VAA-Information

PART-TIME WORK AND PARENTAL LEAVE

VAA *Verband Angestellter Akademiker (Association of Employed Academics and Executives in the Chemical Industry)*

SUMMARY

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The opportunity to work part-time is based on various laws, which need to be applied correctly. Through the German Act on Part-Time Work and Fixed-Term Employment (Teilzeit- und Befristungsgesetz, TzBfG), lawmakers provide for a general entitlement to part-time work. Part-time work during parental leave is governed by the particular requirements of the Federal Parental Allowance and Parental Leave Act (Bundeselterngeld- und Elternzeitgesetz, BEEG).

Part-time work is any period of employment that is less than the regular weekly working hours set out in a collective agreement and not just the conventional reduction to half-time work. The TzBfG applies to full-time employees and to employees who are already working part-time. Thus, employees who are already employed part-time can reduce their working hours by a further few hours, for example. The TzBfG does not stipulate a minimum reduction of working hours, which means that even a reduction of one hour per week is covered by the purpose of the act.

1. CONDITIONS OF PART-TIME WORK UNDER SECTION 8 TZBFG

The employer must have **at least 15 employees**; only the headcount is relevant when calculating the threshold (small business clause (Kleinbetriebsklausel)). Whether the employees work full-time or part-time is irrelevant.

All employees who have been employed for over six months, including **exempt employees (i.e. those not covered by standard collective agreement and pay scale) and executive staff**, are entitled to work part-time. The TzBfG expressly stipulates in Section 6 that the employer must also enable employees in executive roles to work part-time pursuant to the law. The employee is then entitled to reduce the working hours that were previously contractually agreed, i.e. the working hours applied in the business or to the individual employee.

1.1. APPLICATION DEADLINE

The request to work part-time, i.e. to reduce the contractually agreed working hours (specifying the extent of this reduction), must be made no later than **three months** before the planned commencement of part-time work. If the employee inadvertently submits an application to commence part-time work on a date before this three-month period has passed, this is deemed to be an application to commence part-time work on the earliest possible date. The application must be interpreted to mean that the employee is requesting a reduction of working hours after the minimum period of three months has passed. In principle, however, employers can waive the period of notice, which only serves to protect them. It can be assumed that compliance with the three-month notice period is waived if the employer discusses the application with the employee without reservation and in the knowledge of non-compliance with the period of notice.

Under Section 8 (2) sentence 2 TzBfG, the employee **should** state the desired distribution of working hours when submitting his/her application. It therefore follows, as ruled most recently by the Federal Labour Court (BAG) on 23 November 2004 – 9 AZR 644/03 –, that the employee can decide whether to first request the reduction of working hours or whether to additionally request a specific distribution of working hours. He/she can make the reduction of hours dependent on the employer agreeing to the requested distribution. On the other hand, the employee is not obliged to immediately specify in a binding manner the distribution of working hours he/she wishes to adopt when submitting the application to work part-time. If the employee wishes to request a particular distribution of working hours, however, he/she must raise this issue at the latest when discussing the matter with the employer. The application must include the specific date when the

employee wishes to commence part-time work and the extent of the reduction of hours desired.

1.2. PROCEDURE

The employee's request to reduce his/her working hours may be made **informally**, i.e. there is **no need to submit a written application** for a reduction of working hours. If the employee mentions in a discussion with his/her employer on 28 February 2019 that he/she would like to reduce his/her working hours from 1 June 2019 by working one hour less a day, and the employer does not react to this request, this results in **acceptance by default**. The consequence is that the employee can reduce his/her working hours by one hour per day from 1 June 2019 without sanctions and without the employer being able to do anything to counteract this.

However, it is advisable to submit a written application stating the start and desired reduction of hours as well as the distribution of working hours in order to prevent misunderstandings.

The employer is under an **obligation to negotiate** on the application for part-time work (Section 8 (3) TzBfG). An attempt should be made to reach a mutual agreement on the desired reduction and distribution of working hours.

According to a ruling of the Federal Labour Court (BAG 18 February 2003 – 9 AZR 356/02), a violation of the obligation to negotiate pursuant to Section 8 (3) TzBfG does not necessarily lead to invalidity of the rejection of the request to work part-time. However, if the employer does not comply with its obligation to negotiate and rejects the application, it cannot raise any objections against the employee that could have been eliminated during negotiations.

However, rejection of the application is invalid (Section 8 (5) sentences 2 and 3 TzBfG) if the employer does not respond at all to the request for a reduction and redistribution of working hours within the time limit. If, therefore, the parties have not agreed on the reduction of working hours and if the employer has not rejected the reduction of working hours in writing no later than one month before the desired commencement of part-time work, the working hours are reduced to the extent requested by the employee.

The same result applies if an agreement has been reached on part-time work itself but not on the distribution of working hours. In both cases, the working hours are reduced to the extent desired by the employee and the distribution of working hours requested by the employee is deemed to be agreed. In both cases, the result is **acceptance by default**.

If the employee has not complied with the three-month notice period, the request is accepted by default no earlier than one month before the "corrected" date.

Please note: Just like taking unauthorised leave, an unauthorised reduction of working hours after the request has been rejected by the employer constitutes a refusal to work, which may result in termination without notice. The employee must therefore legally pursue the enforcement of his/her request, if necessary by means of a temporary injunction.

If the employee and employer have reached an agreement on the reduction and redistribution of working hours, the result must be agreed in writing no later than one month before the desired commencement of part-time work. If, on the other hand, no agreement has been reached, the employer must inform the employee **in writing** of his/her decision to reject the reduction and distribution of working hours, again **no later than one month** before the desired commencement of part-time work.

It should be noted that the employer is still able to unilaterally amend the agreed reduction or distribution of working hours. If the employer wishes to amend the existing reduction or redistribution of working hours, operational reasons alone are no longer sufficient; instead, the operational interest must significantly outweigh the employee's interest in retaining his/her previous working hours.

Although an employer may revoke the reduction of working hours in this way under individual employment law by virtue of its right to issue orders (Direktionsbefugnis), under collective bargaining law its doing so triggers the works council's right of co-determination under Section 87 (1) (2) of the German Works Constitution Act (Betriebsverfassungsgesetz, BetrVG).

After a decision to approve or reject an employee's application for part-time work has been made, his/her working hours can only be **reduced again** after a period of **two years** has passed. If the employer justifiably rejected the employee's application to reduce his/her working hours, he/she must consequently wait two years before submitting another application (**disqualification period** (Sperrfrist)). The employer may invoke this disqualification period pursuant to Section 8 (6) TzBfG. However, practice has shown that employers rarely make use of this right.

1.3. CONFLICTING OPERATIONAL REASONS

The employer must agree to the employee's request for part-time work and specify the distribution of working hours in accordance with the employee's wishes provided there are no conflicting operational reasons. Under the Act on Part-Time Work and Fixed-Term Employment (TzBfG), employees are not entitled to work part-time if operational reasons conflict with part-time work (Section 8 (4) TzBfG). Operational reasons may conflict with both the reduction and distribution of working hours. Consequently, employers have three options when making the decision: They can agree to both the reduction and distribution, reject both, or agree to the reduction but reject the distribution. The employer must set out and justify the conflicting operational reasons in detail and, in the event of litigation, must also provide evidence of them. The question therefore arises as to the scope and intensity that the "operational reasons" are required to have.

The following applies equally to the jobs of executive staff since their jobs are not fundamentally indivisible either.

According to the **wording of the law**, operational reasons conflict with an employee's entitlement to a reduction of working hours if the reduction of working hours has a "significant" negative impact on

- the organisation,
- the workflow or
- operational safety

or causes "disproportionate" costs for the employer. It is sufficient to provide verifiable and plausible reasons. Since this legal version makes it difficult both for the employer to provide accurate reasons against the request to reduce the employee's working hours that will stand up in the labour courts and also for the employee to attribute the correct scope to the reasons for the employer's refusal and to assess its consequences, the first labour court decisions were to be expected.

Recently, the labour courts have repeatedly discussed the interpretation of "operational reasons" pursuant to the TzBfG. It is clear from all judgments that, with respect to conflicting operational reasons pursuant to the TzBfG, they demand **high standards for the substantiated explanation** of these reasons. The employer must therefore set out the operational reasons in a specific and substantiated way, and not just using key words, in order to verifiably demonstrate that the employee's request for part-time work and distribution of working hours would have a significant negative impact on the organisation or workflow. It was thus decided that the employer must make reasonable efforts, and in particular make use of its right to issue instructions, to eliminate or minimise the disruptions to the workflow and operational organisation within the company by means of reorganisation and a different distribution of the working hours in order to comply with the employee's wish to work part-time.

In accordance with the case law of the Federal Labour Court (BAG), a three-step review process is used to determine whether a "reasonable" operational reason conflicts with the employee's request to work part-time (BAG 18 February 2003 – 9 AZR 164/02). The **first step** is to determine whether there is indeed an operational organisational concept on which the working hours arrangement deemed necessary by the employer is based and if so, what this concept is. What is primarily at issue is whether or not this is an arbitrary concept and whether the concept presented is actually implemented in the business.

The **second step** is to examine the extent to which the working hours arrangement actually conflicts with the employee's request to work part-time. In this connection, the question also arises as to whether the employer can be reasonably expected to change operational processes or personnel deployment in line with the employee's individual working hours request. If this is not the case, the weight of the conflicting operational reasons must be examined in a **third** and final **step** of the review.

The question arises here as to whether the employee's request to work part-time has a significant negative impact on the particular operational matters named in Section 8 (4) sentence 2 TzBfG or the operational organisational concept and the entrepreneurial objectives on which it is based.

A ruling has now been made by the Federal Labour Court (BAG 23 November 2004 – 9 AZR 644/03) on the employer's objection that it can find **no suitable additional staff**. If the employer does not have a part-time replacement available, an operational reason conflicts with the request for part-time work. The employer cannot then be instructed to recruit a full-time employee and reduce overtime. The reasons for which the employee is seeking to reduce his/her working hours are also irrelevant.

In its ruling of 21 June 2005 – 9 AZR 409/04 – the Federal Labour Court determined that the employer can successfully rely on the argument that operational reasons conflict with the employee's wish to reduce his/her working hours because it would be necessary to employ a replacement whose ongoing training would result in disproportionate additional costs. The employee could not successfully state in response that he/she would be able to manage his/her previous workload in the reduced hours by intensifying his/her work or by being willing to work outside the agreed working hours and thus eliminate the need to recruit a replacement.

A possible conflicting operational reason would be that the employer has no workspaces and rooms available for the distribution of the working hours because all part-time employees wish to work in the mornings due to childcare. Operational reasons that would have a significant negative impact on the organisation could also include the need for continuous presence if face-to-face communication is important. Other factors that could have a significant negative impact on the workflow include increased inefficiency in information transfer or priority periods of peak loads on certain days of the week or at certain times of day.

Questions of occupational safety are raised if a specific minimum number of employees need to be present in accordance with regulations under public law. Other considerations may include particular requirements arising from the type of professional activity, which require employees to be continuously present as far as possible.

The circumstances of the individual case are particularly important if there is a need to assess whether reducing the employee's working hours has a significant negative impact on the employer's interests. A significant negative impact does not include circumstances normally associated with staff changes, i.e. the material and personnel costs associated with the recruitment of a replacement or an increase in the regular working hours of an existing part-time employee. The additional work involved for the personnel department, costs of advertisements, interviews with candidates, initial training and the resulting disruptions to work processes are not sufficient.

If you are a VAA member and your request to reduce your working hours is rejected for operational reasons, you should seek legal advice from the VAA lawyers.

2. RIGHT OF CO-DETERMINATION

Even if the employee has been able to reduce his/her working hours as requested, the employer can still unilaterally alter the organisation of the employee's working hours if the interest of the company in reorganising the working hours outweighs the interest of the employee and if the employer has given one month's notice of this change. Although it may be permissible for an employer to revoke the reduction of working hours in this way under individual employment law by virtue of its right to issue orders (Direktionsbefugnis), under collective bargaining law its doing so triggers the works council's right of co-determination under Section 87 (1) (2) of the German Works Constitution Act (Betriebsverfassungsgesetz, BetrVG). The employer's consent to part-time work and the reduction of working hours resulting from acceptance by default are also subject to co-determination.

In addition, when an employee transitions from full-time to part-time work, this may constitute a transfer that is subject to consent under Section 99 BetrVG if it results in a change to the specific circumstances in which the work must be performed. It is **stipulated by law** in Section 7 (3) TzBfG that the employer must inform the employee representative body about part-time work in the establishment and company, in particular about current or planned part-time positions and about the transformation of part-time positions into full-time positions or vice versa. The employee representative body must be provided with the required documents upon request.

If the employer voluntarily complies with the request for part-time work because there are no conflicting operational reasons, it does not need to involve the works council since the works council has no participation rights in the **reduction of working hours**. This is not a change to the usual working hours of the company but to the individual working hours of a particular employee. In addition, the working hours are not being reduced temporarily but permanently. By contrast, the works council must be involved in the **distribution of reduced working hours** since the distribution of individual working hours may affect the remaining employees. Employers are therefore only obliged to involve the works council before making a decision if they voluntarily comply with the request for part-time work although they could reject it for conflicting operational reasons. In this event, they only need to obtain the consent of the works council with regard to the distribution of working hours.

3. ENTITLEMENT TO EXTEND WORKING HOURS?

Once an employee has reduced his/her working hours, he/she is permanently employed part-time. When a suitable vacancy arises that has the extended contractual working hours desired by the employee, he/she must be **given preference** if equally qualified. Only if there are conflicting urgent operational reasons or requests from other part-time employees to modify their working hours does this not apply. The employer must exercise its discretion when deciding who to select. Recruiting an employee without considering part-time employees who would like to extend their working hours is a personnel measure that violates the law pursuant to Section 99 (2) (1) of the Works Constitution Act (BetrVG).

The ruling of the Federal Labour Court of 15 August 2006 – 9 AZR 8/06 – on entitlement to extend working hours can only rescue the employer from the plight described above to a limited extent. According to this ruling, Section 9 of the Act on Part-Time Work and Fixed-Term Employment (TzBfG) provides the basis for a claim made by the employee if the employee indicates that he/she wishes to extend his/her working hours, the employer has a vacancy to fill that offers the longer working hours desired by the employee, and there are no conflicting urgent operational reasons or requests from other part-time employees to modify their working hours. The employee's suitability for the position is taken as given.

Since the employee is only entitled to extend his/her working hours under certain conditions, the ruling of the Federal Labour Court which rejects a claim for fixed-term part-time work (see above) is of little practical relevance.

Lawmakers have now amended this law to incorporate a solution to the problem, namely **bridging part-time work (Brückenteilzeit) pursuant to Section 9a TzBfG**.

The prerequisites for the new approach of bridging part-time work are:

- The employer normally has more than 45 employees.
- The employee has been working for the employer for over six months.
- The employee makes an application to the employer to reduce the contractually agreed working hours (full-time or previous part-time work) for a specific period of between one and five years.
- No specific reasons (e.g. raising children, caring responsibilities) are necessary.
- The application is submitted in writing at least three months before the start of the desired reduction of hours.
- There are no conflicting operational reasons that would have a significant negative impact on the organisation, workflow or operational safety (see above).
- A special "reasonable threshold" (Zumutbarkeitsgrenze) applies to employers who have between 46 and 200 employees: Even if the other prerequisites are met, these employers only have to grant the right to bridging part-time work to one in every 15 employees (**protection against excessive demand**).

In addition to the new legal entitlement, the law makes it easier for employees who are already working part-time for an unlimited period and would like to work more. Under the previous legal situation, employers already had to give preference to part-time employees who wanted to work longer hours when filling vacancies if these employees were equally qualified for the position. However, this only applied if there were no conflicting urgent operational reasons or requests from other part-time employees to modify their working hours. The burden of demonstration and proof in this matter lay with the employer. Since 1 January 2019, the employer has also had to demonstrate and, if necessary, prove that the position does not correspond to the part-time employee's previous position or is not vacant or that the part-time employee is not at least as suitable as another preferred candidate.

Furthermore, it was made clear that the employer must discuss the employee's wish to change the duration and/or organisation of his/her existing contractual working hours. This obligation applies regardless of the extent of the working hours and the number of employees working for the employer. The employee can consult a member of the employee representative body for assistance or mediation. In addition, the employer must inform the employee representative body of any requests made to modify working hours.

4. INDEPENDENT PROHIBITION OF DISMISSAL

Dismissing an employee on the grounds of his/her refusal to switch from full-time to part-time employment and vice versa is not permitted (Section 11 TzBfG). However, this special **prohibition of dismissal** does not restrict the employer's right to dismiss an employee for operational reasons on other grounds.

Dismissal with the option of altered conditions of employment (Änderungskündigung) of a full-time employee whose working hours are to be reduced due to a decreased workload (even if this is caused by the employer) continues to be **permitted**. However, it is vital that this matter be examined by the VAA lawyers.

The employer might wish to oppose the employee's request to reduce his/her working hours and officially reprimand him/her. This is not permissible. The employer may **not discriminate** against an employee due to him/her exercising rights pursuant to the TzBfG (Section 5 TzBfG). However, dismissals on any other grounds remain **unaffected**. Ordinary dismissals within the scope of application of the Protection Against Dismissal Act (Kündigungsschutzgesetz) can therefore occur for personal, behavioural or operational reasons, as is the case with other employees.

If a part-time employee is given notice of ordinary dismissal for operational reasons, the question arises for the employer as to whether it must include full-time employees in the **social selection** process. If the employer made an organisational decision on the basis of which certain work is intended for full-time employees, the full-time employees are not to be included in the social selection process.

However, the decision must not be manifestly subjective, unreasonable or arbitrary. The basic idea is that the employer must decide which work is performed as full-time work and which as part-time work. Assuming that full-time employees have to be included in the social selection process and these employees need less social protection, they must be the first to be dismissed. A part-time employee would be entitled to be transferred to the full-time position that has become vacant. He/she is not entitled to a full-time position, however. The business decision to structure certain positions as full-time positions must therefore be respected and cannot be reviewed by the labour courts. In the case of dismissal for operational reasons, the conclusion on social selection can be visually expressed as follows: Whole apples can only be compared with whole apples, but not with half apples. Therefore, part-time and full-time employees **cannot be compared** in the social selection process.

5. PRINCIPLE OF EQUAL TREATMENT

A part-time employee is not allowed to be treated less favourably due to his/her part-time work than a comparable full-time employee unless there are **objective reasons** justifying different treatment (Section 4 (1) sentence 1 TzBfG). The TzBfG thus **explicitly** regulates a principle of equal treatment in the case of part-time work.

Part of this principle is the **obligation** to grant **benefits** on a **pro rata** basis. Remuneration for work or any other divisible non-monetary benefit must be granted to a part-time employee at least to an extent corresponding to his/her working hours as a proportion of the working hours of a full-time employee. This is referred to as the **pro rata temporis principle**. It is therefore self-evident that if employees receive remuneration on a pro rata basis, their current remuneration is reduced in accordance with their level of employment.

Any payments for overtime must also be paid when the reduced working hours are exceeded. However, it can be contractually agreed that overtime payments are only made when the working hours for full-time employees are exceeded. In that case, part-time employees are not entitled to these payments if they only exceed their individual working hours but not those of a full-time employee.

Part-time employees must be paid the **13th monthly salary** for their new working hours as a proportion of their original working hours, i.e. pro rata.

The extent to which part-time employees must be granted **bonuses** depends on the purpose of the payment. This purpose is determined by the employer. It is rare that the intended purpose will result in part-time employees being completely excluded from special payments of this kind.

The traditional Christmas bonus must also be paid to part-time employees. Part-time employees also have higher expenses at Christmas. They too have performed work. They too have shown loyalty to the company. And in their case too, future loyalty to the company is a consideration. The Christmas bonus must therefore also be paid to part-time employees. How much they receive is open to question. The answer to this question depends on the purpose of the payment. If at least one purpose of the bonus is also to reward the work that employees have done, a pro rata reduction of the payment is justified.

If a **long-service award** is given solely to recognise a certain period of service (work anniversary), as will usually be the case, part-time employees must also receive the full payment. In this case, the award is given solely on the basis of company loyalty that has already been demonstrated; the aim is to reward this loyalty. If, on the other hand, the long-service award depends on the extent of work performed by employees, part-time employees are only entitled to receive the award on a pro rata basis. The same applies if the value of the long-service award is related to the employee's earnings. Companies usually have a works agreement or guideline on long-service awards, which contains special regulations for part-time employees.

Of course, the employer remains at liberty to provide part-time employees with a **company car as a non-monetary benefit** even while they are working part-time. The company car is part of the employee's remuneration in the broader sense. The non-monetary benefit is that the employee is able to use the company car for personal use. The law stipulates that remuneration must be granted on a pro rata basis.

However, if working hours are reduced by 50%, how should a part-time employee be granted 50% of a company car? If the use of a company car cannot be divided in a sensible way – with two employees alternating their use of the vehicle, for example – the employer is entitled to take back the company car. In return, however, the employer must pay the part-time employee financial compensation amounting to 50% of the foregone non-monetary benefit of personal use. The extent of this compensation depends on the amount on which the flat-rate taxation of personal use is based, known as the non-monetary benefit of 1% of the list price.

6. OCCUPATIONAL PENSION SCHEME

Part-time employees must be included in any occupational pension schemes run by the employer. Excluding part-time employees from the company pension scheme or placing them at a proportionate disadvantage is not permissible and violates the **prohibition of discrimination** pursuant to Section 4 TzBfG.

7. INITIAL AND CONTINUING EDUCATION AND TRAINING

The employer must ensure that part-time employees can also participate in initial and continuing education and training measures to advance their professional development and mobility (Section 10 TzBfG). This does not give rise to an entitlement to the implementation of such measures because there is no general entitlement to continuing education and training. The aim is simply not to exclude part-time employees from educational measures of this kind compared to full-time employees.

8. PAID ANNUAL LEAVE

If the reduced working hours are **distributed evenly** – i.e. the number of weekdays on which the part-time employee works remains unchanged compared to the number of weekdays worked when he/she was previously employed full-time – the duration of paid annual leave for part-time work corresponds to that for full-time work.

If the reduced working hours are **distributed unevenly** – i.e. the number of weekdays on which the part-time employee works is fewer than the number of weekdays worked when he/she was employed full-time – his/her entitlement to paid annual leave must be calculated precisely. The entitlement to this leave in working days that applies to full-time work must be divided by the number of days worked by full-time employees. The result must be multiplied by the number of days on which the employee is obliged to work part-time.

Example: If the agreed working hours for full-time work are five days per week and the part-time employee now only works three days per week, his/her paid annual leave is calculated as follows: leave entitlement agreed for full-time work – 30 working days per year. Calculation of current leave entitlement for part-time work – 30 : 5 x 3 = 18 days' leave.

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