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Newsletter
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Does A Rejected Applicant Have The Right To Demand Information?

BAG, Decision of May 20, 2010 -
Case 8 AZR 287/08 (A)

According to the Federal Labor Court (BAG), a rejected applicant has no right to demand information as to whether another applicant was hired and on which grounds. The Senate was not able to decide by itself whether this finding complied with the mandatory anti-discrimination guidelines of EC Law and referred the relevant questions to the European Court of Justice (ECJ) for a preliminary ruling.

The plaintiff sought damages from the defendant on account of alleged discrimination based on her gender, age and origin during the application process and also demanded information on the individual hired by the defendant.

The lower courts dismissed the complaint. The Eighth Senate of the Federal Labor Court could not issue a final decision because it depended on an interpretation of EC Law by the ECJ. The court suspended the proceedings and referred the following questions to the ECJ for a preliminary ruling:

1. Does EC Law provide an applicant, who demonstrates that he possessed the qualifications for a job advertised by an employer but whose application was rejected, with a right to demand information from the employer as to whether another applicant was hired and, if so, on the basis of which criteria?

2. Is the fact that the employer does not provide the requested information a circumstance which can be deemed to indicate the existence of the discrimination alleged by the employee?

The Federal Labor Court itself did not perceive any such right to demand information under German law. A rejected job applicant's allegations of discrimination in violation of the Equal Opportunity Act, although he satisfied the advertised qualification profile as well as at least one of the factors set out in Section 1 of the Equal Opportunity Act, do not obligate the employer to explain its ultimate hiring decision and the underlying grounds.

There is also no right to demand information – at least in the case decided – arising from pre-contractual obligations or under principles of good faith (Section 242 German Civil Code) since

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an additional mandatory requirement for the right to demand information is that the complainant must demonstrate an already established entitlement to performance, here a right to damages pursuant to Section 15(2) of the Equal Opportunity Act. The plaintiff's allegations did not provide any basis for the conclusion that she was rejected on account of one of the discrimination factors set out in Section 1 of the Equal Opportunity Act and thus been discriminated against, making her entitled to damages.

Such a right to demand information also could not be derived from the wording of the Equal Opportunity Act itself. There is no codified basis for the claim, particularly as the legislator had envisioned a specific and pursuant to national law final provision regarding the burden of demonstration and proof by means of Section 22 Equal Opportunity Act. A substantive right to information which is already granted when the employer fails to meet the requirements as to the burden of demonstration and proof pursuant to Section 22 of the Equal Opportunity Act would have the result of rendering this provision a nullity.

Furthermore, the European directives themselves do not envision any express right to information. Although such a right was proposed in a draft directive, it was not included in the final version. The final decision on this issue is, however, to be made by the ECJ.

Conclusion: The Federal Labor Court does not recognize the right of a rejected applicant to demand information under national law. It remains to be seen, however, whether this corresponds with the mandatory anti-discrimination guidelines of EC Law in the opinion of the ECJ. Employers should sufficiently document hiring decisions. In particular, the documentation should unequivocally make clear that no discrimination factors but the applicant's qualifications played a role in the decision.

Theft Permitted? – The Case of "Emmely"

BAG, Judgment of June 10, 2010 -
Case 2 AZR 541/09

Effectiveness of immediate termination for cause requires the existence of serious grounds pursuant to Section 626(1) German Civil Code. There are no "absolute grounds for termination." Rather, a case-by-case determination is required.

Plaintiff "Emmely" was employed as a cashier in a supermarket. While doing some personal shopping, she redeemed two bottle return vouchers worth a total of EUR 1.30, which had been lost by customers in the store. The employer then terminated her for cause and without notice, in addition for reasons of precaution, as of the next permissible effective date. The plaintiff was never given a prior warning during the many years of employment.

The plaintiff's wrongful termination suit was dismissed by the lower and intermediate courts, since, under the long-standing case-law of the Federal Labor Court, property crimes are in themselves sufficient to justify a termination for cause. The only issue unaffected thereby was the necessary weighing of interests. Even if a serious ground is present, it may be that a termination, and especially a termination for cause, is not justified. In the case of the plaintiff, the weighing of interests did not provide a favorable result.

On June 10, 2010, however, the Federal Labor Court surprisingly revoked the lower court decisions and allowed the plaintiff's appeal.

The Federal Labor Court's reasoning for its decision has not yet been made public. Only a press release is available, which does not give a clear picture of the Court's fundamental considerations.
The press release can thus be interpreted as meaning that in the future every property crime will no longer "in itself" constitute grounds for termination. Contradicting this conclusion are, however, statements by the President of the Federal Labor Court made to the press relatively shortly before the announcement of the "Emmely" decision.

On the other hand, the Federal Labor Court's press release can also be understood to mean that a property crime against the employer will continue to justify a termination "in itself," but that the specific circumstances of each case must be more closely examined as part of the weighing of interests in the future. In particular, such circumstances could include the length of the employment relationship and whether there had been any complaints prior to the current violation.

The Federal Labor Court also appears to have addressed as part of the "Emmely" decision the issue of whether a warning should have been given first, prior to a termination due to a second similar violation.

If the Federal Labor Court considered this issue relevant to the case, it could suggest a stricter construction of the warning requirement compared to its prior case-law. The issuance of a prior warning has long been a basic requirement for the effectiveness of a termination based on conduct. But the existing case-law has always considered the warning requirement to be dispensable where the employee cannot count on the employer approving of his conduct in the first instance.

In the case at hand, the plaintiff is also unlikely to be able to expect her employer to approve of her cashing in redemption vouchers that do not belong to her at the employer's expense. Should the Federal Labor Court nevertheless require a warning, this would mean a clearly stricter construction compared to the case-law existing so far.

Conclusion: At least until the publication of the Federal Labor Court's decision in the case of "Emmely," there is considerable uncertainty in practice as to employee property crimes against the employer. Whether the still-to-be published substance of the Federal Labor Court decision will resolve this uncertainty remains doubtful. Thus, at the present time, it cannot be determined which type and degree of property crime can or must exist in order to justify an immediate contractual termination for cause without a prior warning. General gradations may likewise be prohibited. It is more likely that a case-by-case assessment must be made. More than ever, great care should be taken prior to effecting a termination based on conduct.

Excessive Post Contractual Competition Restrictions and Compensation for Compliance with such Restrictions

BAG, Judgment of April 21, 2010 - Case 10 AZR 288/09

The right to compensation for compliance with post-contractual competition restrictions requires the employee to satisfy restraints on competition to the extent binding pursuant to Section 74a(1) German Commercial Code. Compliance with discretionary provisions is not necessary.

Excessive Post Contractual Competition Restrictions and Compensation for Compliance with such Restrictions

The plaintiff had been employed – most recently as marketing director – by a window and door manufacturer which sold its products exclusively to dealers. His post-contractual competition agreement provided for a prohibition against working for a competitor, in whatever capacity, for a period of two years following the end of employment relationship. After his employment relationship ended, the employee became an agent for a distributor of his former employer, where he was responsible for sales to retail customers.

His suit for compensation for compliance with the post-contractual competition restrictions was dismissed by the first two lower courts. The Regional Labor Court based its dismissal on the fact that, although the restraint on competition was partially non-binding, the employee could claim compensation only if he had acted in accordance with the whole of the agreed prohibition on competition – regardless of its partial non-binding nature.

The Federal Labor Court saw the issue entirely different. First, it determined that activities at different sales levels (retail versus wholesale distribution) per se did not constitute competition. The post-contractual competition restriction's wording became non-binding pursuant to Section 74a(1) 2nd sentence of the German Commercial Code. It became, however, not non-binding or void as a whole but only in the part exceeding the legitimate extent; there had thus been a valid diminution, different than under principles of General Business Terms and Conditions. Furthermore, the Federal Labor Court went on to explain that an employee who complies with statutory law and his contract, and thereby the prohibition agreement binding on him, can bring a claim for the full amount of compensation for compliance with competition restrictions. He is not obligated either to comply with the competition prohibition in its entirety (including the non-binding part) or forfeit all compensation for compliance. In this respect, the case is different from an entirely ineffective prohibition on competition, whereby precisely such a choice is given to the employee.

Conclusion: Once again, it is evident that the conclusion of a post-contractual prohibition on competition in itself, as well as significantly stricter requirements in its phrasing, should be well thought through. The employer should assess in particular whether agreeing on a competition restriction is even economically advantageous given the uncertainty of its actual scope of application and binding nature. In addition, the duties of an employee may change after the conclusion of a post-contractual competition agreement and thereby also affect in practice the binding scope of the post-contractual prohibition restriction. There is no general answer, though there is a general suggestion to be noted: the employer should combine each change in its employee's job function (promotions) with the conclusion of a modified version of the post-contractual competition prohibition.

General Release Provisions Do Not Encompass Pension Entitlements

BAG, Judgment of April 20, 2010 - Case 3 AZR 225/08

" ... General release provisions are as a rule to be interpreted as not encompassing pension entitlements. The great significance of pension entitlements requires an unequivocal statement; a waiver must be clearly and unambiguously expressed." (Headnote)

During a wrongful termination proceeding, the plaintiff had reached a settlement, which included a release provision, with his employer. In a subsequent proceeding regarding vacation pay, expenses and commissions, another settlement was concluded and included a general release.

In his complaint, the plaintiff made claims against his last employer based on a pension commitment from his prior employer, which had been subrogated to the last employer as a result of a – disputed – business transfer. He alleged that such pension entitlements were not covered by the release provisions.

The Federal Labor Court itself remanded the matter to the Regional Labor Court on account of the unresolved issue of the business transfer. It nevertheless made clear that no release provision contained in a settlement would oppose the granting or increase of pension entitlements.

Rather, the legality and scope of a settlement provision is to be ascertained pursuant to the provisions of Sections 133, 157 German Civil Code, i.e. to be determined based on the intention of the parties and general custom and practice. Such a settlement provision can be a release agreement or a constitutive or declaratory acknowledgment of a debt – of a negative type.

A release agreement can only be presumed when the parties have assumed the existence of a particular debt and mutually wished to provide that it was no longer to be satisfied. A constitutive debt acknowledgment pursuant to Section 397(2) German Civil Code exists when the parties' intention is to extinguish all or a specified group of acknowledged or unacknowledged claims (i.e. neither party owes the other party any further obligation).

In the instant legal dispute, the Federal Labor Court assumed that neither of the parties had given any thought to a possible obligation arising from a granted pension commitment.

General Release Provisions Do Not Encompass Pension Entitlements

Although general release provisions are to be construed broadly, i.e. comprehensively, given their function of creating clear relationships and preventing future disputes between the parties, special circumstances exist in the case of pension entitlements as a result of their particular value and significance. No employee would waive such rights without reason. On account of the great significance of pension entitlements, an effective settlement requires an unequivocal statement, such that the waiver is clearly and unambiguously expressed.

Conclusion: General release provisions are thus as a rule to be interpreted as not encompassing pension entitlements. If the employer also wishes to "take care of" pension entitlements in a compromise clause, this will require an unequivocal and clear provision and documentation of the intent to waive. In this respect, the rule of Section 3 German Retirement Savings Act must be taken into consideration, pursuant to which vested prospective entitlements can be bought out only under narrow circumstances.

Childcare Costs of Single-Parent Workers' Council Member

BAG, Decision of June 23, 2010 -
Case 7 ABR 103/08

The Federal Labor Court addressed the issue of whether an employer must reimburse costs incurred by a single-parent member of the workers' council for the care of her minor children during multiple-day, external workers' council activities.

A complaint was brought by a workers' council member, a single mother, for the reimbursement of childcare costs incurred as a result of her participation in two meetings of the entire workers' council and a workers' council convention. The workers' council member was away from home for a total of ten days. She had to engage outside help for the care of her eleven- and twelve-year-old children, spending a total of EUR 600.00. The workers' council member requested reimbursement from her employer for the costs of outside care. In particular, it was argued that childcare through her adult employed daughter, who lived in the

household, had not been possible, as she had declined to look after her younger siblings.

The Federal Labor Court ruled that costs to be borne by an employer pursuant to Section 40(1) German Works Constitution Act included the expenses of a single workers' council mother deemed necessary to discharge her workers' council duties, but not all costs resulting in any way from workers' council activities. Expenses attributable to personal lifestyle are generally not reimbursable. However, a constitutional interpretation of Section 40(1) Works Constitution Act requires that the employer bears the costs incurred by a workers' council member for the care of minor children for periods in which the member must discharge her workers' council activities outside of her personal working hours. In such a case, the workers' council member faces a conflict between her workers' council duties and the obligation of personal parental care pursuant to Article 6(2) German Constitution. The workers' council member should not be required to sacrifice assets as a result of fulfilling both duties simultaneously.

Unlike the Regional Labor Court, the Federal Labor Court granted the petition of the single mother and ordered the employer to pay child care costs. It was expressly noted that the refusal of the adult employed daughter living in the household to look after the children was not a bar to the requirement that costs be reimbursed.

Conclusion: Thus the Federal Labor Court clarified, to the detriment of the employer, that the previously disputed question of whether childcare costs incurred by workers' council members are costs to be reimbursed by the employer. In the future, it remains to be decided in each individual case whether the use of outside care is necessary. Therefore, the availability of another parent authorized to provide care could negate the reimbursement requirement. Where necessary, the age of the children could also be taken into account, as the costs of care decrease as age increases. It should be noted, however, that an employer must adapt to the expansion of its reimbursement obligation.

Employer Has No Right to Injunctive Relief in Connection with Political Activity by Workers' Council

BAG, Decision of March 17, 2010 - Case 7 ABR 95/08

The employer itself has no right to seek injunctive relief in cases where a workers' council has violated the prohibition against political party activity.

The parties disputed the right of the workers' council to express political statements in the employer's place of business. In 2003, in reference to the Iraq war, the workers' council hung a sign containing the words "No to war." In 2007, it called upon employees of the business to take part in a referendum. The employer was unsuccessful in trying to obtain an injunction against such activity.

Based on its case-law to date, the Federal Labor Court declined to find that the employer had a right to injunctive relief and ruled in favor of the workers' council.

First, it found that general political statements without reference to a party are not covered by the prohibition set out in Section 74(2) 3rd sentence of the German Works Constitution Act. Moreover, the now current opinion of the Federal Labor Court itself does not provide the employer with a right to injunctive relief in connection with violations of this prohibition.

Rather, the rights of the employer in cases of a workers' council's gross violation of its legal obligations are conclusively determined under Section 23(1) Works Constitution Act.

The Federal Labor Court based its decision on the fact that the Works Constitution Act clearly differentiates between the concepts "political" and "political party" and that Section 74(2) 3rd sentence of the Act prohibits only "political party" activities in the workplace. Moreover, the particular value placed by the law on freedom of expression (Article 5(1) German Constitution), as well as the meaning and purpose of the political party neutrality order, i.e. to preserve peace and cooperation within the workplace, lead to the conclusion that the prohibition set out in Section 74(2) 3rd sentence of the Works Constitution Act is to be narrowly construed. In light of its prior case-law, the Federal Labor Court found that general political statements which neither support nor go against a political party, group or movement do not fall within the confines of Section 74(2) 3rd sentence of the Works Constitution Act.

Further, an employer does not have a right to injunctive relief in the case of political party workers' council activities – also under the prior case-law. The systematic design of the Works Constitu-

tion Act belies such a right to injunctive relief under its Section 74(2) 3rd sentence. Section 23(3) of the Act sets out just such a right to injunctive relief for the workers' council and labor unions represented in the company in the case of a gross violation on the part of the employer, but no right of injunctive relief for the employer. In the case of gross violations of the workers' council duties, Section 23(3) Works Constitution Act is conclusively applicable. Pursuant to this provision, the employer may request the dissolution of the workers' council if it is committing gross violations of its duties. In terms of execution, a right to injunctive relief against the workers' council would also be meaningless. Because a workers' council possesses no assets, the threat, assessment or levying of administrative fines is not conceivable.

Disputes over the legitimacy of a particular political (party) activity of the workers' council can still be addressed by the employer in a petition for declaratory judgment. A corresponding judicial declaration could be determinative for a dissolution petition by the employer pursuant to Section 23(1) Works Constitution Act, as the disregard of a prior judicial declaration could justify such a petition in the event of a subsequent violation by the workers' council.

A declaratory judgment petition does require, however, that the employer retain a vested interest in the resolution of the dispute at the time of the requested judicial decision.

Conclusion: Under the current case law, there are no conceivable circumstances under which an employer would have the right to injunctive relief against a workers' council, including in the case of gross violations of the prohibition against political party activity. An employer can, however, have the legitimacy of a particular activity by the workers' council resolved by means of a declaratory judgment petition and, in the case of gross violations by the workers' council, petition for its dissolution. Still, this is the only means for an employer to obtain quick and effective judicial assistance in connection with a workers' council violation of labor-management relations law. In addition, there the employer has now no legal means to prevent general political activity by a workers' council.

Changes in Case-Law on unity of collective bargaining

After the 10th Senate of the Federal Labor Court announced on June 23, 2010 that it also no longer adheres to the principle on unity of collective bargaining, the 4th Senate changed its opinion, as already presumed in our June 2010 Newsletter. Hence, the principle "one business – one union" no longer applies. The effect on, among other things, the law pertaining to labor disputes is unknown. The Confederation of German Employers' Associations (BDA), together with the German Trade Union Federation (DGB), has presented a proposal for the codification of pay scale uniformity. Whether such a law will be adopted, and which contents it will have, remains to be seen.

BAG, Decision of June 23, 2010 - Case 10 AS 2/10; Decision of June 23, 2010 - Case 10 AS 3/10; Judgment of July 07, 2010 - Case 4 AZR 549/08

Seminar **Employment Law 2010**

We would like to refer you to our seminar events „Employment Law 2010" which will be held in October and November, including among others the following topics:

Seminar Topics

- Current Issues in Employee Data Protection
- "Emmely" and the Consequences
- Bonuses between Incentives and Loyalty Rewards
- The "Low Performer" Employment Relationship

The seminar will be held in the following cities at the dates indicated below:

Seminar Dates

Frankfurt
Thursday, October 21, 2010, 5:00 pm
Grüneburgweg 102, 60323 Frankfurt am Main

Düsseldorf
Thursday, October 28, 2010, 4:00 pm
Georg-Glock-Strasse 4, 40474 Düsseldorf

Munich
Thursday, October 28, 2010, 5:00 pm
Prinzregentenstrasse 48, 80538 Munich

Chemnitz
Thursday, October 28, 2010, 6:00 pm
Weststrasse 16, 09112 Chemnitz

Cologne
Thursday, November 18, 2010, 2:00 pm
Renaissance Hotel Cologne
Magnusstrasse 20, 50672 Cologne

Hamburg
Thursday, November 18, 2010, 3:00 pm
SIDE Hotel, Drehbahn 49, 20354 Hamburg

Berlin
Tuesday, November 23, 2010, 5:00 pm
Maritim proArte Hotel,
Friedrichstrasse 151, 10117 Berlin

We appreciate your interest in this event. For additional information and to register for participation, please see: **www.heuking.de/aktuelles/veranstaltungen**.

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