

## Employment & Benefits - Austria

### Let's rock during sick leave

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#### Introduction

Employees are entitled to at least six weeks' paid sick leave, increasing to eight weeks after five years, 10 weeks after 15 years and 12 weeks after 25 years of continuous employment. Beyond the full pay entitlement period, employees are entitled to half pay for another four weeks in any given year. This sick leave regime is financed entirely by the employer, without any possibility of recovering a portion of it from the social security provider (ie, the regional health insurance fund).

It is also settled case law that employees can trust their doctor's diagnosis and proposed treatment plan or therapy. Further, employees must adhere to any advice given regarding refraining from conduct that might aggravate their medical condition or negatively influence the healing process or course of recovery. Any conduct that does not comply with these guidelines might constitute grounds for summary dismissal.

In a recent decision (9 ObA 64/14y), the Supreme Court had to consider whether activities performed during an employee's sick leave that would not typically be regarded as adequate conduct were acceptable.

#### Facts

The plaintiff was dismissed and claimed compensation, asserting that his conduct during his sick leave had not hindered his recovery or prolonged his incapacity.

After two decades working in sales and on key accounts for his employer, the plaintiff developed symptoms including depressive moods and sleeplessness. He believed that his health problems were caused by his stressful work environment and suggested that the employment relationship be terminated on mutual consent (prompting an entitlement to statutory severance pay, which the plaintiff would have lost had he given notice unilaterally). He also developed an ulcer and called in sick. Two weeks into his sick leave, the plaintiff consulted his family doctor, who extended the period of sick leave by another three weeks, diagnosed symptoms of burnout and suggested that the plaintiff consult a psychiatrist. The psychiatrist confirmed the burnout symptoms, recommended psychotherapy and extended the sick leave for a further six weeks. During that period, the defendant gave notice of termination (also prompting an entitlement to statutory severance pay). Following the notice letter, the plaintiff again suggested a mutual termination of employment and requested that the defendant help to finance his retraining courses, because he wished to pursue a different career path.

During his sick leave, the plaintiff went for long walks with his partner and visited a sauna and fitness studio several times. He even drove to Munich to watch the Red Hot Chili Peppers perform. Towards the end of the extended sick leave period, the plaintiff consulted another psychiatrist who again recommended psychotherapy. The plaintiff also mentioned that he wished to pursue a new career, possibly as a physiotherapist. The sick leave was then extended for another eight weeks. During that phase of sick leave, the plaintiff attended several psychotherapy sessions and registered for a private vocational school in Germany to attend classes in physiotherapy. His family doctor supported this move and reported it to the regional health insurance fund. The physiotherapy classes were held Monday through Friday from 8:00am to 5:00pm; the family doctor had prescribed that the plaintiff go out between 8:00am and 6:00pm only.

The plaintiff did not inform the defendant about his specific retraining courses in Germany. When the defendant learned about them from a private detective it had hired, the plaintiff was dismissed without notice.

#### Decisions

#### Author

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The lower courts held that the plaintiff had discussed his intention to start vocational training with his doctor and that the psychotherapist had supported this move. Based on the psychotherapist's counselling, the plaintiff could rely on his doctor's advice; thus, his conduct did not constitute sufficient grounds for dismissal because he had no reason to believe that, under the circumstances, vocational training would have a negative influence on his capacity to work. The lower courts applied the same rationale with respect to the Red Hot Chili Peppers concert. Attending the concert had no adverse effect on the plaintiff's recovery. The lower courts reasoned that depressive disorders and burnout symptoms typically require a change of scenery.

The Supreme Court confirmed the lower courts' decisions and opined that the plaintiff had only followed his doctor's instructions when starting his vocational training and that he could rely on this advice.

In previous cases the Supreme Court has also held that taking exams for driving licences and going out dancing need not necessarily amount to conduct that adversely affects the recovery process if these activities are performed during prescribed going-out times and are not contrary to a doctor's recommendations. In one case the Supreme Court even concluded that going out dancing might be a healthy activity when diagnosed with back pain. In another case, the court said that towards the end of recovering from a flu-like infection, spending two or three days in a restaurant where the employee's wife worked and helping her during that period of convalescence did not constitute a breach of contract.

### Comment

Sick leave remains a heavily contested topic in Austria. This largely has to do with the fact that employers have no right to learn about employees' diagnoses and are therefore at a complete loss in determining whether certain conduct during a period of sick leave might potentially delay the recovery process. Conversely, the incapacity to work, which is a question of law, is officially confirmed by doctors who have no insight with respect to an employee's working conditions. Consequently, doctors often attest to a legal issue (ie, incapacity to work) without the information required to make this judgement, and employers seek to dismiss employees when they learn of conduct that would normally attest to a capacity to work.

Most would not ordinarily assume that going to a rock concert and attending classes from 9:00am to 5:00pm (albeit during the doctor's prescribed times) instead of performing contractual work would pass as conduct that might speed up recovery, or at least not delay it. In any event, it is hard for employers to understand why employees who are travelling, going dancing or to a concert, dining in restaurants, passing exams, attending week-long retraining courses or even performing supportive work during their sick leave would lack the required capacity to work in their jobs.

The problem becomes even more impenetrable with an increase in medical diagnoses pertaining to employees' mental health and wellbeing, commonly labelled as the all-encompassing but unspecific 'burnout syndrome'.

In hindsight, and given the complex evidentiary issues of such cases, the employer would have been well advised to accept the employee's proposal of mutual termination and contribute to the costs of his vocational training.

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