HEUKING KÜHN LÜER WOJTEK

Newsletter
Employment Law

June 2010

German notice periods contrary to European law

AGG I - insufficient knowledge of German language as reason for dismissal

AGG II - claim for compensation due to xenophobic harassment

Deferred compensation: "partially" zillmerized insurance rates permissible

No compensation in the event of lost right of objection

Retroactive termination agreement permissible? Preliminary agreement is subject to statutory written form

Case-law on unity of collective bargaining about to be amended

German notice periods contrary to European law

ECJ, 19.01.2010 C-555/07 "Kücükdeveci"

The provision of Section 622(2) 2nd sentence of the German Civil Code [BGB], pursuant to which periods of employment completed before the age of 25 are not taken into account in calculating notice periods, is not compatible with European stipulations.

As was to be expected, the European Court of Justice declared the German legislation to be contrary to European law due to a violation of the principle of non-discrimination on grounds of age. The female employee had been in the defendant's employment since the age of 18. After 10 years, the employer terminated the employment taking account of a notice period of only one month. In accordance with the provisions in the German Civil Code, the defendant calculated the statutory notice period as if the employee had three years' length of service, taking into account only the period of employment after the employee having reached the age of 25, and not the actual ten years of service. The European Court of Justice affirmed the employee's view that this represented impermissible, unjustified difference in treatment in connection with age. Even though an employee in principle cannot directly refer to a violation of European directives towards non-public employers, the European Court of Justice at the occasion of this judgment asserted that German courts are obligated to no longer apply national legislation, also towards private employers, to the extent to which it violates the principle of non-discrimination on grounds of age. This prohibition is not only contained in Directive 2000/78, but rather is a "general principle of Community law".

Conclusion: Pursuant to Section 622 BGB, German employers must fully take into account the employment with a company completed in the individual case with immediate effect for the calculation of the notice periods, regardless of at what age the employee commenced his employment. At the same time, however, established case-law of the Federal Labor Court continues to apply, pursuant to which a selected term of notice period, which is too short, does not invalidate the notice of termination. Rather, instead of the deadline which has been calculated for a period that is too short, the legally permissible notice period will apply.

AGG I - insufficient knowledge of German language as reason for dismissal

BAG, Judgment of 01/28/2010, Case 2 AZR 764/08

An ordinary notice of termination of an employee, who is not able to read work instructions composed in the German language, can be justified.

The plaintiff, a native of Spain, had been employed by the defendant employer, a company in the automobile supply industry, since 1987. In 2001, the employee signed a job description according to which his job required good spoken and written command of the German language. At the expense of the employer and during working hours, the plaintiff took a course in German in 2003. Despite his employer's recommendation, the plaintiff refused to take follow-up courses. In several internal audits since 2004 the employer determined that the plaintiff was unable to read and understand the work and inspection instructions composed in the German language. Consequently, in 2005 and 2006, the employer repeatedly and unsuccessfully requested the plaintiff to improve his knowledge of German on pain of termination. At the end of 2007, the employer served notice of termination, after once again only insufficient language skills were ascertained in an audit.

In the second instance, the Higher Labor Court Hamm adjudged the notice of termination to be ineffective. The Federal Labor Court contradicted this opinion now (press release of January 28, 2010). Accordingly, an ordinary notice of termination can be justified if the employee is unable to read work instructions composed in the German language. To the extent to which the knowledge of the German language is required for the employee's occupation, such a requirement does not represent a discriminatory disadvantage of the employee, particularly due to his ethnic origin within the meaning of Section 3(2), 2(1)(2) General Equal Treatment Act [AGG]. The employer pursues a legitimate objective and for this reason an objective exclusive of a discrimination within the meaning of the General Equal Treatment Act, if the employer, such as for reasons of quality control, introduces work instructions in the German language. Moreover, in the case at hand, the employer gave the plaintiff sufficient opportunity to acquire the necessary language skills.

Conclusion: If they are relevant to the occupation, the lack of language skills can justify the notice of an ordinary termination in individual cases. Prior to a notice of termination, however, in principle sufficient time should be granted to the employee to acquire the relevant skills. Alternatively, and this may be the better solution in case of doubt, necessary language skills should already be checked orally or in writing in the recruitment process.

AGG II - claim for compensation due to xenophobic harassment

BAG, Judgment of 09/24/2009 - Case 8 AZR 705/08

If xenophobic harassment in a company lead to an employee's dignity being violated and if additionally a "hostile environment" exists, the employer may be obligated to pay compensation for damages under the General Equal Treatment Act.

The plaintiffs are Turkish citizens and are employed as order pickers in the warehouse by the defendant employer. About half of the employees in the business are of foreign origin. The business had a men's rest room with five individual cubicles. At least two of the toilet doors showed a swastika and the following handwritten inscriptions: "Sh** foreigners, you sons of b****es, foreigners out, you ***heads, foreigners have become locals." The plaintiffs considered this to be discriminatory harassment and demanded compensation from the defendant employer amounting in each case to at least EUR 10,000.00 net pursuant to Section 15(2) of the General Equal Treatment Act. The Federal Labor Court rejected the complaint just as in the previous instances.

The scribblings were linked to the characteristic of ethnic origin pursuant to Section 1 General Equal Treatment Act. For the assumption of harassment, however, a "hostile environment" must exist as a synonym for an environment characterized by intimidation, hostilities, degradation, humiliation or insults (cf. Section 3(3) General Equal Treatment Act). The Federal Labor Court held that the inscriptions alone were not sufficient. The scribblings affected only a very limited section of the work-related environment of the plaintiffs and did not characterize said environment.

However, the Federal Labor Court expressly emphasized that discernibly exhibited inaction and clearly expressed disinterest on the part of the employer with respect to xenophobic slogans can create a hostile environment. In the end, however, the Federal Labor Court was able to leave the question open in the adjudged case since the plaintiffs had failed to assert the alleged violation of the employer within the two-months cut-off deadline of Section 15(4) General Equal Treatment Act.

Conclusion: If an employer acquires knowledge of xenophobic or discriminatory hostilities of any type in the business, he should immediately take action against them and see to it that those do no longer happen in the future.

Deferred compensation: "partially" zillmerized insurance rates permissible

BAG, Judgment of 09/15/2009 - Case 3 AZR 17/09

It had been disputed for a long time, whether and to what extent the "zillmerization" of rates of direct insurances concluded for deferred compensation, i.e. the offsetting of the incurred acquisition and marketing costs with the savings component of the first insurance premiums is permissible. The Federal Labor Court considers it appropriate to distribute the acquisition costs over a period of five years.

After his early resignation, the plaintiff demanded payment of wages totaling EUR 7,004.00 from the defendant employer. The employer had paid this amount to a direct insurance company in the period from November 2004 until the end of September 2007 as part of the agreed deferred compensation model. After termination of the employment, the insurer had informed the plaintiff that the actuarial reserve would only amount to EUR 4,711.47 due to "zillmerization". Due to having been burdened with the acquisition and marketing costs, only a relatively low actuarial reserve had been built up in the first years after the insurance policy entering into force. For this reason, the plaintiff regarded the deferred compensation agreement as invalid and demanded payment of the converted compensation.

The Federal Labor Court initially determined that even the use of fully zillmerized insurance agreements did not violate the principle of equality of value of Section 1(2)(3) Company Pension Schemes Improvement Act [BetrAVG] since upon taking out of direct insurance, equality of value is to be measured taking into account actuarial principles and the arising calculation of the insurance benefits. However, a fully zillmerized insurance agreement, in which the costs of entering into the agreement and marketing costs are charged with immediate effect at the beginning of the insurance policy, could represent an unreasonable disadvantage within the meaning of Section 307 German Civil Code [BGB]. Ultimately, a non-forfeitable entitlement of adequate economic significance must remain available to pension recipients despite an early resignation from the employment relationship. It seemed doubtful as to whether full zillmerization of the insurance rate which in the case of early exemption from contributions would lead to zero benefits or very low benefits, were compatible with this concept. Nevertheless, in principle the Federal Labor Court considers it permissible to charge the costs incurred in taking out the direct insurance to employees. Following Section 169(3) Insurance Contract Act [VVG], it considers a period of five years as appropriate for the distribution of these costs.

Deferred compensation: "partially" zillmerized insurance rates permissible

Even if the amount of the insurance and pension benefits due to a full zillmerization should be legally objected to, so the Federal Labor Court further, this would not lead to a "revival" of the deferred compensation claim, but rather to a claim for an increase in the insurance benefits. The complaint for payment of the contractual compensation therefore remained unsuccessful.

Conclusion: The decision suggests that for deferred compensation, the taking out of direct insurance policies with partially zillmerized rates which provide for a distribution of the costs of entering into the agreement and marketing costs over a period of at least five years, is permissible. Even to the extent to which existing agreements may be unduly discriminatory due to "full" zillmerization, this does not lead to a claim to the already converted compensation under the employment agreement. However, the risk exists that insurance benefits have to be increased.

No compensation in the event of lost right of objection

BAG of 11/12/2009, Case 8 AZR 751/07

If an employee loses his right of objection (such as by forfeiture), he cannot later request to be put in such an economic state as if he had exercised the objection effectively.

The Federal Labor Court held that in the case to be adjudged, the employee had forfeited his right to object to a transfer of a business: On the one hand, he had continued to work with the new owner of the company, without objecting, despite the filing of an application for insolvency. Even after notice of termination by the insolvency administrator, the employee still waited an additional month prior to declaring his objection. On the other hand, at the time of the objection one year had passed since the transfer of the business, so that the previous employer in the view of the Federal Labor Court did not (longer) have to take into account an objection.

The Federal Labor Court dismissed a claim for compensation due to the failure to properly inform on the transfer of the business:

No compensation in the event of lost right of objection

While the violation of the duty to inform (actual legal obligation) could in principle trigger a claim for damages, the employee, however, could not request from the previous employer, despite the latter's violation of the duty to inform, to be treated as if termination of the employment with the defendant had not occurred due to proper objection (and the employee therefore also would have had claims for compensation after the transfer of the business against the employer). The failure to inform in compliance with statutory provisions had led to the fact that the one-month deadline for the exercising of the right of objection had not been set in motion. The legislator had thus granted the employee the opportunity to exercise an objection in the event of a violation of the duty to inform even without compliance with a one-month deadline. For this reason, the employee would be in a position to attain the continuance of his employment with the previous employer by exercising the right of objection which is not bound by a time limit. However, if the employee's conduct led to his right to exercise his objection ceasing to exist (such as by forfeiture), the employee's right to be placed in such an economic state as if the objection had been made effectively was also lost. Such a claim for damages would ultimately circumvent the loss of the right of objection.

Conclusion: The decision is to be welcomed. It creates the necessary legal certainty in the event of forfeiture: If an employee forfeits his right to object to a transfer of a business, he cannot return to the previous employer. At the same time, claims for damages due to the lost possibility of returning are out of the question.

Retroactive termination agreement permissible? Preliminary agreement is subject to statutory written form requirement

BAG, Judgment of 12/16/2009 - Case 6 AZR 242/09

A retroactive termination agreement is permissible only when the employment has already been suspended. Section 623 BGB also applies to a preliminary agreement.

A complaint for severance payment gave the Federal Labor Court an opportunity to respond to two important questions in practice: The plaintiff had been interested in his employer's "immediate option" for an accelerated reduction in personnel. In this context, the employee had held discussions with his branch manager and in his opinion had obtained an oral agreement on entering into a termination agreement.

The complaint remained unsuccessful. It failed already in that the plaintiff asserted a termination as of 04/30/2008, but he had actually been employed by his employer beyond this point in time. The Federal Labor Court clarified that an employment can be terminated with immediate effect or at a future point in time. A retroactive termination agreement, however, would only be permissible when the employment had already been suspended. This was lacking in the case at hand.

In addition, the complaint could not have been successful even if the employment had been suspended as of 04/30/2008 since the statutory written form requirement of Section 623 BGB is also to be observed for a preliminary agreement on termination of an employment. If this written form requirement is not observed, a preliminary agreement is null and void pursuant to Section 125 1st sentence BGB.

Conclusion: For business practice, it has now been established by the Supreme Court that employee and employer are not bound by an orally concluded preliminary agreement aiming at the termination of employment. Prior to entering into retroactive termination agreements, detailed examination is required from the perspective of labor law (but also from the perspective of social insurance law) as to whether the employment had already been suspended at the intended time of termination. Only in such an exceptional case can a retroactive termination be applied.

Case-law on unity of collective bargaining about to be amended

BAG, decision of 01/27/2010 - Case 4 AZR 549/08 (A)

The 4th Senate intends to change its case-law on the principle of unity of collective bargaining.

The issue at stake is whether several collective agreements of different unions can apply side by side in one business. In view of the organizational principle of the DGB Trade Unions dominant in Germany ("one business operation – one union"), only rarely did the overlap of several collective agreements occur to date. However, as the "train driver strike" in 2007 has shown for example, clientele unions such as GDL [German Union of Train Drivers], Cockpit [German pilots union] or Marburger Bund [Association of physicians] have in the meantime given highly relevant significance to the question as to whether collective agreements of different unions can apply in one business operation.

In the case in question, a physician who is a member of Marburger Bund had complained to his hospital. In 2005, he demanded vacation allowances to which he was entitled at the time under the BAT [Federal Collective Agreement for Public Employees] which the Marburger Bund had negotiated with the defendant hospital. The hospital countered that in the meantime it had entered into a more specific collective agreement, the TVöD [Collective Agreement for Public Service], with ver.di which replaced the agreement with Marburger Bund. The hospital's view is correct according to prior case-law. By its membership in VKA [Confederation of Municipal Employers Association], the hospital is bound on the one hand by the BAT towards the members of Marburger Bund and on the other hand by the TVöD towards the members of ver.di. In order to guarantee the principle of the unity of collective bargaining (one business operation = one collective bargaining agreement), the more specific collective bargaining agreement should have priority over the general collective bargaining agreement according to prior case-law. The more specific collective bargaining agreement would be the TVöD, since due to the limited membership of Marburger Bund the BAT would include only the physicians in the business operation of the hospital. The BAT would thus be replaced, so that the plaintiffs can assert no claim from that collective bargaining agreement. The Federal Labor Court now regards such a replacement as invalid, in particular unconstitutional. The Collective Bargaining Agreement Act [TVG] provides for the application and not the replacement of the collective bargaining agreement. The prior "judge-made law", dating back to 1957, could not (longer) agree

with the basic right of freedom of association (Article 9(3) of the German Constitution). In the future, collective standards, which govern content, conclusion and termination of an employment, should apply to their respective members side by side in one business.

Conclusion: A change of case-law may lead to far-reaching changes in the collective bargaining landscape. Particularly unclear is what impact a future collective plurality will have on the right to collective industrial action. If in the future several collective bargaining agreements apply in parallel in one business operation, then the risk exists of several industrial disputes which are not coordinated between the unions involved. These industrial disputes could then increase, since at different points in time different collective bargaining agreements will expire, each collective small group will fight for a new collective bargaining agreement and unions, in their constant fight for members, will accordingly attempt to outdo the others in their demands. For the time being, it remains to be seen as to whether and how the Federal Labor Court will agree to a change of prior case-law. We will report further on this matter.

HEUKING KÜHN LÜER WOJTEK

Responsible editors:

Kay Jacobsen
Dr. Andreas Walle

These and all subsequent editions of the newsletter can be found on the Internet at
www.heuking.de/aktuelles/newsletter

Berlin
Unter den Linden 10
D-10117 Berlin
T +49 (0)30 88 00 97-0
F +49 (0)30 88 00 97-99

Brussels
Avenue Louise 326
B-1050 Brussels
T +32 (0)2 646 20-00
F +32 (0)2 646 20-40

Chemnitz
Weststrasse 16
D-09112 Chemnitz
T +49 (0)371 38 203-0
F +49 (0)371 38 203-100

Cologne
Magnusstrasse 13
D-50672 Cologne
T +49 (0)221 20 52-0
F +49 (0)221 20 52-1

Düsseldorf
Georg-Glock-Strasse 4
D-40474 Düsseldorf
T +49 (0)211 600 55-00
F +49 (0)211 600 55-050

Frankfurt am Main
Grüneburgweg 102
D-60323 Frankfurt am Main
T +49 (0)69 975 61-0
F +49 (0)69 975 61-200

Hamburg
Bleichenbrücke 9
D-20354 Hamburg
T +49 (0)40 35 52 80-0
F +49 (0)40 35 52 80-80

Munich
Prinzregentenstrasse 48
D-80538 Munich
T +49 (0)89 540 31-0
F +49 (0)89 540 31-540

Zurich
Bahnhofstrasse 3
CH-8001 Zurich
T +41 (0)44 200 71-00
F +41 (0)44 200 71-01

LAWYERS AND TAX ADVISORS

Berlin Brussels Chemnitz Cologne Düsseldorf Frankfurt Hamburg Munich Zurich

www.heuking.de