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Newsletter
Employment Law

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Incorrect information as evidence of discrimination

Federal Labor Court,
Judgment of June 21, 2012 - 8 AZR 364/11

Dr. Holger Lüders
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An employer who makes an incorrect statement or statements the contents of which were changing or contradictory in nature with regard to a discriminatory measure risks creating an indication of a violation of the German Equal Treatment Act.

An employee originally from Turkey filed a lawsuit after her employment relationship, as opposed to that of her colleagues, was not extended after an unfounded limited period. Noting the low number of non-German employees at her employer's company, she felt she was being treated unfairly because of her ethnicity, especially because employees from 13 different nations were being employed in the company's other operations. In addition, the plaintiff alleged that the employer had initially claimed the business was in a merger process and there was a need for employee cutbacks. In the proceedings, the employer had justified the fact that the employment agreement was not extended because of poor performance even though her reference certified that she performed her responsibilities "to our complete satisfaction."

In the first instance, the plaintiff was awarded rights to damages and compensation. The decision was overruled by the German Federal Labor Court, which referred it back to be re-mediated and re-investigated. Even though basically quotas or statistics may in fact be an indicator for discrimination, merely a group of employees being unrepresented is not necessarily a compelling indication of discriminatory employee policies. It may, however, be deemed an indication of discrimination if an employer, when disclosing information, provides reasons that contradict its behavior in any other manner. By the same token, reasons with changing content given by the employer may affect an indication for a discriminatory measure. Replacing one reason for its behavior with another may allow the conclusion that the reason that was originally provided was not accurate. It would then not be contrary to logic to assume that the real reasons were not to be discussed. This would indicate that the actual reasons were not allowed and that the burden of presentation in accordance with Section 22 Equal Treatment Act would suffice, even if the employer were not obligated to disclose information.

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Conclusion: Employers are well advised to be particularly cautious when circumstances exist that entail a discrimination risk. As a general rule, companies should await a request for disclosure before providing any further details with regard to the reasons for certain decisions. Information provided must be accurate and must in any case be able to be upheld in case of a plausibility review by the courts.

Age limit applies even in the absence of any economic protection

ECJ,
Judgment of July 05, 2012 - C-141/11 ("Hörnfeldt")

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A national rule pertaining to compulsory retirement, which applies without exceptions and in particular also does not account for the amount of the pension that a person is entitled to is compatible with European law.

In the main proceedings, an employee filed a complaint against a scheduled termination of his employment relationship under Swedish law on the last day of the month on which he turned 67 years of age. Under Swedish law, a person is entitled to retirement once he reaches this age. The employee based his complaint on unlawful discrimination due to age and on his low pension (about EUR 700).

In the opinion of the ECJ, even a termination rule that does not account for the individual pension amount is justified and can therefore be in compliance with the laws of the Union. A rule of this kind does mean unequal treatment. What is governing, though, is in how far the law's objective justifies the disadvantage. In the case at issue, the purpose of the "age 67 rule" is to make room for younger employees in the marketplace and to make it easier for younger people to gain access to the job market. This is a legitimate objective of social and employment policies.

In the opinion of the ECJ, in the equitable assessment to be made, the issue relating to the maximum amount of pension that an employee is entitled to does not need to be taken into account. It would suffice that the employee is at all entitled to receive financial compensation to substitute earnings in the form of a pension. In its decision, the ECJ accounts for the fact that under Swedish law, an employee can apply for basic social services to supplement low pensions, which consist of guaranteed pension, housing subsidies and/or public assistance for maintenance costs available to the elderly. With its decision, the ECJ acknowledges that the requirements under EU laws relating to the justification of age discrimination in this form are not very stringent.

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Conclusion: The ECJ ultimately continues to refer the issue on the design and legitimacy of age limits of this kind back to the individual Member States. For Germany, the German Federal Labor Court issued a decision that the effectiveness of an age limit in a collective agreement does not depend on whether the employee has achieved any specific economic protection once the age limit has been reached. What remains unclear, however, is whether age limits can also be legally effective in individual employment agreements.

Forfeiture of the right to object always requires an element of circumstance

Federal Labor Court,
Judgment of March 15, 2012 - 8 AZR 700/10

Christoph Hexel
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Rarely will a written notification on the transfer of a business be found in practice that satisfies the strict requirements defined by the Federal Labor Court, and in complicated situations, it is almost impossible to find one. This provides employees with an opportunity to object against the transfer of the employment relationship even after a longer period of time has elapsed since the company merger took place.

The right to object may be forfeited, however. The Federal Labor Court always makes a point to emphasize that there must be a review in each individual case to assure that both the required element of time as well as the element of circumstance are met. Each of these elements has an influence on the other, i.e. they literally each depend on the other in the sense of being "communicating vessels." The higher an employee's level of trust is or the more circumstances exists that would make any assertion unreasonable for the defendant, the quicker it can be assumed that any claim will in fact be forfeited and vice versa. Therefore, any dispositions about the existence of an employment relationship may also lead to a forfeiture of the right to object after just a short period of time.

Even in cases, however, where the element of time has reached an excessive length (in the case at issue, the transfer happened more than six years ago) the Federal Labor Court does not attribute any declaratory quality either, where the employee continues to work unquestioned for the acquirer of a business or, as pertains to an element of circumstances, where no basic changes are made to the basic existence of an employment relationship. In the case at issue, the Federal Labor Court only presumed an element of circumstance, because for almost six years there was a conflict that was fought out with the acquirer of a business about tariff dynamics, which was especially caused as a result of the change in the legal situation after the transfer of business. In a constellation of this kind, it would suggest itself that the circumstances would be objected to or at the very least that they would be accepted with prejudice.

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Conclusion: The more time that passes since the transfer of a business has taken place and the longer an employee has already worked for an acquirer, the less likely it is for said employee to be able to object based on the element of circumstance. Nevertheless, because of the major hurdles involved in gaining acceptance for the element of circumstance the forfeiture option is only suitable to a limited extent in its ability to provide correction with regard to the high statutory requirements pertaining to written notifications.

Works council's liability when hiring consultants

Federal Court of Justice,
Judgment of October 25, 2012 - III ZR 266/11

Regina Glaser, LL.M.
(Düsseldorf)

Members of the works council may be personally liable for the costs of a retained consultant. If, according to the German Works Constitution Act, the consultant is not entitled to a fee, claims may be asserted against them in their role as a representative without power of attorney.

The German Federal Court of Justice issued a decision in a complaint filed by a consultant for non-payment, who had been hired by the Works Council in reconciliation of interests proceedings in accordance with Section 111, sentence 2 Works Constitution Act and who asserted a claim for fees of EUR 86,762.90. After the employer refused to bear the costs, the consultant filed a suit against both the works council as a committee and against two of its members personally.

According to the German Federal Court of Justice, an agreement that a works council enters into with a consultant in support of its own concerns is only effective if the agreed upon consultation is necessary in the fulfillment of the responsibilities of the works council and provided that the remuneration promised is typical for the market and the works council is therefore entitled to be exempted from the costs towards the employer pursuant to Section 40 (1) Works Constitution Act. Within this framework, the works council and its members are not liable "twice". If this limit is exceeded when a consultant is hired, however, the acting works council members may be held liable for the difference based on the principles of representation without power of attorney (Section 179 German Civil Code) or if the power of attorney is exceeded.

Works council's liability when hiring consultants

The Federal Court of Justice points out that the risk of the works council or the acting member exceeding the "limits of what is necessary" may not be imposed on the consultant unilaterally. Moreover, the works council members whom a claim is asserted against must, based on how the legal act was drafted, provide evidence that shows that retaining the services of a consultant and the scope of the consulting services requested were within the limits defined in Section 40 (1) Works Constitution Act. They also bear the burden of proof pertaining to the question whether the consultant had known or should have known that in accordance with Section 179(3) German Civil Code the consulting costs were not eligible expenditures.

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Conclusion: Employers should not simply assume the costs incurred by the works council for a consultant out of reflex. Often, a review is worth the effort. The acting works council member does have the option to design the contractual agreement with the consultant accordingly, limiting or even excluding liability entirely in accordance with Section 179 German Civil Code.

Right to compensation for overtime

Federal Labor Court, Judgment of June 27, 2012 - 5 AZR 530/11 Federal Labor Court, Judgment of February 22, 2012 - 5 AZR 765/10

Dr. Holger Lüders
(Düsseldorf)

Recently, the Federal Labor Court clarified in two decisions that not all employee groups are entitled to compensation for overtime. There are no general legal statutes requiring that every hour of overtime has to be compensated.

In both decisions, the Federal Labor Court first clarified that a clause by which every hour of work was to be compensated based on the base salary was null and void. A clause of this kind would only suffice the requirement of transparency if the employment agreement itself defines which tasks are to be performed in what particular time frame. The result of the ineffectiveness of a clause of this nature is that the agreement does not provide for overtime compensation.

Section 612 (1) German Civil Code could then be considered the legal basis for overtime compensation. On this basis, compensation (for overtime) may only be demanded if based on the circumstances the employee can be expected to be paid special compensation for the performance. This must be determined based on general custom, the nature, scale and duration of the service and the relationship between the employees concerned. In "normal" employment relationships, though, this more than likely does result in an entitlement to overtime compensation. In the opinion of the Federal Labor Court, an objective expectation for overtime compensation is generally lacking, however, if in total the compensation paid stands out to a significant extent, exceeding the cap under the statutory pension insurance scheme. The same should apply if bonuses are also paid for a portion of the tasks performed which by no means can be considered insignificant. Because if this is the case, typically from the point of view of the parties concerned, what is definitive here is not that the performance was completed in a particular number of hours, but instead that the outcome (of the closed business transactions) was successful.

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Conclusion: The overtime compensation rules provided for in many employment agreements most likely do not satisfy the requirements defined the Federal Labor Court pertaining to the necessary degree of transparency. For employees, who either owe services of a higher-ranked nature or who already receive additional compensation in the form of bonuses as a result of the added performance, more often than not it cannot be automatically assumed that the employee is entitled to compensation for overtime.

Errors in mass dismissal notifications

Federal Labor Court,
Judgment of June 28, 2012 - 6 AZR 780/11

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In accordance with Section 17 German Protection Against Unfair Dismissal Act, employers are required to notify the Federal Employment Agency of any intended employee dismissals if the number of dismissals exceeds a certain threshold. Errors in mass dismissal notifications may result in the dismissals being null and void, even in such cases in which the Employment Agency does not find faults with the (improperly submitted) notification of mass dismissals.

In the opinion of the German Federal Labor Court, errors in submitting the required mass dismissal notification cannot be rectified by a definitive notice issued by the Employment Agency. Despite a notice of this kind, the court ruled that that the labor tribunal should not be prevented from assuming that a mass dismissal notification is ineffective as protection against unfair dismissal proceedings. Up until now, this issue has been in dispute. The Federal Labor Court no longer considers the notification requirement to be simply of public interest, i.e. to allow employment agencies to prepare for their placement efforts, but deems that it also contains a component designed to protect individuals.

At the same time, however, the Federal Labor Court makes its quite clear that an ineffective mass dismissal notification will not inevitably cause all of the terminations associated with it to be null and void. Rather, this will require that the reasons for the ineffectiveness be differentiated. While a missing opinion from the works council may result in the mass dismissal notification and all terminations requiring notification being null and void, an employee may only reference a notification that in error reflects a lower number of employees to be dismissed if he himself was erroneously not included in this notification. Consequently, the fact that the works council was properly involved must be accounted for in particular. The risks associated with the opinion by the works council can be avoided especially if integrated in an opinion of this kind is a reconciliation of interest (with a list of names) and same reconciliation of interests is submitted to the German Employment Agency along with the notification.

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Conclusion: Employees have been increasingly referencing an ineffective mass dismissal notification in protection against dismissal proceedings. Thus, employers concerned must take the legal requirements about what the notification must definitely contain seriously.

Works council members with limited contracts are not entitled to permanent employment

Lower Saxony State Labor Court, Judgment of August 08, 2012 - 2 Sa 1733/11 (not yet final)

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As a rule, works council members are not entitled to having time limits removed from their agreements with unfounded limited periods. The same also applies if an initial limitation is extended after the employee is elected into the works council within a two-year period.

The employee filing the complaint unsuccessfully asserted - in the first two instances at least - that stipulations provided for under European Law were in contradiction to an unfounded limitation period for works councils. In their opinion, this would otherwise prevent employees from running as candidates in works council elections. The Lower Saxony State Labor Court did not agree with this. It found that the complaint's intention was not to obtain an interpretation of Section 14(2) German Act on Part-Time Work and Fixed-Term Employment in conformance with the directive, but instead it intended for the standard to not be applied at all where works council members were subjected to unfounded limitation periods.

Moreover, it found that the required minimum protection for employee representatives would be sufficiently guaranteed by existing protective rules, Section 78, sentence 2 and Section 119 Works Constitution Act in particular. Inadmissibility of an unfounded limitation period as defined in Section 14(2) Act on Part-Time Work and Fixed-Term Employment would only be worthy of consideration if the employer had limited the employment relationship solely because the employee was a member in the works council. If this were the case, this would constitute an unlawful disadvantage. The burden of presentation and proof would lie with the works council member to a slightly lesser extent, however. Initially, the works council member would only need to suggest that the employment agreement was not extended because he held a seat on the works council. In this case, the employer would need to present facts based on which it could be determined that the employment relationship was discontinued irrespective of the employees position on the works council. In turn, the works council member would then need to counter this presentation of facts.

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Conclusion: The decision shows that employers are often forced to provide justification for their actions when it concerns employee groups that enjoy special protection privileges. For this reason, employers should take steps to carefully document their decision for and against (not) extending limited employment relationships.

Considering support obligations in social selection process

Federal Labor Court,
Judgment of June 28, 2012 - 6 AZR 682/10

Dr. Sandra Mauer, LL.M.
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If a social selection scheme made by an insolvency administrator is based on a reconciliation of interests that includes a list of names as defined in Section 125 German Insolvency Code, it suffices if the selection only accounts for the support obligations for those children listed as dependents on an income tax card.

The employee who filed the complaint is the father of two children. Only one child allowance was entered on his income tax card, however. After insolvency proceedings were initiated against the employer, the insolvency administrator and the works council prepared a reconciliation of interests that included a list of names, which listed the plaintiff as well. First, age groups were formed for the social selection scheme. In a second step, a point scheme was applied to account for the social selection scheme criteria (support payment obligations, length of service, severe disability and age). Where the plaintiff was concerned, only one child was considered based on the registered child allowance.

The Federal Labor Court deemed the compulsory redundancies to be valid. The question whether corporate parties could make the consideration of children in the support obligations dependent on what is entered on the income tax card had never been discussed. Now, a decision was made in an insolvency case that a social scheme selection based on a reconciliation of interests with a list of names (pursuant to Section 125 Insolvency Code) may in fact be limited to considering those support obligations that are reflected on the income tax card. Applying this approach would not lead to gross errors when selecting the social scheme. In insolvency proceedings especially, decisions about redundancies that serve to reorganize and rationalize a company need to be made quickly. It could not be expected of an insolvency administrator to invest considerable effort in researching the number of dependent children.

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Conclusion: It is doubtful whether this decision would also stand up in issues relating to a social selection scheme outside of insolvency issues. In such cases, time pressures are more often not quite as significant. This is why it is advisable in cases such as these to inquire exactly as to the actual support obligations of each employee prior to making redundancy decisions. The Federal Labor Court emphasized once again that an improperly carried out social selection scheme would only invalidate the termination if in the final result of the process it proved to be incorrect.

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