In a recent decision of the Federal Court of Justice a very important question – which has been largely underestimated so far – is looked at: Which expenses of the employee in connection with the home office must be paid by the employer?
Reimbursement obligation for costs of home office

In a case concerning reimbursement for expenses incurred by the employee for his home office, the Federal Supreme Court recognised the room rent as being subject to mandatory reimbursement even though the premises were rented without relation to the fulfilment of the work. The ruling obliges the employer to reimburse the costs of the employee for the home office.

Background

In its decision (4A_533/2018 of 23 April 2019), the Federal Court dealt with a claim of an employee for the reimbursement of the costs for a room in his private apartment which he used as office and archive. The Federal Court concluded that such a claim for reimbursement of rental costs is valid and that the reimbursement of such costs is mandatory under Swiss law if the employee is not provided with a workplace. Thereby, the Federal Court confirmed the view of a part of the doctrine. However, so far it was uncertain, however, whether such a claim also exists if the employee did not rent the room in view of the performance of the work. This was confirmed by the court correspondingly, while opposing views were regarded to be «inappropriate».

As a result, the Federal Court ruled in favour of a comprehensive obligation of the employer to reimburse all expenses incurred by the employee in respect of the performance of work for the direct or indirect benefit the employer. Thereby, it does not make a difference what the original cause for the expenses was, provided that the expenses are ultimately necessary for the performance of the work.

Reimbursement of expenses

According to the law (Art. 327 et seq. CO), the employer has to compensate the employee for the equipment and materials provided by the employee for work. However, it is permitted that the parties agree that no compensation is paid.

In regard to work expenses incurred by the employee in the performance of work, the contractual freedom of the parties is limited. The law only allows that the parties may agree that such expenses are reimbursed in form of a fixed sum, such as a regular allowance and provided that such allowance covers the necessary expenses in average.

So the essential question is whether the home office and the costs associated therewith are work equipment (which could be covered by an inclusive clause) or work related expenses. Work equipment and material are deemed to be objects which, by their nature, are essentially either used or consumed/modified by the employee during the performance of work. In home office, these are the workplace in the broad sense, i.e. the office infrastructure, such as the furniture (in particular table, chair, electronics, sometimes PC and monitor) and the room (or a portion of it), as well as the consumables (e.g. paper). If the employee provides such equipment or material himself, he has to bear the expenses given a respective contractual provision. This inter alia plays a role in so-called Bring Your Own Device regulations (e.g. for laptop, mobile phone). The ongoing costs of the home office, such as subscription and connection costs (e.g. for internet, telephone), electricity, heating as well as maintenance and repair work (but not maintenance costs), which are necessary for the work, are treated differently.
At least following the ruling of the Federal Court, the (rental) expenses for the room can also be subsumed under this category. The employer is therefore obliged to reimburse these expenses.

In general, the employee’s right to reimbursement exists only for necessary expenses related to home office. Whether expenses are deemed necessary is to be assessed on a subjective basis. Necessity is given in particular if the employer does not offer any adequate workplace. On the other hand, if home office is requested solely by the employee whereas a workplace is made available by the employer, the employee is not entitled to reimbursement of expenses. However, whether the employer is also required to reimburse private expenses which the employee does not directly incur for the performance of the work, but which are also used in this context (e.g. general subscription for the public transport system), is controversial. At least for expenses which are of advantage/benefit to the employer, a pro rata reimbursement in accordance with the extent of use (by analogy with Art. 327b CO) is presumably appropriate. To that end, adequate criteria must be determined for the attribution of costs (e.g. home office-/work quota for room rental).

**Further home office issues**

During home office, the rights and obligations under the employment relationship remain unchanged in principle, though they have to be adjusted to the special circumstances of working in private premises. Since an employer’s inspection cannot be carried out to the same extent, this holds particularly true for compliance with (mandatory) occupational health and safety regulations (e.g. work and rest periods, health protection, occupational safety, etc.), but also to compliance with rules of conduct in accordance with company regulations. To avoid an unclear situation, the main responsibilities should be defined in the home office agreement. In this regard, it is generally adequate to reference the applicable legal and/or contractual regulations. For compliance reasons, in particular working hours, rest periods and health protection should be explicitly listed in the agreement. The employer should in general be able to rely on the employee’s compliance with the regulations. However, where circumstances so require, the employer must conduct inspections in individual cases. The on-site inspections should be governed in the agreement.

**Conclusion - Need for a legal home office regulation?**

The economic demand for mobility of work, in particular through home office, co-working spaces, continuous availability, wasn’t predictable when the current legal provisions were adopted. While the provision on work equipment and material (Art. 327 CO) is presumably tailored to the more traditional fulfilment of work being performed within the premises of the employer, the expense regulations (Art. 327a et seq. CO) provide for protection for external employees. Home office work is affected by the application of both provisions, the relationship of which is controversial in academic doctrine. An adjustment of the provisions, in particular with regard to home office work, has thus been a political topic (e.g. recently Po. Meier-Schatz 12.3166). However, there has been no concrete revision so far. While a legal revision may provide for clarification, an adequate solution – as the Federal Court has shown – can be based on the applicable reimbursement rules (Art. 327 et seq. CO). In particular, the reimbursement of expenses for pro rata use of private property is already provided in a rather universal form (see for motor vehicles Art. 327b CO).

The decision of the Federal Court has clarified the cost allocation for the private workspace in the home office: The employee is entitled to reimbursement of expenses, irrespective of whether the room was rented specifically for the performance of work or another purpose. The respective costs must be provided for in any lump-sum payment. Because the court decision didn’t assess the reasonable amount for the compensation, the parties should define the respective room costs in the agreement. Since a full remuneration for the expenses is mandatory, a minimum approach is not recommended. Current rental advertisements provide reference points in that regard. In case of combined (private and work) use of the room the compensation must be calculated proportionally. The work quota of the employee may serve as indication.
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