HEUKING KÜHN LÜER WOJTEK

Newsletter
Employment Law

July 2015

Contents

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Dear readers,

we welcome your interest in our new "Employment Law" Newsletter. In this edition we have again compiled an overview of the most important developments and decisions of practical relevance in the field of employment law.

An important development of practical relevance is the decision of the BAG, in which the court has elaborated on the prerequisites for the effective granting of holiday through a declaration of release in cases of termination without notice, alternatively ordinary termination. These prerequisites must be taken into account in future notices of termination.

The State Labour Court Lower Saxony has passed a disputed judgment concerning the adoption of an hourly fee for Works Council lawyers.

The Regional Court Mecklenburg-Western Pomerania has concerned itself with the question of the co-determination rights of the Works Council regarding the setting-up of a dummy video camera.

The BAG has ruled on further interesting constellations. The judgments concern themselves with the possibility of termination based on strong suspicion during vocational training, the primacy of statutory notice periods and a possible entitlement of an employee to damages for pain and suffering in cases of unjustified surveillance. Also worthy of mention is the decision on the option available to employers of continued use of pictures of an employee even after the ending of the employment relationship.

At the end of the Newsletter you will find the accustomed overview of events and publications. This includes reference to a publication concerning the highly topical subject of the minimum wage in transit traffic.

We wish you enjoyable reading.

Regina Glaser, LL.M.
and Astrid Wellhöner, LL.M. Eur.

Articles
Employment Law

The Practice Group Employment Law is made up of a team of lawyers specialising in employment law and qualified specialist lawyers for employment law. We advise and represent national and international companies in all areas of employment law. Our articles cover important new decisions, changes to the law and current case law in the field of employment law.

Damages for pain and suffering in cases of unlawful surveillance

BAG, judgment dated 19.2.2015 - 8 AZR 1007/1

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Strict requirements on secret photo or video surveillance

The Federal Labour Court has once again concerned itself with the possibility and admissibility of secret photo or video surveillance of employees. It is resolutely standing by its previous case law (BAG 7.10.1987 - 5 AZR 116/86, BAG 27.3.2003 - 2 AZR 51/02; BAG 21.6.2012 - 2 AZR 153/11; BAG 21.11.2013 - 2 AZR 797/10).

The secret taking of photo or video recordings can be justified within the framework of Section 32 Subsection 1 Sentence 2 BDSG (German Federal Data Protection Act) given the presence of four preconditions:

1. There must be a specific, fact-based suspicion of punishable action or of other serious misconduct.
2. Less drastic means of clarification must offer no prospect of success or already have been unsuccessful.
3. The undercover photo or video surveillance must be the only practical means remaining.
4. A conclusive assessment must show no disproportionality of the surveillance.

Damages for pain and suffering as a result of violation of personal rights

Violation of these principles shall simultaneously constitute violation of personal rights (Art. 2 Subsection 1 Basic Law in conjunction with Art. 1 Subsection 1 Basic Law) and of the right to informational self-determination. Given sufficient severity, a violation of the law can be sanctioned by damages for pain and suffering (Section 823 Subsection 1 BGB (German Civil Code)) as well as triggering other legal consequences.

The Federal Labour Court has applied these principles in the following case:

A female employee had a dispute with her director. Shortly afterwards, she was off sick for a total period of roughly two months. The first four medical certificates were issued by a specialist general practitioner. The two further medical certificates were issued by a specialist doctor for orthopaedics. The employee initially informed the director that she was suffering from pleurisy and later that she had a slipped disc. The employer was suspicious as regards the incapacity for work, and arranged for a detective agency to take photos and video recordings as part of surveillance of the employee.

The Federal Labour Court declared that the surveillance was inadmissible. In the opinion of the Federal Labour Court, not even the first prerequisite for secret photo or video surveillance was given. The employer had no sufficient factual points of reference for a concrete suspicion of a criminal offence (feigning of incapacity for work). The medical certificates were correct. Their legal relevance was likewise not diminished. Mere suspicions are not sufficient as justification of secret surveillance. There is a need for credible, specific circumstances.

The Federal Labour Court affirmed the decision of the State Labour Court ordering the employer to pay damages for pain and suffering. The damages for pain and suffering totalled 1,000.00 EUR. The employee had filed legal action asserting damages for pain and suffering of 10,500.00 EUR.

Summary: Secret photo or video surveillance can be considered for clarifying serious misconduct. Nevertheless, it presupposes the existence of a justified suspicion which must be based on specific facts. Mere presumptions are not sufficient. Once the first barrier has been overcome, the further preconditions for secret photo or video surveillance must be checked.

Publication of video recordings of an employee – requirement of consent

BAG, judgment dated 19.2.2015 - 8 AZR 1011/13

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Under Section 22 KUG (law governing copyright to art and photography), pictures of employees are only permitted with their written consent. Consent issued without restrictions does not automatically expire upon ending of the employment relationship. Nevertheless, it can be revoked if a plausible reason is provided for this.

The claimant was employed by the defendant as a fitter. When preparing a new internet site, the defendant had an advertising film made which presented its company. The claimant can also be seen in two short sequences of the video concerned. Like 31 other employees, the claimant had issued a "written declaration of consent" to this. Following his departure from the company, the claimant revoked any "consent possibly issued" to publication of his picture, and requested the defendant to remove the video from the homepage. The defendant complied with this request, but reserved the right to again include the advertising film on the company website at a later date. The claimant took legal action against this.

The Labour Court dismissed the legal action in part. The claimant's appeal to the State Labour Court as well as his appeal on a point of law were both unsuccessful.

Requirement of the written form for the consent?

The BAG also initially concerned itself with the question of the requirement of the written form in regard to any consent to be issued. The starting point here is the KUG. This has primacy in the case at hand and does not establish any formal requirements for the consent. At the same time however, this constitutes a recognisably inconsistent assessment compared to the requirements on consent in Section 4a Subsection 1 Sentence 3 BDSG, which fundamentally requires the written form.

Conflict solution through constitutionally conform interpretation of Section 22 KUG

In the opinion of the BAG, which agrees with the established case law of the Federal Constitutional Court in this respect, this conflict can be solved through constitutionally conform interpretation of Section 22 KUG. The respective court must therefore always check on a case-by-case basis whether consent is required, and if so in what form, taking account on the one hand of the interest of the employer in use and, on the other hand, the right of the person concerned to informational self-determination.

Significance of the right to informal self-determination creates the requirement of the written form for consent

Given the importance of the employee's right to also be able to exercise his/her basic right of informational self-determination in the employment relationship, the result of any such weighing-up is that the consent of the employees requires the written form, even and especially in the employment relationship. Only in this way is it possible to show clearly that the consent of the employees to publication of their pictures is given independently of the respective obligations under the employment relationship entered into, and that the issuing or refusal of consent must not have any consequences for the employment relationship. In other respects, neither the basic fact that employees are dependent staff nor the right of the employer to issue instructions would stand in the way of the possibility of informational self-determination.

Consent does not automatically lapse upon ending of the employment relationship

The BAG added that effectively issued consent of the claimant, as defined in Section 22 KUG, likewise does not expire automatically upon ending of the employment relationship. According to the wording, consent had been issued without calendar-related limitation, and was likewise not restricted just to the term of the employment relationship.

Possibility of revocation only given the presence of an "important reason"

Once issued, consent can only be revoked (retrospectively) if the employee can present an "important reason" for this. This ruling applies to cases where the employee has not been singled out and advertising based on his/her specific person, but rather the film has been made for purely illustrative purposes. The result of the overall weighing-up required in such cases is therefore that the employee revoking must be required to state a reason, in the form of a statement, as to why he/she now wishes to exercise his/her right to informational self-determination in contrast to when issuing the consent many years previously. In the case at hand, the claimant had not presented a correspondingly plausible explanation for revocation.

Summary: From a company perspective, written consent should be obtained from the employee in all cases. This must describe the specific purpose of use of the film as precisely as possible. This form of consent does not then automatically expire upon ending of the employment relationship. A check must therefore be carried out in each individual case as to precisely how the employee has been included in the video, what circumstances have changed compared to the time of the issuing of his/her consent, and whether an important reason, based on personal rights, entitles him/her to revoke as an exception.

Termination based on strong suspicion during vocational training

BAG, judgment dated 12.2.2015 - 6 AZR 845/13

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A vocational training relationship under the Vocational Training Act (BBiG) can also be ended by extraordinary termination based on strong suspicion.

The claimant had been in vocational training as a banker with the defendant since 1 August 2010. On 20 June 2011 he counted the money in the night-safe boxes of a branch. A cash shortfall of 500.00 EUR was later ascertained. According to the defendant, the claimant stated the amount of the shortfall spontaneously during a personal meeting, although he had only been spoken to concerning an unquantified cash difference. The defendant terminated the vocational training relationship based on the suspicion of misappropriation of the shortfall, created through the disclosure of perpetrator's knowledge. The claimant considered the termination to be ineffective. He claimed that it is not possible to end a vocational training relationship through termination based on strong suspicion. There had likewise been no correct hearing. Prior to the meeting in question, he had not been informed that he was to be confronted concerning a cash difference. He had likewise not been informed of the possibility of involving a person of his trust. In addition, the defendant had violated obligations under the Federal Data Protection Act. The Labour Court Trier and the State Labour Court Rhineland-Palatinate dismissed the legal action. The BAG rejected the appeal on a point of law against the decision of the LAG Rhineland-Palatinate, and considered the dismissal to be effective as extraordinary termination based on strong suspicion.

Possibility of extraordinary termination under Section 22 Subsection 2 No. 1 BBiG

Through this decision to recognise the possibility of termination based on strong suspicion even in vocational training relationships, the BAG has settled a long-running dispute in case law and literature in favour of employers. In a decision dated 19 June 2006 (9 Sa 1555/05), the LAG Cologne was still of the opinion that termination based on strong suspicion is fundamentally not admissible in vocational training relationships. The reason is that a vocational training relationship is not characterised by a special basis of trust to the same extent as a normal employment relationship.

Special aspects of the vocational training relationship

The BAG has now taken a differing view and stated that the strong suspicion of a serious violation of obligations by the trainee can render continuation of the vocational training relationship unreasonable for the training company. This constitutes

an important reason for termination under Section 22 Subsection 2 No. 1 BBiG. The BAG did however add the restricting note that account must be taken of the special nature of the vocational training relationship.

In the opinion of the BAG, vocational training relationships and employment relationships cannot generally be treated equally. However, both are characterised by a strong commitment of the contract parties, with the result that the understanding of the important reason as defined in Section 626 Subsection 1 BGB corresponds to that of Section 22 Subsection 2 No. 1 BBiG. Consequently, termination based on strong suspicion is also possible in a vocational training relationship.

The strict requirements under case law apply to termination based on strong suspicion

Termination based on strong suspicion in a vocational training relationship must also take account of the accustomed strict requirements under case law. In particular, prior hearing of the trainee is regularly required. When conducting the hearing, account must then be taken of the special aspect of a vocational training relationship – the typical inexperience of the trainee and the resulting risk of placing excessive demands on him/her. Given recognisable excessive demands, the trainee must be given appropriate time to prepare for comment on the accusations. However, this does not mean that an effective hearing would require advance informing of the trainee concerning the intended content of the discussion, as this would create a risk of collusion to conceal the act.

Consideration of the special aspects of the vocational training relationship during the hearing

The BAG does not therefore place any significantly higher requirements on the lawfulness of termination based on strong suspicion in a vocational training relationship, compared to a normal employment relationship. It takes account of the special aspects of the vocational training relationship within the framework of the hearing, at which the individual capabilities and needs of the trainee must be considered.

Summary: A strong suspicion of a serious violation of obligations on the part of the trainee can constitute an important reason for termination of the vocational training relationship under Section 22 Subsection 2 No. 1 BBiG, if the suspicion renders continuation of the vocational training objectively unreasonable for the training company, even taking account of the special aspects of the vocational training relationship. The decision creates legal clarity and is to be welcomed by employers. As such, termination based on strong suspicion is also possible during a vocational training relationship.

Holiday in the event of a switch to part-time work with fewer working days per week

BAG, judgment dated 10.2.2015 - 9 AZR 53/14 (F)

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If a full-time employee is unable to take holiday before switching to a part-time position with fewer working days per week, the number of days paid annual holiday cannot be reduced proportionately for the whole year as a result of the transfer to part-time employment.

This was previously the case law of the European Court of Justice (ECJ). The argument that the acquired entitlement to paid annual holiday is not lowered by any such reduction in days since – expressed as weeks of holiday – it remains unchanged, was explicitly rejected by the ECJ with reference to the prohibition of discrimination against part-time employees. Based on the case law of the ECJ, the BAG has now abandoned its previous case law, under which the days of holiday entitlement were fundamentally to be converted in the event of a reduction in the weekly working hours.

Facts

The BAG was called on to decide on the following facts. The claimant employee was employed full-time up until 14 July 2010. On 15 July 2010, he switched to a part-time position and subsequently worked four instead of five days per week. The employment relationship is covered by the collective wage agreement for the civil service (TVöD). Section 26 Subsection 1 Sentence 2 TVöD-AT grants full-time employees 30 days holiday per year.

The employer was of the opinion that, following the reduction in working hours, the employee was only entitled to 4/5 of the full holiday entitlement and thus to 24 days holiday. As the employee now worked on fewer days per week, he would receive the same amount of time off when expressed in weeks. By contrast, the employee was of the opinion that the holiday was to be calculated separately for the months of full-time and part-time working. This would result in 27 days holiday (15 for the first six months, 12 for the second six months).

Once earned, holiday is retained

Whilst the Labour Court determined that the employee was entitled to a further three days holiday, the court of appeal dismissed the employee's legal action for more days holiday (LAG Hesse, judgment dated 30.10.2012 - 13 Sa 590/12). However, his appeal to the BAG on a point of law was successful. Section 26 Subsection 1 Sentence 3 TVöD-AT does indeed state that the holiday entitlement is lowered accordingly if the weekly working

hours are reduced to less than five days per week. However, this ruling is ineffective if it reduces the number of days holiday acquired during the full-time work. The reason is a violation of the prohibition of discrimination against part-time employees. Holiday entitlement acquired in the first half of the year cannot lapse retrospectively because of the reduction in working hours.

This judgment of the BAG alters its previous case law and implements the current case law of the ECJ. The ECJ decided as early as 2010 that the switch by an employee from a full-time to a part-time position must not result in retrospective reduction of the holiday entitlement (expressed in days) from the period of full-time employment. The holiday remuneration payable for these holiday days must likewise not be reduced (ECJ, judgment dated 22.4.2010 - C-486/08).

Implementation of ECJ case law

Unlike the BAG case, the decision of the ECJ did not concern a collective-wage-agreement holiday ruling, but rather the civil service law in the Austrian Federal State of Tirol. Nevertheless, the ECJ formulated its considerations in general terms. The BAG applied this consistently to the collective-wage-agreement rulings in the case at hand. This makes clear the fundamental nature of the decision. It clarifies that, once "earned", an employee's holiday entitlement can no longer be withdrawn retrospectively as a result of a reduction in the weekly working hours. In all cases, the reduction in the weekly working hours affects only the future. As such, this constitutes a break with the previous BAG case law which assessed this otherwise (for example judgment dated 28.4.1998 – 9 AZR 314/97).

Summary: The decision of the BAG illustrates once again the influence of European law on German case law. Employers must note that holiday entitlement is calculated in days. By contrast, the amount of free time resulting for the employee in practice is irrelevant.

No granting of holiday in cases of termination without notice, alternatively ordinary termination

BAG, judgment dated 20.2.2015 - 9 AZR 455/13

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The BAG has decided that an employer only effectively grants his employee holiday through a declaration of release from duties in a letter of termination if he pays the employee the holiday remuneration before the holiday is taken, or at least gives an unreserved assurance of payment of the holiday remuneration. No such granting is given if the employer terminates the employee extraordinarily, alternatively ordinarily, and declares release from duties in the event of effectiveness of the ordinary termination.

The Federal Labour Court (BAG) was required to decide on the claim of an employee against his former employer concerning remuneration of 15.5 days holiday.

In its letter dated 19 May 2011, the defendant had terminated the claimant's employment extraordinarily with immediate effect, and alternatively with the required period of notice to 31 December 2011. The letter of termination stated the following: "Should the alternative termination with the required notice period be effective, you will be released irrevocably from performance of your work duties with immediate effect, subject to crediting of all claims to holiday and overtime." In the ensuing legal dispute, the parties reached a settlement agreement at the conciliation hearing on 17 June 2011 which conclusively regulated the reciprocal claims. Under this settlement agreement, the employment relationship ended on 30 June 2011. The claimant was released from performance of his work duties up until this date, subject to continued payment of remuneration. The parties also agreed on a general release of claims. The claimant subsequently continued to demand remuneration for his residual holiday entitlement.

The claimant would have been entitled to the claim to compensation for holiday under Section 7 Subsection 4 BUrlG (Federal Holiday Act) if he had not been granted the holiday and the parties had likewise not made any other agreement on this.

No granting of holiday through the declaration of release in the letter of termination

Of material importance for the decision was therefore above all the question of whether the defendant was able to grant the claimant the holiday through the irrevocable release declared in the letter of termination dated 19 May 2011. The BAG now

rejected this in agreement with the previous instance (see LAG Hamm dated 14.3.2013 - 16 Sa 763/12).

Effective granting of holiday presupposes not only release from work duties but also payment of the holiday remuneration – or at least an unreserved assurance of such. If, however, an employer terminates extraordinarily and ordinarily only as an alternative, he is making primarily clear that he does not wish to pay further remuneration – and thus not even holiday remuneration. Unpaid release does not satisfy the employee's statutory claim to holiday. The previous instance refers in particular to European law as regards the reasons. Under European law, the claim to holiday and the claim to holiday remuneration are only two aspects of a single claim (LAG Hamm dated 14.3.2013 - 16 Sa 763/12 with reference to ECJ dated 16.3.2006, Robinson-Steel - C 131/04).

In the specific case, the BAG nevertheless dismissed the claimant's action, as the parties had regulated their reciprocal claims conclusively in the legal dispute concerning dismissal.

Failure of the legal action based on the preceding settlement agreement

Summary: In future, employers must continue to exercise care when formulating extraordinary, alternatively ordinary termination. If it is not clear that the employer is willing to pay the holiday remuneration, he bears a double risk. If the extraordinary termination is ineffective, he must also pay the holiday entitlement in addition to the normal remuneration (as wages owed through default) despite any extended period of release.

Forfeiture of an entitlement to damages for pain and suffering in cases of workplace bullying

BAG, judgment dated 11.12.2014 - 8 AZR 838/13

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The Federal Labour Court has decided that claims to damages for pain and suffering based on workplace bullying can be forfeited. Nevertheless, mere "waiting" or failure to act by the claimant is not sufficient to trigger forfeiture.

In the case to be decided, the claimant was claiming damages for pain and suffering against his former employer, based on damage to his health as well as violation of general personal rights. He stated that he had repeatedly been isolated, degraded and victimised in the period between 2006 and 2008. The last incident had been in February 2008. The claimant was subsequently almost continuously unfit for work, among other things as a result of depression. However, his legal action was not received by the Court until the end of December 2010, and thus almost three years after the last incident. Based on this long period of failure to act, the State Labour Court Nuremberg assumed that possible claims of the claimant to damages for pain and suffering had been forfeited.

Mere "waiting" cannot result in forfeiture of claims based on workplace bullying

The Federal Labour Court set aside the decision of the State Labour Court Nuremberg and referred the matter back to the State Labour Court. In the opinion of the Federal Labour Court, forfeiture of a claim can only be affirmed in very special circumstances. The fact that the alleged victim had refrained from filing legal action for a long time can only constitute an element of circumstance given an obligation of prompt assertion based on additional special circumstances. In the opinion of the Federal Labour Court, anything else would result in circumventing of the statutory limitation of actions.

The statutory limitation of actions must not be circumvented

The State Labour Court Nuremberg is now called on to check whether the claimant has actually become a victim of workplace bullying.

Summary: Claims based on workplace bullying are subject to the legal instrument of forfeiture. A right is forfeited if a long period has passed since the possibility of asserting it (element of time) and if special circumstances occur that cause the delayed assertion to appear as violation of good faith (element of circumstance). In the opinion of the BAG, failure to act over an extended period of time can only constitute an element of circumstance if the alleged victim of workplace bullying is under an obligation to make prompt assertion. This is fundamentally not the case.

The legal entitlement to the formal withdrawal of a written warning/admonishment

LAG Lower Saxony,
judgment dated 20.11.2014 - 5 Sa 980/14

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If an employee is issued with a written warning or admonishment, the question of possible legal protection arises. Under the case law of the Federal Labour Court (BAG), the employee can demand removal of an unjustified written warning from the personnel file in addition to a having a right of reply. Whether and to what extent a claim also exists to withdrawal of an unjustified written warning or admonishment has thus far not been clarified conclusively, and was the subject matter of a judgment by the State Labour Court (LAG) Lower Saxony.

The parties were involved in a dispute concerning whether the employee taking legal action had an entitlement against her employer to withdrawal of a written warning and of an admonishment, both of which had been issued by email and not included in the personnel file. The claimant received an email in which a member of the defendant's Board of Management accused her of not yet having completed a report requested, and made reference to possible consequences in this respect. In a further email, the representative expressed, among other things, his surprise and displeasure at the claimant's cancellation of appointments, and explained that he was still waiting for the naming of Spanish contact persons. He also provided information concerning new work duties and a new official place of work. Both emails were sent to colleagues or superiors of the claimant in copy (cc). The claimant has disputed the accusations made. She is seeking withdrawal of the emails assessed as written warning and admonishment. The defendant has placed on record that any complaints and violations of obligations, made or claimed in the emails, would not be used in future for any possible personnel measures against the claimant. Nevertheless, the defendant is standing by the factual accuracy of the accusations made.

The LAG Lower Saxony has decided that the claimant is not entitled to withdrawal of the statements contained in the emails. An employee is not entitled to the issuing of a formal declaration of withdrawal, if the employer has previously stated that he will not use the unjustly issued written warning for any possible personnel consequences against the employee. This also applies if he declares that he stands by the factual accuracy of the accusations made therein.

Decision of the LAG Lower Saxony

The LAG assumes that the declarations requested by the claimant go too far, and are not necessary for effectively taking account of the interests of an employee in legal protection. Rather, sufficient account is taken of the claimant's need for protection through the fact that the defendant has issued a binding declaration that he will not derive any consequences whatsoever from the two email letters. The forwarding of the emails to colleagues or superiors likewise does not create any need for legal protection concerning the withdrawal of the emails as a whole. Although a claim may exist to withdrawal of individual disapproving and libellous comments contained in these emails, the claimant has not however asserted any such claim in the dispute.

Appeal on a point of law to the BAG

The LAG has granted leave for an appeal to the BAG on a point of law based on fundamental importance of the matter in dispute, as it has not yet been clarified what content an isolated application for "withdrawal of an admonishment/written warning" does or can have under the system, developed by the BAG, of legal protection of an employee against disapproving comments by the employer. The appeal on a point of law is pending under file ref. 2 AZR 64/15.

To date, the BAG has only commented on the withdrawal of a written warning demanded in addition to removal from the personnel file, and in this respect has assumed that "withdrawal and removal" are mainly to be understood as uniform claim to elimination, but, given a corresponding statement of claim, it can also be assumable that the aim behind the withdrawal is also revocation of the comments contained therein (BAG 19.7.2012 – 2 AZR 782/11).

Summary: It remains to be seen how the BAG decides on the appeal allowed on a point of law. A convincing fact is that the LAG has not granted the employee any legal entitlement to formal withdrawal of the written warning or admonishment in the constellation at hand. At the same time, the employer should avoid issuing written warnings and admonishments via emails that are forwarded to colleagues.

Authority of a personnel manager to dismiss

BAG, judgment dated 25.8.2014 - 2 AZR 567/13

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A personnel manager can also be empowered to serve notice of termination alone if he is an Authorised Officer with collective power of representation. The restricted authority as Authorised Officer with collective power of representation does not affect his empowerment to serve notice of termination.

The defendant employer served the claimant with notice of ordinary termination for operational reasons on 27 April 2012 as part of a change in business operations. The letter of termination was signed jointly by the personnel manager with the addition "ppa" (as Authorised Officer) and the personnel caseworker with the addition "i.V." (by commercial power of attorney). According to the Commercial Register, the personnel manager had been appointed as Authorised Officer with collective power of representation. By letter dated 2 May 2012, the claimant rejected the notice of termination as inadmissible due to the lack of evidence of the signatory's power of representation.

Immediate rejection of notice of termination based on failure to present power of attorney is possible

Under the law, notice of termination served by an authorised representative is ineffective if the authorised representative fails to present evidence of power of attorney to the employee, and the employee rejects the termination immediately for this reason (Section 174 Sentence 1 BGB). Such rejection is excluded if the employer has informed the employee in another manner that the authorised representative is entitled to serve notice of termination (Section 174 Sentence 2 BGB).

As a rule, a personnel manager is entitled to serve notice of termination

The Federal Labour Court has already decided repeatedly in the past that any such "informing in another manner" is given if the authorised representative holds a position in the company that normally involves a right to serve notice of termination. This is the case with a personnel manager. Nevertheless, the employee must have been informed beforehand of who holds this position.

A special factor in the legal dispute at hand was that the personnel manager had simultaneously been appointed as Authorised Officer with collective power of attorney. The Senate was therefore required to decide whether the position as Authorised Officer with collective power of representation, in which the personnel manager can fundamentally only effectively represent the company externally together with a Director or another

Authorised Officer, has an effect on his power to serve notice of termination alone.

No effects of appointment as Authorised Officer with collective power of representation on the entitlement of a personnel manager to dismiss

In the opinion of the Federal Labour Court, the power of representation of a personnel manager to serve notice of termination alone is not however restricted by the appointment as Authorised Officer with collective power of representation. If the employee has sufficient knowledge of which person holds the position of personnel manager, he must assume that this person is entitled to serve notice of termination alone. The fact that, in this case, the personnel manager signed the letter of termination with the addition "ppa" changes nothing in this respect.

Summary: If notice of termination is signed by an authorised representative of the company, the original power of attorney, indicating the power of attorney to serve notice of termination, must regularly be enclosed with the notice of termination. If the notice of termination is signed by the personnel manager, the submission of any such power of attorney is not mandatory, if the staff has previously been informed of who holds this position. This can be for example through announcement in the Intranet or through display on the notice board. In case of doubt however, it is always advisable to enclose an original power of attorney with the notice of termination.

Compensation for holiday in the event of incapacity for work following parental leave

LAG Düsseldorf,
judgment dated 26.11.2014, 12 Sa 982/14

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The LAG Düsseldorf (judgment dated 26.11.2014 - 12 Sa 982/14) was recently required to concern itself with the question of whether holiday entitlement, that could not be taken immediately following parental leave as a result of sickness, also still has to be compensated in the third year thereafter.

The claimant employee was unfit for work in 2011 as a result of sickness and was released from work immediately thereafter in accordance with Sections 3 Subsection 1, Subsection 2, 6 MuSchG (Maternity Protection Act). The release continued in 2012 and 2013, in part on the basis of Section 6 MuSchG, then as a result of her parental leave, and finally due to renewed illness. The employee terminated the employment relationship at the beginning of 2014. The employer paid holiday remuneration for the years 2012 and 2013. The subject matter of the legal dispute was now the question of whether the employee was still entitled to holiday compensation for the year 2011.

The LAG affirmed that such an entitlement existed. Parental leave should not result in lapsing of the holiday entitlement. Under Section 17 Subsection 2 BEEG (Parental Allowance and Parental Leave Act), the residual holiday entitlement is automatically transferred to the time after ending of the parental leave, and can then be taken in the year in which the parental leave ends or in the year thereafter. The holiday transferred is then however subject to the same rules as applicable to the original holiday for this period. Any contract clause to the contrary is ineffective.

Extension of the holiday period in the event of illness…

Under Section 7 Subsection 3 Sentence 3 BUrlG, holiday entitlement lapses three months following the end of the holiday year if it has not been possible to grant holiday. However, under Section 7 Subsection 2 of the EU Working Time Directive, this period is extended by one year to 15 months after the end of the holiday year, if the employee has not been able to take the holiday due to illness. This was also the decision already reached by the Federal Labour Court (judgment dated 7.8.2012 - 9 AZR 353/10).

…including following parental leave

The LAG Düsseldorf has now extended this case law to holiday entitlement that has previously been transferred to the period following the parental leave in accordance with Section 17 Subsection 2 BEEG. Under Section 17 Subsection 2 BEEG, this holiday entitlement can be taken in the year in which the parental

leave ends (here: 2012) or in the following year (here: 2013). This means that the holiday entitlement transferred does not lapse until 15 months after the end of the following year (i. e. in this case on 31 March 2015). The LAG considers such interpretation to be justified for reasons of equal treatment (Art. 3 Subsection 1 Basic Law), since otherwise an extended illness immediately following the parental leave would necessarily result in lapsing of the holiday entitlement. This would place an employee exercising his/her right to parental leave at a disadvantage compared to an employee who waives parental leave.

Fundamentally speaking, exactly as with additional holiday

In the case before the LAG Düsseldorf, the employee was entitled to 30 days holiday per year as per her contract of employment. This is 10 days more than the 20 days holiday to which the employee was entitled under Section 3 Subsection 1 BUrlG given a 5-day week. The EU Directive actually only protects this statutory holiday entitlement. If, however, the contract parties wish to regulate the contractual additional holiday differently to the statutory holiday, this must be clear from the contract of employment. This was not the case here. The result reached was therefore applicable to the full holiday entitlement of 30 days.

As the holiday transferred could no longer be granted in the form of release following the termination by the employee, it had to be compensated through payment of the salary for the entitlement accumulated (Section 7 Subsection 4 BUrlG).

Note

The Division granted leave for an appeal on a point of law. The proceedings are pending before the Federal Labour Court (BAG) under file ref. 9 AZR 52/15. The BAG is expected to decide on the matter on 15 December 2015.

Summary: The decision of the LAG Düsseldorf is a logical extension of the BAG case law on the extension of the holiday period, and transfers it consistently to the case of illness following parental leave. During parental leave of their employees, employers must therefore always bear in mind that these return to the company with a very full holiday entitlement, which is initially retained even given subsequent illness.

No right of co-determination concerning the setting up of a dummy video camera

LAG Mecklenburg-Western Pomerania, ruling dated 12.11.2014 - 3 TaBV 5/14

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In its ruling dated 12 November 2014, the State Labour Court Mecklenburg-Western Pomerania (LAG MV) decided that under no conceivable circumstances is the Works Council entitled to a right of co-determination if the employer merely attaches a dummy video camera in the access area. The decision of the LAG MV clarifies a legal issue that has previously been disputed in literature.

The operator of a clinic had a dummy video camera attached in the outer area of the clinic building without the consent of the Works Council formed in the organisation. This was intended as a potential deterrent to third parties wishing to gain unauthorised access to the clinic building. The Works Council saw this as a violation of its right of co-determination and applied to the Labour Court Rostock for the appointment of an arbitration committee, with the aim of forcing the conclusion of a works agreement with the clinic operator on this matter.

The Labour Court Rostock initially approved the application of the Works Council, stating that it could not exclude the possibility of the attachment of the dummy video camera having a bearing on co-determination rights of the Works Council. An opposing view has now been taken by the LAG MV, which has rejected the application by the Works Council for the appointment of an arbitration committee.

Dummy video camera is not a technical surveillance device

The LAG MV initially concerned itself with the question of whether a co-determination right of the Works Council could result from Section 87 Subsection 1 No. 6 BetrVG (Works Council Constitution Act) (introduction of technical surveillance devices). However, the LAG MV ruled that this was not the case. Even objectively speaking, a dummy camera is not suitable for monitoring the conduct or performance of employees. The LAG MV also rejected analogous application of the standard as per Section 87 Subsection 1 No. 6 BetrVG. The sense and purpose of the standard is the protection of the employee's general personal rights against interference through anonymous technical control devices. However, it is clear that no such interference is to be expected through a dummy.

Questions of organisation of the company and of conduct of employees in the company likewise not affected

The LAG MV also rejected a co-determination right of the Works Council under Section 87 Subsection 1 No. 1 BetrVG (questions concerning the organisation of the company and the conduct of employees in the company). Even at first glance, the attachment of a dummy video camera in the outer area cannot have any effects on the internal co-existence between employees and employer in the company. Finally, the employees could still use the entrance concerned, without checks being carried out on who enters or leaves the building through the entrance concerned and when.

The in part opposite legal interpretations put forward in literature were rejected by the LAG MV. The only decisive issue in terms of a co-determination right is whether there is an actual control effect. Only then could the employees' personal rights be affected. This is not the case with a dummy.

Practical tip

No right of co-determination applies as regards the attachment of dummy video cameras. This creates legal clarity in a matter that was previously in part controversial. Employers can now decide freely whether and where dummy cameras are to be attached. Nevertheless, it is advisable to at least make it clear to the Works Council that the devices are indeed just dummies.

Nonetheless: civil-law claims of the employees to refraining are conceivable

Under an older decision of the Regional Court Bonn dated 16 November 2004 – 8 S 139/04 –, the mere presence of a dummy camera could however create pressure of adaptation and surveillance that constitutes interference with the general personal rights of the party concerned. In the opinion of the Regional Court Bonn, this results in civil-law claims to removal and to refraining. Video surveillance actually carried out can also trigger damage claims of the employees concerned (LAG Mainz dated 23.5.2013 - 2 Sa 540/12). Despite the absence of a co-determination right of the Works Council concerning the attachment of dummy cameras, it is therefore not possible to exclude civil-law claims of employees to removal and refraining.

Summary: According to a decision by the LAG Mecklenburg-Western Pomerania, the Works Council has no co-determination right concerning the attachment of dummy video cameras. The Works Council should however be informed that the cameras are indeed only dummies.

Protection of confidence by the BAG as violation of the Basic Law

BVerfG, judgment dated 10.12.2014 - 2 BvR 1549/07

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If German labour courts wish to protect an employer in his trust in their previous case law now that a decision of the ECJ obliges them to alter their previous case law, they must first allow the ECJ to clarify whether this granting of protection of confidence is itself consistent with EU law.

From 1973 onwards, the established case law of the Federal Labour Court took the view that "dismissal", as defined in Sections 17, 18 KSchG (Protection against Dismissal Act), was to be understood not as the serving of notice of termination, but rather the actual ending of the employment relationship intended through this. The notification of a mass dismissal need not therefore be made before serving of notice of termination.

In its judgment dated 27 January 2005, the European Court of Justice (ECJ) decided that this case law was not compatible with Art. 1 to Art. 4 of the European Union Collective Redundancies Directive. Under European law, the term "dismissal" must be interpreted such that it is understood as meaning not the actual dismissal but rather the serving of notice of termination.

Decision of the ECJ

The case law of the labour courts agreed with this decision and made a corresponding U-turn. To avoid unfairness, resulting from the fact that employers had trusted in the case law of the German labour courts when serving notice of termination prior to 27 January 2005, the Federal Labour Court granted one such employer protection of confidence. This employer had served the notice of termination, involved in the legal dispute, before 27 January 2005. The requirement under EU law is not applicable to "old cases" from the period prior to the decision of the European Court of Justice dated 27 January 2005. According to the Federal Labour Court, this was a requirement under the rule of law.

U-turn and protection of confidence

The corresponding decision of the Federal Labour Court dated 1 February 2007 – 2 AZR 15/06 – was attacked by the losing employee in these proceedings through a constitutional complaint. The employee invoked his fundamental right to justice under Art. 101 Subsection 1 Sentence 2 Basic Law. Only the European Court of Justice had to decide on the temporal scope of the European Union law. The jurisdiction of the Federal Labour Court had not been established in this matter. As a result, his case had been withdrawn from the lawful judge.

Problem of jurisdiction

Decision of the BVerfG

The Federal Constitutional Court has agreed with this argumentation, has set aside the decision of the Federal Labour Court and referred the matter back to the Federal Labour Court for a decision. It will now be the task of the Federal Labour Court to submit the question to the ECJ before reaching its own decision, and to obtain an answer from the ECJ as to whether it is consistent with EU law if national courts wish to protect trust in their previous case law that is not consistent with EU law.

Summary: The question remains unclarified of whether an addressee of a rule, trusting in incorrect interpretation of Sections 17, 18 KSchG by the German labour courts in violation of EU law, can or must be protected. Corresponding clarification by the ECJ is still outstanding.

Hourly fee for Works Council lawyers

LAG Lower Saxony - 11 TaBV 51/14

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Under the provisions of the Works Council Constitution Act (BetrVG), an employer must assume the necessary costs of the Works Council. These can also include the legal costs of the Works Council. It is clear that the assumption of costs for advice aimed against the employer creates enormous potential for conflict.

The legislator has regulated the basic model for lawyers' fees in the Lawyers' Remuneration Act (RVG). This links the fee to a large extent to the "value" of the dispute. However, this says nothing about how long the lawyer spends working on the case. The Federal Labour Court (BAG) has affirmed the authority of the RVG. Hourly fees are admissible only in justified exceptions. The BAG is regularly of the opinion that the dispute concerning co-determination rights is always of the same value, irrespective of the number of employees concerned. A value of 5,000 EUR results in a fee of less than 1,000 EUR, irrespective of the amount of work involved.

Decision of the LAG Lower Saxony

A recent decision by the LAG Lower Saxony (ruling dated 14.10.2014 - 11 TaBV 4159/14) must be seen against this background. In this decision, the court considered the granting of an hourly fee of 290 EUR net, or 100 EUR net for pure travelling time, by a Works Council as well as the overall fee of 35,000 EUR for the accompaniment of restructuring measures as appropriate, and obliged the employer to make corresponding payment.

Criticism of the decision

The LAG Lower Saxony justified the exception from the applicable principle (RVG) through a series of (fictitious) arguments. The fact that the employer's lawyer was paid on an hourly basis was irrelevant. The BetrVG does not recognise any right to equal remuneration of employer and Works Council lawyers. Even the reference of the LAG to the fact that the responsibility of the General Works Council makes the advising generally more complex and thus justifies higher remuneration, fails to convince. The reference to the commenting literature on the RVG, which regarded hourly rates of 500 EUR as appropriate, was also wide of the mark. The point quoted addresses in particular the violation of morality through (excessive) hourly rates, not their necessity within the context of the BetrVG.

Fictitious arguments

The opinion of the court that the employer must prove there are Works Council lawyers with above average qualifications who settle in accordance with the RVG, is also misplaced. The Works Council bears the burden of proof as regards the necessity of the specific fee. A telling factor is the comment by the LAG that the fixing of the value in dispute is difficult and that a legal dispute is therefore likely. The LAG Lower Saxony draws the conclusion from this that the hourly fee is the more reliable and verifiable variant. This is denial of justice.

Basis of trust and prior involvement

Two other arguments of the LAG are worthy of note: on the one hand, the employer had, several years previously, once agreed to the specific hourly rate for the same Works Council lawyer. On the other hand, this lawyer has already known the group of companies and the people working there for many years. During the difficult restructuring situation, the basis of trust with him was therefore of fundamental importance.

Checking standard under Section 40 BetrVG

In contrast to the wording of the law, the necessity of costs is not checked against a purely objective view, but whether the Works Council – after weighing up all aspects – could justifiably assume that specific costs were "necessary". The verification standard is subject to the Works Council's diligence also so as not to expose the "honorary office of member of the Works Council" to any excessive liability risks. In individual cases, the two last named arguments of the LAG can indeed justify the awarding of an hourly rate. The LAG adopts a very general approach here. The Works Council may frequently trust in assumption of costs by the employer as in the past. In the case in dispute however, the employer had not declared any such placet prior to the awarding of the mandate. Fortunately, concessions at company level are normal for both sides, even over and beyond the statutory minimum limits. Nevertheless, a voluntary concession must not result in self-commitment for the future. As such, it would have been desirable here for the LAG Lower Saxony to check the factual circumstances more in detail.

Summary: The constellation, in which the employer is required to pay for the Works Council's lawyer, in itself contains the potential for conflict. It is not without good reason that the BGH recently affirmed personal liability of members of the Works Council for the triggering of inappropriate, unnecessary costs. In this respect, the courts and the legislator frequently leave employer and Works Council to themselves. Reliable tables on the value in dispute would help all parties.

Primacy of statutory minimum notice periods

BAG, judgment dated 29.1.2015 - 2 AZR 280/14

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The law – Section 622 Subsection 2 BGB – provides for minimum periods of notice for termination of the employment relationship by the employer. Deviations in individual contracts are only possible if they are to the benefit of the employee, i. e. only longer notice periods can be effectively agreed. The BAG recently specified the principles according to which the required comparison of favourability is to be carried out.

The BAG was called on to judge the case of a female employee whose contract of employment agreed a reciprocal notice period of "six months to 30 June or 31 December of a year". At the time the contract was signed, the employee had already been working for the employer for almost 30 years. As a result, the longest statutory minimum notice period under Section 622 Subsection 2 No. 7 BGB was applicable, namely seven months to the end of a calendar month. In December 2012, the employer served notice of ordinary termination for operational reasons, effective as of 30 June 2013.

In contrast to the LAG Berlin-Brandenburg that had considered termination to 30 June 2013 to be in compliance with the required notice period, the BAG has decided that the notice of termination must be amended to termination to 31 July 2013. By so doing, the BAG has demonstrated clear principles for the assessment of whether a period of notice, agreed in an individual contract, is to be classed as "more favourable" compared to the statutory minimum periods.

Comparison of favourability between contractual and statutory periods of notice requires the observance of various principles

The BAG initially affirmed the previously prevailing opinion that, when conducting the required comparison of favourability, the agreements made on the period of notice (term) and the termination date (date of taking effect) are to be considered as one unit as a general rule. The BAG speaks of an "ensemble" or "group" comparison. It can regularly be assumed that, when agreeing a specific ending date (here for example 30 June or 31 December), the parties are not pursuing any special, independent goals, but rather ultimately only wish to influence the respectively authoritative notice period overall. Consequently, the employer cannot generally claim that any individual agreement on restricted termination dates will be combined with the longer minimum period as per Section 622 Subsection 2 BGB.

"Ensemble comparison" of notice period and termination date

In the case now judged, termination would otherwise not have been able to take effect until 31 December 2013.

Comparison must be carried out in abstract manner, i.e. independently of the specific date of the notice of termination

Rather, the specific case involved checking of whether the agreed shorter period of 6 months, permitting termination only to 30 June or 31 December respectively, was to be regarded as more favourable as an "ensemble" than the longer statutory minimum period of 7 months which, however, unrestrictedly permits termination to the end of each month. According to the principles now established by the BAG, it is not a matter here of which ruling produces a more favourable result at the specific time of the serving of notice of termination. Contrary to an opinion held in part, the fact that the specific serving of notice of termination in December 2012 could take effect on 30 June 2013 according to the contract but not until 31 July 2013 under the law, was not a decisive factor in the dispute.

The predominant favourability during most of a calendar year is not sufficient

It is also of no relevance whether, given abstract consideration over a complete calendar year, the contractual agreement leads more frequently to a more favourable result than the statutory rulings (this was the direction indicated by comments of the BAG in the reasons for its judgment dated 4.7.2011 - 2 AZR 469/00). The LAG had seen this in this way, and had therefore classified the contractual rulings as abstractly more favourable due to the low number of ending dates permitted, with the result that it considered the termination to 30 June 2013 to be effective.

Contractual agreement must always be more favourable

According to the BAG however, contractual rulings can only be asserted as "more favourable" if they always lead to a more favourable result and not just for the majority of the time within a calendar year. As this was not so in the case decided, the BAG was of the opinion that the contractual agreements on the period of notice were ousted overall by the statutory minimum period of 7 months to the end of a month. Thus for example, the employer could have effectively served notice of termination to 31 August 2013 in January 2013.

Summary: Termination agreements in individual contracts will only prevail over the statutory minimum notice periods under Section 622 Subsection 2 BGB if, given an abstract check of the "ensemble" of agreed notice period and any restricting termination dates agreed, they always produce a more favourable result for the employee, irrespective of the specific date of the notice of termination. Otherwise, the law takes priority.

Practical examples
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 on our Practice Group Employment Law.

Events

On 16 and 17 July 2015, **Dr Holger Lüders** was speaking for the Beck Academy on the subject of "Contracts of employment" as part of a summer school in Munich. Dr Holger Lüders will be holding the seminar "Optimum formulation of employment contracts" in Berlin on 25 November 2015. This seminar is also being offered by the Beck Academy.

Astrid Wellhöner and **Bernd Weller** will be speaking at the Summer School Employment Law for the Beck Academy in Munich from 29 to 31 July 2015.

On 10 September 2015, **Bernd Weller** will speak at the seminar "Works Council Constitution Act for Beginners" for the Beck Academy in Berlin. This will be followed on 11 September 2015 by the event entitled "Works Council Constitution Act for Experts" at the same location.

Dr Johan-Michel Menke, LL.M. will be speaking during the seminar "Employment law in sport" organised by the Deutsche Anwaltsinstitut e.V. in Bochum on 16 December 2015, among others together with Anna Lisa Rissel, In-House Counsel and Director Legal, Personnel and Institutional Relations at FC Bayern München AG.

Publications

Bernd Weller has written a paper on the co-determination rights of the Works Council concerning e-learning tools in the AuA (Work and Employment Law) magazine (2015, 85).

Together with Sebastian Wolf, **Bernd Weller** has addressed individual legal questions in (inter)national matrix structures in the AuA (2015, 210).

Bernd Weller has commented on a judgment of the LAG Schleswig-Holstein (3 Sa 400/14) for the Handelsblatt Rechtsboard. This concerns the question of whether the unjustified researching and forwarding of confidential data by a member of the Works Council constitutes a reason for dismissal without notice.

Dr Wilhelm Moll, LL.M. has published the article "German minimum wage when 'passing through'?" in "Der Betrieb" in collaboration with Christoph Katerndahl (Moll/Katerndahl, DB 2015, page 555-560). Summary: "Overall, it can be stated that the interpretation of Section 20 MiLoG (Minimum Wage Act), put forward by the ministry and associations and under which the German minimum wage is applicable when merely passing through, is the subject of reservations. This interpretation is not compatible with either the general employment-law principles on determination of the place of work, nor with the free movement of services under Art. 56 Treaty on the Functioning of the EU. In deviation from the title of a recent press report in the FAZ newspaper on this subject, the result is therefore: 'The minimum wage is not applicable during transit.' This is the case if, when travelling from abroad, Germany is a transit country on the way to a third country, as well as when travelling to Germany and back again."

Dr Wilhelm Moll, LL.M. has written on "The supplementary interpretation of a contract in the event of the ineffectiveness of contract of employment form requirements" in the commemorative publication to mark the 70th birthday of Bruno M. Kübler (Festschrift Kübler, 2015, page 415-429).

Dr Alexander Bork has published a paper on the subject "Removal from office of the outside Director – wilful omission when rejecting alternative work?" in issue 4 of the Neue Zeitschrift für Arbeitsrecht (New Employment Law Magazine) (NZA 2015, 199 et seq.).

People

Lawyer **Britta Fischer** joined our Düsseldorf employment-law team in March 2015 to strengthen the department headed by Dr Holger Lüders. In this role, she advises and represents clients in all matters of individual and collective employment-law. Ms Fischer studied at the Heinrich-Heine University Düsseldorf. She completed her legal clerkship at the Higher Regional Court Düsseldorf. During her elective period, she worked in the legal department of an international group of companies where she handled employment-law matters. After passing the 2nd State Examination, Ms Fischer initially acquired experience in a regional law firm, before joining our partnership.

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Dr Volker Voth has been a member of the Practice Group Employment Law at the Hamburg office of Heuking Kühn Lüer Wojtek since June 2015. He supports the department headed by Dr Andreas Walle, and focuses on advising national and international companies on all matters related to service and employment contracts. Dr Volker Voth is a specialist lawyer for employment law, and previously spent several years working exclusively in employment law for a medium-sized Hamburg law firm. He completed his legal clerkship in Bavaria, among other places at an internationally oriented law firm in Munich. Dr Volker Voth studied at the University of Würzburg.

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This Newsletter does not contain legal advice. The information contained in this Newsletter is the result of thorough research; nevertheless, it presents case law and legal developments in extract form only and is no substitute for individual advice tailored to the particular aspects of the respective individual case.

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