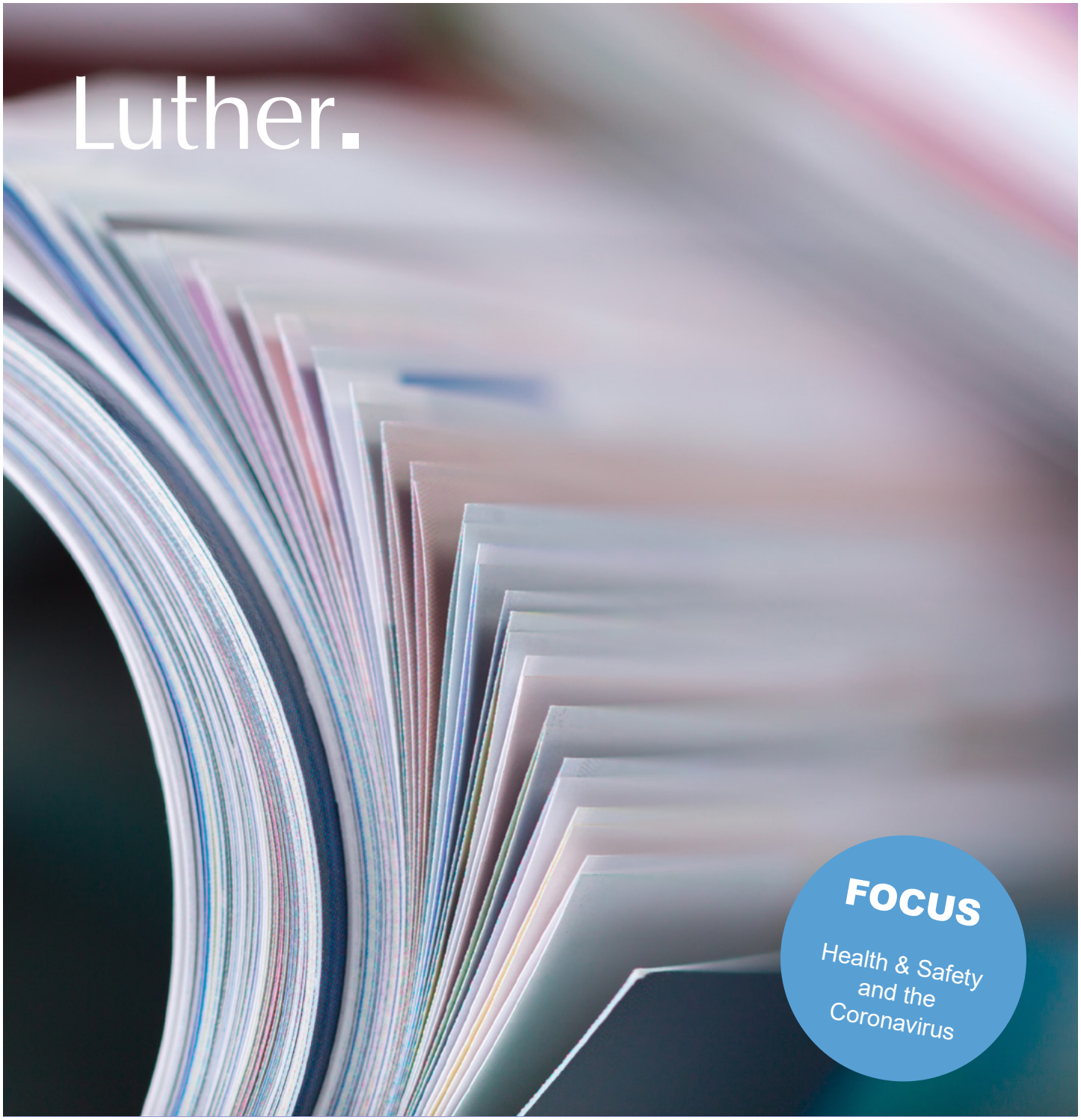

Labour & Employment Law Newsletter

Issue 2, 2020

Contents

Dear readers,

Summer and the holiday season are slowly coming to an end and it is time for us to look ahead. What will employers have to prepare for in the coming weeks and months? The coronavirus has been at the top of the agenda for almost six months now. We report regularly on current issues and developments in this area in our Luther blog. As the number of COVID-19 cases continues to rise, the topic of occupational health and safety is gaining even more importance. In her article, Kerstin Gröne therefore takes a comprehensive look at the subject of occupational health and safety measures in companies and the numerous practical questions arising in this context. Among other things, she addresses the protection obligations of employers in the context of occupational health and safety, dealing with risk groups and returning travellers, and the application of the Federal Government mobile application “Corona-Warn-App”.

Thorsten Tilch deals with the claim to continued employment under Section 102(5) BetrVG in this issue. What must employers take into account if the works council objects to the intended ordinary termination of an employee‘s employment within the framework of the consultation procedure pursuant to Section 102 BetrVG and the employee asserts a right to continued employment? Thorsten Tilch summarises the points to be observed by employers. The article shows the far-reaching legal consequences of an objection by the works council – often unknown in company practice.

In this newsletter, we will of course again deal with what we consider to be the most important court decisions of recent months, which we think will be of particular interest to you in your daily work.

Please feel free to contact our authors if you have any questions regarding the respective comments and articles. We look forward to your feedback and hope you enjoy reading this newsletter!

Stay healthy!

Yours,

Achim Braner

■ EDITORIAL

Health & safety in times of the coronavirus

The number of COVID-19 (hereinafter also referred to as ‚SARS-CoV-2' or ‚coronavirus') cases is rising again. There is already increasing talk of a „second wave". According to the Robert Koch Institute, 12,715 people in Germany are currently infected with COVID-19 (as of 17 August 2020, 0:00 hours). The working world had to adapt to the pandemic and the legal requirements to contain the spread of the coronavirus in the short term. This is an update on the legal responsibility of employers to protect the health and safety of their employees when dealing with the coronavirus.

I. Protection obligations of the employer on site

1. General information

The employer has a duty of care towards his employees. When designing the workplace and arranging services that must be undertaken, the employer must provide for performance of the services in such a way that employees obliged to perform such services are protected against danger to life and limb to the extent that the nature of the services permits (Section 618(1) of the German Civil Code (Bürgerliches Gesetzbuch, BGB). The employer has a duty according to Section 3(1) of the German Act on the Implementation of Measures of Occupational Safety and Health to Encourage Improvements in the Safety and Health Protection of Workers at Work (Arbeitsschutzgesetz, ArbSchG) to take the necessary occupational health and safety measures. As part of this, the employer is obliged to carry out a risk assessment on an ongoing basis; this means that he is also obliged to react to new risks – such as the coronavirus now.

As the Federal Court of Justice (Bundesgerichtshof, BGH) already held more than 40 years ago, it is a general rule that the employer is obliged to keep the company free from risks of infection (BGH, judgment. of 30 November 1978 III AZR 43/77). The employer must intervene on his own initiative to ensure there is no employment of people shedding a virus (Ausscheider), suspected of shedding a virus (Ausscheidungsverdächtiger) or suspected of being infectious (Ansteckungsverdächtiger) within the meaning of the German Protection against Infection Act (Infektionsschutzgesetz, IfSG).

In the event of a breach of these obligations, the employer may be liable. In an action for damages, the employee must only show and prove that there is an objectively improper situation as well as the damage incurred. The condition must have been likely – i.e. not even causal – to cause the damage that occurred. In order to avoid a claim for damages, the employer must then demonstrate and prove that he is not at fault or that the improper condition did not cause the damage. This proof essentially requires documentation of the protective measures taken.

When examining which measures are necessary, the state of the art, the state of occupational medicine and hygiene as well as other established occupational scientific findings must be taken into account. Sector-specific guidelines, recommendations and standards of the employer's liability insurances also contain further specifications.

2. COVID-19

a) Occupational safety standards of the BMAS

The measures an employer has to take with regard to COVID-19 depend on the specific company. The SARS-CoV-2 occupational health and safety standards of the Federal Ministry of Labour and Social Affairs (BMAS), which were published in April 2020, and the specifications of the respective statutory accident insurance schemes provide (initial) guidance. According to these regulations, companies must, in particular, take the following precautionary measures which are already known from the public sphere, namely:

- leaving room where there is room;
- creating space where more room is possible by „moving tables";
- setting up transparent partitions where space is limited;
- introducing longer core working hours, where processes allow this;
- making disinfectant available in a clearly visible way.

With regard to the duties of protection, it is advisable to consider additional possible measures such as:

- activating an emergency pandemic plan;
- informing the employees;
- adopting hygiene regulations and rules of conduct;
- providing personal protective equipment;
- referring to reporting and disclosure obligations;
- medical measures, e.g. examinations by the company doctor;
- releasing sick employees;
- temporarily transferring employees at particular risk to less hazardous workplaces;
- changing work organisation while maintaining
- minimum operation;
- closing operational facilities.

b) Occupational health and safety rules of the BMAS

Last week, the BMAS published a SARS-CoV-2 occupational safety rule of the occupational safety committees (version: 10 August 2020). It will come into force in August when it is published in the Joint Ministerial Gazette (Gemeinsames Ministerialblatt, GmBl). This comprehensively specifies the requirements for occupational health and safety with regard to the pandemic for the period determined in accordance with Section 5 IfSG. In detail, the rules and regulations specify the requirements of the regulations according to the ArbSchG. If these specifications are complied with, the employer can assume that the requirements of the regulations are met. If the employer chooses other solutions, it must achieve at least the same level of safety and health protection for the employees.

In fact, the 17 points of the April 2020 occupational health and safety standard are specified in more detail on the basis of the state of the art in technology, occupational medicine, hygiene and other established occupational scientific findings, as well as the set of public rules and regulations. The rules and regulations – like the Occupational Safety and Health Act in Section 4 – determine a ranking of protective measures: technical measures take precedence over organisational measures and these in turn take precedence over personal measures. They should be properly linked to each other. In particular, the employer must take measures to reduce the number of unprotected contacts between persons and the concentration of airborne viruses in the working environment as far as possible. The following aspects in particular must be taken into account for the basic, technical, organisational and personal measures of occupational health and safety:

- design of the working environment, e.g. arrangement of workplaces to ensure distance, adequate ventilation, devices such as partitions and barriers, and, where appropriate, definition of internal traffic routes;
- contact reduction through such things as digital communication, creation and retention of working groups, working time organisation, and working from home;
- hygiene and cleaning, e.g. washing hands regularly and thoroughly; if this is not possible, providing suitable and re-greasing hand disinfectants, adjusting cleaning intervals;
- general rules of conduct, e.g. distancing; refraining from forms of greeting involving direct physical contact; coughing and sneezing into the crook of your arm or into a tissue; staying at home if symptoms of illness occur.

The rule then goes on to formulate in detail how these steps can be implemented in specific spaces, in the design of work and breaks, in the use of work equipment and tools and in operational communication; measures for improved ventilation are also listed. Where operational needs prevent compliance with the measures, alternatives are mentioned – in particular, the use of a protective face mask where it is impossible to reduce proximity between workers. With regard to the possibility of working from home, the occupational health and safety rule does not go beyond the well-known guideline. Finally, the rule contains information on preventive occupational medicine.

3. Co-determination

The works council has a right of co-determination in matters of health protection pursuant to Section 87(1) No. 7 BetrVG. Areas of co-determination also include, for example, company regulations for the rapid clarification of suspected COVID-19 cases, which the occupational health and safety standard of the BMAS of April 2020 from April 2020 provides for in Item 13. Such an operational pandemic plan should include provisions to identify and inform those persons who are at risk of infection through contact with the infected person in the event of a confirmed infection. In one of the first decisions on the pandemic, Wesel Labour Court dealt with the recording, processing and transmission of images and videos for the purpose of distance measurement and monitoring and affirmed a claim of the works council to refrain and desist if the co-determination rights were not observed (decision of 24 April 2020 – 2 BVGa 4/20).

II. Home office – entitlement and right to issue instructions?

An elegant way of keeping employees in employment in times of pandemics without exposing them to a significant risk of infection is to agree on the employee working from home. The recommendation of the BMAS occupational health and safety standard also tends towards such a solution in Item 6. However, a law regulating a corresponding employer‘s right to unilaterally order someone to work from home does not exist so far, nor does a law which provides for a right to a home office for the employee (in the context of the pandemic this was recently confirmed by the Augsburg Labour Court, judgment of 7 May 2020 – 3 Ga 9/20). The legally most secure and unambiguous option therefore is when the employment or collective bargaining agreement or a company agreement already contains an explicit regulation on setting up an office at home. If a regulation therein permits ordering the employee to work from home, the employer can unilaterally refer the employee to that regulation.

In individual cases, it may even be the employer‘s duty according to Section 618 BGB to send employees to the home office or to grant it to them. Due to the notion of protection or if there is a risk that the business cannot be maintained otherwise, the employee may be obliged in individual cases as a result of his duty of consideration resulting from Section 241(2) BGB to accept the unilateral order of the employer to perform his work from home. On the other hand, the employee‘s circumstances – such as cramped conditions or lack of technical prerequisites – may result in the order to work from home being unreasonable.

This distinction has corresponding consequences for the salary entitlement: If it is not possible or if it is unreasonable to work from home and the employer does not employ the employee in the company even though the employee offers to work there, the employee will generally retain his salary entitlement. The employer bears the so-called default of acceptance or operational risk (Section 615 sentences 1 and 3 BGB). However, if the employee works elsewhere during this period or fails to perform another activity that is reasonable, this may be taken into account when calculating his salary (Section 615 sentence 2 BGB). If the employee refuses to comply with the justified order to work from home, although this is reasonable for him, he loses his salary entitlement. This also applies even though the employer actually bears the business risk and the risk of default of acceptance, since the employee must allow to be credited against him the amount he maliciously refrained from acquiring during this period (Section 615 sentence 2 BGB) – i.e. what he would earn when performing the (reasonable) work in the home office.

Working from home does not release the employer from his responsibility to ensure occupational health and safety. The workplace in the home office is basically the same as the workplace in the company. The employer is consequently also obliged to carry out a risk assessment and take measures in this respect (Sections 3 et seqq. ArbSchG). Due to the inviolability of the home, however, the employer‘s duty to provide information is of particular importance here.

III. Statutory accident insurance stepping in?

If an employee is infected with the coronavirus at the workplace, the question arises as to whether statutory accident insurance will have to step in for any treatment costs etc. The German Social Accident Insurance (DGUV) rejects any obligation to assume liability for personal injury (outside of hazardous operations such as hospitals and laboratories) in the case of COVID-19 diseases, as this is a general hazard and not a

workplace-specific risk. The obligation to pay in „normal operations“ has not yet been clarified by the courts. However, there is a lot that suggests that statutory accident insurance does not normally have a duty to step in.

The obligation for statutory accident insurance to step in is contingent on the existence of an insured event within the meaning of Section 7(1) of the German Social Code (Sozialgesetzbuch, SGB), Book VII – i.e. an accident at work (Section 8 SGB VII) or an occupational disease (Section 9 SGB VII). In any case, there must be a factual connection between the professional activity and the insured event. Moreover, occupational diseases are only those which are classified as such by statutory decree. According to Section 9(1) sentence 2 SGB VII, a disease is only classified as an occupational disease if the disease is caused by special effects to which certain groups of persons are exposed to a considerably higher degree than the rest of the population as a result of their insured activity. Outside the areas where contact with infected persons is unavoidable, a corresponding factual connection is rather absurd. The legal consequence of the absence of an insured event, and thus of the inapplicability of the liability privilege of Section 104 SGB VII, is that the employer is not liable for any infection of his employees at the workplace, but „only“ for infections attributable to him, i.e. those that are negligently caused. As a result, the protective measures taken by the employer come to the fore from a liability law perspective.

IV. Dealing with risk groups at work

A special point, including in the BMAS regulations, concerns dealing with employees who belong to a special risk group in the case of a COVID-19 disease. These generally include smokers, the elderly, severely obese people or employees with certain pre-existing conditions such as:

- cardiovascular diseases;
- chronic pulmonary or liver diseases;
- cancer;
- diabetes;
- immunodeficiency.

Occupational health and safety measures must take into account special hazards for risk groups in the company. It is true that a uniform level of protection must be sought as a matter of priority. However, special treatment is appropriate where it would be disproportionate to apply to all workers the measures necessary to protect one risk group. The problem here is that the employer has no right to ask questions about previous illnesses or smoking habits, for example; this requires the voluntary cooperation of the persons concerned. According to the BMAS occupational health and safety standard, this should be prevented by making advice from the company doctor available to employees belonging to a certain risk group.

Extended measures include such things as the deployment of employees that belong to a risk group outside normal working hours to avoid contact and too much proximity, working from home, the allocation of an isolated workplace, the provision of particularly effective protective equipment – such as more effective protective masks –, temporary transfer to a completely different workplace and, as the last resort, the – in the author‘s opinion – unpaid leave of absence for particularly vulnerable workers.

V. Consequences of inadequate protective measures at work

The employer must make decisions on occupational safety and health measures without any errors of judgement. If he fails to do so, the employee can, according to Section 618 in conjunction with Section 273(1) BGB, refuse to work. The employee‘s entitlement to payment of the wage remains in force in accordance with Section 615 sentence 1 BGB; the employer is in default of acceptance of the work performance because he must guarantee a safe workplace. In case of intentional or negligent violations of enforceable orders of the authorities or in the case of violations of legal regulations, there is a threat of administrative fines and in the event of persistent repetition or in case of endangerment of life or health by intentional action, imprisonment or fines can also apply (Section 25 and Section 26 ArbSchG).

VI. Dealing with suspected cases

The employer must protect the workforce from health hazards, including those posed by other workers. It must draw up a pandemic plan to encourage workers who show symptoms of illness not to come to work or else to leave work. The operation of a functioning reporting and control system is necessary.

According to Section 241(2) BGB in conjunction with Sections 15, 16 ArbSchG, the employees are obliged to cooperate in occupational health and safety matters. They must therefore support the protective measures ordered; in the event of violations, sanctions under labour law are possible. According to Section 16(1) ArbSchG, employees are also subject to an obligation to report any infection or suspicion of infection. In addition, there is an obligation to provide information

in the event of contact with infected persons or recent stays in risk areas. In addition, there are obligations to cooperate, particularly with regard to the provision of medical certificates, a company medical examination in the event of suspected infection and a health check due to the employee‘s own symptoms.

VII. Selected individual questions

1. Concerning the „mask“

Even the BMAS labour standard indicated in Item 15 that the employer should provide protective masks or face masks in the event of unavoidable contact between employees and that these should be worn by the employees. If, on the other hand, contact can be avoided, e.g. by using individual offices, masks do not have to be worn nor do they need to be provided. If this is not possible – even if only in certain areas – the employer must, however, issue masks and he may not pass on the costs to the workforce. In addition, particularly safe masks are advisable for risk groups (see above). An obligation of the employees to actually use the masks results from the obligation to comply with the provisions of occupational health and safety law.

Dealing with employees who refuse to do so, including possibly in public areas outside the workplace where the use of masks is legally required, is problematic. If there is an obligation to wear masks in the company due to occupational health and safety aspects and the employee does not comply with the request to wear a mask, the employer generally may not allow the person concerned to continue working so as not to violate the employer‘s duty to protect other employees. The person concerned may be prohibited from entering the premises. If the person therefore caused the situation where he is not performing his work, he loses his entitlement to wages. In extreme cases, labour law sanctions may also be considered. As employers are generally responsible for ensuring the health of their employees, they can also at least advise their employees to wear a mask on public transport, when shopping etc.

2. Order to install a coronavirus warning application?

In practice, there has been wide discussion about whether use of the “Corona-Warn-App” of the Federal Government can be made mandatory for employees by the employer. Although this can be assumed for the company mobile phone – taking into account the co-determination rights of the works council – this may only be assumed during working hours. A request for private use remains of course possible.

3. Risk for relatives

In the event that employees themselves are not exposed to an increased risk if they become infected, but someone in their household is, it may in individual cases be unreasonable within the meaning of Section 275(3) BGB to come to work. However, since the household does not belong to the employer‘s risk sphere, the employee then loses his wage entitlement.

4. Dealing with returning travellers

The employee‘s information obligations for the purpose of complying with the level of occupational health and safety defined in Section 15 and Section 16 ArbSchG should also include the obligation to inform the employer that he has been in a risk area and whether he has tested negative for COVID-19. If an employee makes a trip to a risk area and is subsequently quarantined, he loses his entitlement to remuneration for this period.

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The guardian of his job – on the right to continued employment pursuant to Section 102(5) BetrVG

The starting point is simple: The works council of the company objects to the intended dismissal of an employee with due notice within the framework of the consultation procedure pursuant to Section 102 BetrVG. The legal consequences of such an objection may be considerable – but are often unknown in business practice.

Legal starting point

Pursuant to Section 102(1) sentence 1 BetrVG, the works council of a company must be consulted prior to each dismissal. The works council can object to an intended dismissal with due notice within one week (in writing) if

- the employer in selecting the employee to be dismissed disregarded or did not take sufficient account of social aspects;
- the dismissal violates a guideline for selection pursuant to Section 95 BetrVG;
- the employment of the employee to be dismissed could be continued at another job in the same operation or in another operation of the same company:
- it would be possible to continue the employment of the employee after a reasonable amount of retraining or further training; or
- continued employment of the employee is possible after a change in the terms of his contract and the employee has agreed to such change (Section 102(3) BetrVG).

If the works council has objected to an intended dismissal with due notice in due time and in the proper manner and if the employee has brought an action for unfair dismissal under the Protection against Dismissal Act against the dismissal which has nevertheless been pronounced, the employer must continue to employ the employee at unchanged working conditions at the employee‘s request after expiry of the notice period until a final decision is given on the case at issue (Section 102(5) sentence 1 BetrVG).

The consequences of an objection by the works council to an intended dismissal with due notice can therefore be of huge significance: Irrespective of the outcome of the dismissal protection proceedings – i.e. in particular irrespective of the validity of the notice of termination given – the dismissed employee must, in principle, continue to be employed in his previous job and be remunerated accordingly even after the expiry of the notice period if he so requests. The employment relationship must be continued. The works council‘s objection makes the employee the „guardian of his job“ at least while the action is pending, while the employer alone bears the risk of uncertainty about the legal validity of the dismissal. The legislator has thus provided the works council with a very effective means of ensuring that intended and necessary replacement appointments cannot be made or can only be made at risk, or that operationally necessary reorganisation measures falter or even come to a complete standstill.

Keeping a close eye on assertion of claim

If the employee‘s right to continued employment under works constitution law exists pursuant to Section 102(5) BetrVG and the employer (silently) refuses to continue employment, the employer is in default of acceptance, regardless of whether or not the notice of termination given to the employee is valid. This is particularly awkward if the employer has overlooked the assertion of the claim for continued employment and for this reason alone the employer has to continue to pay the previous remuneration or has to subsequently pay the previous remuneration without having received any counterperformance for this. In this regard, the remuneration claim does not depend on the actual employment. In individual cases, this may affect all remuneration claims within the three-year standard limitation period.

Employers should therefore in all cases of an objection by the works council to an intended dismissal with due notice pay particular attention to the conditions of the right to continued employment. These are basically:

- the pronouncement of a dismissal with due notice;
- the works council‘s proper objection to this;
- the proper filing of an action under the Protection against Dismissal Act by the employee; as well as
- the assertion of the claim to continued employment by the employee.

In particular, the assertion of the claim to continued employment by the employee, which according to the prevailing opinion in case law and literature must take place by no later than the end of the notice period, often causes problems in practice because it is not bound to any particular form. It therefore often takes place in a „covert” way, for example at the same time as the action for unfair dismissal is filed or as part of the statement of claim related to this action, or in general letters in which (also) withdrawal of the dismissal is requested in general and the employee continues to offer his labour. It should be examined in each individual case whether this is a request for continued employment pursuant to Section 102(5) sentence 1 BetrVG.

Release from the obligation to continue employment

If the continued employment relationship exists pursuant to Section 102(5) BetrVG, it ends by operation of law only upon the legally binding termination of the protection against dismissal dispute. Until that time, the employee must continue to be employed under unchanged working conditions, irrespective of the outcome of the court proceedings. However, the employer is not completely defenceless in this respect. Upon his application, he can instead be released from the obligation to continue employment under the Works Constitution Act by the Labour Court by way of a temporary injunction – the defendant is, curiously, the employee and not the works council. This is always possible if

- the employee‘s action for unfair dismissal does not offer sufficient prospect of success or appears to be deliberate;
- the employee‘s obligation to continue employment would lead to an unreasonable economic burden on the employer; or
- the works council‘s objection was obviously unfounded (Section 102(5) sentence 2 BetrVG)

Whether and to what extent the reasons for the release exist in the individual case must be examined separately in each case. There is a wide range of case law on this subject. It should be noted, however, that a court decision to terminate the employment relationship only takes effect from the moment the decision becomes legally binding and does not have a retroactive effect to the moment of expiry of the notice period. Until the release from the obligation to continue employment becomes legally valid, this obligation continues to exist in full. And although the Higher Labour Court is already the „end of the line“ in the preliminary injunction proceedings and it is a matter of summary proceedings, a few months may pass before a decision is made on the release from the obligation.

On the other hand, the employee can also enforce his right to continue employment in court. On the employer side, it must be noted in this respect that it is disputed whether, since the employer has its own legal remedy at its disposal, the employer may invoke in these proceedings the reasons which would release it from the obligation to continue employment. If this is rejected, the employer probably only has the possibility to object in proceedings initiated by the employee that a continued employment relationship has not arisen to start with.

Conclusion

With the right to continued employment under works constitution law pursuant to Section 102(5) BetrVG, the works council has an instrument at its disposal which may have considerable effects on intended individual or overall measures. Against this background, employers should keep a close eye on further actual developments after receipt of an objection by the works council against an intended dismissal with due notice. If a claim for continued employment is actually asserted, it is advisable to examine the further procedure immediately and to initiate the necessary measures in order to avoid any burdensome circumstances which may arise from the legal consequences of Section 102 BetrVG as early as possible.

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■ JUDGMENT REVIEWS

The prohibition of dismissal of a pregnant employee according to Section 17(1) sentence 1 no. 1 MuSchG also applies to dismissal before the agreed start of employment

Federal Labour Court, judgment of 27/02/2020 – 2 AZR 498/19

The case

The parties are in dispute concerning the validity of a dismissal with due notice. The defendant and the plaintiff concluded an employment contract on 14 December 2017 with an agreed employment start date of 1 February 2018. The employment contract also provided for payment of a contractual penalty by the plaintiff in the event of culpable failure to commence work. In addition, the plaintiff was obliged to be available on call before the agreed start date in the period 27 to 29 December 2017.

On 18 January 2018, the plaintiff informed the defendant about her pregnancy and a certified „complete ban on employment with immediate effect“. The defendant thereupon terminated the employment relationship with effect from 14 February 2018 by letter dated 30 January 2018.

The applicant challenged this dismissal by the action on which this judgment is based.

The decision

The Labour Court upheld the claim at first instance and the Higher Labour Court dismissed the defendant‘s appeal against it.

The defendant‘s appeal on points of law was also unsuccessful. The Federal Labour Court (Bundesarbeitsgericht, BAG) confirmed the judgment of the Higher Labour Court that the defendant‘s dismissal is null and void in accordance with Section 17(1) first sentence No. 1 of the German Maternity Protection Act (Mutterschutzgesetz, MuSchG) in conjunction with Section 134 of the German Civil Code (Bürgerliches Gesetzbuch, BGB).

In the opinion of the Federal Labour Court, the prohibition of dismissal pursuant to Section 17(1) sentence 1 No. 1 MuSchG also applies to a dismissal prior to the agreed start of work. The court stated that this could be derived from Section 17(1) in conjunction with Section 1(2) sentence 1 MuSchG even though the wording of the law was not clear.

However, the system of laws already suggested that it just depended on the existence of a legal relationship aimed at an employment within the meaning of Section 7 SGB IV. The court stated that Section 7(1) sentence 1 SGB IV covered in particular employment relationships. Such an employment relationship already arises, according to the court, when the employment contract is concluded. Irrespective of the time of the agreed start of work, mutual obligations arise as early as the time of conclusion of the contract. In the view of the court, another factor that suggests that Section 17(1) sentence 1 MuSchG applies even before the start of work upon conclusion of the employment contract is the protection of health and livelihood, which is the purpose of the prohibition of dismissal.

This view, according to the court, is supported by the generally phrased purposes of the Maternity Protection Act: According to the court, the purpose of Section 1(1) sentence 2 MuSchG is to enable a woman to continue her employment during pregnancy and after giving birth, to counteract disadvantages a mother might suffer during this period. In particular, the prohibition of dismissal also served this purpose, in the court‘s view. Furthermore, the benefits provided for under Section 18 et seqq. MuSchG were especially intended to ensure that women were financially secure, particularly during periods of prohibition of employment. Incidentally, the history of the origin of Section 1(2) sentence 1 MuSchG also supports the aforementioned understanding, in the view of the court. Until 31 December 2017, Section 1 No. 1 MuSchG still determined the personal scope of application to the effect that the Maternity Protection Act applied „to women who are in an employment relationship“. The reference in Section 1(2) sentence 1 MuSchG to the term „employee“ as defined in Section 7(1) SGB IV with effect from 1 January 2018 was not intended to restrict the personal scope of application, but merely to extend it to include forms of employment outside of an employment relationship.

The result of the interpretation found by the Federal Labour Court was also in accordance with EU law. In this respect,

the court held that the Court of Justice of the European Union had already ruled that the prohibition of dismissal under Article 10 No. 1 of Council Directive 92/85/EEC applies „throughout pregnancy".

Nor, according to the court, was there any concern under constitutional law aspects concerning the result of the interpretation found. In the court's view, it is true that the Federal Labour Court is not obliged to decide on the question of the extent to which fundamental rights can be used as a standard of assessment at all when interpreting the prohibition of dismissal if the German legislator has transposed EU law. However, regardless of this, no fundamental rights of the employers were violated by the interpretation result. The restriction of the employers' entrepreneurial freedom by the prohibition of dismissal is suitable, necessary and proportionate, in the view of the court. The court felt that the way Section 17(1) MuSchG is designed prevents an excessive burden being placed on the employer. Furthermore, according to the court, the prohibition of dismissal is only valid for a limited period of time. In exceptional cases, there is also the possibility of a declaration of admissibility of dismissal pursuant to Section 17(2) sentence 1 MuSchG. Also, the employer does not have to be solely responsible for the costs for periods of employment prohibition pursuant to Sections 18, 20 MuSchG. The fact therefore that the prohibition of dismissal already applies from the time the employment contract is concluded does not constitute an excessive burden on the employer, said the court. In particular, the consequences were no more far-reaching than if the employer learned of the pregnancy of a female employee on the first day of employment.

Against the background of this interpretation, the defendant's notice of termination of 30 January 2018 pursuant to Section 17(1) sentence 1 No. 1 MuSchG in conjunction with Section 134 BGB was null and void, according to the court. The parties had, according to the court, already agreed on employment in December 2017 pursuant to Section 7(1) sentence 1 SGB IV. The obligation to provide the principal contractual performance was already established at that time (conclusion of contract). This is also reflected in the agreement on liquidated damages in the event of not starting to work. In addition, in the court's view, according to the employment agreement, the plaintiff was also obliged to be available on call before the agreed start of work.

Our comment

The Federal Labour Court highlights in its case law the special protection afforded to pregnant women and mothers. The scope of application of the Maternity Protection Act according to Section 1(2) MuSchG is broad. Among other things, part-time employment relationships, fixed-term employment relationships as well as probationary and temporary employment relationships are included. The present judgment confirms the wide scope of application also with regard to the time component.

In this context, the Federal Labour Court's aim in the present case law is to provide comprehensive protection for pregnant women. For this reason, the period between the conclusion of the contract and the start of work is also meant to be covered by the prohibition of dismissal. Otherwise, in practice there would be a risk that pregnant women would wait until the agreed start of work before notifying their employer of their pregnancy. However, this would not be compatible with the statutory obligation of immediate notification under Section 15(1) MuSchG. Therefore, the Federal Labour Court's judgment appears only logical from the point of view of the court.

Nevertheless, the employer is not completely defenceless either. In special cases the employer may submit an application to the competent authority for a declaration of the admissibility of the dismissal pursuant to Section 17(2) MuSchG. This declaration of admissibility is made at the discretion of the authority exceptionally when there are reasons which according to Section 17(2) sentence 1 MuSchG „are not related to the woman's condition during pregnancy, after a miscarriage after the twelfth week of pregnancy or after delivery". However, it should be noted that such an exception is generally only assumed in cases where it would be intolerable for the employer to continue the employment relationship, i.e. where it is unreasonable to expect the employer to continue the employment relationship. This can be the case, for example, if a company closes down or if an employment opportunity is lost without replacement. The circumstances of the individual case are decisive here.

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On the term „operation“ under collective redundancy law

EU law concept of the notification of collective redundancies – incorrect collective redundancy notification

Federal Labour Court, judgment of 13/02/2020 – 6 AZR 146/19

The case

The parties are in dispute about the validity of a dismissal with due notice for operational reasons. The plaintiff was employed by Air Berlin as a pilot based in Dusseldorf, Germany. The employment agreements of the pilots were terminated at the end of November 2017 after the opening of insolvency proceedings, including the employment agreement with the plaintiff.

Air Berlin maintained so-called stations at several airports, to which cockpit, cabin and ground personnel were assigned. Air Berlin notified the competent public authorities of collective redundancies for the „cockpit“ area for the cockpit personnel employed nationwide. This understanding of „operation“ was based on the employee representation for the Cockpit area, „PV Cockpit“, which was formed under a collective bargaining agreement in accordance with Section 117(2) BetrVG. Air Berlin filed the notification with the Berlin-Nord employment agency as the competent public authority for its headquarters because of the central control of flight operations for cockpit staff.

In his action for unfair dismissal, the plaintiff contested the defendant‘s decision to close down the plant and criticised the collective redundancy notification as erroneous. In the lower instances, the plaintiff‘s action was unsuccessful.

The decision

The plaintiff‘s appeal on points of law before the Federal Labour Court was with merit. The Federal Labour Court considered the dismissal to be invalid, Section 17(1) and (3) of the German Protection against Dismissal Act (Kündigungsschutzgesetz, KSchG), Section 134 BGB. In the view of the Federal Labour Court, the „operation“ relevant for the collective redundancy notification within the meaning of Section 17(1) KSchG constitutes the individual station, as in the plaintiff‘s case, Dusseldorf airport. In its judgment, the Federal Labour Court emphasised that the term “operation” under collective redundancy law in Section 17 KSchG is determined by Article 3 of Council Directive 98/59/EC on the approximation of the laws of the Member States relating to collective redundancies (EU Collective Redundancies Directive). According to the court, the EU Collective Redundancies Directive does not know a concept of the term “operation” which is based purely on certain professions. An „operation“ in the sense of EU law is, according to the court, a distinguishable entity of a certain permanence and stability, intended to carry out one or more specific tasks, which is made up of a body of workers and has technical means and an organisational structure to carry out those tasks. It is sufficient in the court‘s view to have a management which ensures proper execution of the work and control of the overall operation of the unit in the sense of coordinating tasks. The definitions of the German term “Betrieb” pursuant to the KSchG and BetrVG are not relevant here; in this respect the Federal Labour Court distances itself from its earlier case law. The Federal Labour Court made it clear that Air Berlin misunderstood the term „operation“. It should have submitted the collective redundancy notification for the cockpit, cabin and ground staff of the individual stations separately to the employment agency competent for the respective station, i.e. to the employment agency in Dusseldorf for the plaintiff. From a categorisation point of view, the effects of the collective redundancies had, in the court‘s view, occurred there.

The consultation procedure had to be carried out by Air Berlin (alone) with PV Cockpit, as the latter was the responsible workers’ representative for the cockpit personnel at Dusseldorf station. In the view of the Federal Labour Court, the question to be answered on the basis of the definition of an operation under EU law as to whether the employer intends to effect collective redundancies must be strictly separated from the question under national law as to which workers’ representation it must consult.

Moreover, the notification did not, in the court‘s view, contain all the necessary mandatory information. Air Berlin was not allowed to restrict itself to information concerning the cockpit staff, Section 17(3) sentence 4 KSchG. The notification should also have included information concerning the ground and cabin staff assigned to the station. In order to determine the scope of the notification obligation, only the concept of the term “operation” of the EU Collective Redundancies Directive is decisive. It is irrelevant that these groups of employees had different workers’ representations under collective law.

Our comment

With this new judgment on the notification of collective redundancies, the Federal Labour Court has further increased the requirements for a properly submitted notification of collective redundancies. Due to the increasing complexity of the notification, employers are advised to check even more closely which is the „operation" that is relevant for notification of collective redundancies. Consistent application of the term "operation" under EU law can in some cases lead to a reduction in the size of the operations and thus to a situation where a notification obligation no longer applies. However, if is it not possible to clearly determine the "operation" within the meaning of Section 17 KSchG, the notification of collective redundancies must be submitted to all potentially competent employment agencies in order to avert the risk of the dismissals becoming invalid due to misinterpretation of the term „operation", in accordance with the respective alternative interpretation. Coordination with the employment agency in the run-up to the notification of collective redundancies does not help the employer in the end, as the current judgment of the Federal Labour Court proves. For the Federal Labour Court, the inquiry by Air Berlin did not clearly show that Air Berlin wanted to clarify the question as to who the competent public authority was in a binding manner and requested an „instruction" from the employment agency on this issue. On the other hand, the Federal Labour Court emphasised that – even if there had been such an „instruction" – this would not have prevented the labour courts from regarding the notification of collective redundancies as invalid.

In conclusion, the new Federal Labour Court judgment also makes it clear once again that in German labour law four concepts of the German term "Betrieb" which are not necessarily congruent must now be observed: the EU law concept of "operation" in the sense of the EU Collective Redundancies Directive, the concept of "undertaking" as defined in the Transfer of Businesses Directive, as well as the concepts of the term "Betrieb" under the Works Constitution Act (BetrVG) and the Protection Against Dismissal Act (KSchG). Employers are well advised to always differentiate carefully between the individual definitions of the term "Betrieb" (undertaking, operation, company).

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Remuneration of a released works council member and the pitfalls of professional development

The decisive point in time for determining workers in a comparable position within the scope of Section 37(4) BetrVG is generally the assumption of office of the works council activity and not the point in time of the release. A new determination of workers in a comparable position requires an objective reason that goes beyond the release.

Federal Labour Court, judgment of 22/01/2020 – 7 AZR 222/19

The case

The parties are in dispute about the amount of remuneration claims. The plaintiff is employed by the defendant union as union secretary (Gewerkschaftssekretär). After the defendant was established in 2001, the plaintiff was elected as a member of the works council. In the works council elections in 2006, the plaintiff was elected chairman of the works council and released from his professional duties.

In the case of the defendant, a remuneration system is applied which is based on a general company agreement. The remuneration depends, among other things, on the respective activities and the size of the district in which the activities are performed. The applicant took the view that he was not correctly classified in the remuneration system. Based on what normally happened in the company, he felt he should be classified in the higher pay grade 9.2.

Before the labour court, the plaintiff successfully sought payment of the difference in remuneration between the two pay grades, and a declaration that the defendant was obliged to pay him remuneration for the future according to pay grade 9.2.

The Higher Labour Court amended the judgment of the labour court and dismissed the action. In the appeal on points of law, the plaintiff seeks to have the first-instance judgment restored.

The decision

The Federal Labour Court set the judgment aside and referred the matter back to the Higher Labour Court. On the basis of the findings of fact to date, the court's view what that it cannot be conclusively assessed whether the plaintiff is to be remunerated according to pay grade 9.2. In any event, the court considered that it cannot be assumed, on the reasons given by the Higher Labour Court, that the plaintiff is not entitled to the claim that was asserted.

The Higher Labour Court had, in the court's view, erroneously denied a claim under Section 37(4) BetrVG. Contrary to the assumption of the Higher Labour Court, the court felt that it is not the time of the release but the time of taking up office that is relevant for determining the group of comparable workers. Contrary to the opinion of the Higher Labour Court, Section 37(4) BetrVG does not, in the court's view, primarily apply to released works council members. Even if Section 37(4) BetrVG is of greater significance in connection with released works council members, its scope of application is nevertheless not limited to this context. According to the court, the relevant date in the present case is therefore the date of taking up office and not the date on which the plaintiff was released.

The Federal Labour Court justifies this with the argument that a works council member who is released from his or her duties pursuant to Section 38 BetrVG would be treated unequally compared to a non-released works council member if the group of comparable workers could be redefined on the occasion of his or her release without an objective reason. At the same time, however, the Federal Labour Court recognises that a new determination of comparable workers may become necessary if there is an objective reason. However, what such an objective reason could be remains open.

The Higher Labour Court also reportedly denied a claim under Section 78 sentence 2 BetrVG on the basis of erroneous grounds. Contrary to the opinion of the Higher Labour Court, the payment of a higher remuneration could also follow from Section 78(2) BetrVG. In the court's view, Section 37(4) BetrVG does not constitute a conclusive regulation on the amount of the remuneration of the person holding an office.

Ultimately, however, the court's view was that the action is currently not conclusive. Since the attention of the plaintiff had not been drawn to this fact in accordance with Section 139(3) of the German Code of Civil Procedure (Zivilprozessordnung, ZPO) in the previous instances, the court stated that he must be given the opportunity to make additional factual submissions once the case is referred back.

Our comment

The Federal Labour Court's judgment is in line with previous case law on the remuneration of released works council mem-

bers and contains no surprises. The Federal Labour Court clarifies that with regard to the group of comparable workers to be used to determine the usual remuneration development, the point in time of taking up office is to be taken into account and not the point in time when the works council member is released from his/her duties. The Federal Labour Court's line of argument is convincing in this respect. In fact, the question of remuneration development also arises in the case of non-released works council members, as these too will not usually perform work to the same extent as before due to their honorary office.

What sounds logical and well-structured in legal terms, however, sometimes poses considerable problems for employers in practice. Particularly in cases where the works council mandate was taken over a long time ago, the problem often arises that many or even all employees in the peer group have left the company in the meantime. In these cases, it will be difficult to show how the remuneration of the works council member would have developed if he or she had had an operational career. In particular, if no employee comparable to the works council member has remained in the company, the employer can only make hypotheses about how the works council member's professional career, and consequently also his or her remuneration, would have developed.

In principle, it would be conceivable to specify the peer group by name when the works council mandate is taken over. The Federal Labour Court permits such specifying company agreements as long as they are within the scope of the legal requirements of Section 37(4) and Section 78 BetrVG. The prerequisite is, of course, that the employees who are specifically named are actually workers in a comparable position within the meaning of Section 37(4) BetrVG. This kind of naming of persons in a comparable position allows at least an assumption to be made of the usual development of the works council member within the company. However, the case law of the courts of first instance holds that the decisive factor continues to be whether the (remaining) employees can be regarded as representative with regard to their professional development.

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The force of legal effect

An employee is generally not entitled to compensation for lost remuneration from his former employer after his action for unfair dismissal has been dismissed with final and binding effect. To break this legal effect, the employer would have to have deliberately and contrary to public policy obtained an incorrect judgment.

Federal Labour Court, judgment of 19/12/2019 – 8 AZR 511/18

The case

The Catholic plaintiff was employed by the defendant church community as organist, choir director and deanery cantor. In 1994 his marriage broke down. The following year he entered into a new relationship. One child was born of this. After the defendant church community had learned of this, it terminated the employment relationship with the plaintiff with due notice as of 31 March 1998. The reason given for the dismissal was that the plaintiff's conduct violated the principle of the indissolubility of marriage and grossly violated the obligations of loyalty towards the defendant included in the employment agreement.

The plaintiff defended himself against the ordinary termination. The diocese joined the defendant parish as intervener in the proceedings for unfair dismissal. The proceedings, which were conducted through several instances, ended in 2000 with a legally binding dismissal of the action. The dismissal was declared legally valid due to the special features applicable to denominational employers. The plaintiff brought various other actions in this matter which are not relevant to the outcome of the present judgment.

In the present proceedings, the plaintiff sought payment of the remuneration lost as a result of the termination and compensation for lost pension rights. In support of his claim, he essentially argued that a clear error of judgment had been made against him in the proceedings for unfair dismissal.

He argued that the reason for termination asserted by the employer had clearly not been covered by the Fundamental order

of ecclesiastical service within the framework of ecclesiastical employment relationships (GrO) that was applicable here. The defendants were aware of this, according to him, but nevertheless maintained that argument untruthfully. Moreover, he said that the defendants misrepresented his position as organist with the aim of deliberately deceiving the court of first instance, namely as being very close to the task of proclaiming the Gospel and therefore subject to increased loyalty requirements. The defendants had, in his view, thereby caused his action for unfair dismissal to be dismissed contrary to public policy. The consequence of this is, according to the plaintiff, that the legal effect of the judgment must exceptionally be undermined with regard to Section 826 BGB, which provides for compensation in the event of intentional damage inflicted on a person contrary to public policy.

The decision

The action remained without merit. In its judgment, the Federal Labour Court emphasised the principle that the legal effect of a judgment excludes further claims against the employer for compensation for any financial losses incurred as a result of termination of the employment relationship. In the court's view, it follows from the legal effect of the judgment that the legal consequence derived from the underlying facts may no longer be challenged by the parties.

Something else could only apply exceptionally in the case of damage intentionally inflicted by the person giving notice of termination contrary to public policy. Only under strict conditions could the substantive legal effect then be breached by granting a claim for damages under Section 826 BGB. For this to happen, the employer must have deliberately and contrary to public policy obtained an incorrect judgment, in particular by fraudulently misleading the court. Firstly, according to the court, the decision must be incorrect and the employer must be aware of this. Secondly, additional circumstances must apply which characterise the employer's actions as contrary to public policy. The expression of incorrect legal views does not in principle constitute such conduct contrary to public policy, since the finding of justice is precisely the court's very own task. On the other hand, conduct contrary to public policy is to be assumed in the case of deliberately untrue presentation of facts or manipulation of evidence.

The Federal Labour Court denied that these conditions were met in the present case. Since the defendants had not invented a canon law reason for termination, they had not obtained the judgment by fraud, according to the court. The courts had dealt with the submitted reason for termination as well as the position of the plaintiff as organist and the corresponding regulations in the GrO. Accordingly, the defendants had, in his view, taken an at least objectively justifiable – and thus not incorrect – position when assessing the validity of the termination.

Our comment

The Federal Labour Court's judgment is convincing in every respect. The legal effect of judgments serves the purpose of legal certainty and order – both are fundamental elements of our legal system that ensure it can function properly.

In favour of the employers, the Federal Labour Court once again confirms an – actually obvious – principle with this judgment: employers may rely on a final and binding judgment in the unfair dismissal proceedings won and need not fear subsequent claims for damages by the former employee. A different decision would reverse the entire logic; for the employers would have to pay the employee lost remuneration despite a positive verdict in the unfair dismissal proceedings and the associated statement that the dismissal was valid and thus „correct". Fortunately, the Federal Labour Court has again classified the conditions which allow such a scenario to take place to be very strict. Only if the employer is proven to be manipulative, malicious or misleading in the process can such a decision be made. However, it is very unlikely that one or more courts will allow themselves to be fooled by the employer's presentation in such a way that an incorrect and objectively unjustifiable judgment is made.

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Continued payment of remuneration – unity of the case of prevention

As a rule, an employer is not entitled to demand that an employee disclose the medical diagnosis on which the prevention from working is based. Exceptionally, however, the procedural rules on the burden of proof and production may result in something different.

Federal Labour Court, judgment of 11/12/2019 – 5 AZR 505/18

The case

The plaintiff had been incapable of work since 7 February 2017 as a result of a mental illness. Until 20 March 2017, the defendant continued to pay remuneration in the event of illness. Subsequently, the plaintiff received sickness benefit because her general physicians attested to her continued incapacity to work until Thursday, 18 May 2017 in several follow-up certificates. Also on 18 May 2017, the plaintiff was certified as incapable of work for the period from 19 May 2017 to 16 June 2017 by means of an initial certificate for the following day due to a gynaecological operation that had been scheduled for some time. On the basis of a further follow-up certificate, the plaintiff was then certified as incapable of work for the period from 17 June 2017 to presumably 30 June 2017. For the period from 19 May to 29 June 2017, the defendant did not continue to pay remuneration. The plaintiff contested this.

The decision

The judgment of the labour court upholding the claim was set aside on appeal by the defendant – after hearing the doctors treating the plaintiff – and the action was dismissed. The plaintiff‘s appeal on points of law, allowed by the regional court, remained without merit.

The claim to continued payment of remuneration pursuant to Section 3(1) sentence 1 of the German Act on Continued Remuneration During Illness (Entgeltfortzahlungsgesetz, EFZG) is limited to a period of six weeks. In accordance with the principle of the unity of the case of prevention, this also applies if a new illness occurs during an existing incapacity to work which also results in incapacity to work. In such a case, the employee can therefore only claim continued payment of remuneration once for a period of six weeks. A new entitlement to continued payment of remuneration only arises if the first illness-related incapacity to work had already ended at the point in time at which the further illness leads to a renewed incapacity to work.

The defendant relied on the principle of the unity of the case of prevention, disputing the fact that the plaintiff‘s incapacity to work as a result of her mental illness had ended before the onset of her incapacity to work because of her gynaecological condition.

According to the general principles, the employee bears the burden of proving and demonstrating that they meet the eligibility requirements for continued payment of remuneration according to Section 3(1) sentence 1 EFZG (Federal Labour Court, judgment of 13 July 2005 – 5 AZR 389/04). This includes not only the fact of incapacity for work itself, but also its beginning and end. Thus, if the employer, invoking the principle of unity of prevention, disputes that incapacity to work as a result of the „new“ illness has only now occurred, the employee must demonstrate as fact substantiating the claim and, in the event of a dispute, prove, that the new incapacity to work only occurred at a point in time when the first illness-related incapacity to work had already ended.

The employee may initially rely on the medical certificate of incapacity to work to demonstrate and prove the beginning and end of an incapacity to work due to a specific illness. However, if it is undisputed or if the employer provides strong evidence that the illnesses for which the employee has been certified as incapable of working overlap, the initial certificate issued to the employee for the „new“ illness loses its value as evidence. It is consequently then up to the employee to provide full proof of the time when the new prevention from working occurred.

The testimony of the attending physician may be available as evidence. The plaintiff was not able to prove this in the present case. The fact that this could not be proved was therefore to

the detriment of the plaintiff because of the distribution of the burden of proof, and so the judgment dismissing the appeal had to be upheld.

Our comment

On the one hand, the judgment continues the Federal Labour Court's previous case law according to which the employee must demonstrate and prove that there is not one uniform case of incapacity to work which directly overlaps, but rather a new illness. The mere presentation of the certificates of incapacity for work is not sufficient for this purpose.

On the other hand, the judgment makes it clear that the employer generally has no means of knowing the employee's state of health, in particular not even through a request for information from the statutory health insurance fund (Section 69(4) SGB X), which excludes the transmission of diagnostic data and does not apply to privately insured employees anyway. In such cases, employers can therefore demand information from the employee about the existence of a „new" illness, if necessary, by presenting the relevant medical certificates.

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Employee's obligation to pay damages for investigation costs in case of non-compliance

If there is a suspicion of significant non-compliance, the employee concerned is obliged to reimburse the employer for the costs incurred by the employer in engaging a law firm specialising in corporate criminal law to clarify the facts in preparation for the dismissal.

Baden-Württemberg Higher Labour Court, judgment of 21/04/2020 – 19 Sa 46/19 (not final)

The case

On the basis of anonymous reports from a whistleblower, the purchasing manager of a company was suspected of having breached applicable compliance regulations to a considerable extent. For example, it was reported that the purchasing manager had declared private trips as business trips and that he had repeatedly been invited by business partners to Champions League matches of a Southern German football club without reporting this. The employer commissioned a law firm specialising in corporate criminal law to clarify the facts of the case. The law firm charged an hourly rate of EUR 350; total costs amounted to more than EUR 200,000. The investigations by the law firm confirmed the suspicion that the purchasing manager had violated the so-called ban on bribes by attending the Champions League games. Against this background, the employer terminated the employment relationship without notice. The validity of the termination was determined in two instances. In the context of the counterclaim, the employer asserts claims for damages – including those relating to the costs incurred in engaging the law firm – against the purchasing manager.

The labour court rejected a claim for reimbursement of the investigation costs with reference to Section 12a(1)

sentence 1 of the German Labour Court Act (Arbeitsgerichtsgesetz, ArbGG). In the view of the court, the provision excludes a substantive claim for reimbursement of costs irrespective of the basis on which it is made. The legislature had taken the fundamental decision to keep the cost risk in labour law disputes manageable by ensuring that each party knew from the outset that it would always and at most only have to bear that part of the recovery costs incurred until the end of any first instance proceedings which it itself incurred.

The decision

The Baden-Württemberg Higher Labour Court proceeds in a more nuanced way in its judgment and awards the employer a proportional claim for damages: The Higher Labour Court refers to the case law of the Federal Labour Court according to which the employee has to reimburse the employer for the necessary costs incurred by the employer due to the violation of contractual obligations if the employer assigns a detective to monitor the employee on the basis of a concrete suspicion and the employee is convicted of an intentional violation of contractual obligations. In this respect, the Higher Labour Court holds that it cannot make a difference whether detectives, auditors, forensic experts or – as in the present case – specialised lawyers, are involved in the investigation. What is instead decisive, according to the court, are the goals derived from the duties of management in the case of suspected compliance violations: to clarify the facts of the case immediately in the event of concrete indications, to remedy violations that have been identified and to sanction misconduct that has been established. Otherwise, management would have to answer for its own breach of duty and might be liable for damages itself. Nor is there any objection, in the court‘s view, to the amount of the hourly rates; on the contrary, they are in line with the usual fees of specialised and qualified lawyers.

In the opinion of the Higher Labour Court, however, the claim for reimbursement is to be limited to the costs incurred until the notice of termination was issued (in the specific case EUR 66,500). The employee‘s obligation to reimburse costs only relates to the measures necessary to eliminate the non-compliance or to prevent damage. This is the case if the investigations result in the employer giving notice of termination.

According to the judgment of the Higher Labour Court, the costs of further investigations aimed at preparing claims for damages and which are not based on a concrete suspicion of a crime are not reimbursable. Section 12a(1) sentence 1 ArbGG which also excludes a claim for reimbursement of pre-judicial or extrajudicial costs would be opposed to this. This would include damages in the form of recovery and prosecution costs.

Our comment

The judgment of the Higher Labour Court is not final; the appeal on points of law is currently pending before the Federal Labour Court. It remains to be seen what stance the Federal Labour Court will take. From the employer‘s point of view, confirmation by the Federal Labour Court of the judgment of the Higher Labour Court would be welcome. Since the Federal Labour Court has already determined in earlier decisions that an employee can be held liable for the costs incurred by employing a detective, it would be consistent to extend this liability for damages to costs incurred by employing specialized lawyers or also auditors or forensic experts, if this were necessary to clarify the facts of the case in the run-up to a termination. On the basis of the three duties of management (clarification of facts, rectification of misconduct and sanctioning of misconduct), it should be left to the discretion of management to decide which experts to consult depending on the circumstances. However, it should be noted that – at least according to the judgment of the Higher Labour Court – only the costs which were necessary to establish the facts on which the termination is based are eligible for compensation. If the employer takes the investigations as an opportunity to „turn over every stone“, he risks not being able to have recourse against the employee for these investigation costs.

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■ CASE LAW IN A NUTSHELL

The date of an employer's certificate must be the date of legal termination of the employment relationship

When issuing a qualified employer's certificate, the date of the legal termination of the employment relationship must be used as the certificate date, not the date on which the certificate was actually physically issued.

Cologne Higher Regional Court, decision of 27/03/2020 – 7 Ta 200/19 (final)

Reasons for the decision

The parties concluded a settlement in the context of unfair dismissal proceedings in which the defendant undertook to issue the plaintiff a qualified employer's certificate. The defendant agreed to use a draft of the plaintiff as a basis for the certificate, from which it may only deviate for good cause. The defendant subsequently sent several versions of the certificate to the plaintiff which differed from the draft submitted by the plaintiff. In particular, the defendant used a day more than nine months after the legal termination date of the employment relationship as the date of the certificate. The labour court imposed a penalty on the respondent in order to enforce the obligation under the court settlement, against which the defendant defended himself in the present proceedings.

The Higher Labour Court ruled that the labour court had rightly ordered the defendant to issue the plaintiff with a certificate bearing the date of the legal termination of the employment relationship. There is no good cause, in the court's view, to depart from the plaintiff's draft. In particular, the defendant is, in its view, not required to breach the truthfulness of the certificate if it states the date of legal termination as the date of the certificate. According to the court, it is a widespread custom, approved by the highest court, to use that date for the certificate, which above all creates legal certainty. It would also avoid the risk of speculation as to whether there was a dispute between the parties concerning the certificate to be issued.

Co-determination in case of „mobile work"

If regulations on the topic of „Mobile Work" – especially on issues of occupational health and safety, working hours and the workplace – are to be made, the conciliation committee is the competent body.

Mecklenburg-Western Pomerania Higher Labour Court, decision of 25/02/2020 – 5 TaBV 1/20 (final)

Reasons for the decision

There is a dispute between the parties involved about the operation of a conciliation committee on the subject of "Mobile Work". The general works council formed at the employer's company has already been trying for several years to reach an agreement on the topic of „Mobile Work". The employer, however, was not prepared to negotiate. The labour court set up a conciliation committee to decide on the drafting of a works agreement on the topic of "Mobile Work". The employer lodged a complaint.

The Higher Labour Court dismissed the employer's complaint. According to the Higher Labour Court, the labour court had rightly appointed the conciliation committee pursuant to Section 76(2) sentences 2 and 3 BetrVG. According to Section 100(1) sentence 2 ArbGG, the applications could only be dismissed due to lack of competence of the conciliation committee if the lack of competence is obvious. That is not the case here, said the court. The topic of „Mobile Work", as the employer understands it, is covered by the co-determination cases provided for in Section 87(1) No. 2, No. 6 and No. 7 BetrVG. The topic of „Mobile Work" also has a collective reference, according to the court, as the interests of colleagues could also be affected, for example in terms of accessibility, coordination of cooperation and data exchange.

Indirect discrimination against an applicant with a university degree from another EU member state

If the applicant is required to submit an equivalency certificate for a university degree from another EU Member State, this may constitute indirect discrimination and justify a claim for compensation under Section 15(2) of the AGG.

Berlin-Brandenburg Higher Labour Court, judgment of 22/01/2020 – 15 Sa 1163/19 (complaint against denial of leave to appeal)

Reasons for the decision

There is a dispute between the parties as to whether the defendant federal state (Land) is obliged to pay the plaintiff compensation for discrimination in the application procedure. The plaintiff, born in Romania, completed her studies at a Romanian university and obtained two degrees (diploma, master‘s degree). At a German university she obtained a further degree (Master‘s) and successfully completed a doctorate. The defendant Land advertised a post for which the plaintiff applied. When asked whether an accreditation procedure had been successfully completed for the Master‘s degree course completed by the plaintiff in Germany, the applicant referred to her university degrees from Romania. The plaintiff‘s application was unsuccessful and she therefore claimed compensation from the defendant Land. The defendant Land took the view that a foreign degree could be taken into account only if it was proven to be equivalent. It would fall within the scope of responsibility of the applicant. The labour court dismissed the action on the grounds that there was insufficient evidence of discrimination.

The Higher Labour Court awarded the plaintiff compensation for indirect discrimination. By making the unsolicited submission of an equivalency certificate for a university degree from abroad a prerequisite in the application procedure, the defendant Land had, according to the court, infringed the prohibition of discrimination under Section 7(1) and Section 1 of the German General Act on Equal Treatment (Allgemeines Gleichbehandlungsgesetz, AGG). In the view of the court, that provision has an effect in particular on persons of foreign origin, which is why there was indirect discrimination on grounds of ethnic origin.

According to a decision of the European Court of Justice, the recruiting authority must itself examine whether the intra-European university degree submitted is equivalent; this must be derived from the fundamental freedom of movement of workers under Article 45 TFEU.

Unreasonableness of the prohibition of an unfounded fixed-term contract due to prior employment

A previous employment of five months that took place 15 years ago does not make the prohibition of an unfounded fixed-term contract unreasonable. A contractual clause in the general terms and conditions by which the employee confirms that he or she has not previously been employed by the employer is invalid pursuant to Section 309 No. 12 letter b BGB.

Baden-Württemberg Higher Labour Court, judgment of 11/03/2020 – 4 Sa 44/19 (final)

Reasons for the decision

The parties are in dispute about the validity of fixed-term contract. The plaintiff worked for a period of five months in one of the defendant‘s companies. As part of a transfer of business, her fixed-term employment contract, which lasted for another eleven months, was transferred to another company. Subsequently, the plaintiff initially retired from working life for family reasons. 15 years later, the plaintiff applied for a position with the defendant again and was hired on a fixed-term contract. The contract contained the following provision in the general terms and conditions (GTC): “You confirm that you have never before been employed by us on any fixed-term or permanent contract.“ In the following years the fixed-term contract was renewed several times. The renewals of the fixed-term were based on agreements in existing supplementary collective bargaining agreements. In the first instance, the plaintiff successfully defended herself against the termination of the employment relationship due to the expiry of the fixed term.

The Higher Labour Court dismissed the defendant‘s appeal. According to the Higher Labour Court, the labour court had correctly decided that the unfounded limitation of the term of the employment relationship based on the previous employment was in violation of the prohibition in Section 14(2) Sen-

tence 2 of the German Act on on part-time work and fixed-term employment contracts (Gesetz über Teilzeitarbeit und befristete Arbeitsverträge, TzBfG).

Non-employment of a severely disabled person

The employer cannot use safety aspects to justify the non-employment of a severely disabled person within the framework of an existing employment relationship if the employer has not previously fulfilled the obligations incumbent upon him under Section 3a (2) of the German Workplace Ordinance (Arbeitsstättenverordnung, ArbStättV) and Section 10 ArbSchG for the barrier-free design of workplaces.

Hesse Higher Labour Court, judgment of 21/01/2020 – 15 Sa 449/19 (final)

Reasons for the decision

The parties are in dispute over the plaintiff‘s claim for employment. The plaintiff is a severely disabled person and uses a crutch. Due to the storage of explosive materials, the defendant is obliged to ensure that the buildings are evacuated in good time if an acute danger situation exists. Because of the concern that the plaintiff could not be evacuated in time due to his disability, the defendant applied to the Office for Integration for approval of the intended termination of the employment relationship with the plaintiff. The plaintiff claimed continued employment in court and was successful in the first instance.

The Higher Labour Court dismissed the defendant‘s appeal on the grounds that there was no overriding interest of the employer worthy of protection that would argue against the continued employment of the plaintiff. The court ,s view was that the defendant had not properly fulfilled its obligations under Section 3(2) ArbStättV and Section 10 ArbSchG concerning the design of workplaces without barriers.

Non-compliance with statutory legal obligations could not establish an overriding interest of the defendant in not employing the applicant, even less so an interest worthy of protection.

Requirements of a joint operation

If employees of another company are to be added to the number of employees of the employer, the conditions for the existence of a joint operation must be fulfilled.

Cologne Higher Labour Court, judgment of 13/02/2020 – 8 Sa 236/19 (final)

Reasons for the decision

The parties are in dispute about the validity of a dismissal. There is a dispute in particular on the question of whether the Protection against Dismissal Act applies because the defendant forms a joint operation with other companies and their employees are to be added. The plaintiff was of the opinion that the defendant formed a single undertaking with a number of other companies and that the number of its employees was therefore above the relevant limit under Section 23(1) sentence 2 KSchG.

The Higher Labour Court followed the view of the labour court, which found in favour of the plaintiff‘s action for unfair dismissal only with regard to the notice period. In the court‘s view, the parties‘ employment relationship was terminated by the defendant‘s notice of termination. The Protection against Dismissal Act was not applicable. The court held that the defendant does not form a joint operation with the companies listed and their employees are not to be added. According to the Federal Labour Court‘s consistent case law, a joint operation can only be assumed if the tangible and intangible resources available in an operating site are combined, organised and used in a targeted manner for a uniform technical working purpose and the use of human labour is controlled by a uniform management system. In particular, there is a lack of uniform management of the companies with regard to the essential functions of the employer in social and personnel matters. In the court‘s view, the close cooperation of the defendant with the companies listed was instead on the entrepreneurial or economic level.

■ GENERAL INFORMATION

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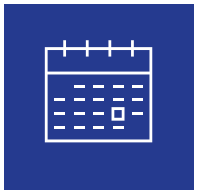
Events, publications and blog



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You will find our blog here.

Legal information

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