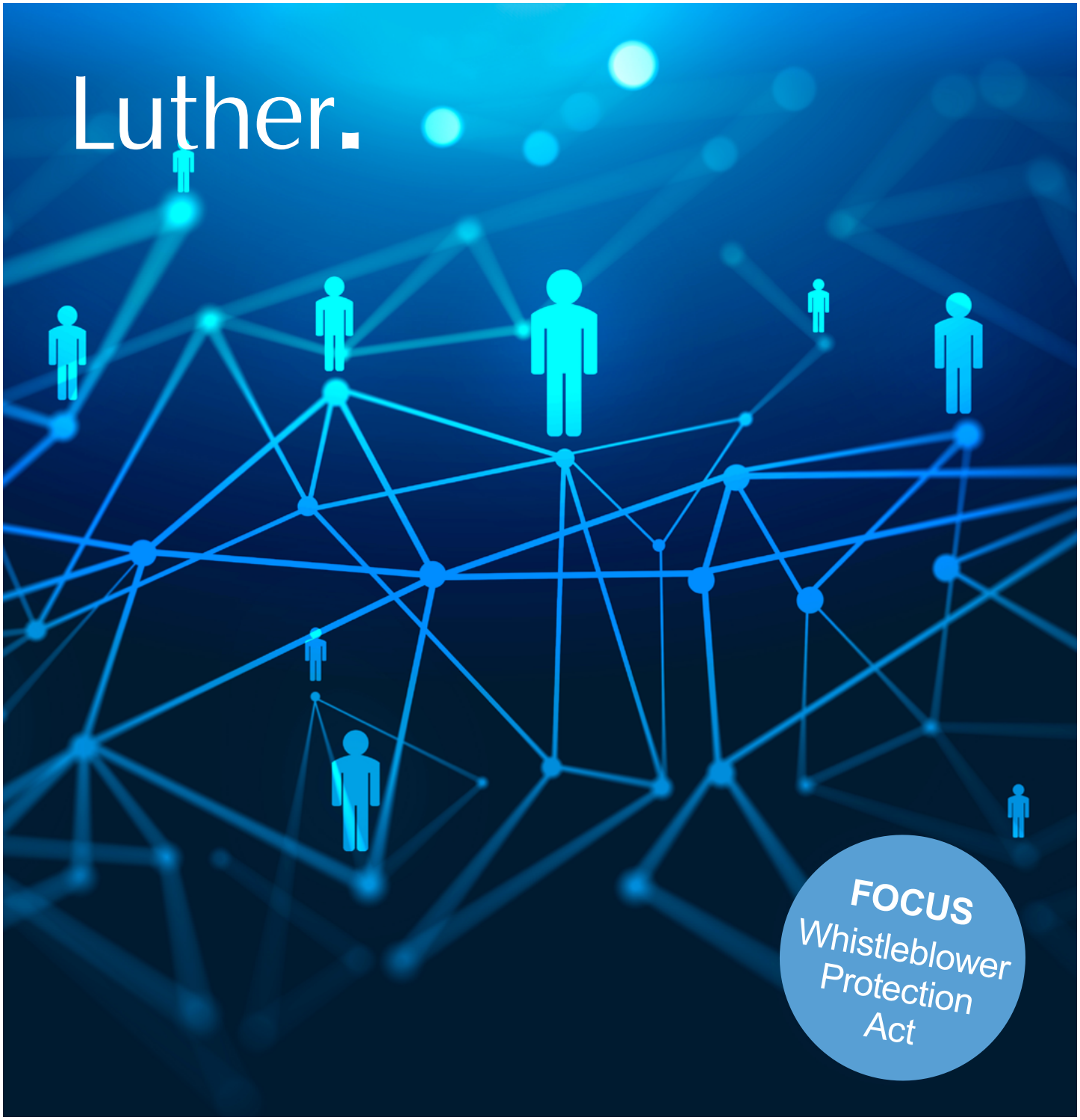

Labour & Employment Law Newsletter

Issue 2, 2021

unyer GLOBAL ADVISORS

Contents

Dear readers,

In this issue of our newsletter we are dealing with two current legislative proposals that will pose a challenge to employers. The respective draft bills prepared by the responsible federal ministries (*Referentenentwürfe*) are available now. Time for us to give you a first overview.

The Federal Ministry of Justice and Consumer Protection (BMJV) has prepared a first draft bill for a Whistleblower Protection Act (*Hinweisgeberschutzgesetz*). This proposed legislation is intended to implement the requirements contained in the so-called EU Whistleblowing Directive of 23 October 2019 (Directive (EU) 2019/1937). The draft bill prepared by the BMJV goes beyond the requirements of the EU Directive in some respects. Time is short, as the EU Whistleblowing Directive must be transposed into national law by 17 December 2021. The topic of whistleblowing will continue to gain importance in the future against the background of increasingly stringent compliance regulations and changing work organisations in global corporate structures. All good reasons for Nadine Ceruti and me to have a closer look at this draft bill in this issue and to give a first overview.

On 14 April 2021, the Federal Ministry of Labour and Social Affairs (BMAS) also presented a draft bill to “curb” fixed-term employment contracts. This is intended to implement the provisions of the Coalition Agreement on the further regulation of the law on fixed-term contracts before the end of the current legislative period. Among other things, a quota-based maximum limit for contracts where the term is fixed without any objective reason is planned, as well as numerous other tightening measures. Whether the draft bill will be implemented in this legislative period is questionable. Paul Gooren gives an overview of the possible legal changes.

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

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

Stay healthy!

Your

Achim Braner

Whistleblower law on the way: companies must take action

The Federal Ministry of Justice and Consumer Protection (BMJV) wants to comprehensively protect whistleblowers from suffering a detriment to their careers in the future and has prepared a first draft bill for a Whistleblower Protection Act (*Hinweisgeberschutzgesetz*, HinSchG-E). This proposed legislation is intended to implement and, in part, extend the requirements set out in the EU Whistleblowing Directive of 23 October 2019 (Directive (EU) 2019/1937): Thus, the HinSchG is intended to cover not only breaches of EU law, but also those of national law. Time is running out for the legislator. The EU Whistleblowing Directive must be transposed into national law by 17 December 2021.

Background: Insufficient protection for whistleblowers

Whistleblowing – the disclosure of wrongdoing in companies or authorities – is a conflictladen topic. Whistleblowers make an important contribution to uncovering breaches of the law and abuses in companies, according to the explanatory memorandum to the draft bill. However, they would always suffer a detriment at work as a result of making such a report. The BMJV's draft bill is intended to prevent this and create legal clarity as to when whistleblowers are protected when reporting breaches.

Up to now, the protection of persons providing information has been shaped primarily by national case law, which is oriented towards the guidelines of the European Court of Human

Rights (ECHR). In 2011, in a landmark decision concerning the reporting of grievances in a nursing home and a subsequent dismissal, the Court dealt with the balancing of employer and employee interests and decided that in the specific case there was a violation of the freedom of expression under Article 10 of the European Convention on Human Rights. The ECHR upheld the employee's duty of confidentiality and loyalty to his employer under his employment contract and described going public as a last resort. Whistleblowers are therefore exposed to a considerable risk when they report breaches of law to external bodies.

Wide scope of protection for whistleblowers

The personal scope of application is broadly defined in accordance with the requirements of the EU Whistleblowing Directive. It shall apply to all natural persons working in the private or public sector who have acquired information on breaches in a work-related context and who report such information to a competent authority or publicly disclose it. Persons having self-employed status, volunteers and persons belonging to administrative, management or supervisory bodies of an undertaking shall also to be covered by the personal scope of application. Nothing else shall apply to whistleblowers whose employment has ended in the meantime or those whose work-based relationship is yet to begin. Furthermore, the draft bill states that protection shall also apply to persons who assist whistleblowers in making a report or disclosure and whose assistance should be confidential.

The draft bill goes beyond the requirements of EU law and protects not only persons who report breaches of Union law, but also those who point out breaches of German law. In this context, all information on breaches of legal norms in all areas of law mentioned in Section 2 HinSchG-E will be covered. In addition to breaches of provisions subject to criminal penalties and fines, the draft also refers to breaches of laws, legal ordinances of the federal and regional governments and legal acts of the EU, insofar as these relate to one of the areas of law listed in Section 2 (1) No. 2, (2) HinSchG-E (including data protection law, environmental law, public procurement law and financial supervision law). The draft bill thus covers the whistleblower cases that occur most frequently in practice.

The draft bill does not set high standards for the validity of reported breaches. It is sufficient if, at the time of the report, the person providing the information had reasonable grounds to believe that the information on the breaches reported was true. According to the explanatory memorandum to the draft bill, neither internal reporting channels nor external competent authorities are obliged to provide technical means or procedures for anonymous reporting. There is also no obligation to process anonymous reports.

Obligation to set up internal reporting channels

In accordance with the requirements of the EU Whistleblowing Directive, the draft bill provides in Section 12 HinSchG-E for an obligation for employers with at least 50 employees to establish internal reporting channels that enable the employees to report information on breaches. Employers are not only natural persons and legal entities, but also partnerships with legal capacity and other associations of persons with legal capacity.

The planned Whistleblower Protection Act poses a great challenge to small and medium-sized enterprises in particular in terms of personnel and expertise. The draft bill therefore provides for an extended establishment period until 17 December 2023 for companies with 50 to 249 employees and allows these companies to establish a shared reporting channel with other companies. In future, smaller companies will have to consider whether to make use of this option.

The main tasks of the internal reporting channels include receiving reports, checking their validity and taking appropriate follow-up action, in particular the internal investigation of the reported facts, including feedback on the processing status within a period of three months. The performance of these tasks may be entrusted to a person employed by the company, an internal organisational unit or a third party. Employees with a dual function, heads of the compliance department, integrity officers, legal or data protection officers are mentioned in the draft bill as examples of possible designated internal reporting channels. Alternatively, external lawyers as ombudsperson, external advisors, auditors, trade union representatives or employee representatives may also be tasked with the establishment and operation of internal reporting channels.

Equal status of internal and external reporting channels – whistleblowers have a choice

The draft bill provides for two equally valid reporting channels for whistleblowers, between which they are free to choose. These are, on the one hand, internal reporting channels, e.g. within the company, and, on the other hand, external reporting channels established at the national level. Contrary to previous case law, whistleblowers are able to directly contact an external reporting channel according to the draft bill.

In exceptional cases, public disclosures (e.g. to the press) are also covered by the scope of protection of the law.

However, Section 7 (3) HinSchG-E also provides for employers to encourage whistleblowers to first use internal reporting channels. However, this must not make it more difficult or restrict the possibility of external reporting.

Prohibition of discrimination: Protection by shifting the burden of proof

Whistleblowers should be given extensive protection against retaliation as a result of reporting wrongdoing in the company. According to Section 35 (1) in conjunction with Section 3 no. 6 HinSchG-E, "retaliation" means "any act or omission which occurs in a work-related context, is prompted by reporting or by public disclosure, and which causes or may cause unjustified detriment to the whistleblower". According to the draft bill, this includes all career detriments, such as dismissal, withholding of promotion, imposition of disciplinary measures, discrimination or mobbing. In this context, the draft bill contains a reversal of the burden of proof in favour of the whistleblower. If a whistleblower suffers a detriment following a report, there is a rebuttable presumption that this is because of the whistleblower's report. The employer must then demonstrate and prove that the action taken is not related to the report. If the employer does not succeed in proving the contrary, the whistleblower may assert his or her own claims for injunctive relief and for damages regardless of fault.

Relationship to confidentiality and secrecy obligations of the whistleblower

The draft bill contains regulations in Sections 5 and 6 HinSchG-E on the sensitive areas in which the interest in maintaining secrecy could in principle stand in the way of reporting or public disclosure. For example, information that is subject to the judicial secrecy or the medical or lawyer's professional duty of secrecy is excluded from the scope of protection of the Whistleblower Protection Act. The situation is different in cases where an employee who is bound to secrecy by an (employment) contract also discloses business secrets when reporting. According to the draft bill, it will be particularly important in this case as to whether the whistleblower had sufficient reason to believe that the disclosure was necessary to uncover the breach.

Assessment and outlook

Even though this is the first draft bill which will certainly still be subject to individual amendments during the legislative process, employers are recommended to deal with this topic more intensively at an early stage – if they have not already done so. Since the EU Directive must be transposed into national law by 17 December 2021, there is a concrete need for employers to take action here. It should be noted in particular that the development and implementation of appropriate reporting systems raises numerous complex issues and that their operational implementation is frequently quite time-consuming. It should also be borne in mind that the works council frequently has co-determination rights when such systems are introduced, which can also make the introduction more difficult. Finally, the employees who are in charge of the internal reporting channels have to be trained extensively.

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New regulations in the law on fixed-term contracts – draft bill of the BMAS

On 14 April 2021, the Federal Ministry of Labour and Social Affairs (BMAS) presented a draft bill on the basis of which the temporary nature of employment contracts is to be "curbed". This draft is intended to implement the corresponding requirements of the Coalition Agreement of the Federal Government of the CDU, CSU and SPD before the end of the current legislative period. Among other things, a quota-based maximum limit for contracts where the term is fixed without an objective reason is planned, as well as numerous other tightening measures. This article is intended to provide an overview of these.

Background

In the course of the 2018 coalition negotiations, the SPD had joined the Federal Government upon the condition that the law on fixed-term contracts in particular is reformed. Accordingly, it was agreed in the Coalition Agreement of the 19th legislative period to abolish the "*abuse of fixed-term contracts*". This is to be achieved in particular by means of the following instruments: (1.) Introduction of a quota of a maximum of 2.5% of the workforce that may be subject to fixed-term contracts concluded without an objective reason for employers with more than 75 employees; (2.) Limitation of the fixed-term contracts concluded without an objective reason to a maximum of 18 months, with only a single renewal; (3.) Preventing endless chains of fixed-term contracts by prohibiting a fixed-term contract after five years.

The current draft bill of the SPD-led Ministry of Labour is now addressing these requirements and attempting to implement these and other regulations before the upcoming elections to the German parliament, the Bundestag. It is to be expected that this "matter of the heart" of the SPD will play a prominent role in the current election campaign.

In addition, the draft bill ties in with the development of case law in recent years. Since the CJEU's Kücük decision in 2012 (judgment of 26 January 2012 – C-586/10), the question of the abuse of law in case of long chains of fixed-term employment contracts has increasingly gained importance in the decisions of the German labour courts. The Federal Labour Court has gradually developed concrete requirements in this respect, which, however, still left a great deal of room for manoeuvre. Clear and much tighter limits are now to be placed on this, to the detriment of the employers' flexibility.

Quota for fixed-term contracts concluded without an objective reason

The key innovation in the proposed amendment to the law is the introduction of a maximum quota for fixed-term contracts concluded without an objective reason. Pursuant to Section 14 (5) of the draft bill for a new Act on part-time work and fixed-term employment contracts (abbreviated as 'TzBfG-RefE'), employers with generally more than 75 employees may only employ a maximum of 2.5% of their employees on the basis of employment contracts where the term is fixed without any objective reason. If this threshold is exceeded, this leads to the invalidity of (not all, but) the fixed terms that cause the threshold to be exceeded.

The date of the agreed commencement of employment is decisive for compliance with the fixed-term proportion of 2.5% and not the date of actual employment, as was envisaged in the Coalition Agreement. However, in order to facilitate the calculation, the calculation date will be the first calendar day of the preceding quarter. The following example shows the effect of this: If an employer wishes to hire a new employee on 1 May for a fixed term without an objective reason, the date to be considered is 1 January. If, for example, the employer has 200 employees at that time, he is allowed to fix the term of five employment relationships. If these have not been "used up" by

1 May, the fixed-term contract is permissible.

However, there are some specifics to be considered in detail. Trainees (in German: *Auszubildende*) are not to be counted, but temporary workers are, insofar as their deployment covers regular personnel requirements. Moreover, the quota only applies to fixed-term employment contracts concluded without an objective reason according to the Act on part-time work and fixed-term employment contracts (TzBfG), but not according to other legal bases. Moreover, the regulations apply not only to initial fixed-term contracts, but also to renewals of fixed-term contracts.

Finally, it should be noted that the draft bill refers to the "employer" as the relevant entity. It is therefore the company, i.e. the legal entity, that is important, not the business as an entity. In this respect, the application of the quota can be prevented, for example, by an employer with several smaller businesses (e.g. supermarkets or retail stores) converting each of these into independent companies.

Citation requirement

The BMAS has seen that it can be extremely difficult to verify compliance with the quota under the current legal situation. This is because, according to the established case law of the Federal Labour Court, the validity of a fixed term must always be reviewed objectively. In principle, therefore, it does not depend on the wording of the employment contract. This means that, in practice, a fixed term may well be based in individual cases both on the prerequisites of a fixed term without an objective reason and on an objective reason. It is sufficient if one of the alternative reasons for justification actually applies. There is precisely no "citation requirement" for one or the other alternative. In this respect, employers often do not have a clear overview of which employment contracts are actually legally limited in time without an objective reason, as this is not apparent from the contracts themselves.

In order to change this, the draft bill now also provides in Section 14 (6) TzBfG-RefE that it must be stated in the employment contracts if the term of a contract is fixed without any objective reason. If this written information is missing, the fixed term can no longer be based on this; if it is present, however, the fixed term can no longer be based on an objective reason within the meaning of Section 14 (1) TzBfG.

However, this means that these formal requirements do not only serve to help monitoring compliance with the quota, but they have to be complied with by all employers, i.e. including those with fewer than 75 employees. Employers must therefore decide whether they want to base the respective fixed-term contract on an objective reason or whether the term shall be fixed without such a reason. In the latter case, however, the employer must also specify the concrete legal basis for the fixed-term employment contract concluded without an objective reason, i.e. either the normal calendar-based fixed-term employment contract pursuant to Section 14 (2) TzBfG (see below for its shortening), the calendar-based fixed-term employment contract in the first four years after a new company is established (Section 14 (2a) TzBfG) or the age-related calendar-based fixed-term employment contract pursuant to Section 14 (3) TzBfG.

Maximum duration

Furthermore, the draft bill provides for a time limit on the general maximum duration of calendar fixed-term employment contracts concluded without an objective reason. Currently, it is permitted under Section 14 (2) TzBfG to fix the term of the employment contract up to a total duration of two years with a maximum of three renewals within this period of two years. The maximum duration is now to be reduced by half a year to 18 months and only a single renewal will be possible (Section 14 (2) TzBfG-RefE). According to the draft, it will still be possible to deviate from this in collective bargaining agreements, but maximum limits (54 months or three renewals) will also be included in such agreements.

Another general limitation on the maximum duration concerns the total duration of fixed-term employment relationships that is generally permitted. The aim is to establish a general ceiling of five years. This applies both to fixed-term employment contracts concluded without an objective reason (Section 14 (3) and (4) TzBfG-RefE) and to fixed-term employment contracts concluded with an objective reason (Section 14 (1a) TzBfG-RefE). Periods of assignment to the employer as a temporary worker are also to be taken into account.

These proposed regulations serve in particular to prevent the abusive use of so-called chain fixed-term contracts. In the past, employers - especially public ones - have occasionally used substitution as an objective reason (Section 14 (1) Sentence 2 no. 3 TzBfG) to keep employees in fixed-term employment relationships for many years and with many contracts. In extreme cases, this shady practice sometimes went so far that even the threshold of the abuse of law (breach of the duty to perform in good faith, Section 242 of the German Civil Code (BGB)) was exceeded. The background to this is that, according to case law, only the last fixed term is subject to judicial review

and an employer is not obliged, among other things, to maintain a general personnel reserve in order to cover the need for substitute employees. Although the Federal Labour Court had gradually set certain limits on these excesses (see, for example, Federal Labour Court, judgment of 26 October 2016 – 7 AZR 135/15), these limits have continued to be very broad and also relatively complicated. The five-year limit is therefore intended to control and simplify the situation and would render most of the above case-law obsolete.

However, the five-year limit again provides for exceptions: On the one hand, it does not apply to all objective reasons (in particular not to the fixed-term justification of the "peculiarity of the work performance" pursuant to Section 14 (1) Sentence 2 No. 4 TzBfG, i.e., for example, for athletes, actors or artists), and on the other hand, only the periods of such employment relationships are to be taken into account between which no more than three years have elapsed. The aim is to introduce a "grace period" of three years, after which the five years can be fully utilised again if necessary.

Changes to the objective reasons for fixed-term contracts

Finally, the draft bill also provides for the abolition of existing objective reasons and the introduction of new ones:

The objective reason that budgets are set for a limited period of time is to be deleted altogether in the new law (Section 14 (1) Sentence 2 no. 7 TzBfG). There had been considerable discussion for some time about the admissibility of this reason under European law. The majority saw this as unlawful preferential treatment of public employers; there is still no clarification by the highest court. The draft bill would now make this obsolete and do away with the above-mentioned objective reason altogether.

Instead, a new objective reason is to be introduced for employment in (certain) hive-off vehicles (Section 111 (10) of the draft bill for a new Social Security Code, part III (SGB III-RefE)), with the aim of avoiding redundancies and improving the chances of integration into subsequent employment with new employers.

Conclusion

The proposed amendments presented by the Federal Minister of Labour, Hubertus Heil, would considerably change the current law on fixed-term contracts. Whether one considers fixed-term contracts to be generally "good" or "bad" depends

essentially on one's political point of view. There is no doubt that such flexibility instruments, which can also be seen as a compensation for the extremely high degree of protection against dismissal, have contributed to the overall reduction in the unemployment rate. The pro-employee and pro-union Social Democrats are now trying to make fixed-term contracts even more difficult, in the hope that fixed-term contracts will become permanent contracts. The basic idea behind some of these regulations, such as the five-year limit or the citation requirement, may well make sense and promote legal certainty. However, employers also have a vested interest in this. But it speaks volumes that, for example, the "black sheep" making abusive use of fixed-term employment chains were primarily to be found in the public sector and rarely in the private sector. In part, the draft bill is thus combating a home-grown problem. However, the planned fixed-term quota will bring about considerable changes with corresponding organisational efforts. Here, employers must create cross-company structures in order to be able to guarantee compliance with the quota. In addition, new legal questions will arise which, until they are resolved, will in turn create legal uncertainty.

As time passes and the parliamentary summer recess approaches, it becomes increasingly unlikely that the bill will be passed before the end of this legislative term. This will also have an impact on the upcoming election campaign. But even after the federal election, the issue will probably continue to be explosive. The political development therefore continues to be exciting, also from the viewpoint of labour law!

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■ JUDGMENT IN REVIEWS

Obligation of the employee to pay compensation for costs of investigations conducted by law firms

Employer's claim for reimbursement of necessary costs of investigations conducted by law firms in the event of compliance breaches by an employee.

Federal Labour Court, judgment of 29 April 2021 – 8 AZR 276/20

The case

The claimant was employed by the defendant as head of the central purchasing department and was a senior manager earning a gross annual salary of approximately EUR 450,000. After the defendant received anonymous tips that the claimant was breaching the compliance regulations, it appointed a law firm specialising in such cases to investigate the matter. The latter found that the claimant had invited persons to dinner at the defendant's expense without there having been any business reason for doing so. It also established that the claimant had, inter alia, travelled to Champions League matches of FC Bayern Munich at the defendant's expense. The tickets to the games had been provided to him by the defendant's business partners upon request. The law firm charged the defendant just under EUR 210,000 for its work. Some of this work was also carried out in the period after notice of termination was given.

The defendant terminated the employment relationship with the claimant with immediate effect for good cause, alternatively with due notice. The dismissal was based on the breach of the so-called 'ban on bribes', the billing of private expenses at the defendant's expense and expense fraud in several cases. The action for unfair dismissal directed against this was dismissed without the possibility of appeal. The termination was thereby valid.

The defendant had filed a counterclaim in the context of the action for unfair dismissal for reimbursement of the investigation costs incurred through the use of the specialised law firm. The investigations by the specialised law firm were continued even after the notice of termination had been given in order to determine any claims for damages in connection with the breaches of duty.

The Mannheim Labour Court (judgment of 27 June 2019, 8 Ca 306/16) had rejected a claim for damages to this end in its entirety in the first instance. The Baden-Württemberg Higher Labour Court upheld the claim for compensation to the extent that it considered the costs arising as a result of the law firm's work carried out until the notice of termination was issued to be recoverable (Baden-Württemberg Higher Labour Court, judgment of 21 April 2020, 19 Sa 46/19). The costs exceeding that amount were not recoverable. With reference to the case law of the Federal Labour Court, it justified this by stating that the further investigations served to prepare a claim for damages, but that a claim for damages only existed with regard to those investigations which were necessary to avert imminent disadvantages. In the opinion of the Higher Regional Court, the further investigations carried out after the notice of termination was issued no longer had any influence on the elimination of the breach of contract or the prevention of loss or damage. The related costs incurred were therefore not recoverable.

The decision

In the above-mentioned case, the Federal Labour Court decided that a claim for damages by the defendant was conceivable in principle, but failed in the present case due to

the lack of need for of the investigations. The defendant had failed to present in concrete terms which activities or investigations were carried out by the law firm appointed, when and to what extent, on the basis of which concrete suspicions the defendant had about the claimant.

Furthermore, it declared that Section 12a of the German Labour Court Act *(Arbeitsgerichtsgesetz*, ArbGG) does not apply to such a case. According to this provision, the reimbursement of costs incurred in the course of proceedings in the first instance is excluded.

Our comment

This decision is in line with the strict case law of the Federal Labour Court on the reimbursement of costs for private investigators. According to this case law, an employer may request reimbursement of the costs of a private investigator if he hires the investigator on the basis of a concrete suspicion he had about a certain employee and a reasonable, economically-minded employer would have taken this action not only because it was expedient but also because it was necessary under the circumstances of the individual case in order to eliminate the disturbance or to prevent loss or damage (Federal Labour Court, judgment of 28 October 2010, 8 AZR 547/09).

The Federal Labour Court also follows this line with the present decision. Regardless of the investigating person (detective, lawyer, etc.), the employer must negotiate significant obstacles if it wishes to claim reimbursement from an employee for the investigation costs incurred due to the specific suspicion of a criminal offence or/and compliance breach it had about the employee.

The employer is well advised to keep a precise “record” of the specific suspicions on the basis of which a law firm or a detective is called in to investigate and which activities are performed in relation to which suspicions. It can be concluded that this also means that an investigator must draw up his bill of costs in appropriate detail. The work schedules must therefore be reviewed in detail before paying the fee. However, it will be necessary to await the reasons for the judgment for further details. So far only the press release is available.

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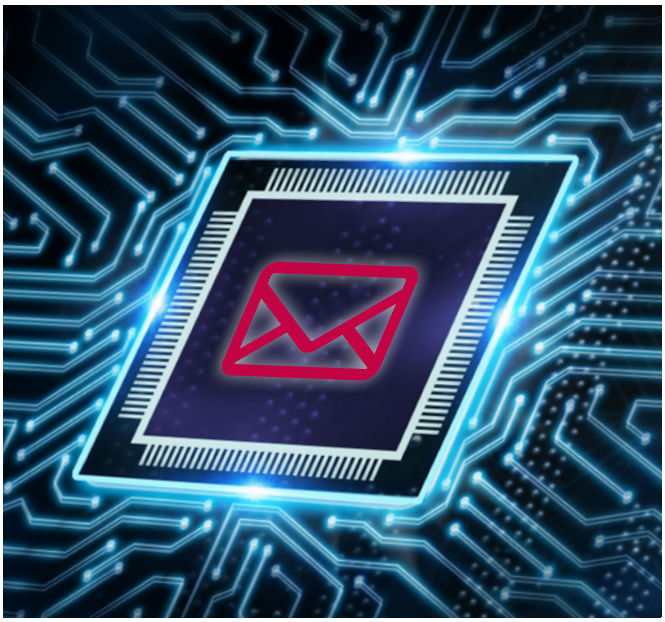
No right to copies of all work e-mails

Federal Labour Court, judgment of 27 April 2021 – 2 AZR 342/20

A dismissed employee cannot request that his former employer provides him with copies of his entire e-mail correspondence. In this respect, the Federal Labour Court ruled that such a claim was not sufficiently specific.

The case

The claimant was employed by the defendant as a corporate lawyer. After only one month, the employer terminated the employment relationship during the probationary period. In his action, the claimant requested, inter alia, information about his personal data processed by the defendant, as well as the provision of a copy of such data pursuant to Article 15(3) of the EU GDPR. The defendant had complied with the request for information, which is why the parties declared the legal dispute to be settled in this respect. The labour court dismissed the claim for a copy of the claimant’s personal data. The Higher Labour Court partially granted it and dismissed it in all other respects. It held that the claimant was entitled to a copy of his personal data which had been the subject of the defendant’s disclosure, but not to the additional copies of his e-mail correspondence and of the e-mails which mentioned him by name.



The decision

The defendants' appeal on points of law to the Federal Labour Court was not successful. The Federal Labour Court expressly left open whether the right to be provided with a copy pursuant to Article 15 (3) of the EU GDPR can include the provision of a copy of e-mails. In any case, such a claim assumed in favour of the claimant would have to be asserted in court either with a sufficiently specified claim (Section 253 (2) no. 2 of the German Code of Civil Procedures (*Zivilprozessordnung*, ZPO) or – if this is not possible – by way of an action by stages pursuant to Section 254 ZPO. This was lacking in the present case. If the defendant were ordered to provide a copy of the claimant's e-mail correspondence, as well as e-mails that mention him by name, it would remain unclear exactly of which e-mails the defendant would be required to provide a copy.

Our comment

From the employer's point of view, the judgment of the Federal Labour Court is certainly to be welcomed: With the introduction of the EU GDPR, clever employee representatives had quickly identified the right of access under Article 15 (3) EU GDPR as a means of exerting pressure in the context of unfair dismissal proceedings. A vast number of employees who were made redundant requested information about the processing of their personal data. Given the explosive nature of potential breaches of data privacy, not least the threat of fines of up to EUR 20 mio. or up to four per cent of annual global turnover, this often helped to push up severance payments.

Notwithstanding the fact that the question whether the right to be provided with a copy pursuant to Article 15 (3) EU GDPR can include the provision of a copy of e-mails remains unresolved, it is in any case appropriate that employees must be specific in their request for information. This means that the ball is now in the employee's court; only when he can specifically name the e-mails that he would like to view, is there possibly an obligation on the part of the employer to provide him with copies of these.

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Employee status of a crowdworker

The performance of a large number of very small jobs ("micro jobs") through the use of an online platform can establish an employment relationship with the platform operator. The circumstances of the individual case are decisive.

Federal Labour Court, judgment of 1 December 2020 – 9 AZR 102/20

The case

The parties disputed, among other things, the validity of an ordinary termination as well as payment claims.

The defendant is a so-called "crowdworking company", which in particular offers to control the presentation of branded products at retailers and petrol stations. For this purpose, the defendant breaks down the orders of its customers into a large number of small orders (so-called "micro-jobs"), which it makes available via an app to so-called "crowdworkers" for execution.

The parties are bound by a framework agreement and additional terms of use on crowdworking. According to these provisions, the claimant as a crowdworker was required to use the defendant's app. The app's user account was neither transferable nor could it be shared. The framework agreement, which could be terminated at any time, also provided that a contractual relationship would arise only between the claimant and the defendant, and not with the defendant's clients. The orders placed via the platform had to be processed according to de-tailed specifications. Beyond the requirements of the job, the claimant was not given any instructions as to the hours and place of work. The successful processing of orders increased the claimant's ranking in the defendant's system, giving him access to more lucrative orders. The claimant had been working for the defendant since early 2017. With an average weekly workload of approximately 20 hours, the claimant achieved average earnings of approximately EUR 1,750.00. Following disagreements over the execution of orders, the defendant notified the claimant via e-mail that it would no longer be placing orders with the claimant, that the

claimant's account would be closed, and that the claimant should disburse the balance on the app. The claimant challenged this in court, asserting, among other things, his status as an employee.

The decision

The labour court and the higher labour court dismissed the action. The claimant 's appeal to the Federal Labour Court, however, was successful. The Federal Labour Court classified the crowdworker as an employee. Based on Section 611a of the German Civil Code (Bürgerliches Gesetzbuch, BGB), the Federal Labour Court examined the existence of an employment relationship on the basis of the circumstances of the individual case. The Federal Labour Court came to the conclusion that the claimant performed work that was bound by instructions and determined by others in a manner typical of an employee within the scope of the actual performance of the contract. This is because the claimant was required to provide the service personally, the activity owed was simple in nature and its execution was predetermined in terms of content, and the specific use of the app was to be regarded as a means of third-party determination in the awarding of the order.

The obligation to provide services in person arose from the fact that, under the contractual arrangements with the defendant, the claimant was prohibited from sharing or transferring his user account on the app with or to other users. In fact, the claimant could therefore only execute the orders placed with him himself and not - like a self-employed person - have them executed by third parties (e.g. his own employees).

In the opinion of the Federal Labour Court, the fact that simple activities were involved also spoke for the existence of an employment relationship. Since it was simply not possible in essence for the claimant to freely organise his activity, since the app to be used by him specified in detail the individual work steps to be carried out by him, without leaving the claimant any relevant flexibility of his own.

Finally, the fact that the claimant's job was not self-determined resulted from the defendant's ability to control employment needs arising from the app. The acceptance of individual micro-jobs by the claimant was economically insignificant. Only the possibility of being able to accept a large number of orders enabled the claimant to find economically viable employment. However, the ability to accept a variety of orders within a given area was tied to the ranking in the defendant's

system. The claimant's ranking increased with the proper execution of orders. The defendant's system thus led - without the defendant having to give explicit instructions in this regard - to the automated planning and assignment of a large number of tasks to trained crowdworkers.

Based on this, the Federal Labour Court came to the conclusion that the long-term and continuous employment of the claimant led to an amalgamation of the individual micro-jobs into a uniform employment relationship.

Our comment

First of all, it should be noted that the Federal Labour Court's decision does not mean that crowdworkers are generally to be classified as employees. Nor does the Federal Labour Court's decision give rise to any presumption that crowdworkers are regularly to be regarded as employees. The circumstances of the individual case remain decisive.

Nevertheless, the BAG's decision poses difficulties of definition in practice. Platform operators are likely to have to adapt their contractual terms to ensure that individual crowdworkers have sufficient flexibility to execute the orders assigned to them. Against the background of the remaining legal uncertainty in the use of crowdworkers, a clarifying regulation from the legislator would be desirable. At the end of 2020 - even before the publication of the Federal Labour Court's decision - the Federal Ministry of Labour and Social Affairs (BMAS) had for the first time commented on the future working conditions of crowdworkers, in particular with regard to their inclusion in social insurance and the clarification of their employee status, in a white paper. It remains to be seen to what extent the legislator will now press ahead with this in view of the case law of the Federal Labour Court.

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Invalidity of a works council election where ballot envelopes are not used when casting votes

The principle of a secret ballot anchored in Section 14 (1) of the German Works Constitution Act (*Betriebsverfassungsgesetz*, BetrVG) is violated if ballot envelopes are not used when casting votes in a works council election. In this case, the essential procedural requirements set out in Section 11 (1) of the Rules for Election (*Wahlordnung*, WO) and Section 12 (3) WO, which provide for the use of ballot envelopes, are infringed, thereby providing grounds for contesting the works council election.

Federal Labour Court, decision of 20 January 2021 – 7 ABR 3/20

The case

The parties disputed the validity of a works council election held in May 2018. The election committee did not provide ballot envelopes for voting in person at the polling station during the works council election held at the employer's premises. Therefore, votes were cast in person without the use of ballot envelopes. Three employees entitled to vote asserted the nullity, or alternatively the invalidity, of the works council election. The applicants base their contestation on the violation of the provisions set out in the Rules for Election that ballot envelopes must be used when voting in person.

The decision

The lower courts granted the applicants' alternative claim that the works council election should be declared invalid. The appeal on points of law filed by the works council with the Federal Labour Court was unsuccessful.

The Federal Labour Court based the successful contestation of the election on the fact that the election committee had breached the provisions of the Rules for Election in Section 11 (1) and Section 12 (3), by allowing the voting in person to take place without the use of ballot envelopes. Section 11 (1) sentence 2 WO provides that voting shall take place by handing in ballot papers in the envelopes intended for this purpose. Pursuant to Section 12 (3) WO, the voter shall state his or her name and insert the ballot envelope in which the ballot paper is placed into the ballot box after the vote has been recorded on the electoral roll. The Federal Labour Court states that non-compliance with these two provisions constitutes grounds for contestation, since they are essential election provisions within the meaning of Section 19 (1) BetrVG. The reason for this was that the two provisions would uphold the principle of a secret ballot, which stipulates that the voter's vote must not be known to anyone else. The purpose is to protect the voter from any social pressure. In addition, it must be ensured that each employee can make his or her choice according to his or her free conviction. These principles are formalised in the provisions of Section 11 et seqq. WO and are indispensable. The secrecy of the ballot is guaranteed by the fact that the voter personally marks the ballot paper unobserved and puts it into the ballot envelope. This prevents the voting behaviour from becoming visible when the vote is cast.

Nor can the use of ballot envelopes be dispensed with in works council elections because ballot envelopes are no longer used in other elections, for example the elections to the German Parliament (*Bundestag*) or the elections of employee representatives to the supervisory board. In the aforementioned elections, the principle of a secret ballot is taken into account by folding the ballot paper and placing the folded ballot paper in the ballot box, so that the vote cannot be seen by others. This is expressly provided for in the relevant election regulations, whereas the election regulations for works council elections prescribe the use of ballot envelopes. The Federal Labour Court further states that it cannot be ruled out that the election result would have led to a different outcome if ballot envelopes had been used, since it is not inconceivable that employees could be influenced in casting their votes by the assumption that their voting behaviour could become known due to the lack of use of ballot envelopes

Our comment

With its decision, the Federal Labour Court confirms its established case law that an infringement of essential election regulations, i.e. those which concern the basic principles of the works council election, constitutes grounds for contestation.

Particularly strict requirements are to be placed on the principle of a secret ballot as such a fundamental principle, so that a breach of the provisions of the electoral regulations, which set out more detailed rules concerning the principle of a secret ballot, also constitutes grounds for contestation. Essential electoral regulations are, in particular, those regulations which, in contrast to mere 'shall' provisions or rules of order, must be complied with. Since the Rules for Election for works council elections stipulate the mandatory use of ballot envelopes when casting votes, votes cast in breach of these regulations are invalid. This is consistent, as it is the only way voters can be sure that their vote will remain secret. In case of decision proceedings in which the invalidity of an election due to (possible) infringements is to be clarified, the elected works council remains in office until a legally binding decision is reached, such that the employer must also take due account of the participation and co-determination rights of the works council in this respect and cooperate with it in a spirit of trust. The reason for this is that the invalidity of a works council election that is determined in a final and binding manner is only effective for the future. This is different in the case of an infringement that leads to the nullity of the works council election. Nullity is assumed in the case of breaches of essential principles to such an extent that there is no longer even a semblance of a lawful works council election (Federal Labour Court, decision of 19 November 2003 – 7 ABR 24/03). The nullity of a works council election is limited to absolutely exceptional cases and can lead to the interruption of the works council election. If nullity is likely, this can also be asserted by the employer in interim injunction proceedings, which must be reviewed in each individual case.

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Entitlement to equal pay in the context of temporary employment

A temporary agency worker who asserts a claim for equal pay must submit all facts necessary for the calculation in order to substantiate the claim and, when asserting the claim, must observe the preclusion periods validly agreed in the employment contract.

Federal Labour Court, judgment of 16 December 2020 – 5 AZR 22/19

The case

The claimant asserted a claim for equal pay pursuant to Section 8 (1) of the German Temporary Employment Act (Arbeitnehmerüberlassungsgesetz, AÜG) (or Section 10 (4) AÜG in the version applicable until 31 March 2021). She was employed as a temporary agency worker by the sued employer, a temporary work agency, from January to September 2017 on the basis of a fixed-term employment contract. During this period, she was assigned to two user undertakings. The employment contract concluded between the claimant and the defendant contained a reference to the collective agreements for temporary employment (in short: igZ-DGB). In addition, a two-stage preclusion period of three-months each for the assertion of claims was agreed in the employment contract.

The claimant claimed differential pay according to the equal pay principle on the basis of the collective agreements applicable to permanent employees at the user undertakings. The claimant based her claim for differential pay on the fact that a deviation from the principle of equality through an agreement in the employment contract on the application of corresponding collective agreements which deviated from the collective agreements applicable in the user undertaking was not compatible with Article 5 of Directive 2008/104/EC on temporary agency work.

The labour court dismissed the action. The higher labour court upheld the claimant's appeal.

The decision

The claimant was also unsuccessful with the asserted claim before the Federal Labour Court. The Federal Labour Court did not have to decide on the question of Union law raised by the claimant as to whether it is compatible with Article 5 of Directive 2008/104/EC on temporary agency work to deviate from the collective agreements applicable at the user undertaking by means of an agreement in the employment contract on the application of corresponding collective agreements since, in the opinion of the Federal Labour Court, this was not relevant to the decision. The Federal Labour Court dismissed the claim asserted by the claimant due to non-compliance with the preclusion periods under the employment contract and the lack of substantiation of the claim asserted by the claimant.

In the opinion of the Federal Labour Court, the claim asserted by the claimant against the first user undertaking was forfeited, since the claimant did not adhere to the first stage of the preclusion period agreed in the employment contract for claims for remuneration. In the opinion of the Federal Labour Court, the imperative nature of the claim under Section 8 (1) no. 2 AÜG provided for in Section 9 (1) no. 2 AÜG is not opposed to this. Preclusion periods relate exclusively to the manner of enforcing a claim that has arisen and do not form part of its content. Since the claim for equal pay is a claim arising out of the employment relationship, the independent preclusion provision in the employment contract could cover the claim asserted by the claimant.

Likewise, the claimant did not have a claim to equal pay against the second user undertaking pursuant to Section 8 (1) AÜG, since she did not sufficiently substantiate the amount of such a claim. In principle, the temporary agency worker bears the burden of submission of facts (Darlegungslast) and the burden of proof (Beweislast) concerning the amount of the claim. In this regard, the temporary agency worker has a right to information pursuant to Section 13 AÜG. If the temporary agency worker does not rely on such a right, he or she must present all the facts necessary for its calculation in order to submit the facts required for the right to equal pay. This includes first and foremost the designation of a comparable permanent employee and the remuneration granted to this employee by the user undertaking. If, alternatively, the temporary agency worker refers to a general remuneration scheme, he or she must not only explain its content, but also that such a scheme was actually applied in the user undertaking during the period of temporary employment and how he or she would have been classified according to it had he or she been a regular employee. These requirements were not met by the claimant's submission of facts, which relied solely on the fact that the user undertaking belonged to the metal and electrical industry to substantiate the claim.

Our comment

In this decision, the Federal Labour Court confirmed and substantiated the previous case law on the agreement of preclusion periods in temporary employment relationships and the requirements for the burden of submission of facts and the burden of proof on the part of the temporary agency worker for the assertion of remuneration on the basis of the principle of equal pay. The application of preclusion periods agreed in the employment contract as general terms and conditions (Section 305 (1) Sentence 1 and Sentence 2 of the German Civil Code (Bürgerliches Gesetzbuch, BGB) also for the claim to remuneration in accordance with the principle of equal pay provides the employer who assigns temporary agency workers to user undertakings on a commercial basis, with a tool for limiting risk. Although preclusion periods do not have any effect with regard to obligations to pay arrears to social security institutions and do not exclude sanctions due to violations of the principle of equal pay, they can limit the risk of a claim in relation to the temporary agency workers in terms of time. The contractual provisions must be measured against the requirements of both the German Temporary Employment Act and the law concerning general terms and conditions.

The Federal Labour Court also comments on the fact that the claimant has not fulfilled her obligation to substantiate the amount of the differential remuneration. If the temporary agency worker cannot rely on information provided by the temporary work agency pursuant to Section 13 AÜG, the requirements for the submission of facts regarding the remuneration that are relevant for an equal pay increase.

On the other hand, there was no need for the Federal Labour Court to comment on the compatibility of the deviation from the principle of equal pay through the agreement of collective agreements with Union law (Article 5 (3) of the Temporary Agency Work Directive) because the action was not successful for other reasons. This question, which in the case law of the courts of instance is as far as can be seen predominantly answered in favour of compatibility, will therefore continue to occupy the courts in the future.

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Different treatment of part-time and full-time employees in terms of remuneration

The core issue of the decisions submitted (CJEU) is whether an overall consideration of all remuneration components or an individual consideration of the specific remuneration scheme is to be applied in order to assess the existence of unequal pay due to part-time employment. It will also have to be decided whether the reaching of certain thresholds satisfies the requirements for the existence of an objective reason for unequal treatment for full-time and part-time employees and is compatible with the pro rata temporis principle.

Federal Labour Court, decision of 11 November 2020 – 10 AZR 185/20 (A)

The case

The subject of the proceedings is a claim for increased remuneration, so-called additional flying hours remuneration, of a pilot employed on a 90% part-time basis. In addition to a basic allowance, there is a collectively agreed entitlement to the additional flying hours remuneration if a certain number of flight duty hours are worked per month, thereby triggering the thresholds for the increased remuneration. There is no provision in the collective agreement for these limits to be reduced for part-time workers in proportion to their working time. The claimant is of the opinion that the trigger thresholds should be lowered in accordance with his part-time factor, so that he is entitled to the increased compensation if these individual trigger limits are exceeded. The defendant is of the opinion that the difference in treatment is justified by an objective reason, since the additional flying hours remuneration serves to compensate for a particular workload.

The labour court upheld the action. The higher labour court dismissed the action.

The decision

In the opinion of the Tenth Senate of the Federal Labour Court, a preliminary ruling by the CJEU is required for the final decision on the legal dispute.

First of all, the CJEU had to decide whether a national provision treats part-time workers less favourably under Clause 4 (1) of the Framework Agreement on part-time work annexed to Directive 97/81/EC ('the Directive') if it allows additional remuneration for part-time and full-time workers to be linked in a uniform manner to the fact that the same number of working hours is exceeded and thus allows the total remuneration, and not the specific remuneration component of the additional remuneration, to be taken into account.

The CJEU had, inter alia, in the Helmig case (1994), made a comparison of total remuneration and found that part-time employees received the same total remuneration as full-time employees if they received an overtime allowance when the standard working time laid down in the collective agreement was exceeded.

In the Elsner-Lakeberg case (2004), on the other hand, the CJEU considered the remuneration components in isolation. An unequal treatment of part-time employees was assumed, since the number of additional hours to be worked in order to receive overtime pay had not been determined in proportion to the respective working hours.

Finally, in the Voß case (2007), the CJEU compared the methods of overall and individual assessment and assumed unequal treatment of part-time employees if they were affected earlier by a reduction in hourly pay than full-time employees.

The Sixth Senate abandoned the overall method initially applied by various senates of the Federal Labour Court with reference to the Elsner-Lakeberg 2017 decision and took an isolated view of the overtime remuneration component. The Senate justified a differentiation between part-time and full-time employees with regard to the working of a standard number of hours in order to receive overtime pay on a higher work load limit of part-time and full-time employees. In 2018, the Tenth Senate followed this view and abandoned its case law on the overall assessment. Remuneration for standard working hours and remuneration for overtime exceeding the normal working hours that can be compensated by spare time (Mehrarbeit) and overtime that cannot be compensated by spare time (Überarbeit) are to be compared separately. Whether the Elsner-Lakeberg case actually constituted a change in the case law of the CJEU, however, had met with great concern in the lower courts and in the literature.

In the present case, if the additional flight hours remuneration component is considered in isolation, unequal pay must be assumed. Part-time employees would not benefit from the additional remuneration until they had worked the difference in hours between their personal working time and the working time of a comparable full-time employee. If, on the other hand, the total remuneration is taken into account, there is no unequal treatment. Accordingly, part-time employees received the same (basic) remuneration for the difference in hours as a full-time employee. A preliminary ruling by the CJEU is required.

If the CJEU affirms the application of the individual assessment, the question then arises as to whether the purpose of the additional remuneration as compensation for a particular workload meets the requirements of the objective reason to justify the difference in treatment (Clause 4 (4) of the Directive) and is compatible with the pro rata temporis principle set out in Clause 4 (2) of the Directive.

The CJEU has not yet ruled on this issue. The pro rata temporis principle does not contain an absolute prohibition of discrimination, but only states that a different workload alone does not justify different treatment. Unequal treatment is

justified if the reason for it results from the relationship between the performance and the extent of the part-time work. These conditions are fulfilled by the additional flying hours remuneration provided for in the collective agreement. However, it is unclear whether the justification that the additional remuneration serves to compensate for a particular workload fulfils the requirements of an objective reason in order to justify the unequal treatment. A preliminary ruling by the CJEU is necessary to decide the case.

Our comment

It remains to be seen how the CJEU will position itself on these two questions. It is to be welcomed that the first question referred for a preliminary ruling provides an opportunity to clarify the decision reached in the Elsner-Lakeberg case. It is hoped that this decision will contribute to clarity at the national level on the methods to be applied when determining unequal treatment between full-time and part-time workers. This decision would not only provide the courts of instance with a uniform methodology. The parties to the agreement could already prevent unequal treatment of part-time and full-time employees by applying the appropriate methodology. It remains to be seen whether the CJEU will ultimately commit itself to the application of one method of interpretation or whether it will consider both methods to be applicable depending on the individual case of the remuneration scheme to be assessed.

With regard to the second question referred for a preliminary ruling, it remains to be seen whether the CJEU will have to rule on this question or whether it will take an abstract position in this respect since it will not be necessary to decide this in the present case. From a practical viewpoint, an initial decision on the substantive requirements of the objective reason would be useful in order to be able to design legally secure solutions in line with the interests of employees and employers in the future and with a view to the changing needs of employees and employers.

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■ CASE LAW IN A NUTSHELL

Dispute over the validity of a notice of dismissal pending a change of contract

Rhineland-Palatinate Higher Labour Court, judgment of 16 March 2021 – 8 Sa 125/20

An employee may not bring an action against an unnecessary notice of dismissal pending a change of contract if he has accepted the contractual offer associated with the notice of dismissal on the condition that the change of working conditions is socially justified. Even if the employer's notice of dismissal unnecessarily endangered the existence of the employment relationship and was therefore disproportionate, the employee must bear the costs of the legal dispute in this case.

Reasons for the decision

The employee making the claim is employed under a collective bargaining agreement, according to which the classification of employees is automatically determined by their field of activity. In the opinion of the employer, the employee's range of activities did not match her previous classification. The employer gave notice of dismissal to the employee pending a change of contract even though this was unnecessary given that the provisions of collective agreements apply automatically. The employer justified the notice of dismissal on the grounds of urgent operational requirements. The employee accepted the offer of a change of contract associated with the dismissal subject to its social justification. She also filed an action for protection against a change of contract with the labour court, which the labour court dismissed as unfounded. The appeal filed against this was also unsuccessful.

The court of appeal stated in this regard that the subject of the action for protection against a change of contract pursuant to Section 2 of the German Protection against Dismissal Act (Kündigungsschutzgesetz, KSchG) is the social justification of the changed contractual working conditions compared to the working conditions that existed at the time of receipt of the notice of change and until the date of the change. Here, however, there was no such change in working conditions; the employee's reclassification did not result from changes in the terms of her employment contract, but rather from the automatic nature of the collective bargaining agreement. For this reason, however, the reclassification could not be reviewed in court by way of an action for protection against a change of contract.

The procedural consequences in such a case of an unnecessary notice of dismissal pending a change of contract depend on the employee's reaction: 1. If - as is the case here - she accepts the request for change subject to the proviso that the allegedly changed working conditions are socially justified, and if she brings an action for protection against a change of contract, this is rejected; there is no change in working conditions. In order to obtain full legal protection in such a case, the employee must file appropriate subsidiary applications. 2. If the employee rejects the change request associated with the notice of dismissal pending a change of contract, what remains of the notice of dismissal pending a change of contract is the notice of termination. The action for protection against unfair dismissal brought against this pursuant to Section 4 Sentence 1 of the German Protection against Dismissal Act (Kündigungsschutzgesetz, KSchG) is successful because an unnecessary notice of dismissal pending a change of contract is disproportionate and therefore invalid.

Reduction of holiday entitlement in the event of short-time work

Dusseldorf Higher Labour Court, judgment of 12 March 2021 – 6 Sa 824/20

The employee's annual holiday entitlement is to be reduced proportionately by periods during which he is not obliged to work due to short-time work being reduced to zero for economic reasons.

Reasons for the decision

The employer had introduced short-time working in 2020 due to COVID19 and also agreed a 3-day working week with the employee without making a separate holiday arrangement. In June, July and October, the short-time work of the employee was reduced to zero working hours. Her holiday entitlement was reduced by 1/12 by the employer. The employee brought an action against this, seeking a declaratory judgment that she was entitled to an unreduced holiday entitlement of 14 days (the proportion of 28 days' holiday corresponding to the 3-day week).

The dismissal judgment of the labour court was upheld by the higher labour court. It is true that the holiday entitlement under Sections 1, 3 (1) of the Federal Vacation Act (Bundesurlaubsgesetz, BUrlG) automatically arises after six months of employment and is not affected by short-time work. However, the number of leave days and thus the amount of the holiday entitlement depended on the number of days on which the employee was required to work. That followed from the recreational purpose of the holiday. The minimum annual holiday of 24 days was thus based on a 6-day week. However, an exemption from the obligation to work where short-time work is reduced to zero working hours should therefore also be taken into account. The same follows from Union law, in respect of which the CJEU has already held that the right to paid annual leave is, in principle, subject to the condition that the worker has actually worked during the period in question. Various exceptions from this principle apply, which, according to Hamm Higher Labour Court, also include a case where work is reduced to zero during short-time work throughout the entire calendar year on the basis of a redundancy programme and claiming short-time working allowances while being employed by a hive-off vehicle. However, the case to be decided here where short-time work is reduced to zero working hours for several months as a result of the economic situation was different: This form of short-time work is a case of part-time work for which a reduction in the holiday entitlement is recognised. This is also in line with Union law, on which the CJEU has previously held that short-time work is to be regarded as actual temporary part-time employment because the short-time worker only formally has a full-time employment contract.

Labour law - contesting the effective adoption of a resolution by the works council based on lack of knowledge

Hesse Higher Labour Court, decision of 8 February 2021 – 16 TaBV 185/20

If the employer disputes the works council's adoption of a resolution based on lack of knowledge, it must substantiate the invitation, agenda and adoption of the resolution in detail. However, such substantiation is also sufficient if the employer is in a position to dispute individual aspects. Working from home is not an obstacle to attending a works council meeting. The works council decides by resolution whether participation in such a meeting is to be by video or telephone conference.

Reasons for the decision

The employer organises the access to the company premises, which is regulated in the company agreement, by means of an access control system and company passes. In this way, the employer denied employees access to the workplace before 5:30 a.m., against which the works council is seeking an injunction. In particular, the employer contested the proper

adoption of a resolution by the works council to initiate these proceedings.

The labour court had dismissed the application as inadmissible. The complaint lodged against this was rejected by the higher labour court, which, although it did not consider the application to the labour court to be inadmissible, found it to be unfounded. It is the responsibility of the works council to demonstrate that the resolution was passed properly. On the other hand, according to Section 138 (4) of the German Code of Civil Procedure (Zivilprozessordnung, ZPO), the employer can plead lack of knowledge because it lacks its own perception in this respect. Provided that the works council substantiates the preconditions for an effective resolution, a blanket declaration of lack of knowledge by the employer is irrelevant. Rather, the employer must state the facts specifically disputed by means of substantiated submissions. Only then should evidence be taken. Moreover, the works council's resolution was not invalid because a works council member was not present. Attendance at the works council meeting was not at the discretion of the individual member who was working from home. A different decision could at most result from Section 29 (3) of the German Works Constitution Act (Betriebsverfassungsgesetz, BetrVG), according to which the works council must decide that a hybrid meeting is to take place as a result of a corresponding application.

In substance, however, the determination of the opening hours of the company did not fall within the scope of the works council subject to codetermination. In this respect, the employer is exercising its domiciliary rights. Therefore, although the application to the labour court was admissible, it had to be dismissed.

Operational Integration Management (OIM) - proportionality of a dismissal due to illness

Dusseldorf Higher Labour Court, judgment of 9 December 2020 – 12 Sa 554/20

An operational integration management process must be carried out again if the employee is again unfit for work for more than six weeks without interruption or repeatedly within twelve months after the first operational integration management process. The cause of his illness is irrelevant for this.

Reasons for the decision

The employee, who had been employed since 2001, was on sick leave for a total of 762 days between 2010 and 2016, which resulted in significant costs for the continued payment of wages. The employer dismissed him in 2015 on operational grounds, but invalidly because of his special protection against dismissal as a works council member. In 2016, he was dismissed again due to illness, against which the employee successfully brought an action for protection against dismissal. From 2017 to 2019, the employee was again on sick leave for a significant period of time. At the instigation of the employer, an operational integration management process took place in 2019. The employee stated that his absences were also due to draughts at work which made him ill. His superior stated that this draught could not be completely eliminated. Then, in October 2019, the employer consulted the works council about a proposed ordinary termination of employment, and in November applied for approval from the Inclusion Office. The latter rejected the application because there was no special protection against dismissal. In early 2020, the employer again terminated the employment relationship and continued to employ the employee during the trial. With his action for protection against unfair dismissal, the employee defends himself against this dismissal.

The labour court upheld the action, and the employer's appeal against it was unsuccessful. The dismissal was not socially justified and therefore legally invalid. Whether the employee can be given a negative health prognosis required for a dismissal due to illness and whether these health problems can no longer be reasonably accepted by the employer, the court leaves undecided. In any case, the dismissal was not necessary to eliminate the disruption in the employment relationship, because the reorganisation of the workplace according to the needs of the employer was available as a milder means. In particular, the employer was required pursuant to Section 167 (1) Sentence 1 of the of the German Social Code, Book IX (SGB IX), to carry out a new operational integration management process. The employee was again unfit for work for 74 working days after the first operational integration management process. This requires the employer to carry out another operational integration management process in view of its purpose.

Continued employment during a trial and subsequent judicial termination of the employment relationship

Mecklenburg-Western Pomerania Higher Labour Court, judgment of 9 March 2021 – 5 Sa 226/20

The employer's request to resume work after the action for protection against dismissal has been granted and the employer has been ordered to continue to employ the employee on a provisional basis does not imply that the employer is willing to conclude an employment contract and establish a new employment relationship. This applies even if the employee has not threatened enforcement or made the employer aware of his enforceable title to continued employment.

Reasons for the decision

Previous proceedings for protection against unfair dismissal led to the termination of the employment relationship in return for severance pay. However, employee and employer continue to dispute the validity of various terminations and, in particular, the consequences of continued employment during the trial.

The labour court had dismissed the action for protection against unfair dismissal. This judgment has now been confirmed by the higher labour court. The employment relationship between the parties had already been previously terminated. In this respect, it only mattered whether they had established a new employment relationship during the ongoing proceedings for protection against unfair dismissal. The contracting parties are free to do so and this can be done both explicitly and implicitly, in particular provided that the employment relationship ends automatically with the legally binding conclusion of the unfair dismissal proceedings. Such a conditional employment relationship is particularly likely if the employer requests the employee during the proceedings for protection against unfair dismissal to resume and continue his employment until the court decision.

However, this consideration does not apply if the action for protection against unfair dismissal was upheld. The employer would then be obliged to actually continue the employment, but not to conclude a new employment contract. For this reason, however, the continued employment was to be interpreted only as the avoidance of enforcement and not as the wish to conclude a new employment contract. Therefore, according to general principles, such an agreement does not exist.

Claim for damages for failure to perform work until the expiry of the notice period

Cologne Higher Labour Court, judgment of 5 March 2021 – 10 Sa 802/20

The employer violates its duty to mitigate damages if he makes the possible employment of an employee during the expiry period of the mutually terminated employment relationship dependent on the recalculation of remuneration already earned.

Reasons for the decision

The employee and the employer had terminated their employment relationship by mutual agreement because a better employment opportunity had arisen for the employee. However, the employer only agreed to a termination at the end of the contractually agreed notice period. The employee nevertheless stopped working. She is now suing for outstanding claims to remuneration from the terminated employment relationship, which the employer is countering with claims for damages for non-performance of work, offsetting them and otherwise claiming them in the alternative.

The labour court ruled in favour of the employee and the employer's appeal against this judgment was also unsuccessful. Even though it is true in the view of the court that the employee is obliged to pay damages on the merits under Section 280 (1) of the German Civil Code (Bürgerliches Gesetzbuch, BGB), because she failed to perform her duties and was therefore at fault, the employer was unable to prove that this was the cause of any loss it suffered. A loss of profit within the meaning of Section 252 BGB could be considered, but she did not substantiate this. In any event, she breached her obligation to mitigate damages: the employee had made contradictory statements about the possibility of alternatively employing a freelancer. Furthermore, the employee has submitted, without this being objected to, that part of her work was taken over by another employee. In this respect, there was a shortfall in capacity utilisation, which was compensated for and excluded a loss of profit. Finally, it had to be taken into account that the employment of the employee could have been continued to be employed to a lesser extent and that the employee was willing to do so. Only the employer did not agree to this. By making such employment of the claimant conditional on the recalculation of variable remuneration already earned, the employer did not avail itself of this possibility of mitigating the damage.

■ GENERAL INFORMATION

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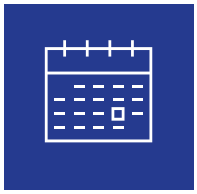
Events, publications and blog



You will find an overview of our events here.

You will find a list of our current publications here.

You will find our blog here.

Legal information

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