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Newsletter
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The Employment Law Practice Group consists of a team of lawyers specializing in employment law and certified specialist lawyers for employment law. We advise and represent national and international companies in all fields of employment law. In our articles, we discuss important new developments, legislative amendments, and the current case law in the field of employment law.

Return to the eternity clause as regards the prohibition of previous employment?

LAG Baden-Württemberg, judgment dated 26.9.2013, 6 Sa 28/13

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Under Section 14 Subsection 2 Sentence 1 TzBfG (Law on Part-Time Employment), time limitation without an objective reason is inadmissible if a fixed-period or indefinite employment relationship has already existed beforehand. In its judgment of 6 April 2011 (7 AZR 716/09), the BAG (Federal Labour Court) decided that a "previous employment relationship" can only be regarded as such if it has ended a maximum of three years before the current employment relationship. Employment in earlier periods should not be taken into consideration.

At the time, the BAG judgment was noted with pleasant surprise: it helps many companies in practice. At the same time however, there was regular open criticism of the fact that, through its interpretation that "previous" can only apply for the duration of the limitation period of three years, the BAG had assumed the role of substitute legislator. The LAG Baden-Württemberg now takes the same line in its latest judgment. It criticises the BAG by claiming that "previously" is such a clear (time-unlimited) term that interpretation reducing it to three years is no longer compatible with the wording of the law. Furthermore, the history of the law also suggests the absence of any time limitation. The LAG Baden-Württemberg did not see any violation of Art. 12 GG (Basic Law) – as claimed by the BAG – in the restricting possibility of time limitation without an objective reason.

The LAG closes with the criticism that, in its decision of April 2011 and despite a corresponding obligation under Section 45 Subsection 2 and 3 ArbGG (Labour Court Law), the BAG has not brought about a decision of the Great Senate, although there have been diverging decisions of other Senates. In order to preserve the uniformity of case law, BAG Senates must, when

wishing to deviate from the opinion of other Senates, consult the other Senates and request the Great Senate for a decision if no agreement can be reached. The BAG did not do this in 2011.

Finally, the LAG Baden-Württemberg rejects protection of confidence for the employer in the specific case. The chain of time limitations had begun prior to the then judgment of the BAG. Consequently, the employer could not have relied on the decision of the BAG when agreeing the time limitation.

Conclusion: The question of eternal application in Section 14 Subsection 2 Sentence 1 TzBfG, considered settled since 2011, is again on the agenda. Employers must still be advised to check precisely whether the employee, now to be hired on a fixed-term basis "without objective reason", has ever worked for the company in the past. In practice this creates major difficulties, not least when considering the admissible storage data and legal transfers of companies and company divisions. A new decision of the BAG in this matter as well as concerning protection of confidence is eagerly awaited.

Qualifying-date clauses for mixed-character special payments

BAG, judgment dated 13.11.2013, 10 AZR 848/12

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A mixed-character special payment which by all means also constitutes remuneration for work performances already provided, cannot be made conditional in General Terms and Conditions of Business on the existence of the employment relationship as at 31 December of the year in which the work performance was provided.

The parties disagreed concerning an entitlement to a special payment for the year 2010, described as "Christmas bonus". The claimant had been employed by the defendant as Controller since 2006.

Each year, he received a special payment together with the November salary that was equivalent to the respective November salary; this was initially described as ex-gratia payment, then as Christmas bonus as from the year 2007. In addition, the defendant sent its employees a letter in the autumn of the respective year setting out the "Guidelines" for the payment. Among other things, the letter for the year 2010 stated that the payment was being made "to employees of the publishing company in a non-terminated employment relationship as at 31.12.2010". The employees were also to receive 1/12 of the gross monthly salary for each calendar month with paid work performance. Employees joining the company during the course of the year received the special payment on a pro-rata basis in accordance with the Guidelines. The claimant's employment relationship ended on 30 September 2010 through termination by him. In his legal action, the claimant asserted a pro-rata (9/12) amount of the special payment.

The previous instances dismissed the action. Upon appeal by the claimant, the Tenth Senate of the Federal Labour Court ordered the defendant to make payment in accordance with the demand for relief.

Mixed character, loyalty to the company and remuneration

In the opinion of the BAG (Federal Labour Court), the special payment is intended on the one hand to tie the employee to the company beyond the end of the year, and thus to reward loyalty to the company. The remuneration simultaneously also covers the work performed during the course of the year. In such cases, qualifying-date clauses such as that agreed here are ineffective under Section 307 Subsection 1 Sentence 1 BGB

(German Civil Code). They constitute inappropriate prejudicing of the employee and are at variance with Section 611 Subsection 1 BGB, as they withdraw remuneration from the employee that has already been earned. According to the local guidelines, the entitlement to remuneration was acquired monthly. By contrast, there were no indications that the special payment was intended primarily as counter-performance for periods after departure of the claimant or for work performances not yet provided.

Qualifying-date clause inadmissible as regards remuneration

The effective agreement of a qualifying-date ruling necessarily requires the special payment concerned to be a pure ex-gratia payment that rewards exclusively the loyalty to the company shown in the past and expected for the future. As soon as the payment is (at least also) intended as remuneration for work performances, qualifying-date rulings are generally inadmissible, as they inappropriately prejudice the employee as defined in Section 307 Subsection 1 Sentence 1 BGB.

If the employer wishes to make a special payment conditional on non-terminated existence of the employment relationship as at the date of payment or as at a defined date in the following year, it is advisable to make express reference, when making the corresponding payment, to the fact that this is intended exclusively as reward for loyalty to the company and not (also) as remuneration for the employee's work performance.

Conclusion: The Senate expressly renounces its previous case law that non-waiver clauses are also admissible if the special payment concerned is intended both as remuneration for work performances already provided as well as to reward loyalty to the company. The additional purpose of the special payment does not alter the fact that the qualifying-date ruling withdraws work remuneration from the employee that has already been earned. The employer has no interest, deserving of protection, in retrospectively altering the relationship between performance and counter-performance.

No liability of the recruitment agent under the Equality of Treatment Act

BAG, judgment dated 23.1.2014, 8 AZR 118/13

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Claims for compensation in cases of violation of the General Equality of Treatment Act (AGG) under Section 15 Subsection 2 must be made against the employer. If a recruitment agent is involved in the advertisement of job vacancies, he shall not be liable for any such claims.

In September 2011, the claimant applied for a position as recruitment agent advertised in the Internet. The job advertisement was aimed at "career entrants" with one to two years of professional experience. The application was to be addressed to UPN GmbH. Reference was made at the end of the job advertisement to a UP GmbH as regards possible "contact information for applicants".

The claimant applied via the e-mail address stated, he addressed the letter of application to UP GmbH. He received a rejection by e-mail; the sender of the e-mail was UPN GmbH. The claimant then unsuccessfully requested compensation from UPN GmbH, whereupon the latter provided detailed reasons for the rejection of the application. Finally, the claimant brought legal action against UPN GmbH for payment of appropriate compensation. During the litigation, UPN GmbH pleaded that not it but UP GmbH had advertised the position.

As with the previous instances, the legal action before the Federal Labour Court was unsuccessful. In the opinion of the Senate, the claim for compensation made against UPN GmbH by the claimant is not justified. This is because UPN GmbH was merely a recruitment agent. Had the claimant been employed, not it but rather UP GmbH would have become the employer. However, according to the Federal Labour Court, the claim for compensation under Section 15 Subsection 2 AGG could only be asserted against the "employer".

Claim for damages only against employer

Even if Section 15 Subsection 2 AGG (other than Section 15 Subsection 1 AGG) does not explicitly name the employer as the party against whom claims must be asserted, the judgment of the Federal Labour Court now constitutes a decision by the highest court that the claim for compensation under Section 15 Subsection 2 AGG is exclusively against the employer. As a recruitment agent is therefore not liable himself, the only option open to the unsuccessful applicant is to claim against the employer on the basis of discrimination when filling the position.

Entitlement to information against recruitment agent

Case law recognises that the employer can also be accused of discrimination against an applicant if the discrimination is committed by third parties. The difficulty for an applicant, who is potentially the victim of discrimination, then lies in identifying the employer behind the recruitment agent. For this reason, it appears advisable to grant the applicant a right of information against the recruitment agent as regards the employer behind an anonymous job advertisement, at least if he has set out the probability of a compensation claim in sufficient manner, or even if only tangible indications exist for the serious possibility of a compensation claim. This is because the applicant is dependent on the identity of the employer in order to be able to assert a claim for compensation under Section 15 Subsection 2 AGG in the first place. In such cases, the preclusive period is also not likely to start until the applicant first gains knowledge of the potential employer without any delay for which he is responsible.

Conclusion: Claims for compensation based on non-material damage as per Section 15 Subsection 2 AGG must be made exclusively against the (potential) employer. If a recruitment agent is involved in the advertisement of job vacancies, he shall not be liable for claims under Section 15 Subsection 2 AGG. The Senate was not called on to consider whether other claims can result against the recruitment agent. As a result, this decision also shows that utmost caution is called for when recruiting personnel. Notwithstanding the fact that, when formulating job advertisements, any reference that could be considered discriminatory must be avoided, the employer should always check thoroughly whether and – if so – which personnel agent he entrusts with the recruitment.

Crediting of remuneration components against the minimum wage

ECJ, judgment dated 17.11.13, C-522/12

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The ECJ (European Court of Justice) was required to decide on the question of to what extent remuneration components can be credited against the minimum wage.

The employment relationship of an employee was covered by the collective wage agreement Minimum Wage Industrial Cleaning. The employer had not paid the employee the minimum wage, asserted by way of legal action, and argued that the employee had already received payments above the minimum wage. Two lump-sum, collective-wage-agreement allowances (allowance as increase in the profit sharing and special payment based on the economic situation) as well as capital formation benefits were to be credited against the minimum wage.

Based on a submission of the BAG (Federal Labour Court) dated 18 April 2012, 4 AZR 168/10, the ECJ decided on 17 November 2013 that the inclusion of remuneration components in the minimum wage is possible, provided the relationship between the performance of the employee on the one hand and the financial counter-performance, provided to him/her on the other hand, does not change.

In the opinion of the ECJ, the crediting of capital formation benefits does not result in a change in performance and counter-performance. Capital formation benefits differ from the wage in the actual sense as they are aimed at achieving a social-policy objective. Consequently, they cannot be regarded as components of the normal relationship between the work performance and the financial counter-performance to be provided by the employer for this.

By contrast, lump-sum benefits, intended as a wage increase for work performed, can be credited against the minimum wage. It is a matter for the BAG to check whether this is actually the case in the pending legal dispute.

Conclusion: According to the decision of the ECJ, capital formation benefits cannot be credited against a minimum wage to be paid. In terms of further payments, a check must be made in each individual case as to whether these are intended as financial counter-performance for work performed, with the result that crediting against the minimum wage is possible.

No employment with hirer in the event of hiring out that is no longer only "temporary"

BAG, judgment dated 10.12.2013, 9 AZR 51/13

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On 1 December 2011, the legislator included in Section 1 Subsection 1 Sentence 2 AÜG (Law on Temporary Employment) the fact that hiring out of employees must only be "temporary"; this resulted in a dispute as to whether violation of this results in the creation of an employment relationship between the temporary employee and the hirer. After several State Labour Courts also supported this opinion, it has now been opposed by the BAG (Federal Labour Court). A legal consequence of this nature is not compatible with the law.

In the case at hand, the employee was employed with a company with a license for the hiring out of temporary workers, and hired out the majority of its employees to its parent company, the operator of a clinic. Following the ending of the claimant's work for the parent company after more than three years, he claimed that his employment relationship with the company hiring out was incorrect. His hiring out had not been only temporary, with the result that an employment relationship had been created between him and the parent company hiring him. Following dismissal of the legal action by the Labour Court, the State Labour Court Baden-Württemberg agreed with the opinion that, given the constellation of hiring out of workers that is no longer just temporary, an employment relationship is created between the temporary employee and the hirer.

The BAG set aside the decision of the State Labour Court and dismissed the legal action of the employee as a whole. No employment relationship is created between a temporary employee and a hirer, even if the deployment is not just temporary. The law provides for such legal consequences only in the event of the company hiring out not having the license required by law. This sanction, standardised in Section 10 Subsection 1 Sentence 1 AÜG, cannot be extended to cover other violations of regulations of the AÜG. In view of the number of conceivable violations and the likewise manifold sanctions, it is the task of the legislator to prescribe specific legal consequences. The BAG has therefore, with pleasing clarity, removed the recent legal uncertainty created by various identical LAG (State Labour Court) decisions.

Nevertheless, the BAG had no cause to decide whether continuing, or no longer temporary, hiring out of workers is to be assumed in the case at hand. The question of how the term "temporary" is to be understood remains unanswered. In view of the numerous conceivable constellations of temporary hiring out of workers, only case-by-case decisions can be expected from the courts in this respect anyway, and these will permit transfer to other facts to a limited extent only. In the opinion of the LAG Schleswig-Holstein (ruling dated 8.1.2014, 3 TaBV 43/13), both a person-related as well as a workplace-related consideration must take place here, depending on the constellation of the case.

Given work that objectively arises permanently, the temporary employee should only be involved for the performance of this on an auxiliary basis. Otherwise, his work is no longer "temporary". This also applies if the temporary employee – employed by the hirer on a fixed-term or indefinite basis – performs permanent tasks for the latter without having replaced a regular employee.

Temporary hiring out

Conclusion: Even if the BAG has clarified a contentious legal issue through the decision at hand, peace cannot be expected in the field of the hiring out of temporary workers. It is possible that the license for the temporary hiring out of workers will be withdrawn in future if the party hiring out no longer hires out its workers only temporarily. Companies that regularly use temporary employees should therefore pay attention to ensuring that the license for the temporary hiring out of workers exists continuously, even given established contractual relations with parties hiring out. In addition, the BAG has recently awarded Works Councils the right to object to the use of temporary employees under Section 99 BetrVG (Works Council Constitution Act) if this is not merely temporary.

Effective notification of mass dismissals requires indication of the social selection criteria

LAG Düsseldorf, judgment dated 26.9.2013,
5 Sa 530/13

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If, as part of the mass dismissal notification procedure under Section 17 KSchG (Protection Against Unfair Dismissal Act), an employer fails to inform the Employment Office sufficiently concerning the envisaged criteria for the selection of the employees to be dismissed, the notification will be considered incorrect and will result in ineffectiveness of any termination based thereon.

The claimant was employed as General Warehouse Manager with a company against which insolvency proceedings were opened. Following a long search, the insolvency administrator succeeded in finding a buyer for the insolvent company. However, the latter declared himself unwilling to take over all employees. Rather, a significant share of the insolvent company's personnel were to be dismissed on the basis of a so-called buyer's concept.

For the purpose of implementing the terminations for operational reasons as per the buyer's concept, the insolvency administrator concluded a reconciliation of interests with the responsible Works Council involving a list of names stating the employees to be terminated (see Section 125 InsO (German Insolvency Code). Under the reconciliation of interests, among other things the hierarchy level of General Warehouse Manager and with it the claimant's job was to be discontinued. Accordingly, the claimant was on the list of names. When implementing the social selection, the insolvency administrator had, in accordance with Section 125 Subsection 2 No. 2 InsO, carried out the social selection among comparable employees in terms of the length of service in the company, age and existing maintenance obligations. When doing so, he had also formed age groups. The dismissals planned overall were undisputedly subject to the requirement of notification under Sections 17 et seq. KSchG. The reconciliation of interests, including the list of names, was enclosed with the notification of mass dismissals made by the insolvency administrator. Nevertheless, the documents submitted to the Employment Office contained no information whatsoever concerning the social selection carried out when drawing up the list of names and, in particular, no reference to the formation of age groups. The claimant challenged his termination through legal action for unfair dismissal and, among other things, invoked the errors in the notification of mass dismissals.

According to the LAG (State Labour Court) Düsseldorf, the notification of mass dismissals indeed turned out to be incorrect in this case, as the indication of the envisaged criteria for the selection of the employees to be dismissed as per Section 17 Subsection 3 Sentence 4 KSchG is part of the so-called compulsory information for the notification and not part of the so-called desired information considered as being dispensable. The fact that the Works Council had undisputedly been extensively informed of the social selection within the scope of the consultation procedure under Section 17 Subsection 2 KSchG, was considered by the LAG to be insignificant. It was not the consultation procedure under Section 17 Subsection 2 KSchG that was under consideration but solely the incorrect informing of the Employment Office as per Section 17 Subsection 3 Sentence 4 KSchG.

In several recent decisions, the BAG (Federal Labour Court) has consolidated its opinion that an incorrect notification of mass dismissals results in the legal ineffectiveness of termination by the employer, served on the basis of the notification (see most recently BAG, judgment dated 21.3.2013, 2 AZR 60/12, NZA 2013, 966); as a result, the LAG agreed with the claimant and ruled that the termination was ineffective.

In the context of this decision, it should again be mentioned at this point that the BAG has recently also made it clear that the correctness of the entire procedure of notification of mass dismissals as per Section 17 KSchG (consultation process with the Works Council and issuing of the actual notification) must also be checked in full by the labour courts in the action for unfair dismissal, even if the Employment Office has not objected to the notification received but confirmed it as being correct.

Conclusion: The decision is not yet final and absolute. Nevertheless, it is based to a major extent on the most recent decisions of the BAG concerning matters of the notification of mass dismissals. In view of the new and strict line adopted by case law, utmost care is now called for when carrying out mass dismissals, not only in terms of the participation rights of the Works Council under Sections 111 et seq. BetrVG (Works Constitution Act) (reconciliation of interests, social plan) and Section 102 BetrVG (hearing before individual terminations), but also in terms of the entire procedure under Section 17 KSchG. Supposedly minor formal errors in the notification procedure can call the effectiveness of all terminations into question and thus have disastrous consequences.

Extraordinary termination based on strong suspicion – subsequently added new facts possible

BAG, judgment dated 23.5.2013, 2 AZR 102/12

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In a legal dispute concerning the effectiveness of termination based on strong suspicion, account must also be taken of circumstances of which the employer has become aware at a later date. Prior hearing of the employee is not necessary in this case, even given the existence of new reasons for termination.

The claimant worked for the defendant as District Sales Manager in the field sales force. In August 2010, the defendant developed a suspicion that the claimant may have been involved in the fraudulent awarding of orders to the detriment of the defendant. The defendant heard the claimant in August and September 2010 concerning the accusations – which the claimant disputed – and then terminated with immediate effect in October 2010 on the basis of strong suspicion. The defendant became aware of new grounds for suspicion in July 2011. These indicated that the claimant had invoiced a construction company for an amount of approx. EUR 9,000.00 in November 2009 for a construction project of the defendant. The documents found gave rise to the suspicion that the construction work invoiced had not been carried out for the defendant but rather on the claimant's property. The defendant introduced this new knowledge into the legal dispute during the appeal procedure, without having previously again heard the claimant in this respect.

Introduction of new reasons for termination

The BAG (Federal Labour Court) decided that not only the actual circumstances, known to the employer at the time of giving notice of termination, were of significance. On the one hand, account should also be taken of circumstances that did not become known until later and which either weakened or strengthened the original suspicion. On the other hand, facts that create the suspicion of an independent – new – reason for termination can also be introduced into the litigation. In each case, a prerequisite is, however, that the new facts already existed objectively at the time of giving notice of termination, and were merely not yet known to the employer at this time.

No new hearing

If the employer introduces new facts into the legal dispute that merely reinforce the suspicion, then, according to the BAG, there would also be no need for a renewed prior hearing of the employee, as is normally a prerequisite for the effectiveness of termination based on strong suspicion. The BAG referred to the fact that the employee had already been heard concerning the

accusation giving rise to termination. Additionally, the employee could easily also defend himself against the increased suspicion during the proceedings for unfair dismissal. The same applies to the introduction of new facts into the proceedings for unfair dismissal which establish the suspicion of a further violation of obligations. Here too, the BAG does not see the need for a further hearing. Finally, the requirement of hearing is intended to protect the employer against overhasty decisions and to counter the risk of an innocent person being affected by the termination. If however – as in the case of "subsequent adding" of reasons for termination -, the employee has already received the notice of termination, renewed hearing can no longer prevent the giving of notice of termination. The employee's rights are also safeguarded even without a hearing as the employee can defend himself against the new suspicion in the unfair dismissal proceedings that are already pending.

Hearing of the Works Council

It should however be noted that the BAG requires hearing of the Works Council analogous to Section 102 Subsection 2 BetrVG (Works Council Constitution Act) concerning the extended reasons for termination. Finally and in contrast to the hearing of the employee, the hearing of the Works Council is not only for the purpose of clarifying the facts but should also give the Works Council the opportunity of actively influencing the employer's decision to terminate. As the Works Council is not involved in the legal action for unfair dismissal, it must be heard before introduction of the extended reasons for termination into the ongoing litigation.

Period of notice

According to the BAG, consideration of subsequently added new facts is likewise not frustrated by the two-week deadline of Section 626 Subsection 2 BGB (German Civil Code). According to the wording of the provision, this deadline is applicable solely to the exercising of the right of termination.

Conclusion: New facts can be introduced into the proceedings for unfair dismissal, even after the serving of notice of termination based on strong suspicion. When introducing new facts that establish the suspicion of a further violation of obligations, there is no requirement for renewed hearing of the employee concerned, but the Works Council must be heard again.

No entitlement of the Works Council to submission of all final written warnings

BAG, ruling dated 17.9.2013, 1 ABR 26/12

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The Works Council cannot make a blanket demand for the employer to submit all final written warnings, issued as from a certain date, in anonymized form, with the exception of executive managers and the directors.

In the decision, the Works Council demanded that the employer submit all final written warnings issued during a specific period. The Works Council justified its application by referring to the fact that it could intervene in a regulating and job-retaining manner and influence the employer before he would give notice of termination, if it had knowledge of existing problems – as set out in final written warnings. Additionally, the study of individual final written warnings had shown that the employer had in part reprimanded violations of instructions that had been issued without the involvement of the Works Council.

Following upholding of the Works Council's claim by the two previous instances, the Federal Labour Court dismissed the corresponding application.

No entitlement on the basis of Section 80 Subsection 2 BetrVG

The claim of the Works Council does not result from Section 80 Subsection 2 BetrVG (Works Council Constitution Act). According to this standard, the Works Council must be informed by the employer in good time and extensively for the purpose of performing its duties. Under Section 80 Subsection 2 Sentence 2 Half Sentence 1 BetrVG, the employer is obliged in particular to provide the documents, necessary for performance of the tasks, if requested to do so. According to the decision of the BAG (Federal Labour Court), a precondition for the entitlement is that the Works Council has a task at all, and that the documents requested are also necessary for performance of this task.

It is precisely these prerequisites that the Works Council – contrary to its corresponding obligation – failed to set out to a sufficient extent. There is no task for the Works Council for which the handing over of all final written warnings could be necessary.

There is no duty of the Works Council to influence the employer such that no employment contracts are terminated. Outside the formal hearing procedure as per Section 102 BetrVG, the Works Council must not be involved in the issuing of final written warnings. Rather, the right of co-determination is not created until initiation of the information procedure as per Section 102 BetrVG.

Section 87 BetrVG likewise does not result in any duty of the Works Council that generally necessitates the Works Council being able to see all final written warnings. Final written warnings can concern complex facts that are not related to the co-determination rights of the Works Council. Here, the BAG quotes assault as an example of a reason for a final written warning. The Works Council had not set out in sufficient detail why, in the specific case, its co-determination rights under Section 87 BetrVG should require the submission of all final written warnings issued.

Through this decision, the BAG overruled the opinion of the previous instances that even a "certain probability of the existence of Works Council duties" is sufficient to create an entitlement to information on the part of the Works Council.

Conclusion: The decision shows that the Works Council's rights and duties are a matter of the specific facts. Employers are not required to comply with all requests by the Works Council to hand over documents without further legal checking. Rather, it is the Works Council's duty to demonstrate in detail why which documents are necessary for the fulfilment of its statutory tasks. Blanket requests and blanket references to Section 87 BetrVG do not satisfy this obligation.

A call for strike action must not be circulated via the company e-mail account

BAG, ruling dated 15.10.2013, 1 ABR 31/12

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Employees are not entitled to use physical resources of the employer for the circulation of a call for strike action by the trade union to the workforce.

The employer ran a hospital with approx. 900 employees. The employee involved in the proceedings was the Chairman of the Works Council and a member of the ver.di trade union. His employer provided him with a company e-mail account which he used for both company purposes as well as for his work for the Works Council (first name.name@employer.de). The employee used this account to pass on a call by ver.di for strike action to all employees and asked them to take part in the warning strike. He signed the e-mail with his name and the words: "For the ver.di Company Group". The signature information on the e-mail stated the telephone number of the Works Council office. The employer then sent a letter to the Chairman of the Works Council criticising the use of the company e-mail account and the indication of the telephone extension of the Works Council. During ensuing court proceedings, the employer demanded that the Works Council refrain in future from using physical resources of the company for calling and organising a strike.

Property as a right of defence

The Federal Labour Court, like the previous instances before it, essentially granted the employer's claim to injunctive relief. Nevertheless, the courts put forward differing reasons for this. While the previous instances assumed that the obligation of neutrality, as standardised in Section 74 Subsection 2 Sentence 1 BetrVG (Works Council Constitution Act), means that a Works Council member is not entitled to use physical resources of the employer for industrial action, the Federal Labour Court based its findings on the civil-law claim to injunctive relief under Section 1004 Subsection 1 Sentence 2 BGB (German Civil Code). According to this, the owner can demand that the disturber refrain from further interference with his property.

No obligation on the employer to tolerate

In the opinion of the First Senate, the employer, as owner of the physical company resources, is not obliged to tolerate the circulation of calls for strike action via its Intranet. The basic right to engage in trade-union activities under Section 9 Subsection 3 Basic Law for the Federal Republic of Germany is not inadmissibly restricted by the claim to injunctive relief. The Senate drew attention to the fact that employees can exercise their right to mobilise the workforce to participate in a strike in various ways.

Use of the employer's electronic means of communication is just one such possibility – albeit a very effective one. Employees who are members of a trade union are not therefore absolutely dependent on the company IT structure for their trade-union activities. While calls for strike action can be circulated quicker and more purposefully in this manner, it is not the employer's duty to cooperate in this by providing own operating resources.

In this context, the Federal Labour Court made it clear that the question of whether the call for strike action is circulated via the company Intranet by a member of the Works Council or by a "normal" employee is not decisive. An employer cannot be generally required to support the coalition-specific involvement of an employee in industrial action against the employer by providing own operating resources.

Conclusion: Employers must not tolerate the use of physical company resources for industrial action. This applies in particular to the company e-mail account and to the company Intranet. In the event of violation, the employer can demand restraint from the employee and also assert this entitlement by way of a temporary injunction.

No obligation of the employer to provide information about conversion of remuneration

BAG, judgment dated 21.1.2014, 3 AZR 807/11

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Employers are not required to draw the attention of their employees on their own initiative to the entitlement to conversion of remuneration within the scope of the company old-age pension scheme.

The Federal Labour Court (BAG) has now clarified the question of whether employers are obliged to pay damages if they fail to explain to their employees that they have a statutory entitlement to conversion of remuneration.

Since 2002, employees have had a legal entitlement to use part of their salary for building up a company old-age pension. The corresponding ruling can be found in the Law on Improvement of Company Old-Age Pensions or, in short, in the Company Pensions Act (BetrAVG). This states at the very beginning in Section 1a that employees can request the employer to build up a company old-age pension from their future remuneration entitlements. Thus far however, a disputed question has been whether the employer is also required to draw the attention of his employees to this vested right on his own initiative. The Third Senate of the BAG has now ruled on this matter. The employer is not required to expressly draw the attention of his employees to the possibility of conversion of remuneration.

The claimant was an employee who was employed with the defendant company up until 30 June 2010. Following the end of the employment relationship, he demanded damages of 14,380.38 euros from his employer, claiming that the employer had failed, in breach of duty, to inform him of his entitlement to conversion of remuneration under Section 1a BetrAVG. Given corresponding knowledge of his entitlement, he would have converted 215.00 euros per month of his salary into an expectancy of benefits under the company old-age pension scheme. He would have chosen direct insurance as form of implementation.

In its judgment of 27 July 2011, the State Labour Court Hesse, as previous instance, had dismissed the action for damages. The claimant's appeal to the BAG was now likewise unsuccessful. The BAG decided that neither Section 1a BetrAVG nor the employer's duty to give assistance obliged the employer to inform the employee of his own accord concerning the entitlement to conversion of remuneration under Section 1a BetrAVG.

As such, there was no violation of obligations by the employer, as required for a claim for damages.

The decision must be assessed as positive news for employers. At the same time, there is a need for caution. Courts are still required to keep the duties to inform and the related risks to employers within reasonable limits. Because only in this way is it possible to generate or maintain the urgently required acceptance among employers of a company pension scheme. Nevertheless, the BAG has made it very clear in other decisions that the employer can by all means be liable for damages – in particular if he offers complex pension systems or voluntary advisory services. If the employer provides information in this context, the content of this information must be correct and complete.

Conclusion: Against this background, employers are well advised to limit the references, provided by them on company pensions, to fundamental subjects, e.g. to the forms of implementation available in the company, the works agreements concluded in this respect or to the fundamental possibility of conversion of remuneration. They should by all means refrain from individual "pension support" in order to avoid liability risks.

Changes to the right of exemption concerning old-age pension insurance

BSG, judgments dated 31.10.2012,
B 12 R 8/10 R; B 12 R 3/11 R; B 12 R 5/10 R

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Members of professional pension schemes require current, employment-related exemption notifications.

Employees and self-employed persons are entitled to exemption from compulsory insurance under the statutory old-age pension scheme if they are members of a professional association (e. g. Medical Association, Bar Association) and of a professional pension scheme (e. g. doctors' pension scheme, lawyers' and tax advisors' pension scheme), and practice a profession-related activity (Section 6 Subsection 1 no. 1 SGB (Code of Social Law) VI). The legal consequence of this is that contributions must be paid to the professional pension scheme and not to the Deutsche Rentenversicherung Bund (DRV Bund) (German Federal Pension Fund).

Earlier administrative practice of the DRV Bund

With classic profession-related activities, the DRV Bund assumed in the past that, once issued, exemption would remain valid in the event of a change of employer if the new activity is likewise clearly profession-related (example: a doctor moves from one hospital to another; a lawyer joins another law firm).

In its judgment dated 31 October 2012, the Federal Social Court (BSG) declared this generous practice to be inadmissible. In the opinion of the court, exemption from compulsory membership of the statutory old-age pension scheme applies only for a very specific employment with a specific employer or for a self-employed activity actually practiced. The exemption becomes ineffective upon giving up the employment. This means that each change of employer or each significant change in the area of duties with the existing employer requires the submission of a new application for exemption.

This case law resulted in major uncertainty. Given the long-standing administrative practice of the DRV Bund, the question arose as to whether exemption notifications issued before 31 October 2010 enjoy safeguarding of existence and protection of confidence.

Change in the administrative practice at the DRV Bund

In its **letter dated 10 January 2014**, the DRV Bund advised that it has adjusted its administrative practice to the requirements of the BSG as stated in the judgment of 31 October 2012. This results in the following case scenarios.

Taking up of employment after 31 October 2012 – new exemption notification required

An independent exemption procedure must be carried out for each new position of employment or self-employed activity taken up after 31 October 2012, if these are subject to compulsory insurance.

For this purpose, "newly taken up" means not only any change of employer but also any significant change in the area of duties with the existing employer. The employer must include the exemption notification in the remuneration files and present this if necessary during a tax audit. If the employer is not in possession of a current profession-related exemption notification, he is obliged to register the employee with the statutory old-age pension scheme and to pay the corresponding contributions. Otherwise, a later social security audit can result in the employer being obliged to make back payments of past contributions. By and large, the related costs affect solely the employer. This is because the employee contribution to the statutory old-age pension scheme can only be claimed from the employee retrospectively to a limited extent, namely only with the next three salary payments. If the employment relationship has since ended, recourse claims against the employee are no longer possible at all.

Taking up of employment before 31 October 2012

In the case of employees whose last change of job was before 31 October 2012, the DRV Bund differentiates in terms of whether a classical profession-related employment exists (e. g. doctor in a hospital, lawyer with lawyers as employers, pharmacist in pharmacies) or another profession-related activity (e. g. in-house lawyer, in-house tax advisor, pharmacist in an industrial company).

Protection of confidence for classical profession-related activities

Nothing changes in the case of employees who have received an exemption notification in the past for a classical profession-related employment (e. g. doctor in a hospital, lawyer with lawyers as employers, pharmacist in pharmacies), and who continue to practice such an activity following a change of job before 31 October 2012: their "old" exemption notification remains applicable for the employment currently practiced. An obligation to submit a new application for exemption does not apply until there is a renewed change of employment. If so desired, an application can also be submitted for the current employment in order to obtain clarification.

No protection of confidence for in-house lawyers

The situation is different with employees who are in possession of an exemption notification for an earlier profession-related

activity, but have relinquished this as a result of a change of job (e. g. in-house lawyer changes company) or a significant change in duties (e. g. promotion of an in-house lawyer to Head of Department) prior to 31 October 2012. They have no protection of confidence concerning the exemption notification issued previously. In all cases, they require a current, employment-related exemption notification and must therefore submit a new application for exemption covering the current activity. The DRV Bund grants these employees the possibility of retrospective submission of the application.

If processing of the application shows that the current activity qualifies for exemption, the exemption will be issued as from the date of submission of the application. Nevertheless, there is no requirement for back payments of contributions to the statutory old-age pension scheme for the past. The contributions paid to the professional pension scheme remain applicable. This guarantees the employees concerned uninterrupted protection by the professional pension schemes.

If, however, liability to compulsory insurance under the statutory old-age pension scheme is ascertained during processing of the application or during a social security audit, the contributions to the old-age pension scheme will be levied from the employer retrospectively for the past, in accordance with the general rulings and together with the surcharge on overdue payments.

Conclusion: Employers who pay contributions to the professional pension scheme for employees should have an employment-related exemption notification from the DRV Bund concerning the current activity in their remuneration files. If this is not the case, the employees concerned should demonstrably be requested to submit a corresponding application for exemption as soon as possible, because only a positive exemption notification can create legal certainly as regards the contribution payments, and protects the employer against high demands for back payments from the DRV Bund.

From our praxis
Employment Law

Heuking Kühn Lüer Wojtek uses regular events as well as lectures and publications by our lawyers from the Practice Group Employment Law to provide information on employment-law subjects of everyday relevance to clients. The following pages also provide an overview of the latest personal data and distinctions of our Practice Group Employment Law.

Publications

Bernd Weller wrote a guest commentary on the subject "The future of temporary employment" in the "FAZ Personaljournal", February 2014 Issue.

Bernd Weller drew attention to Compliance risks in the context of Works Council elections for the Federal Association of Compliance Managers. A second part on Compliance risks after the election will follow shortly.

To the article

In the "Compliance-Berater" (Compliance Consultant) (magazine 1/2-2014, 44), **Bernd Weller** comments on a judgment of the LAG Baden-Württemberg concerning the termination without notice of a Daimler manager as a result of luxury expenditure on the company villa.

In the "Fach-Newsletter PERSONALIntern", Issue 6/2014, **Regina Glaser LL.M.** wrote on the subject "What employers must by all means be mindful of when serving notice of termination".

Lectures

This year, **Dr Holger Lüders** will again be speaking at various seminars organised by the Beck Academy. On 11 March 2014 ("Works Council Constitution Act for Beginners") and on 12 March 2014 ("Works Council Constitution Act for Professionals – Decision Update"), both to be held in Munich, he will be representing Bernd Weller. On 15/16 July 2014, he will be holding a two-day summer course on the subject of "Employment contracts", again in Munich. On 5 November 2014, he will speak in Düsseldorf within the framework of the seminar series "Optimum formulation of employment contracts", which will also be continued in 2015.

Dr Johan-Michel Menke LL.M. will speak on the subject "Legally secure processing of difficult terminations – severance management of "non-terminable" employees" in Frankfurt on 6 May 2014. The seminar is being organised by the "Forum Institut für Management".

On 26 and 27 June 2014, **Bernd Weller** will deliver a presentation for the Beck Academy at the seminars "Works Council Constitution Act for Beginners or Professionals" in Hamburg.

Astrid Wellhöner and **Bernd Weller** will speak at the "Summer course Employment Law", organised by the Beck Academy on 6-8 August 2014 in Munich.

People

Thomas Schulz LL.M. has been a member of the Practice Group Employment Law at the Hamburg office of Heuking Kühn Lüer Wojtek since November 2013. He assists the department headed by Kay Jacobsen. In this role, he advises and represents clients in all matters of individual and collective employment-law. Mr Schulz studied at the University of Kiel. He completed his training as junior lawyer at the Higher Regional Court Schleswig. Mr Schulz worked as law clerk, among other places at the German Football Association in Frankfurt as well as in a renowned firm of business lawyers in Hamburg, specialising in the field of employment law. Before joining Heuking Kühn Lüer Wojtek as lawyer, Mr Schulz obtained an LL.M. in the field of sports law at the Nottingham Trent University, England.

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