HEUKING KÜHN LÜER WOJTEK

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Non-Compete Restriction in Terminated Employment Relationship?

BAG, Judgment of January 28, 2010 - Case 2 AZR 1008/08

The Federal Labor Court addressed the issue of whether and to what extent an employee must comply with the statutory non-compete restriction in a terminated employment relationship. The employee had initially been terminated without notice. This first termination was later "withdrawn." The plaintiff also withdrew her wrongful termination suit. Shortly thereafter, the employer learned from a communication by the employee to the employer's customers that she would soon be going into business for herself and wanted to continue to serve the clients. For this reason, the employer once again terminated her without notice, and in the alternative, with notice.

The Federal Labor Court overruled the extraordinary termination; the additional ordinary termination was successful. The circumstance of an employee competing while a wrongful termination action is still ongoing is "per se" a grave breach of duty, as well as deemed a material ground within the meaning of Section 626(1) Civil Code. Pursuant to the non-compete restriction, an employee may not engage in competitive activities in his or her own name and interest. He or she is likewise not permitted to support a competitor of the employer. Even where a post-contractual non-compete restriction pursuant to Section 74 Commercial Code has not been agreed, prior to the conclusion of the employment relationship the establishment of one's own business or transfer to a competitor business for the time after separation may only be prepared. However, engaging in solicitation, such as brokering competitor transactions or the active poaching of clients, is prohibited.

In the case decided, the plaintiff had not only exploited her work at competitor companies but moreover directly threatened the legitimate economic interests of the defendant. Such conduct in breach of contract was also not justified on account of the requirement not to willfully forego other earnings (Section 615 sent. 2 Civil Code). The Federal Labor Court did, however, make allowance for the plaintiff in that she had been placed in a "difficult situation" by the issuance of the first, and later withdrawn, immediate termination. On the other hand, the Federal Labor Court viewed the ordinary conduct-based termination – without prior warning – as justified.

Non-Compete Restriction in Terminated Employment Relationship?

Given the grave breach of duty, the defendant could expect the plaintiff would not conduct herself otherwise after prior warning in a comparable situation in the future, either. The unlawfulness of her conduct was immediately evident to the plaintiff. She could not even rely on first-time acceptance of her conduct by the defendant.

Conclusion: A breach of the non-compete restriction following the issuance of a termination is also a grave conduct-related breach of contract. As part of the weighing of interests in the individual case, however, it is of considerable importance whether the employer had forced the employee into an economic dilemma by means of a prior ineffective termination.

Termination with Option of Altered Conditions of Employment – Lack of Consent from Workers' Council for Transfer

BAG, Judgment of April 22, 2010 - Case 2 AZR 491/09

An employer who wishes to effect a transfer that is no longer covered by managerial authority under an employment contract must, on the one hand, validly issue a notice of termination with the option of altered conditions of employment and, in the case of a transfer, not only consult with, but also obtain the consent of, the workers' council pursuant to Section 99 Labor Management Relations Act, if necessary, with the assistance of the Labor Court (consent substitution proceedings).

Both proceedings are assessed differently under the law, but have considerable interdependencies in practice. The employer issues a termination with the option of altered employment conditions for the purposes of a transfer. It does not manage to obtain the consent of the worker's council, and also fails in judicial proceedings.

Termination with Option of Altered Conditions of Employment – Lack of Consent from Workers' Council for Transfer

According to long-standing jurisprudence, the consent of the workers' council or its judicial substitute are not prerequisites for the individual-law effectiveness of a termination with the option of altered employment conditions.

In this case, the termination with the option of altered employment conditions is also not somehow provisionally ineffective. The termination, as a unilateral constitutive declaration, does not tolerate such a condition of legal uncertainty. The employer, however, is hindered in implementing the effectively changed conditions of the employment contract under individual law on account of the labor management relations law obstacle.

After the consent substitution proceeding in the case decided was lost in a final decision, the question arose whether this led to the continuing impossibility (Section 275(1) Civil Code) of the implementation of the amended employment contract provisions, with the legally determined lack of consent of the workers' council thus "disrupting" the effectiveness of the termination with the option of altered employment conditions. The Federal Labor Court rejected this. The employer could resolve its "dilemma" by again trying to bring about consent. Whether and how an employer could escape this "infinite loop" if needed was left open by the court.

Conclusion: In the case of a transfer, the employer is well advised to obtain the consent of the workers' council in a timely manner. Without it, it is hindered in implementing the amended contract terms.

Illegality of Lump-Sum Overtime Compensation Under General Terms and Conditions

BAG, Judgment of September 01, 2010 - Case 5 AZR 517/09

The provision in General Terms and Conditions "... necessary overtime shall be compensated by the monthly salary" is invalid where the maximum scope of overtime work is not sufficiently evident to the employee at the time of contract execution.

Following the conclusion of the employment relationship, the plaintiff demanded from his employer compensation for 102 hours of overtime. He was employed as manager of the high-rise rack at Euro 3,000 monthly. The defendant maintained for him a working hour account, based on weekly mandatory working time of 45 hours. The mandatory working time was comprised of 38 regular and 7 overtime hours. All working time in excess thereof was credited as "overtime" in the working hour account and partially compensated with time off. Otherwise, the form agreement contemplated that necessary overtime would be compensated by the monthly salary. Overtime work could arise where the plaintiff was obligated on account of corresponding need to perform his work on Saturdays as well, and he also agreed to work in cases of company need outside regular working hours, at night, on weekends and on holidays.

The Federal Labor Court deemed the provision on lump-sum compensation for overtime to be invalid since at the time of contract execution the maximum overtime to which he would be subject was not evident to the employee. In particular, no limitation to the statutorily permissible maximum working time could be derived from the contract, although exceeding it was likely given the job description.

Conclusion: For lump-sum compensation of overtime, it is necessary that the maximum number of overtime hours be foreseeable to the employee at the time of contract execution. An express limitation to the statutorily permissible maximum working time is required when the specific job description appears likely to exceed the working time governed by public law.

Promise to Rehire As Material Reason for Time Limitation

BAG, Judgment of June 02, 2010 -
Case 7 AZR 136/09

The promise to rehire made to a severed employee can justify limiting the term of the employment relationship with a replacement where the consummation of the right to be rehired can genuinely be anticipated in the foreseeable future and an employment opportunity is held open for the severed employee through the employment of a replacement.

The plaintiff opposed the ending of his employment relationship and alleged that the limitation of his employment contract on account of and for the time of additional training of the employee severed from his employment relationship for this purpose was invalid due to the lack of a justifying material ground.

The Federal Labor Court allowed the limitation controls. First, it continued its prior jurisprudence, according to which the material reason of replacement within the meaning of Section 14(1) sent. 2 no. 3 Act on Part-Time Work and Fixed-Term Employment Contracts exists only where the person to be replaced is (presumably) in an employment relationship with the employer for the duration of the contract period agreed with replacement. The fixed-term employment of an employee in the place of an employee separated from the employment relationship would not be covered by the material reason of replacement. This also applies where the employer has made a promise to rehire the severed employee and for that reason desires to employ a replacement only until the possible rehiring. No right to employment follows from the promise to rehire, only a right to the conclusion of an employment contract. The conclusion of an employment contract with a replacement that is limited until the possible rehiring of the severed employee therefore does not serve to cover the need for a replacement. Rather, it results from planned different staffing with the employee possibly to be rehired.

The plan to differently staff a workplace at a later time can, however, according to the Federal Labor Court, qualify as another material reason, not listed in Section 14(1) sent. 2 nos. 1-8 Act on Part-Time Work and Fixed-Term Employment Contracts, justifying the fixed-term staffing of the workplace.

The justified interest of the employer not to continue newly staff its workplace because a promise to rehire was made to a severed employee and, according to the substance thereof, it can genuinely be expected that the dismissed employee will exercise his or her right to be rehired within a foreseeable period of time, then

only serves to justify the limitation of the employment contract with the replacement if there is an original connection between the promise to rehire and the employment of a replacement. This is to be shown by the employer at trial. It is necessary that a possibility of employment in conformance with contract can be kept open for the employee to be rehired through the employment of a fixed-term employee.

This was lacking in the case decided. In this case, the collective bargaining agreement contemplated that rehiring could be effected only for a job that was of equal or higher value in comparison to the prior one, with the jobs assigned to compensation groups. The plaintiff was assigned a job that caused him to fall under a lower compensation group than the employee to be rehired would have reached under the collective bargaining agreement. The job of the plaintiff was thus not suited for keeping open the employment of an employee to be rehired, so that the limitation of his employment contract on this basis was invalid for lack of a justifying ground.

Conclusion: If an employer wishes to engage an employee only for a fixed term until the genuinely expected return of a severed employee, it must take care to assign the fixed-term employee a job that the returning employee can and will perform pursuant to the governing employment contract and collective bargaining law provisions.

Managing Director of A Corporation Can Be Deemed A Worker Pursuant to Directive 92/85/EEC

ECJ, Judgment of November 11, 2010 - C-232/09 (Danosa vs. LKB Lizings SIA)

Facts: Since 2006, Ms. Danosa had been the sole managing director of LKB Lizings SIA., a limited liability company in Latvia. In July 2007, she was dismissed as managing director. Ms. Danosa considered the dismissal to be contrary to law and alleged that her dismissal violated Article 109 of the Latvian Labor Code, which prohibits the termination of pregnant employees. At the time of her termination, she was eleven weeks pregnant.

Both of the lower courts had dismissed the complaint. The Latvian court of last resort referred to the European Court of Justice the question whether the members of a governing body of a corporation fall under the union law definition of worker and whether a provision that contemplates termination of members of company management without limitation is compatible with Article 10 of Directive 92/85.

The ECJ held that a member of management (managing director) also performs work for compensation and exercises his or her office under the supervision of another (the shareholders' meeting). The requirements existed prima facie to qualify as a worker pursuant to Directive 92/85/EEC on the introduction of measures to improve the safety and health protection of pregnant workers. It was the task of the submitting court to review the facts to determine whether such was the case in the pending legal dispute.

Article 10 of Directive 92/85 (this legislation obligates the member states to prohibit the termination of employees during pregnancy) stood in opposition to the company law regulation under which members of a corporation's management can be dismissed without limitation. Even if worker status were not presumed in this case, the termination of a member of management, if resulting from the pregnancy, could constitute direct gender discrimination.

The ECJ decision indicates two things. For one, the possibility that governing bodies (managing directors and managing boards) can also appeal to provisions that were first applicable only to workers but not to governing bodies (such as the Maternity Protection Act or the Federal Law on Parental Leave and Monetary Allowance) does not appear to be excluded. While the ECJ left the concrete determinations to the fact-finding court, its decision makes clear that it would extend its definition of worker far into fields that under German law would qualify as independent service relationships under appointment relationships of governing bodies. In addition, German law will adjust to the fact that appointment and dismissal as company law acts will be challenged, depending on the circumstances, by appealing to protection regulations that actually apply only to workers or are reviewable under the General Act on Equal Treatment. The ECJ limits these measures not only to the service relationship under the law of obligations (the appointment agreement), but permits direct control of company law appointments and dismissals.

Discussions in supervisory boards and/or shareholders' meetings will have to be conducted with a view to the standards of the General Act on Equal Treatment. Otherwise, discrimination suits may be a threat at the level of the governing body, as shown by the decision recently handed down by the Cologne Higher Regional Court with respect to the managing director of Städtische Kliniken Köln (Cologne Higher Regional Court, July 29, 2010 - Case I-18 U 196/09).

Bonus Commitment through Implied Conduct

BAG, Judgment of April 21, 2010 - Case 10 AZR 163/09

An employee's individual employment contract right to payment of a yearly bonus can arise from conclusive conduct, in particular in connection with statements by the employer. The right is not affected by the fact that the payment varies from year to year without a regularity being evident to the employee.

The plaintiff asserted a claim for a yearly bonus that had been neither contractually agreed nor expressly contained in a written commitment addressed to the plaintiff. The plaintiff was the wife of the defendant's managing director and had been employed by the defendant since 1998. The plaintiff received a yearly bonus with her December salary for calendar years 2000 through 2006, DM 52,000.00 (Euro 26,587.18) in 2000, DM 57,000.00 (Euro 29,143.64) in 2001, Euro 35,000.00 in 2002, Euro 50,000.00 in 2003, Euro 52,000.00 in 2004 and Euro 57,500.00 in both 2005 and 2006. The specific yearly amount of the bonus was always communicated to the plaintiff during a telephone call with the shareholders living in the US. The payments were not made under a reservation of voluntariness. After the plaintiff's marriage with the defendant's managing director failed, she received no yearly bonus for 2007. The plaintiff demanded a yearly bonus for 2007 equal to 45% of her annual salary. She relied on company practice, as she had been paid a corresponding yearly bonus for many years. Both the Labor Court and the Baden-Württemberg Regional Labor Court dismissed the complaint.

After the plaintiff appealed, the Federal Labor Court surprisingly allowed the appeal on April 21, 2010, reversed the lower court decisions and remanded the matter to the Regional Labor Court for further fact-finding. Like the Labor and Regional Labor Court, the Federal Labor Court did not see, however, any right arising from company practice. A company practice relates to a number of employees or at least to a definable group of employees without individual particulars forming the contractual relationships. The plaintiff therefore could not rely on the legal concept of company practice because a collective element was missing in her case.

As a manager, the plaintiff was not comparable to other employees of the business. It was only she who obtained a right to a yearly bonus corresponding to her elevated position from 2000 to 2006. For this reason, a claim based on the labor law principle of equal treatment also failed.

Bonus Commitment through Implied Conduct

The Federal Labor Court, however, sanctioned a claim on the basis of an implied agreement under an individual employment contract. Since 2000, the plaintiff had regularly received a yearly bonus, which had increased in different measure and remained the same in 2005 and 2006. A reservation of voluntariness was never articulated. Each year a shareholder of the defendant once again informed her that she would receive a yearly bonus in a particular amount. From this actual conduct, in connection with the shareholder's statements, the Federal Labor Court inferred an offer by the defendant, which the plaintiff had accepted through conclusive conduct pursuant to Section 151 Civil Code. The 10th Senate emphasized that it would be legal error to deny an individual law claim because the payment was not promised in a certain amount. It would be precisely typical of a bonus claim to be dependent on various factors, such as the business's operating results and/or personal accomplishments, and thus fluctuate. If, from the defendant's view, the grounds for the claim were to be newly decided each year, it would likely separately suggest the one-time nature of the payment.

According to the Federal Labor Court, ordinary compensation (Section 612(2) Civil Code) cannot be used to measure the amount of the claim, as neither contractual nor customary bonus compensation is evident. The amount is thus to be determined by the employer pursuant to Section 315(1)-(3) Civil Code. Where necessary, the court is to determine by decision the amount of the bonus pursuant to Section 315(3) sent. 2 Civil Code.

Conclusion: The decision clearly shows that in the future, where voluntary payments are actually rendered, the risks resulting from implied promises will have to be even more strongly the focus of contract formation. If there is no reservation of voluntariness or an express statement of the one-time nature of the payment, this can result in a binding commitment for the employer if the payment varies in amount and there is no written arrangement.

Payment in lieu of Vacation During Inactive Employment Relationship

Cologne Regional Labor Court,
Judgment of April 29, 2010 - Case 6 Sa 103/10

An inactive employment relationship does not give rise to any vacation.

The parties disputed vacation pay for the period of an inactive employment relationship. Due to illness, the plaintiff was unable to work. By decision of the pension insurance institute, she was granted a temporary pension for fully reduced earning capacity. The collective bargaining agreement of the Federal States applied to the parties' employment relationship. Pursuant to Section 26(2)(c), collective bargaining agreement of the Federal States the duration of her convalescent leave, including any agreed additional vacation, was decreased by 1/12 for each calendar month in which the employment relationship was inactive. Pursuant to Section 33(2) sent. 6 collective bargaining agreement of the Federal States, the employment relationship is inactive, among other things, during the period in which an employee is drawing a pension on account of fully reduced earning capacity. The parties' employment relationship was concluded at a later time. In her complaint, the plaintiff demanded vacation pay for the granted period of fully reduced earning capacity.

The Cologne Regional Labor Court rejected the asserted claim for vacation pay. During the granted period of fully reduced earning capacity, the employment relationship was inactive pursuant to the provisions of the collective bargaining agreement of the Federal States. The legal effect of inactivity arises directly from Section 26(2)(c) collective bargaining agreement of the Federal States. The duration of the convalescent leave is accordingly reduced by 1/12 for each calendar month of inactivity. In particular, the shortening provision under collective wage law does not violate Article 7 of Directive 2003/88/EC in the interpretation resulting from the jurisprudence of the ECJ in the judgment of January 20, 2009 (C-350/06 and C-520/06, "Schultz-Hoff"). Article 7 of Directive 2003/88/EC addresses the case of non-expiration of accrued vacation and/or vacation pay claims in the case of long-term illness. In the present case, vacation claims are not yet accrued on the basis of collective wage requirements.

The decision is not yet legally effective. The Cologne Regional Labor Court has allowed appeal pursuant to Section 72(2) Labor Court Act due to the fundamental significance of the case. The proceeding will be held before the Federal Labor Court under case number 9 AZR 442/10.

Conclusion: An inactive employment relationship does not give rise to any vacation.
The ECJ's "Schultz-Hoff" decision of January 20, 2009 did not change this in any way. The Federal Labor Court will definitively address the particular issues in 2011.

Section 613a Civil Code - Transfer of Operating Company – Effect on Employees Dispatched by Another Affiliate ("Albron Catering")

ECJ, Judgment of October 21, 2010 - C 242/09

The employment relationships of employees who are actually working in a divesting affiliate but employed by another affiliate may also be covered by a company transfer of business to an acquirer pursuant to Section 613a Civil Code.

At the Dutch Heineken Group, all personnel is employed by Heineken Nederlands Beheer BV (HNB). HNB assigns personnel to the various companies of the Heineken Group. The plaintiff was employed at HNB from 1985 to March 1, 2005 as an employee of the "Meal Delivery" department and for the entire time was assigned to the affiliate Heineken Nederland BV (HN) to perform work in the area of catering. The meal delivery services performed by HN were transferred by contract to Albron Catering on March 1, 2005. From March 1, 2005, the plaintiff was employed by Albron in the "staff canteen" department. He filed a complaint against Albron for a judgement to the effect that the divestiture of March 1, 2005 was a transfer of business and the employment conditions that had until then applied to him at HNB also applied in his employment relationship with Albron.

On the submission of the Gerechtshof te Amsterdam, the ECJ joins the legal opinion of the plaintiff and the advocate general's opinion. Directive 2001/23/EC, also applicable to Section 613a Civil Code, is accordingly also applicable, in the case of the transfer of an affiliate company, to an employee who permanently works for this company, but is contractually employed by an-

other company of the group. The ECJ argued on the basis of the Directive's wording, which differentiates between contractual employers and non-contractual employers. An employment relationship with a non-contractual employer, as existing between the plaintiff and HN in the case at issue, is equivalent to the relationship with a contractual employer. Thus, also for reasons of employer protection, a contractual relationship of the employee to the seller is not necessary in every case for the Directive to be applicable. Apart from the contractual employer also such person can be considered as seller that is responsible for the economic activity of the transferred unit and as such establishes as - another - employer of the unit employment relationships with employees.

The ECJ's decision is also without reservation applicable for the territory of the Federal Republic of Germany. While it was formerly presumed that Section 613a Civil Code covers only employees that have an employment contract with the seller, due to the obligation to interpret national law in conformity with directives, this is no longer tenable in cases of permanent dispatch of employees within a group of companies. The ECJ forbids the grandfathering of old cases.

Of particular practical significance is the question not expressly decided by the ECJ: whether in other assignment cases and, in particular, leasing of employees, an employment relationship arising outside the contractual relationship must be assumed. Further development is awaited on this issue.

Conclusion: Employees who are actually working in the company of the seller, but are contractually employed in another company may also be covered by a transfer of business pursuant to Section 613a Civil Code. A substantial employment relationship outside the employment contract exists where the employee was permanently dispatched to another affiliate. It remains to be seen whether the jurisprudence on this construction of two employers also extends to other assignment cases and, in particular, to leasing of employees.

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Responsible Editor:

Dr. Wilhelm Moll, LL.M.

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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

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