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Newsletter
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Inquiry regarding Severe Disability in Employment Relationship

Federal Labor Court, Decision of February 16, 2012 – 6 AZR 553/10

Markus Schmülling

An employer's inquiry regarding severe disability or an application for obtaining the status of severe disability is permissible in an existing employment relationship after six months, i.e. as appropriate after receipt of disability protection pursuant to Sections 85 et seqq. Social Code (SGB IX). This applies particularly to preparing intended terminations.

In the institution of insolvency proceedings, a provisional insolvency administrator who had been put in charge of the employer's assets requested in a questionnaire that the data available to him be completed and/or verified, including information regarding the existence of a severe disability or an legally equivalent circumstance. An employee denied his severe disability, whereupon he was given notice of termination without the consent of the Integration Office.

The Federal Labor Court found that the notice of termination given was valid. While the prior consent of the Integration Office had been required in view of the employee's severe disability pursuant to Section 85 Social Code, from the perspective of good faith (Section 242 German Civil Code), however, the employee could not invoke special termination protection as a severely disabled person. The employee's invocation of such protection after notice of termination was givendespite his denying the question regarding a severe disability prior to being given notice, as inconsistent conduct was not to be regarded as significant.

The Federal Labor Court thus found an inquiry regarding a severe disability or an application for obtaining the status of severe disability permissible in an existing employment relationship after six months. Pursuant to his duty of care, the employee was to answer the inquiry truthfully, since it arose in connection with the employer's legal duty under the requirement that severe disability pursuant to Section 1(3) Employment Protection Act has to be taken into account with regard to applying social criteria for redundancy as well as the observation of the provisions for special protection against dismissal of Sections 85 et seqq. Social Code. The inquiry was to enable the employer to abide by the law. It did not discriminate disabled employees against those without a disability. The Federal Labor Court also did not find any objection to the permissibility of the inquiry for reasons of data protection. According to the Senate's remarks, the employer is not obligated to specifically communicate to the employee the reason for the inquiry. The employee does not satisfy his duty

of care by disclosing his disability to the employer after notice of termination is given within the period pursuant to Section 4 Employment Protection Act.

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Summary: According to this decision, an inquiry regarding severe disability is permissible in an existing employment relationship after six months. The decision does not address an inquiry regarding severe disability upon the initiation of a contract. The permissibility of such an inquiry has not been clarified by the high court and is controversial in the literature.

Rejected Job Applicant Has No Right to Disclosure Under Interpretation of General Act on Equal Treatment in Conformity With EC Directives

ECJ, Judgment of April 19, 2012 – C-415/10, Meister; (Federal Labor Court, Decision of May 20, 2010, 8 AZR 287/08)

Dr. Wilhelm Moll LL.M.

An employee that meets the requirements of the job description and whose application was not considered does not have the right to have the employer disclose the reasons for its decision.

In her complaint, the 50-year-old Russian-born plaintiff sought damages for discrimination in a job application and demanded disclosure from the defendant about the person hired. The plaintiff had received a diploma in systems engineering in Russia, which was equivalent to the completion of a polytechnic degree in computer science. On October 5, 2006 the plaintiff responded to a job advertisement by the defendant for an "experienced software developer" and received a rejection on October 11, 2006. After the defendant once more came across a job advertisement with the same content on the Internet, the plaintiff applied anew on October 19, 2006. The defendant once again responded with a rejection. The parties did not dispute that the plaintiff met the requirements of the advertised position.

The Federal Labor Court assumed that the plaintiff's petition was insufficient to presume a shift in the burden of proof pursuant to Section 22 of the General Act on Equal Treatment. The plaintiff had not conclusively presented any evidence to allow

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the presumption that the defendant had violated the prohibition against discrimination of Section 7(1) of the General Act on Equal Treatment. The Federal Labor Court thus confirmed its standing jurisprudence that, to shift the burden of proof, it is insufficient for the applicant to provide to the potential employer by means of his/her application notice of the existence of characteristics pursuant to the General Act on Equal Treatment, as there is no empirical principle that these characteristics (here: gender, age and ethnic origin) lead to the rejection of the applicant, even where he/she fits the required profile. Rather, there must be additional accessory facts. Because the plaintiff was not able to present such accessory facts, she sought disclosure from the defendant. Because the General Act on Equal Treatment does not contemplate such a claim, the Federal Labor Court stayed the proceedings and referred the issue of disclosure to the ECJ for a preliminary ruling pursuant to Art. 267 of the Treaty on European Union, as it decides on the interpretation of directives that form the basis of the General Act on Equal Treatment.

The ECJ rejected a right to disclosure. Although the directives applied to persons seeking employment – thus implemented through Section 6(1) sent. 1 of the General Act on Equal Treatment in conformity with EC directives –, a shift in the burden of proof arises thereunder only so that the person who considers himself/herself aggrieved by the violation of the principle of equal treatment is first obliged to make out convincing facts that allow for the presumption of indirect or direct discrimination. A right to disclosure cannot be derived therefrom. Rather, all circumstances of the main proceeding are to be considered or reviewed to the effect whether they present evidence that discrimination can be presumed. According to the ECJ, this includes in particular the circumstance that it appeared that the defendant denied the plaintiff any access to information and that the plaintiff met the job description but nevertheless was not asked to an interview by the defendant. The domestic court was to ensure that the goal of the directive was not circumvented by the defendant.

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Summary: The ECJ's decision makes clear that there is no right to disclosure and Section 22 of the General Act on Equal Treatment is not to be expanded by way of interpretation in conformity with EC directives. It is not certain whether a shift in the burden of proof may be derived in an individual case from the employer denying the employee any information on the hiring decision. In any event, it cannot be ruled out that the denial of any information leads to a shift in the burden of proof. Therefore, in selecting among job applicants, the employer should carefully document the reasons for the hiring decision. When it cannot substantiate its hiring decision, there is a risk that this will lead to a claim for damages.

Effective Date Clauses Are Invalid When Special Payments of A Mixed Nature Are Involved

Federal Labor Court, Decision of January 18, 2012 – 10 AZR 612/10

Dr. Wilhelm Moll LL.M.

A special payment of a mixed nature, which also constitutes compensation for work already performed, cannot be made dependent in General Terms and Conditions on the uncurtailed existence of the employment relationship at a specific point in time outside the base period for the special payment.

The plaintiff had worked as a securities dealer for the plaintiff since 2003. The employment relationship ended as a result of notice of termination in March 2008 as of mid-year. The plaintiff sued for the payment of "bonuses" that the defendant had promised him in 2005, 2006 and 2007 in addition to special payments related solely to performance. These "bonuses" were to be paid at the defendant's will if the employment relationship continued without notice having been given as of a specified effective date. The defendant wrote to the plaintiff in 2005 as follows (and similarly in 2006 and 2007):

" … we are pleased to inform you that, due to your contribution to the success of our business in the 2004 fiscal year, we will be making a voluntary one-time special payment of EUR 15,300.00 gross.

In addition to the foregoing special payment, we would also like to inform you that in the event that an employment relationship exists with you, without notice having been given, as of April 15, 2008, we will pay you a bonus of EUR 15,300.00 gross to reward your tenure with the business."

The Cologne Labor Court granted the petition in its entirety. The Cologne Regional Labor Court amended the Labor Court's decision and dismissed the complaint. The Federal Labor Court reversed the decision of the Regional Labor Court and denied the defendant's appeal of the Labor Court's decision with the exception of interest.

Special payments may be made subject to commitment clauses when they do not unreasonably prejudice the employee; they can make a payment dependent on the existence of the employment relationship without notice having been given as of a specific point in time. According to the jurisprudence, this does not hold when the payments are made solely as consideration for work performed. The jurisprudence no longer adheres to the exclusion criterion of exclusivity. Rather, effective date clauses are invalid if – as in the case decided – they have the purpose

of both rewarding loyalty to the business and compensating work already performed.

The purpose served by the special payment is to be determined through interpretation. In the case decided, the Federal Labor Court presumed a special payment "of a mixed nature." According to the Federal Labor Court, from an objective view, the defendant had undertaken to make the promised payment not for loyalty to the business, but also for work performed. This was derived by the Federal Labor Court from, among other things, the amount of the "bonus," which in all cases corresponded exactly to the special payment made for achievement for the previous year.

If, in addition to other reasons, the compensation is at least also meant for work already performed, the effective date clause does not withstand substantive review pursuant to Section 307(1) sent. 1 Civil Code, as it unreasonably prejudices the employee, making the commitment provision is invalid. In the case decided, the plaintiff had a right to the payment of "bonuses" even though he was not in an employment relationship with the defendant as of the effective date. The weighing of interests came down in favor of the plaintiff because, according to the Federal Labor Court, the clause was not compatible with the fundamental principles of Section 611(1) Civil Code and Art. 12(1) Basic Law (freedom of occupation). In addition, the contractual purpose was threatened because the employer could free itself from the obligation by simply giving notice despite contractual performance, so that a nearly empty payment promise arose. The defendant had no valid interest to counter this. The rewarding of company loyalty was insufficient, according to the Federal Labor Court, because a protected interest of the employer to subsequently modify the relationship of performance and consideration could not be recognized.

The clause is not divisible; it cannot be split into a part that only serves to reward company loyalty, so that the effective date provision is invalid in its entirety.

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Summary: Pursuant to this decision, the employer could still decide to reward company loyalty and couple this with repayment and/or effective date provisions. However, the purpose of the grant must clearly arise from the undertaking. The purpose of the undertaking must lie **exclusively** in the rewarding of company loyalty. Only the pure remuneration of company loyalty can be made dependent on notice of termination of the employment relationship not having been given.

Co-determination in Voluntary Financial Benefits

Federal Labor Court (BAG), Judgment of December 13, 2011 – 1 AZR 508/10

Dr. Ulrich Boudon

In the case of financial benefits, which the employer is obligated to grant neither by law nor by contract, the latter is free to decide whether he provides these benefits, what funds he makes available for this purpose, what purpose he pursues with them and how the group of persons accordingly benefitted is abstractly to be determined. Only in the framework of these specifications is the decision, according to which criteria the calculation of the individual benefits and their amount in relation to each other is to be determined, subject to the codetermination of the workers' council pursuant to Art. 87 I no. 10 of the Works Council Constitution Act.

The Federal Labor Court has confirmed its established jurisprudence, according to which in matters of operational wage setting the wage policy decision is free of co-determination. On the other hand, the design of the distribution principles is subject to the right of co-determination. The case decided was based on a company agreement concerning the granting of bonus payments, in which it stated:

"The corporate management decides at the beginning of each year on whether the employees can be granted bonus payments. The granting of bonus payments represents a voluntary benefit, to which no legal claim arises even after repeated unreserved payment. If the corporate management decides to grant the employees bonus payments, the following regulations apply thereto …"

The employer first gave notice in January 2009 that he had decided not to distribute any bonus for the calendar year 2008. Thereupon the plaintiff asserted his claim to a bonus as a claim for damages, because contrary to his duty the employer did not decide on the granting of a bonus at the beginning of the business year and did not properly carry out the procedure provided for in the company agreement for its distribution.

The Federal Labor Court rejected the complaint and made it clear that the company agreement establishes an obligatory relationship to the workers' council, but not a set of duties of the employer in relation to the individual employee.

Co-determination in Voluntary Financial Benefits

The procedural provisions made in the company agreement for the distribution of financial benefits bind the employer in the framework of the obligatory relationship to the workers' council in accordance with the Works Council Constitution Act. They do not include one's own obligations as to performance and conduct for the benefit of the individual employee. Therefore, the employer basically remains free to decide on the "whether" of a voluntary benefit and the amount of the funds made available for this purpose.

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Summary: Bonus claims can only be derived from an explicit contractual commitment. Unless this exists, an asserted infringement of distribution principles alone can also not indirectly trigger payment obligations of the employer via a claim for damages.

Christmas Bonus and Effective Date Clause

Federal Labor Court, Judgment of January 18, 2012 – 10 AZR 667/10

Dr. Ulrich Boudon

If a special allowance does not serve as remuneration for work done and it only ties in with the existence of the employment relationship, it does not constitute an unreasonable discrimination pursuant to Section 307 of the Civil Code if the non-terminated existence of the employment relationship at the time of the payment is determined as an eligibility requirement.

The plaintiff demanded the payment of a Christmas bonus, which was to be paid with the remuneration for the month of November. The employment contract contained the provision: *"The claim to a bonus payment is excluded, if the employment relationship is in a terminated state at the time of the payment. A bonus payment is at the same time a loyalty bonus."* With the letter of November 23 the employer terminated at the end of the year.

The lower-instance courts granted the complaint for payment of the Christmas bonus. The Federal Labor Court reversed the decision of the Regional Labor Court and remanded the case.

Christmas Bonus and Effective-Date Clause

The claim to a Christmas bonus can be made dependent on the non-terminated existence of the employment relationship on the payment date. In doing so, it does not matter who has terminated the employment relationship. Rather the purpose intended with the special payment is decisive. Insofar as it does not serve as remuneration for work done and – as in the case decided – employee loyalty to the company is being honored, a clause, which ties the payment only to the existence of the employment relationship can be agreed upon with the basic legal concept of Section 611 Civil Code and withstand a check of the contents pursuant to Section 307(1) sent. 1 Civil Code. The clause also does not lack transparency. The term "non-terminated" is unambiguous.

The plaintiff had asserted she had only been terminated, because she did not voluntarily waive the Christmas bonus. The Regional Labor Court must now explain whether the employer has caused the occurrence of the condition in bad faith and this is therefore deemed never to have taken place pursuant to Section 162(2) Civil Code.

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Summary: Effective date clauses for special allowances are permitted unless they serve as remuneration for work done and do not constitute an essential part of the overall remuneration. The purpose of the special allowance must clearly arise from the agreement, for example, through the identification as a "loyalty bonus."

Vacation Compensation Claims Subject to Collective Bargaining Limitation Periods

Federal Labor Court, Decision of December 13, 2011 – 9 AZR 399/10

Dr. Annette Krahforst

A claim for compensation of statutory vacation that cannot be taken due to continued permanent disability is subject to collective bargaining limitation periods. A limitation period for the vacation compensation claim may not exceed the duration of the base period for the vacation claim; it may be considerably shorter than one year.

Vacation Compensation Claims Subject to Collective Bargaining Limitation Periods

The Federal Labor Court ruled on the compensation claims for statutory vacation for the years 2004 to 2006 of an employee whose employment relationship had been terminated as of April 30, 2006 and who had previously had a continued permanent disability. It rejected the claim for vacation compensation on the basis of a two-month collective bargaining limitation period applicable between the two parties. Continuing its changed jurisprudence since the ECJ's Schultz-Hoff case (C-350/06), pursuant to which statutory vacation compensation claims are not extinguished when the employee is disabled as of the end of the vacation year and/or the carry-over period; the vacation compensation claim is thus no longer to be seen and treated as a surrogate for the vacation claim, but purely as a monetary claim, so that the court referred to the collective bargaining limitation period.

The collective bargaining limitation period could also be applied in view of the ECJ's KHS judgment of November 2011(C-214/10). In further development of its Schultz-Hoff jurisprudence, the ECJ ruled that, in view of its meaning and purpose of providing the employer recovery from his work for a time and for another time relaxation and free time, statutory vacation not taken due to disability should only be carried over for a certain time; the carry-over period must clearly exceed the duration of the base period for which the vacation should be granted.

According to the FCJ, this does not mean that a limitation period for the vacation compensation claim must considerably exceed the duration of the vacation base period. Pursuant to the jurisprudence of the ECJ, the conditions for asserting and granting a vacation compensation claim solely followed the law of the particular states. Furthermore, the vacation claim does not lapse during the existing employment relationship because the employee is not able to use the vacation. A disabled employee may, however, make a vacation compensation claim aimed at the payment of money after the termination of the employment relationship.

Because vacation compensation claims were already excluded under a collective bargaining agreement, the Federal Labor Court left open the issue of whether a carry-over of vacation claims for 2004 and 2005 until the plaintiff's termination in 2006 should be rejected pursuant to the ECJ'S KHS decision. It pointed out, however, that the KHS decision established the application of the shortest carry-over period permissible under European law. It is nevertheless questionable whether a carry-over period could

be derived with sufficient precision from the ECJ jurisprudence or whether it would have to result from a statutory provision.

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Summary: The jurisprudence on the Federal Holiday Benefits Act is still in flux. The Federal Labor Court ruled that vacation compensation claims are subject to collective bargaining limitation periods. Still open is the question of which time period a permanently disabled employee's vacation claim will be carried over and thus continue to be valid.

Unlimited Time Limitation Controls

Federal Labor Court, Decision of February 15, 2011 – 7 AZR 394/10

Dipl.-Kfm. Dr. Thorsten Leisbrock

In order to be valid, limited and considerably increased working hours require such circumstances that would also justify the limitation of an additional employment agreement separately concluded to increase working hours pursuant to Section 14(1) of the Act on Part-Time Work and Temporary Employment Contracts.

The plaintiff, who was employed in judicial service, initially worked "half days." In a supplementary agreement valid for three months, the plaintiff agreed with her employer that the working hours for this period would be increased to "full days."

The plaintiff subsequently filed a declaratory judgment action with the Labor Court for a determination whether the time limitation of this increase in working hours was invalid. After the lower courts had dismissed the complaint, the plaintiff prevailed on appeal. The Federal Labor Court remanded the case to the Regional Labor Court to determine whether a material reason justifying the time limitation existed.

The Federal Labor Court adhered to the principle that the limitation of individual working conditions is not subject to the application of the Act on Part-Time Work and Temporary Employment Contracts, but undertook a substantive review pursuant to Section 307 Civil Code ("Review of General Terms and Conditions").

According to this regulation, provisions in general terms and conditions are invalid if they unreasonably prejudice the user's contractual partner in violation of the requirement of good faith.

There is, however, – according to the Federal Labor Court – no unreasonable prejudice in violation of good faith if there is a material reason that would also justify the limitation of a separately concluded employment agreement. This was necessary where a limited increase of working hours was "considerable" in scope. Such a considerable scope existed when for three months working hours were increased by half the time of a full-time worker.

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Summary: Therefore, from a substantive perspective, a review of material reasons is quasi necessary by analogy to Section 14(1) of the Act on Part-Time Work and Temporary Employment Contracts, although the provisions of the Act on Part-Time Work and Temporary Employment Contracts are not applicable. A significant consequence of this view is that the employee can have an analogous review of material reasons undertaken using Section 14(1) of the Act on Part-Time Work and Temporary Employment Contracts via a general declaratory judgment action not related to the time period of Section 17 of the Act on Part-Time Work and Temporary Employment Contracts.

Withdrawal of Private Use of Company Car – Grace Period

Federal Labor Court, Decision of March 21, 2012 – 5 AZR 651/10

Dr. Sascha Schewiola

The Withdrawal of private use of a company car without compensation for loss of use may be permissible.

The parties disagreed over compensation for the lost private use of a company car.

Article 2(3) of the Employment Agreement read as follows:

"In the event of notice of termination, R shall have the right to release the employee from his/her work obligations with the continuation of earnings."

Article 7 of the Company Vehicle Agreement read as follows:

"The employer reserves the right to revoke the transfer of the company car if and as long as the automobile is not neces-

sary for work purposes on the part of the employee. This is, in particular, the case where the employee is released from work performance following notice of termination of the employment relationship. In the event revocation is exercised by the employer, the employee shall not have the right to request compensation for loss of use or damages."

Following notice given by the employee as of June 30, 2009, the employer released the employee from work and requested the return of the company car. The return was made on June 9, 2009. With his complaint, the employee sought compensation for the loss of use for the period of June 9 to June 30, 2009.

The Federal Labor Court agreed with the plaintiff. In the Federal Labor Court's view, the revocation clause in the company car agreement initially withstood a review of general terms and conditions. In particular, the clause did not violate Section 308 no. 4 Civil Code. The revocation of private use of a company car in connection with an effective release of the employee was reasonable for the employee. In particular, the revocation clause need not provide for any notice and/or grace period. This was to be considered solely in the exercise of revocation.

The withdrawal of private use of the company car also does not require any notice of amendment, as long as less than 25% of regular earnings are affected by the withdrawal. If a demand for surrender is subsequently permissible, no damages are payable for the withdrawal of private use.

In this specific case, however, the employee had not exercised its revocation right using reasonable discretion pursuant to Section 315 Civil Code (review of exercise). The employee had stated that it had only the company automobile. In addition, pursuant to Section 6(1)(4) of the Income Tax Act, the private use was to be taxed for the entire month of June. The loss of use had therefore led to an appreciable decrease in the employee's gross income. The employee's interest in actually being able to use the taxed benefit therefore outweighed the employer's abstract interest in the immediate withdrawal of the company car.

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Summary: The withdrawal without compensation of a company car also provided for private purposes after notice of termination and the release of the employee may be permissible in the case of a corresponding contractual basis. In exercising its right of withdrawal, the employer should grant a reasonable grace period, preferably until the end of the current calendar month.

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