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Newsletter
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Editorial

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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 a decision by the BAG (Federal Labor Court), through which the court overturns "late-marriage clauses". Accordingly, a ruling under which a surviving dependents' pension can only be claimed if the deceased employee married before reaching the age of sixty, is ineffective on the grounds of age discrimination.

The BAG has also concerned itself with so-called "AGG Hoppers" (persons abusing the General Equality of Treatment Act). The BAG has requested the European Court of Justice to make a preliminary ruling on the question of whether a sham applicant, i. e. a so-called "AGG Hopper", enjoys protection against discrimination if the intention of his/her application is clearly not only appointment and employment, but merely to achieve the status of an applicant in order to be able to assert claims for damages.

A further decision of the BAG raises questions of practical relevance. For example, in two decisions the BAG has rejected a claim to damages by companies affected by an unlawful strike against another company. These two judgments by the BAG are further evidence that Germany is currently experiencing a renaissance of the strike culture.

A recent decision by the Regional Court Frankfurt a. M. is currently attracting attention from numerous German companies: contrary to the previously prevailing opinion, the Regional Court Frankfurt a. M. has decided that the employees based abroad must be involved in the election of employee representatives to the Supervisory Board, and that they must be taken into consideration as regards the number of employees authoritative for application of the Co-Determination Act. This also applies to employees of foreign subsidiaries. If the opinion of the Regional Court Frankfurt a. M. establishes itself, this would have significant effects on many small and medium-sized companies with dependent foreign group companies.

Our new "Ticker" appears for the first time at the end of the Newsletter. The aim of this new section is to present changes to the law and political projects, of relevance for employment law, in an appropriately concise form. At the end of the Newsletter you will also find the accustomed overview of events and publications. Among other things, this section includes references to our series of seminars on Employment Law. This year, the Practice Group Employment Law is once again organizing seminars on employment law themes of practical relevance at all German locations in November.

We wish you enjoyable reading.

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Articles
Employment Law

The Practice Group Employment Law is made up of a team of lawyers specializing 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.

Dismissal without notice for "pirate copies"

BAG, judgment dated 16.7.2015 – 2 AZR 85/15

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If an employee uses his/her work PC for private purposes, e. g. by copying audio or video files onto company DVD and CD blanks, this can justify dismissal without notice.

The plaintiff had been employed at the Higher Regional Court Naumburg as IT manager since 1992. His duties included ordering the accessories required for data processing. A business audit was conducted in March 2013. During this audit, the hard disks used by the plaintiff were examined and evaluated. This revealed more than 6,400 "pirate copies" (e-book, picture, audio and video files). Also found installed on the computer used by the plaintiff was a program for circumventing the manufacturers' copy protection. The defendant (the Federal State) then terminated the employment relationship without notice.

The Labor Court Halle and the State Labor Court Saxony-Anhalt granted the plaintiff's legal action for unfair dismissal. The LAG (State Labor Court) Saxony-Anhalt was of the opinion that it had not been established with certainty which specific contribution the plaintiff had made to the undisputed copying and burning processes. Additionally, the criminal prosecution authorities were not involved in clarification of the facts. In the opinion of the LAG Saxony-Anhalt, this had not enabled comprehensive clarification of the facts of the matter.

Specific contribution to the deed immaterial

The BAG (Federal Labor Court) reversed the appeal judgment of the LAG Saxony-Anhalt and referred the matter back to the LAG Saxony-Anhalt for further clarification. In the opinion of the BAG, dismissal (without notice) is also possible even if the plaintiff has not carried out all questionable acts himself/herself, but rather has cooperated with other employees or has consciously enabled the creation of "pirate copies" by these. The plaintiff had not been able to deduce from the possible permission to

use his work computer for specific other private purposes that he was permitted to carry out the copying and burning.

Own investigations by the company admissible

The BAG also drew attention to the fact that an employer is permitted to carry out independent investigations to clarify facts without involving the criminal prosecution authorities. Nevertheless, a requirement in this respect is that the investigations are carried out speedily. The own investigation measures and the related clarification of the facts also suspend the period under Section 626 Subsection 2 BGB (German Civil Code).

No need for criminal offence (violation of copyright)

The BAG thus correctly establishes that the unauthorized use of the work computer can justify dismissal without notice, irrespective of criminal acts committed in this context. An employee likewise cannot claim recourse to having acted jointly with other employees. This is because the BAG draws attention to the fact that the principle of equal treatment is not applicable within the framework of dismissal on grounds of conduct. The decision of the BAG thus makes it clear that appropriate employment law measures can be taken if employees massively violate their duties under their contract of employment. As such, the argument that a long period of employment with the company excludes dismissal cannot apply.

Summary: If an employee uses his/her work computer for private purposes without authorization, dismissal without notice is possible. In this case, the interest of an employer in immediate ending of the employment relationship can outweigh the interests of the employee in continuation of the employment relationship (at least up until expiry of the period of notice). This is the case in particular if the employee commits punishable acts in this context.

Age-discriminating dismissal in small companies

BAG, judgment dated 15.7.2015 – 6 AZR 457/14

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Even in small companies with less than 10 employees, dismissal can be ineffective as a result of age discrimination in accordance with Section 7 AGG (General Equality of Treatment Act) if, on the basis of evidence presented, direct disadvantaging for age reasons as per Section 22 AGG can be suspected, and the employer does not succeed in refuting this suspicion.

Suspicion ruling under Section 22 AGG also applies in small companies to the detriment of the employer

The decision by the BAG (Federal Labor Court) was based on the following facts: the plaintiff, born on January 20, 1950, had been employed by the defendant as doctor's assistant in a joint practice since December 16, 1991. At the time of the serving of notice of dismissal in 2013, the practice had a further four, younger employees in addition to the plaintiff. The plaintiff was most recently deployed predominantly in the laboratory. By letter dated May 24, 2013, the defendant terminated her employment relationship to December 31, 2013. In the letter of termination, the defendant justified the dismissal by stating that this was due to changes in the laboratory area that made it necessary to restructure the practice. In addition, the plaintiff was "now entitled to a pension". The other four employees were not dismissed. Through her legal action, the plaintiff contested the effectiveness of the dismissal and demanded compensation based on age discrimination. Even the letter of termination gave rise to the suspicion of disadvantaging based on her age. The defendant argued that the intention was merely to formulate the letter of termination in a friendly and binding manner. Notice of termination had been served due to an expected falling away of 70 to 80 percent of the chargeable laboratory services. A comparison between the plaintiff and the other doctor's assistants was not possible as she is less qualified. This was the only reason for her dismissal. The previous instances had dismissed the action. The appeal to the Federal Labor Court on a point of law was successful and resulted in the matter being referred back to the State Labor Court (LAG) Saxony.

Deviating opinion of the LAG Saxony

The State Labor Court Saxony had also argued that age-related discrimination certainly did not apply, as the different treatment was admissible under Section 10 AGG in the case of the plaintiff given her age. By taking account of the plaintiff's age, the defendant had pursued a legitimate aim, as it had wished to protect younger employees, not entitled to a pension, against dismissal. Consequently, the consideration of the "pension entitlement" or

of the age was appropriate and necessary, both from an abstract perspective as well as, in the specific case, within the meaning of Section 10 Sentence 1 and 2 AGG.

The 6th Senate of the Federal Labor Court argued against this by stating that the dismissal was in violation of Section 7 AGG and thus ineffective. Based on the suspicion ruling of Section 22 AGG, the plaintiff had stated that the dismissal was due to the entitlement to a pension. In turn, the defendant should therefore have been able to demonstrate that the age discrimination, to be suspected on the basis of reference to the "pension entitlement", was not given. It had not produced the evidence necessary for this. It was not yet possible to establish whether and to what extent the plaintiff was entitled to the damages asserted. The 6th Senate therefore considered itself compelled to refer the matter back to the State Labor Court for a new hearing and a decision.

BAG: suspicion ruling under Section 22 AGG applies to the detriment of the employer

Summary: This ultimately surprising decision by the BAG illustrates once more that extreme caution is called for as early as when formulating the notice of termination. Even in a small company, notice of termination can be ineffective as a result of age discrimination. We therefore strongly recommend avoiding polite formulations in the notice of termination which are intended to state a reason for the dismissal. Under Section 22 AGG, such formulations can create a suspicion to the disadvantage of the employer during litigation, which is difficult to refute.

Small, dynamic reference clause with transfer of company ownership

BAG, judgment dated 17.6.2015 – 4 AZR 61/14

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The Federal Labor Court (BAG) has submitted a request to the ECJ (European Court of Justice) for a preliminary ruling (Art. 267 Treaty on the Functioning of the European Union), in order to obtain conclusive clarification concerning the application and content of a small dynamic reference clause following a transfer of company ownership.

BAG case law

According to BAG case law (BAG 18.4.2007 – 4 AZR 652/05; BAG 17.11.2010 – 4 AZR 391/09) in the event of a transfer of a business or withdrawal from an employers' association, the previous content of the collective agreement does not remain applicable merely statically, but rather continues to regulate the employment relationship with its time-dynamic development even after the transfer of business or withdrawal from the employer's association.

ECJ case law

Following two ECJ decisions (ECJ 9.3.2006 – C-499/04 – Werhof; ECJ 18.7.2013 – C-426/11 – Alemo Herron), literature has in part supported the opinion that this BAG case law is not compatible with ECJ case law. On the one hand, the ECJ has referred to the freedom of association of the party acquiring the business. Negatively, this (also) includes not joining any association, with the result that it is questionable whether the previous collective agreements could also be applied to the party acquiring the business if the latter is not similarly bound by a collective agreement. On the other hand, the ECJ has decided that, in the event of a transfer of business, contract of employment rulings that refer dynamically to collective agreements, can only be enforced against the acquiring party if the acquiring party has (had) the opportunity of participating in the negotiations concerning the collective agreements. In terms of the application and content of a small dynamic reference clause, the considerations of the ECJ would mean that dynamics with respect to the party acquiring the business could only be assumed with difficulty following withdrawal from an association, because and if the party acquiring the business is, on the one hand, bound by collective agreements that do not correspond to his association membership, and he has no possibility of exercising an influence over the development of the collective agreement. The issue under European law concerns Art. 12 Subsection 1 EU Fundamental Rights Charter (freedom of association) and Art. 16 EU Fundamental Rights Charter (free enterprise).

Submission in accordance with Art. 267 Treaty on the Functioning of the EU

In its order to refer the matter to the ECJ dated June 17, 2015, the 4th Senate of the BAG is (still) of the opinion that the party acquiring a business is bound by the small dynamic reference clause after the transfer of company ownership in the same way as the party selling the business. Nevertheless, the 4th Senate recognizes that this ultimately depends on the interpretation of EU law provisions (Art. 3 of the Transfer of Undertakings Directive) and certainly Art. 16 Fundamental Rights Charter – by contrast, Art. 12 Subsection 1 Fundamental Rights Charter is not problematized. The interpretation of these EU law provisions is the sole responsibility of the ECJ. The question has therefore been submitted to the ECJ for a preliminary ruling. The decision of the ECJ will have to be awaited.

Formulation options in contracts of employment

The discussion concerning the application and content of the small dynamic reference clause indicates an urgent need to exercise utmost care when formulating reference clauses in contracts of employment.

- It is possible to agree on merely a static reference to a collective agreement.
- It is also possible to agree on a large dynamic reference clause in the sense of a change of collective agreement clause, so that those collective agreement provisions apply to the employment relationship that are respectively applicable to the employer.
- Finally, it is possible to formulate the small dynamic reference clause in a way that the dynamics end in the event of a transfer of business or withdrawal from an employers' association, so as to also avoid unpleasant and unmanageable consequences if a business is sold or in the event of withdrawal from an employers' association.

Summary: For the time being, the application and content of small dynamic reference clauses have not been clarified conclusively. Under previous BAG case law, the consequences of a small dynamic reference clause constitute a problem in the event of a transfer of company ownership or withdrawal from an association. A duty of careful formulation of employment contracts is to create the necessary clarity, and to take account of the appropriate rulings for a transfer of company ownership or withdrawal from an association.

Parental leave: No reduction in vacation following ending of the employment relationship

BAG, judgment dated 19.5.2015 – 9 AZR 725/13

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Under Section 17 Subsection 1 Sentence 1 BEEG (Parental Allowance and Parental Leave Act), the employer can reduce the recuperation vacation, to which the employee is entitled for the vacation year, by one twelfth for each full calendar month of parental leave. A precondition is that the entitlement to recuperation vacation still exists. This is not the case if the employment relationship has ended and the employee is entitled to payment in lieu of vacation.

An employee also acquires his/her annual vacation entitlement if he/she has not actually worked during the vacation year. The entitlement to vacation is dependent solely on the existence of the employment relationship. As the employment relationship is suspended during parental leave in terms of the principal duties but otherwise continues to exist, the respective employee also acquires vacation entitlement during parental leave.

Facts

In view of the suspension of the principal duties under the employment relationship during parental leave, there is justification for the employer being able to reduce the employee's annual vacation entitlement on a pro-rata basis for the duration of parental leave in accordance with Section 17 Subsection 1 Sentence 1 BEEG. Under this ruling, the employer can reduce the recuperation vacation, to which the employee is entitled for the vacation year, by one twelfth for each full calendar month of parental leave.

In the case to be decided by the BAG (Federal Labor Court), the plaintiff was on parental leave as from mid-February 2011 up until the ending of the employment relationship on May 15, 2012. On May 24, 2012, the plaintiff unsuccessfully requested the defendant employer to make payment in lieu of her vacation entitlements from 2010 to 2012. Following legal action by the plaintiff to assert her claim to payment in lieu of vacation, the defendant declared in September 2012 that it was reducing the recuperation vacation as a result of parental leave (Section 17 Subsection 1 BEEG).

The BAG affirmed the decision of the previous instance that had ordered the employer to also make payment in lieu of vacation for the period of parental leave. The BAG initially makes it clear

that the employer can reduce the vacation, but is not obliged to do so. If it wishes to exercise its right, it must issue a binding declaration of legal significance in order to reduce the vacation entitlement. This statement must be received by the employee.

Reduction in vacation during parental leave presupposes a declaration by the employer

The previous case law of the BAG regarded the claim to payment in lieu of vacation as being equivalent to the recuperation vacation. Accordingly, the claim to payment in lieu of vacation shared the legal fate of the vacation entitlement (so-called surrogate theory). The result was that the power to reduce under Section 17 BEEG could still be exercised even after ending of the employment relationship. Following the abandonment of the surrogate theory by the BAG, the claim to payment in lieu of vacation constitutes a purely monetary claim – fundamentally divorced from the vacation entitlement. In the case at hand, the BAG logically assumes that the declaration on reduction of vacation during parental leave presupposes the existence of an outstanding vacation entitlement for the employee. However, no such entitlement exists if the employment relationship has ended. Upon ending of the employment relationship, a claim to payment in lieu of vacation is created in favor of the employee. However, Section 17 BEEG does not provide for a reduction in the claim to payment in lieu.

Change in the case law of the BAG: Reduction in vacation during parental leave only possible if a vacation entitlement still exists

In the case to be decided by the BAG, the employer could therefore no longer successfully declare a reduction in the vacation during parental leave in accordance with Section 17 Subsection 1 Sentence 1 BEEG. The plaintiff's employment relationship ended on May 15, 2012. On this date, a claim to payment in lieu was created in her favor. The reduction, declared in September 2012 and thus just under four months after ending of the employment relationship, was made too late.

Summary: Employers should not forget to make use of their right to reduce vacation during parental leave. This requires a contractual declaration to the respective employee. Proof of receipt of the (preferably written) declaration should be ensured. Employers learn the possible scope of reduction on the basis of the written request for parental leave by the employees (see Section 16 Subsection 1 BEEG). In the event of retrospective extension of parental leave – a frequent occurrence in practice – it is important to declare renewed reduction of the recuperation vacation in accordance with the extended parental leave. If the employment relationship is not continued following parental leave, employers can make use of their right of reduction during the notice periods to be observed (see Section 19 BEEG) or prior to conclusion of a termination agreement.

Protection against discrimination with sham applications?

BAG dated 18.6.2015 – 8 AZR 848/13 (A) – submission to the ECJ

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The Federal Labor Court has requested the European Court of Justice to make a preliminary ruling on the question of whether a sham applicant (a so-called "AGG Hopper" (person abusing the General Equality of Treatment Act)) enjoys protection against discrimination, if the intention of his/her application is clearly not appointment and employment, but merely to achieve the status of an applicant in order to be able to assert claims for damages.

The defendant, a member of a large insurance group, advertised a "Trainee Program 2009", stating as requirements criterion a very good university qualification, obtained not more than one year previously or to be obtained during the coming months, as well as qualified, vocation-oriented practical experience, for example through training, internship or as working student. An employment law bias or medical knowledge was also preferred for applicants in the subject area law. The plaintiff, who had passed the First State Law Examination in 1999 with the grade "satisfactory" and then the Second State Law Examination in 2001 with the grade "adequate" and had since worked predominantly as a self-employed lawyer, stated in his application that he had leadership experience as a former senior executive in a legal expenses insurance company. He was currently attending a course as Specialist Lawyer for Employment Law and, following the death of his father, was also handling an extensive medical-law assignment which had also given him a broader horizon of experience in medical law. As a former senior executive, he was also accustomed to working independently and assuming responsibility. The defendant finally rejected the application. Following this, the plaintiff asserted damages for 14,000 euros based on age discrimination. The plaintiff turned down the defendant's subsequent invitation to an interview with its HR Manager, and instead suggested prompt talks concerning his future with the defendant following fulfilment of the compensation claim.

A claim to compensation presupposes that the candidate applies with the aim of being employed

The Labor Court Wiesbaden dismissed the legal action. The plaintiff's subsequent appeal was also unsuccessful. In its statement of the grounds for the decision, the Federal Labor Court is of the opinion that the plaintiff had not applied to the defendant with the aim of being employed as trainee. Even the formulation

of the letter of application and the notifications of the plaintiff contained therein were not consistent with a desire to be employed as trainee. This was also supported by the fact that the plaintiff had turned down the invitation to an interview. For this reason, the plaintiff cannot be regarded as "applicant" or "employee" as defined in Section 6 Subsection 1 Sentence 2 AGG, and consequently cannot invoke Section 15 AGG. Nevertheless, the Federal Labor Court also draws attention to the fact that the law of the European Union does not name the word "applicant" in the relevant Directives, but rather protects "access to employment or to dependent and self-employed gainful occupation". However, it remains unclarified whether the Directive law presupposes that access to employment is really being sought and appointment actually desired. This is a matter of interpretation.

The Federal Labor Court has therefore asked the European Court of Justice the question of whether the existence of a formal application is sufficient to trigger the protection under EU law. In the event of the European Court of Justice answering this question in the affirmative, the Federal Labor Court wishes to know whether the lack of subjective seriousness of the application is to be regarded as an abuse of law, or still falls under "exercise of rights" within the meaning of the provisions of EU law.

Is the availability of a formal application sufficient to trigger the protection against discrimination under EU law?

Summary: The European Court of Justice will now have to decide whether applicants, whose application or other conduct indicate that they are not seriously interested in recruitment and employment but rather only wish to create the prerequisites for legal action for damages, enjoy the protection of relevant EU law and thus of the General Equality of Treatment Act. If the European Court of Justice answers this question in the affirmative, exclusively the availability of a formal application will be sufficient in future for the assertion of compensation claims, irrespective of how seriously this application is meant. This would greatly facilitate the systematic filing of legal action by so-called "AGG Hoppers". For employers, this means that utmost care is called for during the entire application process – not only when formulating job advertisements but even if applicants are very obviously not interested in the position advertised -, so as to avoid the impression of any discrimination.

BAG overturns customary "late-marriage clause"

BAG, judgment dated 4.8.2015 – 3 AZR 137/13
Press Release No. 40/15

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A ruling under which a surviving dependents' pension can only be claimed if the deceased employee married before reaching the age of sixty is ineffective on the grounds of age discrimination.

Many pension regulations for company old-age pension schemes include so-called "late-marriage clauses". These are intended to exclude a surviving dependents' pension if the marriage or registered civil partnership is entered into at an advanced age – e. g. after the sixtieth birthday of the employee entitled to a pension. The significance of such a ruling is obvious: the risk of death increases with age. If employees marry a – frequently considerably younger – woman at an advanced age, this can result in significant payment obligations for the employer for a surviving dependents' pension in the event of death. Keeping the costs of the surviving dependents' pension within limits is a legitimate aim of the employer. To date, the Federal Labor Court (BAG) has recognized "late-marriage clauses". In a decision thus far published only as a press release, the responsible 3rd Senate has overturned this case law.

The facts of the matter

The plaintiff was the widow of a man who died in 2010. His former employer had refused to pay the woman a surviving dependents' pension. It invoked the "late-marriage clause" in the pension regulations. Under this ruling, an additional precondition for payment of the widow's pension is that the employee entitled to a pension has married before reaching the age of 60. The plaintiff's deceased husband did not satisfy this precondition. The defendant employer was of the opinion that the husband had not married until the age of 61 and thus too late, an opinion also shared by the previous instances. It was only following an appeal by the widow on a point of law that the Federal judges decided in her favor, and awarded the widow the surviving dependents' pension.

As the 3rd Senate has now decided, the "late-marriage clause" is ineffective under Section 7 Subsection 2 of the General Equality of Treatment Act (AGG), because it directly disadvantages the deceased husband on the basis of age. This discrimination is likewise not justified under other regulations of the AGG. Section 10 Sentence 3 No. 4 AGG does permit differentiation by age under facilitated preconditions for company social security systems. However, based on its wording, this regulation covers only

old-age and invalidity pensions and not surviving dependents' pensions – and thus likewise not widow's/widower's pensions – in terms of age limits as a precondition for the receipt of benefits under the company old-age pension scheme. Consequently, justification under this regulation is not possible, either directly or analogously. According to the judgment, the "late-marriage clause" results in an excessive impairment of the legitimate interests of the employees entitled to receive a pension. The BAG therefore ordered the employer to pay the widow a surviving dependent's pension.

Summary: "Late-marriage clauses" are widespread in practice. To avoid unexpected payment obligations, employers are advised to check their own pension regulations and to adapt them if necessary. The legitimate aim of the employer in keeping the costs of surviving dependents' pensions within limits and excluding "pension marriages" can be achieved through age-difference clauses and rulings on the minimum duration of the marriage.

Indemnification of the Works Council against lawyers' costs

BAG, judgment dated 18.3.2015 – 7 ABR 4/13

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The Works Council Constitution Act (BetrVG) obliges employers to assume the necessary costs of the Works Council (Sections 40 Subsection 1, 80 Subsection 3, 111 Sentence 3 BetrVG). This also includes the costs of any advising of the Works Council by a lawyer. The obligation of the employer to assume the costs of advice aimed against the employer can involve enormous potential for conflict – in particular if the advising results in (expensive) decision-making processes.

Labor Courts are mainly generous as regards the question of whether the involvement of a lawyer is necessary in the context of a decision-making process. Through the decision quoted, the BAG (Federal Labor Court) has now again drawn attention to the fact that, when checking the necessity, the Works Council must not act solely on the basis of its subjective needs. Rather, the Works Council is required to weigh up on the one hand the interests of the workforce in proper execution of the office of a Works Council and, on the other hand, the justified interests of the employer. When deciding on the bringing of or defense against legal action, the Works Council must not disregard the interest of the employer in limiting his obligation to bear costs. Like any other party that can act at the expense of another, it must therefore adhere to the standards that it would apply if it or its deciding members were required to bear the costs.

As such, the BAG is repeating its established case law, according to which lawyers' costs of the Works Council need not be reimbursed by the employer if the intended legal action appears obviously without prospects of success from the outset, or if legal counsel is involved in abuse of law, with the result that the interests of the employer in limiting its obligation to bear costs are disregarded. However, this hurdle is reached only in exceptional cases, and is more likely to fail due to technical errors of the Works Council.

Weighing up of interests by the Works Council

In the decision at hand, the BAG has considered the assumption of costs for the initiation of a decision-making process, aimed at appointing an arbitration body to deal with the complaint of an employee, as not necessary under Section 40 Subsection 1 BetrVG, as there was no previous attempt at agreement. Generally speaking, the legitimate interest to take legal action, required

under Section 99 ArbGG (Labor Court Law) for the formation of an arbitration body, is lacking if, in a matter requiring participation, employer and employee side have not carried out the attempt at amicable agreement, envisaged under Section 74 Subsection 1 Sentence 2 BetrVG, but rather have referred the matter straight to the arbitration body.

The BAG has simultaneously made it clear that an employer is only required to bear the costs of work by a lawyer for the Works Council if the appointment is based on a correct resolution of the Works Council. The Works Council must have concerned itself with the corresponding facts as a body, and formed a uniform will through a vote. As such, the burden of producing evidence and proof lies with the Works Council.

In the event of legal action spanning several instances, an effective resolution of the Works Council is required not only prior to the initial appointment of a lawyer, but fundamentally also before an appeal is lodged on behalf of the Works Council. This is particularly true if the Works Council has been defeated in the first instance. Not least in the interest of limiting the costs of the employer, the Works Council must check whether, and if so with what arguments, an appeal against a decision to its detriment offers a prospect of success. Whether the proceedings should be continued in the next instance is a matter that the Works Council cannot assess when initiating the proceedings, but rather only once it knows the reasons for the decision to be contested and has concerned itself with these.

This formal argumentation is also of significance because the absence of a resolution cannot be rectified by retrospective approval.

Correct passing of resolutions

Summary: The basic constellation, in which the employer is required to pay for the advising of the Works Council aimed against the employer, contains potential for conflict per se. Frequently, it is then the formal arguments that can provide an employer with promising argumentation for refusing to bear costs.

No claim to damages for parties harmed by an unlawful strike?

BAG, judgment dated 25.8.2015 – 1 AZR 754/13
BAG, judgment dated 25.8.2015 – 1 AZR 875/13

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Germany is currently experiencing a renaissance of the strike culture. Our economic processes are dependent on close interlinking between different companies, service providers and suppliers. This close interlinking makes the processes highly susceptible to disruption. In the past, this situation has been skillfully exploited for example by IG Metall, who – in order to protect the strike fund – has organized strikes at key suppliers with small workforces, in order to hit the automotive industry as a whole.

Today, we are witnessing how small trade unions representing specific professional groups are calling on their (limited number of) members to strike and causing enormous effects as a result. Here, pressure is also applied specifically on the employer through the fact that the strike affects a large number of persons (commuters, business travelers, holiday travelers, goods transport, supplies of goods to industrial customers etc.).

Strike as legitimate weapon in industrial disputes

A strike, i.e. the downing of tools as such, can trigger claims for damages on the part of those affected. A (lawful) strike is however justified under Art. 9 Subsection 3 Basic Law. In such cases, the trade union and the strikers are therefore protected against claims for damages. Even if the lawmaker has thus far not found the energy to regulate these questions, the case law of the BAG (Federal Labor Court) and BVerfG (Federal Constitutional Court) has been clear for decades. An unlawful strike does not enjoy this protection. It can be forbidden by a court and results in obligations of the trade union and the strikers to provide damages – at least with respect to the victims of the strike.

BAG: No damages for third parties affected

In two decisions dated August 25, 2015, the BAG has now rejected a claim to damages for companies affected by an unlawful strike against another company. In one of the two cases, the air traffic controller union (GdF) had gone on strike at Stuttgart airport, with the result that numerous flights of various airlines were cancelled. In the second case, the GdF had announced a strike. The mere announcement resulted in a fall in bookings and flights were cancelled. In both cases, the strikes were stopped or forbidden completely by court decisions. Both cases thus constituted unlawful withdrawal of labor. In a press release (the precise reasons are not yet available), the BAG rejects interfer-

ence in the commercial operations of the airlines concerned. In each case, the strike by the GdF was aimed solely at the German Air Traffic Control Service (DFS).

Summary: The decisions of the BAG give rise to questions. Should a decisive factor in terms of the obligation to pay damages really be whether the trade union directed its strike only against the DFS or also against airline companies and travelers? Particularly in the case of air traffic controllers, a strike necessarily impairs air traffic. It may be worth considering protecting trade unions against existential angst in this way. However, any such privileging of liability is alien to the system and would necessitate legislative intervention. Privileging of liability would only be acceptable if accompanied by a restriction of the right to strike – for example as in Italy -, and periods of advance notification and emergency services would have to be ensured. As the law stands however, this privileging of trade unions is not apparent.

Consideration of foreign subsidiaries in co-determination

Regional Court Frankfurt a. M.,
ruling dated 16.2.2015 – 3-16 O 1/14

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A recent decision by the Regional Court Frankfurt a. M. is currently attracting attention from numerous German companies. Supervisory Boards of German companies operating internationally may be made up incorrectly, or a co-determination Supervisory Board may have to be formed for the first time in a number of such companies.

The Petitioner, a Professor of Labor Law from Munich, had acquired several shares in Deutsche Börse AG with the aim of subsequently initiating so-called status proceedings. The aim of the proceedings was to establish that the Supervisory Board of Deutsche Börse AG has been formed incorrectly. The Respondent's Supervisory Board was formed in accordance with the Law on One-Third Participation (DrittelbG), and one third of its members are employee representatives. At the time of the decision, Deutsche Börse AG had approx. 1,600 employees in Germany, but more than 2,000 employees worldwide.

Whether and to what extent a co-determination Supervisory Board has to be formed is based on the number of employees in the respective company. If the company has more than 500 employees, one third of the members of the Supervisory Board must be employee representatives in accordance with the provisions of the DrittelbG. If the respective company has more than 2,000 employees, the composition of the Supervisory Board is based on the provisions of the Co-Determination Act (MitbestG). In this case, half the members of the Supervisory Board must be representatives of the employees. The ruling previously applicable under prevailing opinion was that employees working in foreign companies, in particular those in foreign subsidiaries, are not to be taken into account as regards the threshold levels, because company co-determination is subject to the so-called "principle of territoriality". Only employees of group subsidiaries with their registered office in Germany were taken into account.

Background to the decision

Contrary to this previously prevailing opinion, the Regional Court Frankfurt a. M. has now decided that the employees based abroad must be involved in the election of employee representatives to the Supervisory Board, and they must be taken into consideration as regards the number of employees authoritative for application of the Co-Determination Act. This also applies to employees of foreign subsidiaries.

In the opinion of the court, this results in a situation where not just a third but rather half the members of the Supervisory Board of Deutsche Börse AG must be employee representatives, meaning that the current composition is not correct. If the workforce in other countries is taken into account, Deutsche Börse AG would have more than 2,000 employees.

Decision: Employees working abroad count

In its reasons, the Regional Court Frankfurt a. M. refers to the wording of Section 1 Subsection 1 MitbestG (Co-Determination Act) in conjunction with Section 5 Subsection 1 MitbestG. This does not provide for any restriction just to employees working in Germany. Consequently, exclusively the general term of "group" as per Section 18 Subsection 1 AktG (German Stock Corporation Law) is authoritative. This also includes foreign subsidiaries.

The general definition of a group of companies also includes foreign subsidiaries

Even now, German companies are well advised to give thought to possible construction options. This is undoubtedly also true in view of the fact that the corresponding threshold levels of 500 or 2,000 employees can quickly be exceeded as a result of a completed company purchase. The judgment of the Regional Court Frankfurt a. M. can also give cause to think more closely about transformation into a European Company (Societas Europaea – SE) or the formation of an SE by way of cross-border merger.

Practical tip

Summary: If the opinion of the Regional Court Frankfurt a. M. were to establish itself, this would have significant effects on many small and medium-sized companies with dependent foreign group companies. They would be obliged to take the employees of these group companies into account when determining the number of employees for the threshold levels under the co-determination laws and, if the threshold levels are exceeded, to have one third or half the members of the Supervisory Board elected by the employees. If no Supervisory Board exists at present, there would be an obligation to form one, with corresponding participation of the employees.

Consideration of Directors in collective redundancies

ECJ, judgment dated 9.7.2015 – C-229/14
(Balkaya/Kiesel Abbruch- und Recycling Technik)

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(Outside) Directors of a GmbH (Limited Liability Company) and interns must be taken into consideration when making collective redundancies.

The law stipulates that employers must serve notice of collective redundancy if they dismiss a large number of employees. This obligation dates back to the European Directive 98/59/EC of July 20, 1998 on the approximation of the laws of the Member States relating to collective redundancies ("Collective Redundancies Directive").

Section 17 Subsection 1 KSchG (Law on Protection against Dismissal) sets out when an employer is required to serve such notice of collective redundancy. In companies that regularly have more than 20 and less than 60 employees, this is the case if, for example, the employer dismisses more than 5 employees within 30 calendar days. The standard contains further threshold levels for companies of varying sizes.

Determination of the threshold levels under Section 17 Subsection 1 KSchG

The European Court of Justice (ECJ) has now been asked to clarify who is to be regarded as "employee" for the purpose of this regulation. The reason for submission of the question was action for unfair dismissal before the Local Court Verden. The employer – a German GmbH – had served the plaintiff, as well as all other employees, with notice of ordinary termination for operational reasons due to the closure of the company, without previously having made notification of collective redundancy. The initial court was of the opinion that the company had 19 employees at the time of the serving of notice of termination. There was a dispute between the parties as to whether a further two persons, who also worked in the company, were to be regarded as "employees" within the meaning of the Collective Redundancies Directive, and were therefore to be taken into consideration when determining the threshold levels envisaged under Section 17 Subsection 1 KSchG. These were, on the one hand, the (outside) Director of the company and, on the other hand, a re-trainee who worked in the company as part of an internship funded by the Job Center, and who received no remuneration from the company.

Term "employee" for the purpose of the Collective Redundancies Directive

The ECJ answered the question in the affirmative in both cases. Both the (outside) Director as well as the re-trainee are "employees" within the meaning of the Collective Redundancies

Directive. The corresponding definition of an employee must be interpreted in uniform manner and in compliance with EU law. As such, the question of how the employment relationship is to be classified under national law is irrelevant.

Under EU law, the defining characteristic of an employee status is the performance of work against remuneration and bound by instructions. The (outside) Director of a GmbH is appointed by the Shareholders' Meeting, is subject to its instructions and supervision when performing his duties, and can be removed from office by it at any time against his wish. Since, as a result, he is in a subordinate relationship to the company, the (outside) Director must be regarded as "employee" for the purpose of the Collective Redundancies Directive.

(Outside) Directors and interns must be taken into consideration when determining the threshold levels

The same applies to re-trainees and interns, who effectively work in a company in order to acquire or improve knowledge, or to undergo vocational training. They too must be taken into account when determining the threshold levels under Section 17 Subsection 1 KSchG. Additionally, their dismissal must also be notified.

The dismissal of (outside) Directors and interns is notifiable

Summary: Notification of collective redundancies continues to demand the utmost care. During proceedings for unfair dismissal, employers cannot invoke the fact that Directors, plant managers and similar senior persons are not to be taken into consideration under Section 17 Subsection 5 KSchG. National law must be interpreted in accordance with EU law, such that they too apply as "employees" for the purpose of the Collective Redundancies Directive. The same applies to interns. Particularly in small companies, this can trigger an obligation to notify. In this respect, attention must be paid to the fact that the notification of collective redundancy must be submitted to the Employment Office before serving notice of termination or concluding termination agreements. Otherwise, the notice of termination will be ineffective.

Ticker
Employment Law

In the newly introduced "Ticker" section, the Practice Group Employment Law provides information on new and practically relevant developments in the field of employment law. From an employment law perspective, 2015 has already been an eventful year. For this reason, we wish to use the following pages to inform you of the relevant changes to the law in recent months.

New parental leave as from July 1, 2015

The new Parental Leave Act is applicable to all children born after July 1, 2015. The changes do not yet apply to children born up to and including June 30, 2015. This means that, up until June 30, 2023 at the latest, both the old and the new version of the law will apply parallel to one another.

The new rulings create greater scope for flexibility through the change in utilization and the support of (part-time) work by both parents.

The parental leave can be spread over three time periods. Up to 24 months of parental leave can be taken in the period from the child's 3rd birthday up until the 8th birthday, so as to enable alternation in care of the child and gainful employment. The consent of the employer is not required for this.

Kindly read the article by Regina Glaser in the Employment Law Newsletter April 2015 regarding details of the new ruling.

Law on Uniform Collective Agreements now in force

The Law on Uniform Collective Agreements dated July 3, 2015 was announced in the Federal Law Gazette on July 9, 2015 (Federal Law Gazette 2015 I 1130) and came into force on July 10, 2015.

The Law on Uniform Collective Agreements is intended to prevent simultaneous application of different collective agreements of competing trade unions for the same group of employees within a company. If there are conflicting collective agreements in a company, only the collective agreement of the trade union with the most members among the company employees will now apply. In this case, the minority trade union can require the employer to adapt the collective agreement concluded by it to the collective agreement applicable in the company (right of subsequent amendment).

The majority situation of the trade union members within a company can be evidenced among other things through the presentation of a notarial declaration.

Several small trade unions have already lodged a constitutional complaint immediately following the coming into effect, among them the pilots' association Cockpit and the doctors' trade union Marburger Bund. They are of the opinion that their freedom of association under Art. 9 Subsection 3 Basic Law has been violated.

Draft of a law implementing the EU Mobility Directive

On July 1, 2015, the Federal Cabinet approved the draft of a law implementing the EU Mobility Directive. This law is scheduled to be passed by Parliament in the fall. A central aspect of the draft is improving the transferability of expectancies of a company pension in the event of a change of employer.

Proposal for amendment of the law on company pensions

In future, employer-financed expectancies of a company pension should be non-forfeitable after just three years, provided the employee has reached the age of 21 by this time. As a fundamental rule, non-forfeitable expectancies of departed employees must be adjusted in the same scope as the increase in the expectancies of active employees, in so far as they have been earned as from the year 2018. If the employee moves to another employer in another EU country, the provision of compensation for the pension expectancy requires his/her consent, provided he/she informs the previous employer of this within three months following the ending of the employment relationship. A new Section 4a BetrAVG (Company Pensions Act) is intended to create obligations on the employer or the pension scheme to inform the employee of the acquisition of expectancies of a company pension.

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.

Lectures

From November 2 to 4, 2015, **Dr. Johan-Michel Menke, LL.M.** will be speaking at St. John's University in New York on the subject "Fixed-term employment contracts and relocations in professional sports – U.S. versus Europe from a German perspective".

On November 4, 2015, **Dr. Wilhelm Moll** will address the Working Group Insolvency in Cologne on the subject "Current questions related to the transfer of company ownership".

On November 11, 2015, **Bernd Weller** will speak on the subject "The arbitration body" during the employment law days of the seminars at Schloss Schwetzingen.

Dr. Holger Lüders will be holding the seminar "Optimum formulation of employment contracts" in Berlin on November 25, 2015. This seminar will also be organized in Munich and Frankfurt a. M. in 2016.

On December 2 and 3, 2015, **Bernd Weller** will deliver a presentation for the Beck Academy in Düsseldorf on the subjects "Works Council Constitution Act for Beginners" (December 2) and "Works Council Constitution Act for Professionals" (December 3).

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

Events

Series of seminars on Employment Law

This year, the Practice Group Employment Law will again be organizing seminars on employment law themes at all German locations. Each lecture event will last approximately 2 hours. They will be followed by a get-together with the possibility of addressing further questions to our speakers.

Further, regularly updated information on our seminars can be found at www.heuking.de/en/press-events/trainings-events/ or via the following QR code from your smartphone or tablet:

The following subjects will be dealt with in November 2015:

- The use of outside personnel in companies
- Practical problems related to implementation of the Minimum Wage Act
- Suspicion of contract-breaching conduct – how to react?
- Selected questions concerning the transfer of company ownership
- Reference clauses in contract formulation
- Employee participation – models and implementation

Please address any questions you may have to Ms. Ann Carolin Endres on 0211 600 55-173 or by email to a.endres@heuking.de.

Publications

Bernd Weller wrote an article on the subject "The level of the lawyer's fee – the remuneration of the Works Council lawyer" in issue 8/2015 (page 70) of the "Personalmagazin".

Dr. Holger Lüders and **Bernd Weller** have written a joint paper on principles of the remuneration of Works Council Lawyers as well as their obligations with respect to the employer. The paper appeared in "Der Betrieb 2015", 2149.

Bernd Weller and **Dr. Holger Lüders** have provided a joint summary for the "Betriebsberater" on case law concerning the co-determination rights of the Works Council on matters of health protection and accident prevention. This paper will appear in one of the next issues.

Dr. Sascha Schewiola has published a paper on the subject "Transfer of company ownership – which employer benefits are passed over" in the magazine "Arbeitsrechtberater" (issue 7/15).

People

Lawyer **Anna Schenke** joined the Practice Group Employment Law at the Düsseldorf office of Heuking Kühn Lüer Wojtek in June 2015. She assists the department headed by Regina Glaser, LL.M. (Boston). In this role, she advises and represents German and international clients in all matters of individual and collective employment law. Ms. Schenke studied at the University of Osnabrück. Between April 2011 and May 2015 she worked for an international firm of business lawyers specializing in the field of employment law in Düsseldorf and Perth (Australia), initially as law clerk and subsequently as lawyer.

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