation of the Federal Ministry of Labour and Social Affairs. Said instrument has already been used; currently, (as of 1.11.2020) the regulation of 16 April 2020 is in force[19], which extends the period of entitlement to short-time compensation for the period up until 31.12.2020, to 21 months, under the condition, however, that the reduced working hours were introduced in 2019. Recently, an extension to a period of 24 months

[18] Biere/Krebühl, in: Dahl/Göpfert/Helm (Editors), Chap. 2, Margin note 53.
[19] Federal Law Gazette I p. 801.

has been decided.

Pursuant to Paragraph 104.3 of the Social Code III, a new time period of one year (or longer) begins if no short-time compensation was paid for a period of three months. Specific reasons for such an "interruption" are not given. In normal cases work is begun again, but it is also feasible that at least a part of the period is taken up with annual leave. In extreme cases one could add the leave periods from two separate years (which, as a rule, would make up three months), but then it is very likely that at the end of this period the Federal Employment Agency would check thoroughly if the conditions for reduced working hours are still in place, and if, in particular, one can still speak of a temporary lack of work.

Short-time allowance covers only those hours that are not worked because of a lack of work. Accordingly, it does not cover leave and holiday remuneration, for which the employer continues to be responsible. Before the current situation, the employer also had to pay the social contributions, including the employee's contribution, for working hours that are reduced. However, in the current Coronavirus crisis, this considerable burden has since been lifted, as the amounts paid are reimbursed by the Federal Employment Agency[20]. The newly created regulation, which says that workers on reduced working hours can earn additional money through a secondary job (e.g., as a hospital assistant) that is not added to the short-time compensation, is also of interest. The only limit is the income before the reduced working hours scheme; it may not be

[20] Paragraph 2.1 Short-time Compensation Regulation of 25 March 2020; for further matters see *Däubler*, Arbeitsrecht [Employment Law] Margin note. 987 f.

exceeded. A particular clause in the works agreement on reduced working hours, whereby the creation of the right to annual leave is not influenced by the reduction in working hours, is also worthy of note. The reasoning behind this is a decision by the Court of Justice of the European Union (CJEU)[21], whereby a reduction of annual leave due to the reduction of working hours, as for part-time employees, does not contravene European Union law. This means two things at the same time: it can take place, but it does not have to; precisely for this reason clarification is needed and given in some works agreements.

3. Procedure

Pursuant to Paragraph 99.1 of the Social Code III, the reduction in work must be reported by the employer to the responsible employment agency, i.e. the local branch office of the Federal Employment Agency. The notification may take the written or electronic form. The responsible agency is that located in the same district as the enterprise or the enterprise department where the lack of work is about to arise or has already materialised. Only after notification is made can the employer make an application for short-time compensation, which is guaranteed for the individual month. The earliest possible period is the month in which the notification is given. If the application is approved, the employer receives the short-time compensation, which it in turn passes on to the individual employees. Should the employer fail to take action in this matter,

[21] 8.11.2012 – C-229/11, NZA 2012, 1273.

then the company's employee representatives (the works council, staff council) may make the notification and application.

The procedural details are by no means uncomplicated. Given the large influx of applications in the current Coronavirus period, the Federal Employment Agency has made a form for "rapid application" available online, in an effort to make the process easier and speed it up[22]. Those who wish to study this in greater detail, please see the "Hinweise zum Antragsverfahren" (Application Process Guide)[23] and "Fachliche Weisungen Kurzarbeitergeld" (Professional Instructions on Short-time Allowance)[24]. It is recommended that the employer in particular follows the process precisely, as the Federal Employment Agency can demand repayment of the short-time compensation, if it is established afterwards that the prerequisites were not met. The employer cannot, in turn, look to the employee for recovery, i.e. expect reimbursement from the latter, as the employee has a right to payment of wage replacement in the amount of the short-time compensation[25]. It is also frequently laid out in collective bargaining agreements and works agreements that full remuneration is to be paid where short-time compensation is not guaranteed.

[22] www.arbeitsagentur.de/datei/kurzantrag-kug-107_ba146383.pdf.
[23] www.arbeitsagentur.de/datei/hinweise-kurzarbeitergeld_ba014273.pdf.
[24] www.arbeitsagentur.de/datei/dok_ba013530.pdf.
[25] BAG [Federal Labour Court] 11.7.1990 – 5 AZR 557/89 - NZA 1991, 67; likewise applicable to seasonal short-time compensation in the construction industry BAG 22.4.2009 – 5 AZR 310/08 - NZA 2009, 913; and BAG Bertz, Kurzarbeit in Zeiten der Corona-Krise [Reduced Working Hours in the Coronavirus Crisis], NJW Special Issue 2020, 243.

IV. Exceptions

1. Marginal employees

Persons who do not earn more than EUR 450.00 a month are defined as marginal employees in accordance with Paragraph 8 of the Social Code IV. They are not included in unemployment benefit schemes and thus do not receive short-time allowance. In the current situation this regulation has resulted in difficulties for many students who barely manage to keep their heads above water with the help of such a job (e.g., as a waiter in a restaurant or as a taxi driver), together with support from their family. The sudden absence of that income source without any replacement has not been compensated for sufficiently by the State, as only loans were made available.

2. Apprentices

Apprentices (as well as the companies they learn their trade at) are, as a rule, excepted from reduced working hours schemes and short-time compensation, as their apprenticeship is continued in full and may not depend on the firm's order books. In contrast to marginal employees, apprentices continue to receive their full remuneration. In emergency cases, certain teaching may be delayed or moved online. It may also become necessary to transfer an apprentice to another department that continues its normal

workload[26]. Only when none of the above is possible can apprentices be included in reduced working hours schemes. It may also be advisable to draw up a list of exceptions to be included in the works agreement on reduced working hours that expressly includes apprentices and any other groups that may form exceptions.

3. Taking care of children instead of working

During the pandemic it has frequently been the case that a mother or father could not come to work because there was a child under the age of 12 to care for. Given that, during the lockdown in spring 2020, schools and pre-schools were closed, parents faced conflicting duties: They had to look after children who stayed at home, also at times when they would otherwise have been at work. This is a situation that evidently has nothing to do with reduced working hours schemes. Whilst it is true that workers who stayed at home were not guilty of a breach of duty, as Paragraph 275.3 of the German Civil Code allows for the rejection of unreasonable duties: It was indeed unacceptable to leave a child or even several children at home without care. However, this also meant that, in accordance with Paragraph 326.1 of the Civil Code, the entitlement to consideration, i.e. remuneration, was also forfeited.

The legislator has reacted unusually swiftly to this situation. By means of Article 1.7 of the Act "On the Protection of the Population

[26] Lakies, Berufsbildungsgesetz [Vocational Training Act], Basiskommentar [Basic Commentary], 5th Ed., Frankfurt/Main 2020, Paragraph 10, Margin note 3; Banke, in: Wohlgemuth, Berufsbildungsgesetz [Vocational Training Act], Handkommentar [Commentary Manual], Baden-Baden 2011, Paragraph 10, Rn. 25.

in the Event of an Epidemic of National Concern" of 27 March 2020[27], two provisions were added to the Protection against Infection Act. The new Paragraph 56.1a lays down that, in the event of the temporary closure of children's care facilities and schools with the aim of preventing the spread of infectious diseases, the persons responsible for the welfare of children up to the age of 12 are entitled to compensation for the resulting loss of income. A prerequisite for this is that they must take care of the children themselves, because no other reasonable care solution is possible. The grandparents, as members of a risk group themselves, are beyond question in such a situation. Another demand that is made in some cases is that, to the extent reasonable, any existing working time credit must first be worked off[28]. Secondly, Paragraph 56.2 of the Protection against Infection Act was amended to define the "compensation" as 67% of the loss of income and that it is guaranteed for a maximum of six weeks. There is also an upper limit of EUR 2,016.00 per month. The allowable time period for each parent has since been extended to ten weeks; single parents are given 20 weeks. There is a parallel that can be drawn to short-time compensation here, but only in terms of the amount payable and not the duration. Payment is made by the employer, which receives the amounts in question reimbursed by the Federal Health Office[29].

[27] Federal Law Gazette I p. 587.
[28] Kleinebrink, Arbeitsbefreiung zur Betreuung eines Kindes [Release from Work to Take Care of a Child], Der Betrieb 2020, 952, 955.
[29] Kleinebrink, Der Betrieb 2020, p. 952, p. 955.

4. The self-employed

People who work on a self-employed basis are not included in the unemployment benefit scheme. This is also true when they are mostly dependent on one single client/customer and thus qualify as "employee-like" persons. They therefore do not receive short-time allowance. If cultural events were cancelled or shops closed they have accordingly remained without coverage. The State provides only subsidies for fixed costs, which has led to many artists and shop owners experiencing existential difficulties. The respective measures introduced in November 2020 have changed: Small enterprises that have up to 50 employees receive 75% of the income they had earned in November 2019.

5. Exceptional cases

Employees who have already been made redundant do not receive short-time compensation; nor do workers who have signed a severance agreement (Paragraph 98.1 of the Social Code III). Maintaining their job is evidently not an achievable goal in such cases.

Workers who are receiving sickness benefit are also excluded; two salary replacement schemes cannot be used at the same time. If the sickness benefit comes to an end, and the person in question becomes available on the labour market once more, then said worker is entitled to receive short-time compensation again.

Anyone who was taking sick leave when the reduced working

hours were introduced and therefore was entitled to continued remuneration, is entitled to only a reduced compensation amount, in just the same way as employees who were not on sick leave. In lieu of short-time compensation said worker receives, in accordance with Paragraph 47b of the Social Code V, sickness benefit in the same amount. Should a worker become ill during the period of reduced working hours, they retain, for the duration of the continued remuneration entitlement, an entitlement to short-time compensation.

V. Redundancy in reduced working hours phase?

A prerequisite for a reduced working hours scheme is that there is a temporary lack of work. Redundancies made by the enterprise in question are only admissible if there is a long- lasting or permanent lack of work or a lack of work whose duration is not foreseeable. The reasons that may justify a reduced working hours scheme can therefore not serve to justify redundancies for economic reasons[30]. That would indeed be a contradictory behaviour.

This applies to the whole enterprise in which reduced working hours are introduced. If 40 out of 100 employees can continue to work full-time, then this shall mean that there is not even a

[30] BAG [Federal Labour Court] 23.2.2012 – 2 AZR 548/10 - NZA 2012, 852; Biere/Krebühl, in: Dahl/Göpfert/Helm (Editors), loc. cit., Ch. 2, Margin note 15; Rachor, in: Bader/Fischermeier et al., Gemeinschaftskommentar zum Kündigungsschutzgesetz und zu sonstigen kündigungsschutzrechtlichen Vorschriften [General Commentary on the Protection Against Dismissal Act and other Dismissal Law-related Regulations], 12th Ed., Cologne 2019, Paragraph 1 of Protection Against Dismissal Act, Margin note 569.

temporary lack of work for said workers. They can also not - even though they are not directly affected by a reduced working hours scheme - be made redundant by the enterprise for economic reasons.

This does not include cases where, during the period of reduced working hours, new reasons for definitive reductions in staff arise. However, this is not the case if only the temporary loss of work is extended: additional customers place no new orders because they are now affected by the Coronavirus measures, too. In such cases the only solution that can be taken into consideration is the extension of the reduced working hours period. However, the case becomes different where important orders fail to materialise on a long-lasting or permanent basis, because the client has been declared bankrupt or the enterprise is to go into liquidation. In such cases, economic redundancies are possible[31]. Nevertheless, a simple decision by the employer to reduce the business operations on a lasting basis is not sufficient: By applying for short-time compensation the employer has committed to continue the business at least for the period provided for.

The possibility of making employees redundant because of a newly emerged situation can be excluded by means of a collective bargaining or works agreement. Regulating things in such a way can be limited to the duration of the reduced working hours period, or

[31] BAG [Federal Labour Court] 23.2.2012 – 2 AZR 548/10 - NZA 2012, p. 852.

can be defined for a longer period.

VI. Redundancy instead of reduced working hours?

As already emphasised, a temporary lack of work is not grounds for redundancies. However, it may be the case that the employer regards the lack of work to be long-lasting or permanent in nature, whereas the employees themselves and the works council see it as a temporary phenomenon. In such a case, the works council can make use of its right of initiative in accordance with Paragraph 87.1.3 of the Works Constitution Act, and attempt to bring the employer to the negotiating table. If that attempt is not successful, because the employer only wants to negotiate a definitive reduction in staff, it can initiate the formation of a conciliation committee. Pursuant to Paragraph 100 of the Labour Court Law, it can do so by applying, at the Labour Court, for the appointment of a conciliation committee chairperson and the determination of the number of board members. In the scope of such a process all that is examined is whether "evidently" no right of co-determination exists, which, in the case of "open" developments burdened by uncertainties, will hardly be the case. The conciliation committee thus established will then look into the possibility of reduced working hours. Here the Federal Employment Agency plays a decisive role: If it leans towards approving short-time allowance, because in its opinion the prerequisites are given, then it will be difficult for the employer to insist on its intention to make employees redundant. Reduced working hours are introduced; and jobs are, temporarily, kept. If the

works council does not, however, make use of its right of initiative, then it has lost a major opportunity[32].

If the employer wants to make a large number of workers redundant, or carry out other forms of staff reduction, then the prerequisites for a change in business in the sense of Paragraph 111.3 of the Works Constitution Act are often given. The assumption of an operations limitation in the sense of Paragraph 111.3.1 of the Works Constitution Act is a particularly obvious option here. In such a case, the employer must first negotiate with the works council on the reconciliation of interests and a social plan, which, if the works council only acknowledges temporary lack of work, often leads to the appointment of a conciliation committee. The committee can decide whether there is a lasting or a temporary reduction in the work volume. Arguments for the latter alternative will be more difficult to express than making use of the right of initiative; the conciliation committee chairperson will likely ask the critical question as to why only now a lack of work of a temporary nature is being announced. The chairperson would also have to close the procedure, as he/she is not appointed to judge the matter of "reduced working hours"; the chairperson will be prepared for such a purpose in exceptional cases.

If the employer wants to make employees redundant without negotiating on the reconciliation of interests and a social plan, then

[32] BAG [Federal Labour Court] 4. 3.1986 – 1 ABR 15/84 - NZA 1986, 432; see also BAG [Federal Labour Court]11.9.1986 – 2 AZR 564/85 - BB 1987, 1882).

the works council can, in the opinion of most of the State Labour Courts, prevent it from making redundancies by means of a preliminary injunction.[33] A preliminary injunction will only remain in effect until a reconciliation of interests is achieved or has been definitively ruled out. This, however, can take many months, during which the enterprise's business relations may have improved. At least the employees have more time to look for another job.

If the enterprise does not have a works council, then all the above possibilities are excluded from the start. Should employees defend themselves against redundancy and begin litigation for wrongful dismissal, then the Labour Court must examine whether, at the time the redundancies were announced, the arguments for a temporary lack of work situation outweighed those for a lasting lack of work, and vice-versa. In cases of real doubt the former alternative is to be given preference. The fact that reduced working hours affect the occupational liberty of the workers less, because they keep their jobs, for now, favours such a decision. For a solution to this situation one can also call on the regulation as laid out in Paragraph 2.2.2 of the Social Code III. It obligates the employer to primarily avoid business operation-related terminations[34]. Given the low level of burden a reduced working hours scheme means for the employer, in accordance with the current legal situation, it is reasonable to

[33] For supporting documentation see Däubler, in: Däubler/Klebe/Wedde (Editors), Kommentar zum BetrVG [Commentary on Works Constitution Act], 17th Ed., Frankfurt/Main 2020, Paragraph 112, 112a, Margin note 53.

[34] Deinert, in: Däubler/Deinert/Zwanziger (Editors), Kündigungsschutzrecht (Protection against Dismissal Act], 11th Ed., Frankfurt/Main 2020, Paragraph 1 KSchG [Protection against Dismissal Act], Margin note 295

expect it to opt for this path in cases of doubt.

VII. Conclusions

Reduced working hours schemes have proven themselves as a solution in Germany. This is, not least, made clear by the fact that the number of workers on reduced working hours schemes was continuously between 5.5 and 6 million between March and June 2020[35]. That is almost one-sixth of the total salaried workforce. Following the economic crisis of the years 2008 and 2009 there has been consensus that a return to pre-crisis levels was made decisively easier by the fact that enterprises still had their trusted workers at their disposal. In the current much deeper crisis many sectors of the economy are currently experiencing because of the Coronavirus pandemic, the legislator has even made it easier to receive short-time compensation and adjusted the amounts to meet the increased needs of those affected. Reduced working hours schemes accordingly prove themselves to be a flexible measure to clearly mitigate the effects of a crisis. However, that a crisis of this kind cannot be prevented, is quite another matter.

[35] www.arbeitsagentur.de/presse/2020-39-der-arbeitsmarkt-im-august-2020.

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