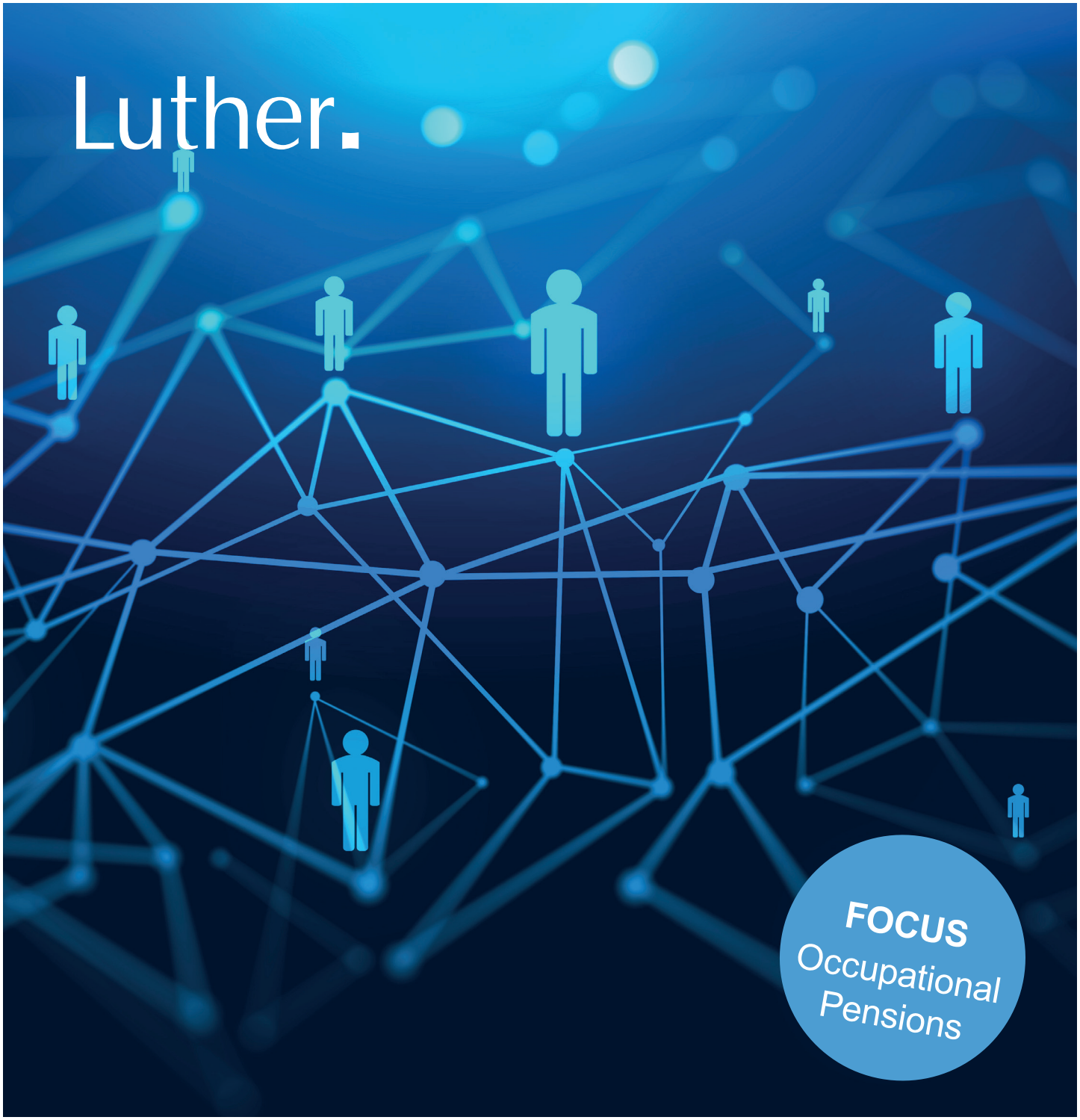

Labour & Employment Law Newsletter

Issue 2 2022

unyer GLOBAL ADVISORS

Content

Dear Readers,

With the holiday season ahead of us, what could be more appropriate than putting together some good holiday reading for your break. Whether you're on the beach or in the mountains, you're sure to have made a good choice with our latest Labour & Employment Law Newsletter. In this issue, we look at a variety of different topics.

Collective redundancy notifications carry significant risk potential for employers due to the complexity of the subject matter and constantly evolving case law. In May 2022, Nadine Ceruti and I were able to have the question on the necessary content of collective redundancy notifications, which had not yet been clarified by the supreme court, clarified in proceedings before the Federal Labour Court. The judgments are an important milestone in the context of case law on the effectiveness of collective redundancy notifications. Against the background of these judgments, we have dealt in this issue with current developments in collective redundancy notification law and provide an overview of key practice-oriented issues.

In mid-April 2022, the Federal Ministry of Justice published a second draft bill for a Whistleblower Protection Act . 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). This provides for the obligation of employers with usually at least 50 employees to set up internal reporting channels. From the perspective of labour law, the protection of whistleblowers against retaliation is another essential aspect. The draft does not contain a planned effective date. Time is short, as the EU Whistleblowing Directive must be transposed into national law by 17 December 2021. It is therefore expected that the law will be passed this year. 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. These are all reasons for Sandra Sfinis and Martina Ziffels to have a closer look at this draft bill in this issue and to provide a first overview.

On 21 June 2022, our partner Dr Marco Arteaga opened a congress on occupational pensions (baV) in Berlin with top-class representatives from politics, science and practice. The motto of the congress was "Leinen los Sozialpartnermodelle!" (Cast off social partnership models!) At the invitation of the Eberbacher Kreis, some 150 industry representatives gathered in the Meistersaal at Potsdamer Platz to discuss the future of social partnership models in Germany. In this issue, we therefore deal with the topic of occupational pensions and introduce the baV experts in our practice group.

Naturally, we will also consider the latest case law developments in this newsletter. We have again made a selection that we hope will be of particular interest to you. As always, we look forward to receiving your feedback on our topics. Please feel free to contact our authors directly if you have any suggestions or questions.

In the last issues of our newsletter we presented a new section in which we report on labour law developments and topics from our newly founded global network unyer. We are very pleased that Antoine Jouhet from FIDAL in Lyon is providing new insights into French labour law in this issue.

In addition, our special newsletter will be published shortly on the red-hot amendments to the Act on Written Evidence of the Essential Conditions Applicable to an Employment Relationship, which the German Bundestag passed on 23 June 2022. This results in an acute need for action on the part of companies.

We wish you a happy reading and hope you have a nice summer and a relaxing time.

Stay healthy!

Yours'

Achim Braner

Current developments on collective redundancy notifications

In the case of more extensive staff reduction measures, employers regularly have to overcome the hurdle of an effective collective redundancy notification in advance. The particular difficulty for the employer lies in the fact that the legal requirements for the effectiveness of a collective redundancy notification are very high and it is therefore highly susceptible to error. It is therefore not surprising that the collective redundancy notification often becomes a subject of dispute in court proceedings and that errors result in the invalidity of the dismissals.

The adoption of Council Directive 98/59/EC of 20 July 1998 on the approximation of the laws of the Member States relating to collective redundancies (the so-called Collective Redundancy Directive, or "CRD") created the basis for the collective redundancy notification obligation. The German legislator transposed the CRD requirements into national law with Section 17 et seqq. of the German Protection against Dismissal Act (*Kündigungschutzgesetz*, KSchG). The courts interpret Section 17 et seqq. KSchG on the basis of the requirements of the CRD in conformity with the Directive, insofar as the national provisions leave room for interpretation. The interpretation is based on the purpose of the CRD. This is primarily aimed at protecting employees in the event of collective redundancies. Case law is constantly evolving and unfortunately, occasionally causes astonishment. Employers are therefore well advised to deal intensively with the issue in advance of planned collective redundancies.

1. Collective redundancy notification obligation

Section 17 KSchG obliges employers to submit a collective redundancy notification to the Employment Agency if a certain number of employees are to be dismissed within 30 days. The obligation to notify depends on the size of the company. Section 17 KSchG therefore provides for different thresholds depending on the size of the company. All redundancies that occur in any selected 30-calendar-day period are added together. This may mean that a dismissal that was not initially subject to a collective redundancy notification subsequently becomes subject to notification if the threshold values are exceeded in the relevant 30-day period after all. As a result, the non-notified dismissal becomes (subsequently) invalid.

The number of regular employees in the company is to be taken into account in determining the respective size of the

company. If the number of employees is more than 20 and less than 60, the collective redundancy notification would have to be submitted when more than five employees are dismissed. The threshold values of Section 17 KSchG are therefore quickly reached depending on the size of the company. If there are at least 60 and less than 500 employees, 10% (or more than 25 employees) of the regular employees would have to be dismissed. If the size of the company exceeds 500 employees, the collective redundancy notification must be submitted when at least 30 employees are dismissed. In some cases, the number of employees can be difficult to determine, especially in the case of seasonal fluctuations. It therefore depends on the number of regular employees. Accordingly, the decisive factor is the staffing level that is characteristic of the company in general, i.e. in the regular course of business, and not the number of employees actually employed at the time of the dismissal. Freelance employees are not included. Pursuant to Section 17 (5) KSchG, members of the executive boards of legal entities and representatives of partnerships as well as managing directors, plant managers and similar executives are expressly excluded insofar as they are authorised to independently hire or fire employees. However, caution is required here, as this provision is likely to be non-compliant with the Directive, at least in parts. Thus, in the opinion of the CJEU, managing directors who do not hold an equity interest in the company also count as employees within the meaning of collective redundancy law. They must therefore be taken into account both in determining the size of the company and in determining the relevant threshold values for dismissals. It is therefore advisable to take into account the groups of persons named in Section 17(5) KSchG purely as a precautionary measure when determining the threshold values and to include them in the collective redundancy notification.

The decisive factors are the dismissals effected in the respective company. Only the concept of establishment under Union law is decisive for the determination of the company. This was decided by the Federal Labour Court in February 2020 in the so-called Air Berlin cases referring to the CRD. Thus, neither the concept of establishment as defined in the German Protection Against Dismissal Act nor that of the Works Constitution Act applies. An establishment, within the meaning of the CRD, is a definable entity that has some permanence and stability and is designed to perform one or more tasks. The entity must have a body of employees, technical means as well as an organisational structure to perform these tasks. The demarcation can cause difficulties in individual cases. This applies in particular to matrix structures as well as within cross-location entities. Joint operations of multiple companies also regularly present employers with challenges when it comes to collective redundancy notifications.

Dismissals within the meaning of Section 17 KSchG include employer-side terminations as well as other terminations of the employment relationship initiated by the employer (e.g. termination agreements). According to a recent judgment by the Dusseldorf Higher Labour Court of 15 October 2021 (7 Sa 405/21), terminations due to illness are also to be considered as dismissals within the meaning of Section 17 KSchG. They must therefore be taken into account when determining the threshold values for issuing a collective redundancy notification.

2. Responsibility and Employment Agency forms

The collective redundancy notification must be submitted to the responsible Employment Agency. The Employment Agency responsible is the one in whose district the establishment in which the dismissals are effected is located. Thoroughness and accuracy are required in the selection process, as a collective redundancy notification submitted with the wrong Employment Agency will result in the termination being invalid. The Federal Labour Court has recently confirmed this once again (Federal Labour Court, judgment of 13 February 2020, 6 AZR 146/19).

If there are several establishments or parts of establishments affected by the dismissals, the question arises as to which of the establishments must be reported. The same applies if the deployment of employees is controlled from another location or for employees in the field. The net result may be that the collective redundancy must be reported to several different agencies. In any case, extreme caution is required here.

The purpose of the collective redundancy notification is to enable the Employment Agency to absorb and reduce the burden on the labour market. It should be able to react quickly with appropriate placement and qualification measures for the dismissed employees by informing them at an early stage. Section 17 KSchG therefore contains precise requirements for the content of the collective redundancy notification implementing the CRD.

For the precise implementation of the requirements and, in particular, in order to keep the overview of the attachments to be enclosed, it is generally recommended to use the forms designed by the Federal Employment Agency. Further details can be included in a cover letter for the collective redundancy notification and submitted with it to the locally responsible Employment Agency.

The Federal Employment Agency shall declare receipt of the collective redundancy notification and its completeness. However, it should be noted that the notice of the Employment Agency cannot cure errors in the notification. An incorrect notification therefore remains invalid, even if the Employment Agency has not pointed out any errors. The Federal Labour Court has recently confirmed this once again.

3. Requirements for the content of the collective redundancy notification

The formal requirements for the content of the redundancy notification are derived from Section 17 (3), sentences 2 to 5 KSchG. According to the wording of the law, the notification "must" contain information on the name of the employer, the registered office and type of establishment, the reasons for the planned dismissals, the number and occupational groups of the employees to be dismissed and those normally employed, the period during which the dismissals are to be effected and the criteria for selecting the employees to be dismissed (Section 17 (3) sentence 4 KSchG). In addition, further personal data of the employees to be dismissed "shall" be communicated, namely gender, age, occupation and nationality (Section 17 (3) sentence 5 KSchG).

With its judgment of 25 June 2021, Hesse Higher Labour Court caused quite a stir among labour law experts, as in the opinion of Hesse Higher Labour Court, the so-called "shall" information in accordance with Section 17 (3), sentence 5 KSchG on gender, age, occupation and nationality must already be provided together with the collective redundancy notification. A lack of this information leads to the invalidity of the collective redundancy notification and thus also of the notified redundancies. The Higher Labour Court essentially justifies this by stating that the "shall" information is also "relevant" information within the meaning of the CRD.

In its judgment of 19 May 2022, the Federal Labour Court annulled the decision of Hesse Higher Labour Court (Federal Labour Court, judgment of 19 May 2022, 2 AZR 467/21). The Federal Labour Court clarified that the interpretation advocated by the Higher Labour Court is contrary to the clearly discernible intent of the German legislator and thus exceeds the limits of interpretation in conformity with the Directive. The decision of the Federal Labour Court is to be welcomed. Accordingly, it has now been decided by the highest court that the "shall" information does not already have to be submitted with the collective redundancy notification.

4. The involvement of the works council - the consultation procedure

If a works council exists in the establishment, it must be informed and consulted in advance about the intended measure as part of the collective redundancy proceedings (Section 17 (2) KSchG). Section 17 (2) KSchG specifies the minimum requirements for informing the works council. A copy of the notification to the works council must be forwarded to the Employment Agency at the same time (Section 17 (3) sentence 1 KSchG).

Failure to inform the works council or failure to inform the works council properly shall lead to the invalidity of the collective redundancy notification and thus to the invalidity of the notifiable terminations. The question of whether the failure to forward the copy to the Employment Agency also results in the invalidity of the dismissals is currently the subject of a referral by the Federal Labour Court to the CJEU (Federal Labour Court, decision submitted of 27 January 2022, 6 AZR 155/21 (A)).

In a second step, the works council must be given the opportunity to advise on avoiding or limiting dismissals and mitigating their consequences. The works council's statement must be forwarded to the Employment Agency together with the collective redundancy notification. If a statement is not available, the collective redundancy notification shall only be effective if the employer credibly demonstrates that it informed the works council at least two weeks prior to issuing the notification pursuant to Section 17 (2) KSchG and it explains the status of the consultations with the works council to the Employment Agency (Section 17 (3), sentence 3 KSchG). According to a decision of Hesse Higher Labour Court, it should also be permissible for the employer to submit the works council statement at a later date, in which case the time limit of Section 18 KSchG (prohibition of dismissal) does not begin to run until the Employment Agency receives the complete notification.

5. Time of the collective redundancy notification

The collective redundancy notification must be submitted to the competent Employment Agency prior to the notices of termination. This was decided by the CJEU in the Junk decision of 27 January 2005. The relevant date is the date on which the notice of termination is given and not the date on which it is received. It is harmless if the employer has already signed the

notice of termination before the notification was issued, as long as it has not yet left its sphere of control (Federal Labour Court, judgment of 13 June 2019, 6 AZR 459/18).

The Federal Labour Court accepts "subsequent notification" of dismissals that have become notifiable. However, only limited to the following: subsequent notification is only permitted for additional intended dismissals within the 30-day period. Dismissals that took place in the past but were not notified remain ineffective.

6. Conclusion

Collective redundancy notifications carry significant risk potential for employers due to the complexity of the subject matter and constantly evolving case law. This is especially true if the measure has to be implemented under high time pressure. Employers are therefore strongly advised, also against the background of the great temporal dynamics of staff reduction measures, to deal intensively with the topic at an early stage and to prepare the collective redundancy notification carefully.

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Dealing with whistleblowers: What employers must observe in the future under the draft bill for a Whistleblower Protection Act

Whistleblowers, i.e. "a person who informs people in authority or the public that the company they work for is doing something wrong or illegal"[1], or informants, are to be given greater protection since the enactment of the EU Whistleblowing Directive (Directive (EU) 2019/1937). It was eagerly awaited how the German legislator would implement the requirements of the EU Whistleblowing Directive in the Whistleblower Protection Act (*Hinweisgeberschutzgesetz*, HinSchG). For example, may an employer terminate an employee who causes an external reporting scandal without first drawing attention to any wrongdoing within the company?

In mid-April 2022, the Federal Ministry of Justice published a "pre-consented" second draft bill (hereinafter "HinSchG-E"). This provides for the obligation of employers with usually at least 50 employees to set up internal reporting channels. From the perspective of labour law, the protection of whistleblowers against retaliation is another essential aspect.

The draft does not contain a planned effective date. It is expected that the law will be passed this year.

1 https://www.oxfordlearnersdictionaries.com/definition/english/whistle-blower#:~:text=%2F%CB%88w%C9%AAsl%20bl%C9%99%CA%8A%C9%99r%2F,doing%20something%20wrong%20or%20illegal

Which information is subject to the protection of the law (material scope of application)?

The material scope of application of the HinSchG-E covers all information on violations of national criminal law, but also of EU law specified by the Directive as well as standards of national law that are factually related to the areas of regulation specified by EU law.

In contrast to the first draft, information on all violations subject to fines no longer fall within the scope of the law. Violations are covered only "insofar as the violated provision serves to protect life, limb or health or to protect the rights of employees or their representative bodies." For employers, this means that, as the draft currently stands, violations of the obligation to pay the statutory minimum wage or non-compliance with occupational health and safety provisions that are subject to fines are covered by the material scope of application. Violations of the rights of works constitutional bodies (e.g. works council, spokesperson committee) are also covered.

Which persons are protected (personal scope of application)?

The "person providing the information" is protected. According to Section 1 HinSchG-E, this is any natural person who has obtained information about the aforementioned violations in connection with professional activities or in the run-up to such professional activity and reports or discloses them. This broad personal scope of application thus covers not only (former) employees but also job applicants, self-employed persons, volunteers and members of corporate bodies (supervisory board members, etc.).

Furthermore, in addition to whistleblowers, persons who are the subject of or affected by a report or disclosure are also protected. The bill therefore also covers named witnesses and even those persons who are accused of misconduct.

To which employers do the provisions of the HinSchG apply?

From the time the Act comes into force, all employers in both the private and public sectors with usually at least 50 employees are required to comply with it, in accordance with Section 12 (2) HinSchG-E, although a transitional period until 17 December 2023 is to apply to such employers with fewer than 250 employees, in accordance with Section 42 HinSchG-E.

Pursuant to Section 12 (3) HinSchG-E, selected employers will also be required to comply, regardless of the number of employees, particularly in the financial services sector.

What are the employer's obligations?

Pursuant to Section 12 (1) HinSchG-E, the employer must establish internal reporting channels. In accordance with the

group privilege expressed in Section 14 (1) HinSchG-E, it is possible to establish a uniform internal reporting channel for the parent company, sister company or subsidiary, for example. In addition, several smaller and independent companies may also set up a uniform internal reporting channel pursuant to Section 14 (2) HinSchG-E.

In addition, Section 19 et seq. HinSchG-E provides for the establishment of external reporting channels by the Federal Government, whose tasks will be performed by the Federal Office of Justice. Additional reporting channels may be established at federal state level.

Previously, the Federal Labour Court considered an attempt at internal clarification to be necessary in some cases before the employee turned to external agencies. Is such a gradation (internal remedy before external reprimand) also provided for in the HinSchG-E?

No. The law distinguishes between confidential **reporting** to internal and external reporting channels on the one hand and **disclosure** to the public (e.g. press, social media) on the other. **Reports** concern information provided to the reporting channels that are sufficiently substantiated. **Disclosures** concern information about violations to the public.

According to Section 7 HinSchG-E, the whistleblower has the right to choose whether to make use of an internal or external reporting channel. However, for disclosure to the public (press, social networks), the informant must, in principle, have previously made a report to the external reporting channel and no follow-up action has been taken or the informant has not received feedback in time. However, in special cases, the whistleblower is also protected if he goes directly to the public, for example, if there is a risk of irreversible damage to the physical integrity of a person.

What does the prohibition of retaliation include?

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 informant or whistleblower. Thus, any adverse action taken as **a result of** the report or disclosure may be considered to be retaliation. In the employment relationship, this includes, for example, the notice of termination, the issuance of a warning, the refusal to allow participation in a training event, negative performance appraisals, changes in working hours, (reputational) damage or the causing of financial losses.

Does a prohibition of termination apply to whistleblowers?

No, but: only retaliation in response to reported or disclosed information is prohibited. In this respect, the constellation is comparable to the prohibition of measures under Section 612a of the German Civil Code (*Bürgerliches Gesetzbuch*, BGB), according to which an employee may not suffer any disciplinary measures for the permissible exercising of a right. An absolute prohibition of termination does not apply, so that, for example, the notice of termination for behavioural, operational or personal reasons is still conceivable for other reasons.

However, in contrast to the prohibition of measures under Section 612a BGB, a reversal of the burden of proof applies to retaliation under Section 36 (2) HinSchG-E. If the employee submits that he reported or made available a report or disclosure of a violation under the HinSchG-E and subsequently suffered a disadvantage, it is up to the employer to prove the facts that the measure was not taken as a result of the report or disclosure and that the person providing the information did not suffer an unjustified disadvantage.

What happens in the event of a violation of the HinSchG provisions?

In addition to the fact that measures taken contrary to the prohibition of retaliation (e.g. notices of termination) are null and void pursuant to Section 134 BGB, the perpetrator of a prohibited retaliation is obligated pursuant to Section 37 HinSchG-E to compensate the person providing the information for the damage caused by the retaliation. These may be - also future - financial losses, damages for pain and suffering as well as equitable compensation in money due to the violation of the general right of personality. However, there is no entitlement to the establishment of an employment relationship pursuant to Section 37 (2) HinSchG-E.

In addition, the administrative fine provisions provided for in the HinSchG-E must be observed, which may, for example, be payable to the regulatory authorities in individual cases up to EUR 100,000.00 for obstructing reports, prohibited retaliation or violating confidentiality.

Outlook

Once the law comes into force, employers are required to implement it quickly. In particular, the obligation to set up an internal reporting channel gives rise to a concrete need for action. In this context, the law raises complex issues, not least because of the requirement to maintain confidentiality. In addition, the employer must deal with the works council in order to safeguard its co-determination rights.

We will provide you with further information on the employment law provisions of the HinSchG-E, in particular on the prohibition of retaliation and the co-determination rights of the works council, in our webinar "Der HinweisgeberschutzG-E aus arbeitsrechtlicher Perspektive" (The Draft Whistleblower Protection Act from an Employment Law Perspective) on 7 July 2022 from 12.30 p.m. to 1.15 p.m. We cordially invite you to attend the webinar: [https://www.luther-lawfirm.com/newsroom/veranstaltungen/detail/10340].

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■ bAV-SPECIAL

"Cast off social partnership models!"

Luther partner Dr Marco Arteaga opens top-class bAV congress

Berlin - On 21 June 2022, a congress on occupational pensions (baV) was held in Berlin under the motto "Leinen los Sozialpartnermodelle!" (Cast off social partnership models!) with top-class representatives from politics, science and practice. At the invitation of the Eberbacher Kreis, some 150 industry representatives gathered in the Meistersaal at Potsdamer Platz to discuss the future of social partnership models in Germany.

The Eberbacher Kreis is an association of leading bAV consultants from national and international commercial law firms founded in 2016.

In his opening speech, the spokesperson of the Eberbach Kreis, **Luther partner Dr Marco Arteaga**, pointed out the importance of the social partnership models introduced by the German Company Pension Strengthening Act (*Betriebsrentenstärkungsgesetz*), especially for small and medium-sized employers:

"SME, in particular, do not burden themselves with liability risks or additional administrative efforts by participating in social partnership models, but they can keep up with large employers in the competition for qualified specialists when it comes to social benefits," Arteaga said.

The social partnership models are also receiving tailwind from the political arena. **Permanent State Secretary at the Federal Ministry of Labour and Social Affairs, Dr Rolf Schmachtenberg**, representing the Federal Minister of Labour, Hubertus Heil, who was prevented from attending at short notice, emphasised that the social partnership models offered an ideal and innovative instrument for further expanding the important role of the collective bargaining parties in old-age provision. According to Schmachtenberg, the collectively agreed social partnership model opens up possibilities for simple, attractive, very cost-effectively organised company pensions with a concomitant high level of security.

"The Federal Government therefore stands by this model and thanks the colleagues who are currently working on its implementation with the social partners," Schmachtenberg said.

Peter Klotzki, Managing Director of the association of independent professions "Bundesverband der Freien Berufe e.V.", sees the social partnership models as an effective means of increasing the loyalty of employees in independent professions and countering the shortage of skilled workers:

"If the legal conditions are created, we can bring all of the occupations of the independent professions together in a single fund or single social partnership model. We expect this to result in enormous cost benefits in the interest of employees."

The conference programme was rounded off by contributions from prominent voices from abroad.

David Webber, professor at Boston University and author of the highly regarded book "The Rise of the Working Class Shareholder - Labor's Last Best Weapon", the former CEO of the second largest Dutch pension fund "Zorg en Welzijn (PFZW)" managing assets of around EUR 250 billion, **Peter Borgdorff**, as well as **Thomas R. Schönbächler**, Chairman of the Executive Board of the largest Swiss pension fund, provided exciting insights into the pension system in the USA, the Netherlands and Switzerland in their presentations.

No further employer's allowance for deferred compensation

If a collective pension agreement from 2008 stipulates an employee entitlement to an employer's allowance for the deferred compensation, employees cannot demand an additional employer's allowance on the basis of the statutory transitional provision in Section 26a of the German Company Pensions Act (BetrAVG). If a company collective agreement from 2019 refers to such a collective pension agreement, any entitlement is also excluded beyond 31 December 2021.

Federal Labour Court judgment of 8 March 2022 - 3 AZR 361/21 and 3 AZR 362/21

Background

The German Company Pension Strengthening Act (*Betriebsrentenstärkungsgesetz*, BRSG), which came into force on 1 January 2018, introduced a mandatory employer's allowance for deferred compensation with the statutory employer's allowance in accordance with Section 1a (1a) of the German Company Pensions Act (*Gesetz zur Verbesserung der betrieblichen Altersvorsorge*, BetrAVG) for the insurance-based options of implementation, namely direct insurance and pension funds (*Pensionskasse* and *Pensionsfond*). With this allowance, the employer returns to the employee most of the social security contribution savings resulting from the deferred compensation agreement. The employer must generally pay the allowance in the amount of 15% of the deferred compensation, unless the actual social security contribution savings are lower in individual cases. This statutory provision may also be deviated from by a collective bargaining agreement to the disadvantage of the employees (Section 19 (1) BetrAVG).

Due to the transitional provision of Section 26a BetrAVG, the employer's allowance obligation for deferred compensation agreements concluded before 1 January 2019 will only apply after a transitional period of three years. For all deferred compensation agreements entered into after 1 January 2019, the employer's allowance must be paid immediately. This means that, as of 1 January 2022, it will be mandatory to subsidise all affected deferred compensations.

In this context, the Federal Labour Court had to make a decision on the question of whether an allowance voluntarily granted by the employer even before the statutory provision came into force already fulfils the statutory obligation, or whether it may be necessary to pay an *additional* allowance.

The cases

In both proceedings, the parties are disputing the employer's obligation to pay an employer's allowance in accordance with Section 1a(1a) BetrAVG in 2019 and 2020. Both claimants (employees) converted part of their salary to a pension fund on the basis of a 2008 area collective agreement (*Flächentarifvertrag*) on pensions. The collective agreement gives employees the option of using salary up to the maximum limit under tax and social security law to finance company pension benefits. Based on the collective agreement, the employer also granted the employees a basic pension amount equivalent to 25 times the skilled worker's basic wage per calendar year.

In one case, an area collective agreement is directly applicable due to the fact that both parties are bound by the collective agreement; in the other case, however, a company collective agreement (*Firmentarifvertrag*) from 2019 was applicable, which refers to the aforementioned area collective agreement.

The decisions

Both actions were unsuccessful.

The area collective agreement had been concluded before 1 January 2019. The Federal Labour Court classified it on the basis of Section 26a BetrAVG as a deferred compensation agreement under collective law within the meaning of the provision therein. Therefore, any entitlement to an allowance per se cannot exist until after 31 December 2021.

Due to the statutory transitional provision in Section 26a BetrAVG, employees cannot demand a further employer's allowance until 31 December 2021 if a collective pension

agreement from 2008 already provides for employee entitlement to deferred compensation and additional benefits from the employer on top of the deferred compensation.

In the opinion of the Federal Labour Court, the company collective agreement is a deviation permitted by law in accordance with Section 19 (1) BetrAVG. According to this, certain provisions of the BetrAVG - including Section 1a BetrAVG - may also be deviated from in a collective agreement to the disadvantage of the employees.

The fact that, from the point of view of the Federal Labour Court, such a deviation had to be assumed, was justified by the fact that this company collective agreement referred to the provisions of the area collective agreement on pensions which deviated from Section 1a BetrAVG. Among other things, the provisions on a basic pension amount in that collective agreement had included a distribution of the economic benefits and burdens of deferred compensation that deviated from Section 1a(1a) BetrAVG.

Therefore, if a company collective agreement from 2019 refers to such an area collective agreement and thus deviates from Section 1a BetrAVG to the disadvantage of the employees, any entitlement is also excluded beyond 31 December 2021. The transitional provision of Section 26a BetrAVG is irrelevant in this context.

Our comment

Many questions have unfortunately been left unanswered by the long-awaited rulings of the Federal Labour Court on the employer's allowance under Section 1a (1a) BetrAVG, such as whether the 2008 area collective pension agreement could make use of the collective bargaining opening clauses in Section 19 (1) BetrAVG and modify employees' entitlement even though it was concluded before the BRSG came into force.

With regard to the question of whether collective agreements can constitute deferred compensation agreements under the provisions of Section 26a BetrAVG, at least, the court's classification provides clarity.

Employers and their associations should agree on clear requirements for the employer's allowance in collective agreements that are to be newly concluded. The extent to which payments should be considered to be allowances for deferred compensation should be explicitly specified.

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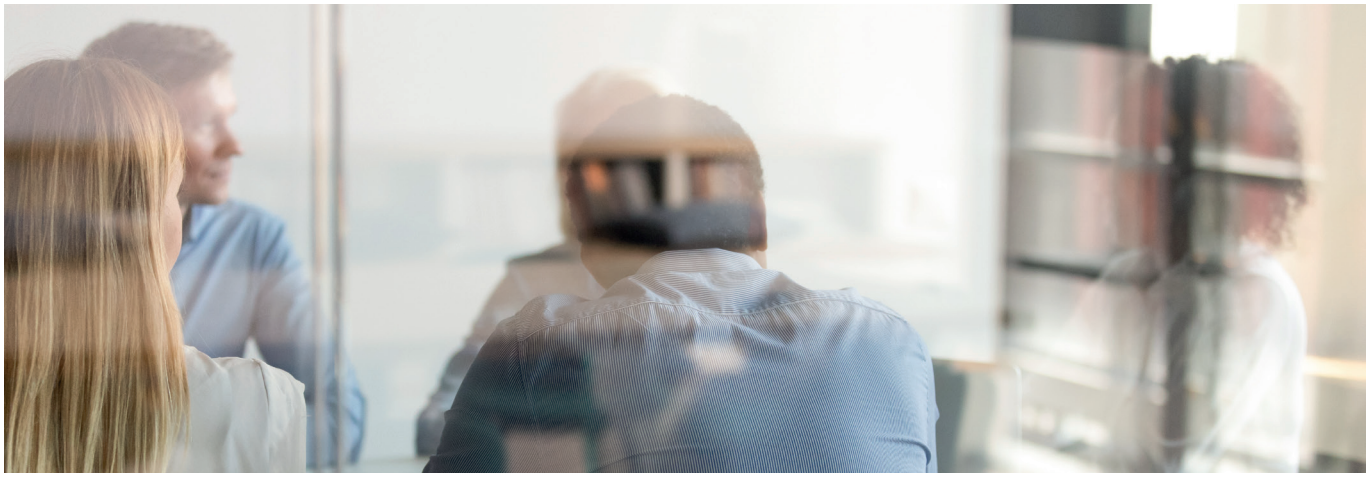
Team Pensions

Luther's Pensions Team provides advice on all topics relating to occupational pension schemes.



- Design, closure, amendment or restriction of pension schemes
- Due diligence on occupational pension law and drafting of contracts for corporate transactions
- Establishment and review of contractual trust arrangements (CTA)
- Release from liability of pension obligations in liquidations and company successions
- Answering all other questions on occupational pension law, including references to tax law, accounting law
- tax law, accounting law, insurance contract law and insurance supervisory law

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■ JUDGMENT IN REVIEWS

The specificity of the statement of claim when asserting claims under data protection law for information about and a copy of personal data

If a plaintiff requests information about and a copy of personal data, a statement of claim that contains terms that are subject to interpretation in addition to the wording of Article 15 (1) 2nd half-sentence EU GDPR and about the content of which there are irremediable doubts is not sufficiently specific. The lack of specificity of the claim leads to the dismissal of the action. Only if the plaintiff cannot reasonably be expected to substantiate the claims further and there is no doubt for the parties as to their content, can this principle be deviated from, since the scope of the claim and the judgment are then established.

Federal Labour Court, judgment of 16 December 2021 – 2 AZR 235/21

The case

After the defendant received reports of possible misconduct by the plaintiff from a whistleblower system it had in place, it dismissed the plaintiff for reasons of conduct. In separate proceedings, the action for protection against unfair dismissal was finally decided in favour of the plaintiff.

Parallel to these proceedings, the plaintiff asserted his claims for information and copies pursuant to Article 15 (1) 2nd half-sentence and (3) sentence 1 EU GDPR in his action. He essentially requested information about his personal performance and conduct data that the employer had stored in its IT systems.

He requested that the defendant be ordered to:

"1. provide the plaintiff with information about the plaintiff's personal performance and conduct data processed by it and not stored in the plaintiff's personnel file, with regard to

- *the purposes of the data processing;*
- *the recipients to whom the defendant has disclosed or will disclose the plaintiff's personal information;*
- *the storage duration or if this is not possible, criteria for determining the duration;*
- *the origin of the plaintiff's personal data, insofar as the defendant did not collect them from the plaintiff himself; and*
- *the existence of automated decision-making, including profiling, and meaningful information about the logic involved and the scope and intended effects of such processing.*

2. provide the plaintiff with a copy of his personal performance and conduct data that is the subject of the processing it performs."

The plaintiff thus based his request literally on the information listed under Article 15 (1)(a) to (f) EU GDPR but added the terms "performance and conduct data" and limited the request for information to personal data "not stored in the personnel file".

At first instance, Stuttgart Labour Court (judgment of 5 June 2019 - 3 Ca 4960/18) upheld the action in full. The Baden-Württemberg Higher Labour Court (judgment of 17 March 2021 - 21 Sa 43/20) partially amended the judgment of the court of first instance, reworded the operative provision with numerous restrictions, conditions and example cases, and dismissed the remainder of the action.

The decision

The employer's appeal on points of law was successful. The judgment of Baden-Württemberg Higher Labour Court is erroneous in law as its judgment formula is not sufficiently defined, according to the Federal Labour Court. A title must have specific or at least determinable content in itself so that the scope of the substantive legal force and thus the effects of the decision can be determined. Otherwise, ambiguities about the content of the obligation would be shifted from the contentious proceedings to the enforcement proceedings. In addition, for reasons of the rule of law, it must be recognisable for the debtor in which cases he has to fear a coercive measure.

According to these standards, an operative provision is too vague if it refers to statutory provisions which themselves contain legal terms and references that require interpretation. The most recent requests for information and copies submitted by the plaintiff were also not sufficiently specific and were thus inadmissible. The use of terms requiring interpretation can only be considered if, on the one hand, further substantiation is impossible or unreasonable for the plaintiff and, on the other hand, there is no doubt for the parties as to their content. Consequently, a request that merely repeats the text of the law is regularly not suitable for resolving a particular dispute between the parties with the effect of res judicata.

The plaintiff's request, which uses the terms "performance and conduct data" that require interpretation and leads to additional ambiguity as to which information is sought by excluding a storage location ("not stored in the plaintiff's personnel file"), does not meet the requirements of specificity. What data constitutes "performance and conduct data" is disputed between the parties and cannot be adequately determined by recourse to the case law of the Federal Labour Court with regard to Section 87 (1) No. 6 of the German Works Constitution Act (*Betriebsverfassungsgesetz, BetrVG*) and the definitions developed there.

In this context, the Senate did not fail to recognise that, for reasons of effective legal protection, there had to be a possibility to enforce the claim following from Article 15 (1) 2nd half-sentence EU GDPR in court. The question as to the admissibility of a claim that merely reproduces the wording of the law pursuant to Article 15 (2) 2nd half-sentence EU GDPR if the employee has not yet received any information from the employer can be left open in view of the special features of the right to information determined by EU law. This is because the plaintiff had added further conditions to his claim, which would make the claim he had formulated not a "minus" but an "aliud" to the claim content pursuant to Article 15 (1) 2nd half-sentence EU GDPR. In this respect, the limitation of the claim could not be theoretically deleted. In addition, the plaintiff had not taken into account that the defendant had already provided information in the current proceedings and had not taken this as an opportunity to substantiate his (remaining) claim.

Consequently, the claim for copies pursuant to Article 15 (3) sentence 1 EU GDPR is also inadmissible, since in the event of a conviction it would also be unclear to which personal data the conviction would specifically relate and when the claim would be fulfilled. In this respect, the plaintiff has the option of asserting his claim by way of an action by stages (*Stufenklage*). The plaintiff's request for copies was not intended to obtain information to further substantiate his claim. A mere repetition of the wording of the regulation is, unlike possibly in the case of the right to information in accordance with Article 15 (1) 2nd half-sentence EU GDPR, in principle not sufficient. It was not possible to identify the personal data of which a copy would be requested. In this respect, there was also no need for preliminary ruling proceedings, as the Senate had already justified elsewhere (Federal Labour Court, judgment of 27 April 2021 - 2 AZR 342/20). This is because the statements made there are also to be applied accordingly to the right to information. Moreover, in the absence of any relevance to the decision, it is irrelevant whether the principle of effec-

tiveness would be satisfied by considering a statement of claim based on the mere wording of the norm.

Our comment

With this decision, the Federal Labour Court confirmed its case law of 27 April 2021 (case no.: 2 AZR 342/20), in which it substantiated for the first time the requirements for the specificity of requests for information on the basis of Article 15 EU GDPR. It ruled that a blanket request for the "surrender of all e-mails that are the subject of data processing and were sent to the employee's official e-mail address or mention him by name" was too vague. However, it must not be overlooked that the present decision is based on a special constellation of facts given the restricted request for information. Usually, claims for the provision of information and the issuance of copies are asserted in practice reproducing the wording of Article 15 (1) 2nd half-sentence of the EU GDPR. Unfortunately, the Federal Labour Court still left open the question of the admissibility of this kind of statement of claim. The relevance of this question is evident, as an incorrect response could lead to claims for damages under Article 82 EU GDPR and administrative fines under Article 83 EU GDPR and claims for information are increasingly being used in the context of actions for protection against unfair dismissal to put employers under additional pressure.

Against the background of this legal question, which has not been decided by the supreme court, employers who are confronted with a request for information that uses or is oriented to the wording of Article 15 (1) 2nd half-sentence of EU GDPR still have the argument of the claim not being specific available as a defence. This applies, in particular, if the plaintiff uses terms that are subject to interpretation for the purpose of alleged substantiation.

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Offer of a Workplace suitable for "suffering" vis-à-vis disabled employee - proportionality

An employee who, due to a disability, can no longer fulfil the essential functions of his previous job shall also be assigned during the probationary period to another job for which he has the necessary skills, abilities, and availability, provided that this measure does not impose a disproportionate burden on the employer.

CJEU, judgment of 10 February 2022 - C-485/20

Initial case

The claimant in the initial proceedings was hired as a specialist employee for the maintenance and repair of railway lines at the Belgian railway company HR Rail SA and began his probationary period in November 2016. In December, the claimant was diagnosed with a heart condition that required the use of a pacemaker. The medical devices used as pacemakers are sensitive to electromagnetic fields and must not be repeatedly exposed to them. Since electromagnetic fields are also prevalent in track systems, the claimant could no longer perform the maintenance and repair activities he had originally been hired to perform. In June 2018, the claimant's condition was officially recognised as a disability. The responsible public body for administrative medicine determined that the claimant was unfit to perform the function for which he had been hired. However, he could be used for activities with average activity, without exposure to electromagnetic fields and without working at high altitudes or with vibration. The claimant was then employed within HR Rail SA as a warehouse clerk. The employer informed the claimant that he would receive assistance in finding a new job within HR Rail SA. The claimant's appeal of the decision of the body for administrative medicine was dismissed. In September 2018, the claimant's employment relationship was terminated and a ban on re-employment at the same pay grade was imposed for a certain period of

time. Subsequently, the general director of HR Rail SA provided the information that the claimant's probationary period had been terminated because he could no longer perform the job for which he had been hired and, unlike permanent employees who are found to have a disability, no assignment to another job was foreseen within the probationary period. The claimant brought an action before the Belgian Council of State for annulment of the decision to terminate his employment. The Council of State suspended the proceedings and turned to the CJEU for a preliminary ruling on a question of interpretation concerning Council Directive 2000/78/EC establishing a general framework for equal treatment in employment and occupation. According to the Council of State it is unclear whether Article 5 of Council Directive 2000/78/EC is to be interpreted as requiring an employer to assign a person who, because of his disability, is no longer able to perform the essential functions of his previous job to another job for which the person has the necessary skills, ability and availability, provided that such a measure does not impose a disproportionate burden on the employer.

Decision on the question referred for a preliminary ruling

The CJEU interpreted the question referred for a preliminary ruling as whether the phrase "reasonable accommodation for disabled persons " in Article 5 of Council Directive 2000/78/EC implies that an employee who is declared unsuitable to perform the essential functions of his previous job because of a disability must be reassigned - even during the probationary period - to another job for which he has the skills, abilities and availability. The CJEU answered the question referred in the affirmative, subject to the restriction that the measures to be taken must not impose a disproportionate burden on the employer. First, the CJEU points out that the objective of Council Directive 2000/78/EC is to provide effective protection against discrimination on the basis of disability, among other grounds. The Directive substantiates the general prohibition of discrimination laid down in the Charter of Fundamental Rights of the European Union.

The claimant in the initial case could also invoke Council Directive 2000/78/EC during the probationary period. The Directive applies to the public and private sectors, including public bodies, and applies to access to employment and self-employment, as well as all types and to all levels of vocational guidance, vocational training, advanced vocational training, and retraining. The broad scope of the provision therefore also includes employees who, after being hired by the employer for training purposes, completed a probationary period. In this respect, the CJEU had already ruled that persons who complete a preparatory service or training periods in a profession also fall under the definition of employee in Council Directive 2000/78/EC if they provide their services under the conditions of an actual and genuine activity in a wage relationship. Finally, it was undisputed that the claimant had been found to be disabled.

Furthermore, the CJEU points out that the appropriate, i.e., effective, and practicable, measures to be provided by employers in accordance with Council Directive 2000/78/EC and its recitals must be determined by taking into account the individual situation. The Directive must also be interpreted in accordance with Article 2 (3) of the United Nations Convention on the Rights of Persons with Disabilities. Under this Convention, discrimination on the basis of disability also covers the denial of reasonable accommodation.

Article 5 of Council Directive 200/78/EC provides for provision of reasonable accommodation to ensure equal treatment. The CJEU has already ruled that the measures listed in Recital 20 of the Directive are not exhaustive. The Court therefore clarifies that such measures of the employer also would be covered which enable the employee to keep his employment. It also constitutes a reasonable measure within the meaning of the Directive to reassign the employee who has become defini-

tively unsuitable for his job because of a disability to another job, in the view of the Court.

However, the CJEU also clarifies that the Directive does not oblige employers to take such measures that impose a disproportionate burden on them. In accordance with the recitals of the Directive, particular consideration must be given to the financial cost of the measure and the size and financial resources of the employer, as well as the possibility of obtaining public funding.

With regard to the facts to be assessed by the Belgian Council of State, the CJEU pointed out that the claimant's employment in the position of warehouse clerk after the determination of his disability had to be taken into account in this assessment. Since it is necessary for employment in another position that a suitable vacancy exists.

Our comment:

The CJEU's decision ranks alongside other decisions on the special protection of people with disabilities in the workplace and is consistent in this respect. Even though the case is a Belgian case, the interpretation of Council Directive 2000/78/EC also has an impact on German labour law. In particular, this interpretation will need to be taken into account when applying the provisions of the German General Equal Treatment Act (*Allgemeines Gleichbehandlungsgesetz, AGG)*, which serves to transpose Council Directive 2000/78/EC into national law, in the future.

Taking into account this decision of the CJEU, this also results in a restriction of an employee's termination options in Germany during the probationary period if the employee is no longer able to perform the job for which he was hired due to a disability. Before issuing a probationary period notice in such a case, it will now have to be regularly examined whether the loss of interest in employment is based solely on the lack of suitability as a result of the disability and whether there is another vacancy to which the employee can be assigned. However, it remains a prerequisite that the job to be offered to the employee with a disability is vacant and that the employee has the skills and knowledge to fill that position.

Against the backdrop of this special protection, which already exists during the probationary period, for persons with disabilities who are no longer able to perform the job they initially held due to the disability, employers should, in the future, already consider possible alternative employment before issuing a probationary period notice. Termination of the employment relationship will be made considerably more difficult in the future despite the agreement of a probationary period. This is particularly evident in the distribution of the procedural burden of production and proof. In accordance with Section 22 AGG, it is sufficient for the employee to prove indications that lead to the assumption of discrimination, due to a disability for example. The employer will then have to prove in full that the termination within the probationary period was not due to the restrictions because of the disability, but that another reason, such as the lack of professional suitability, led to the termination. It will be difficult for the employer to show this in many cases.

Furthermore, although the CJEU emphasises that the measures only have to be taken if they do not impose a disproportionate burden on the employer, the burden of production and proof for this disproportionateness also lies with the employer.

It therefore remains to be seen which requirements the national labour courts will place on the presentation of the circumstances. For the time being, employers are advised to carefully prepare the content for the termination of an employee with a disability, even during the probationary period. Depending on the activity and type of disability, the personnel situation in the company and the other circumstances, the employer is required to extensively document the circumstances in order to avoid discrimination and present an effective termination.

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CJEU submission on the meaning and purpose of the notification requirement in the case of collective redundancies: Mere procedural regulation or individual employee protection?

In Section 17 (3) sentence 1 of the German Protection Against Dismissal Act (KSchG), implementing Article 2 (3) subparagraph 2 of Council Directive 98/59/EC provides that the employer must send a copy of the notification to the works council to the employment agency at the same time as the notification to the works council. The core question of the Federal Labour Court submitted to the CJEU is whether Article 2 (3) subparagraph 2 of Council Directive 98/59/EC is merely a procedural provision or whether it is intended to - at least also - ensure individual protection for employees in the event of collective redundancies.

Federal Labour Court, submission decision of 27 January 2022 – 6 AZR 155/21

The case

The request for a preliminary ruling is made in the context of a dispute between the claimant employee and the defendant, who was appointed as insolvency administrator over the employer's assets. The parties are in dispute as to whether the employment relationship was effectively terminated by ordinary termination for operational reasons. In the decision from 2019, insolvency proceedings were opened against the employer's assets and a decision was adopted in 2020 to completely discontinue the employer's business operations. The negotiations on the reconciliation of interests which followed the closure decision were combined with the consultation procedure to be carried out pursuant to Section 17(2) KSchG. The consultation procedure with the works council was initiated and carried out with the draft reconciliation of interests submitted to the works council on 17 January 2020. However, contrary to Section 17 (3) sentence 1 KSchG, no copy of the draft reconciliation of interests submitted to the works council was submitted to the competent Employment Agency. On 23 January 2020, a proper collective redundancy notification was filed with the responsible Employment Agency. The claimant's employment was then terminated effective from 30 April 2020. The Employment Agency had already scheduled counselling appointments for more than 100 workers for 28 and 29 January 2020. The claimant defended himself against the termination and referred, in particular, to the violation of Section 17 (3) sentence 1 KSchG. Having been unsuccessful in the first two instances, the claimant is pursuing his claim unchanged on appeal on points of law.

The decision

The Federal Labour Court has suspended the legal dispute and referred the following question to the CJEU for a preliminary ruling:

What is the purpose of Article 2 (3) subparagraph 2 of Council Directive 98/59/EC of 20 July 1998 on the approximation of the laws of the Member States relating to collective redundancies, according to which the employer shall forward to the competent authority a copy of, at least, the elements of the written communication which are provided for in the first subparagraph, point (b), subpoints (i) to (v) of the written notification to the workers' representatives?

In the opinion of the Federal Labour Court, the only decisive question in this legal dispute is whether the notice of termination is null and void due to the present violation of the obligation under Section 17 (3) sentence 1 KSchG, that implements Article 2 (3) subparagraph 2 of Council Directive 98/59/EC. This violation could lead to the invalidity of the termination pursuant to Section 134 of the German Civil Code (*Bürgerliches Gesetzbuch*, BGB) if the protective purpose of Section 17 (3), sentence 1 KSchG is at least also the individual protection of employees. Due to the principles of equivalence and effectiveness, the violation must have the same legal consequence - i.e. the invalidity of the termination - as has been assumed by case law in the case of violations of other provisions of collective redundancy protection which at least also serve to protect employees. In order to determine the protective purpose of

Section 17 (3) sentence 1 KSchG, an interpretation of Article 2 (3) subparagraph 2 of Council Directive 98/59/EC is required. The interpretation of this provision, however, was the sole responsibility of the Court of Justice of the European Union within the framework of preliminary ruling proceedings pursuant to Article 267 TFEU.

Our comment

With its decision, the CJEU could set another hurdle for employers in collective redundancy proceedings. Section 17 of the KSchG already contains a large number of pitfalls that require employers to exercise the utmost care. According to the case law of the Federal Labour Court, for example, terminations in the context of collective redundancy proceedings are null and void if the employer has not attached the works council's statement on the dismissals to the notification to the Employment Agency or if the prima facie evidence of the information of the works council and the status of the consultations is incorrect. Errors in the notification procedure with regard to the "must" information of Section 17 (3) sentence 4 KSchG also lead to the invalidity of the collective redundancy notification and thus to the invalidity of the termination. Furthermore, this legal consequence also occurs if the notification is made to the wrong Employment Agency. In its submission decision, the sixth Senate indicates that, in its opinion, there are good arguments in favour of the requirement in Article 2 (3) subparagraph 2 of Council Directive 98/59/EC being only a mere procedural provision. According to the Federal Labour Court, the fact that the required notification is sent at the beginning of the consultation procedure and thus cannot have any influence on the placement activities of the Employment Agency speaks against the individually protective character of the provision. In addition, the Directive only provides for the competent authority to take action at a later point in time, i.e. with the employer's notification pursuant to Article 3 (1) of Council Directive 98/59/EC. In addition, it has become clear in the case at hand that the prompt start of the placement of more than 100 employees could be ensured even despite a violation of the obligation under Section 17 (3) sentence 1 KSchG. Thus, the Federal Labour Court mentions some weighty arguments against the assumption that Article 2 (3) subparagraph 2 of Council Directive 98/59/EC grants individual protection to employees.

From the employer's point of view, it would at any rate be welcome if the CJEU could be convinced by the arguments of the Federal Labour Court. Until the question submitted is clarified, employers are in any case advised to send a copy to the Employment Agency at the same time as the notification to the works council.

Even if the ambiguities in the context of collective redundancy proceedings become less with each supreme court decision, as, for example, with the most recent decision of the Federal Labour Court on the "shall" provision in Section 17 (3) sentence 5 KSchG, employers are advised to keep a close eye on the procedural and formal requirements in collective redundancy proceedings. This is because even "minor" errors can have significant consequences for the effectiveness of terminations pronounced in collective redundancy proceedings.

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Renewed need for adjustment of repayment clauses

A further decision of the Federal Labour Court on the invalidity of repayment clauses for further education and training costs again leads to a need for adjustment of clauses which do not exempt the employee's resignation from the repayment obligation due to a permanent inability to perform through no fault of the employee.

Federal Labour Court judgment of 1 March 2022 – 9 AZR 260/21

The case

The parties are in dispute about the repayment of further training costs. The claimant, employer and operator of a rehabilitation clinic, employed the defendant (employee) as a geriatric nurse and bore the costs of further training of the defendant to become a "Specialist Wound Therapist ICW" in the amount of EUR 4,090.00 for course fees and paid leave.

In the training contract concluded between the parties, the defendant undertook to continue the employment relationship for at least six months after the end of the training. The subject matter of the training contract also included a provision on the repayment obligation. Accordingly, the defendant had to repay the training costs covered by the claimant in the event that the defendant left the claimant's company prior to the expiration of the aforementioned commitment period due to her own ordinary termination for which the employer was not responsible, at a rate of 1/6 for each premature month of termination.

After the defendant terminated the employment relationship existing with the claimant even before the completion of the training, yet successfully completed the training afterwards, the claimant demanded pro rata repayment in the amount of 4/6 of the training costs covered. The claimant asserted this claim by way of an action. The defendant sought dismissal of the action, arguing that the repayment clause of the training contract was invalid pursuant to Section 307(1) sentence 1 of the German Civil Code (*Bürgerliches Gesetzbuch*, BGB).

The defendant was successful both in the first instance before the Labour Court and in the second instance before the Higher Labour Court. In its appeal, the claimant pursued its claim in the third instance before the Federal Labour Court.

The decision

The Federal Labour Court dismissed the admissible appeal and confirmed the opinion of the higher labour court that the repayment clause is invalid pursuant to Section 307(1) sentence 1 BGB. According to the Federal Labour Court the repayment clause must be considered to be a general term

and condition and must therefore be assessed based on the provisions of Section 305 et seq. BGB. It is invalid because the clause only excludes employee resignations for which the employer is not responsible, but not the employee resignations due to the employee's permanent inability to perform through no fault of the employee.

According to the Federal Labour Court, it is generally permissible by way of individual contractual agreements to oblige the employee to contribute to the costs of training financed by the employer if the employee leaves the employment relationship before the expiry of certain periods. However, it is not permissible to simply link the repayment obligation to the employee's resignation within the agreed commitment period. Rather, a differentiation must be made according to the reason for the early departure. The payment obligations linked to the termination originating from the employee would in fact impair the employee's free choice of employment protected by Article 12 (1) of the Basic Law (*Grundgesetz*, GG) and would therefore have to be justified by well-founded and equitable interests of the employer or compensated by equivalent advantages. Overall, the reimbursement obligation - also in terms of its scope - must be reasonable for the employee in good faith.

According to the Federal Labour Court, the clause did not meet these requirements. It based its opinion on the fact that if the employee is permanently no longer able to perform the contractually owed work through no fault of his own, there is no longer an exchange of services due to impossibility. Therefore, irrespective of the employee's termination, the employer cannot use the employee's qualification until the expiry of the commitment period and cannot have an equitable interest in the continuation of this employment relationship which can no longer be fulfilled, and which justifies the restriction of the employee's fundamental right to free choice of employment under Article 12(1) sentence 1 GG. There is also no equivalent advantage for the employee, since for health reasons it is permanently impossible for the employee, through no fault of his own, to perform the work owed and to make use of the knowledge acquired during the further training.

Our comment

The decision of the Federal Labour Court supplements the already extensive past case law on the (in)effectiveness of repayment clauses on training, further training and continuing education costs and intensifies the practical challenges to their effective formulation. In addition to the multitude of effectiveness requirements for specificity and adequacy, the decision concerns the trigger of the repayment obligation. In particular, the question is which cases of employee resignation may trigger a repayment obligation on the part of the employee?

In principle, according to the case law of the Federal Labour Court, the sphere concept applied, according to which a repayment obligation could only be linked to events that fall within the sphere of responsibility and risk of the employee and not of the employer. As early as 2018, the Federal Labour Court had to decide on the effectiveness of a repayment clause in which the employee declared his resignation due to the loss of his medical fitness to perform the work owed through no fault of his own, which was not exempt from the repayment obligation. In the opinion of the Federal Labour Court, the clause - although more likely to be assigned to the sphere of risk of the employee - was invalid *(Federal Labour Court, judgment of 11 December 2018, - 9 AZR 383/18)*. This case law is reinforced by the present decision.

Repayment clauses that do not exempt the employee's resignations for reasons lying in the person of the employee from the repayment obligation are invalid and must be revised in future in model clauses, at least those resignations that are based on reasons for which the employee is not responsible. Due to the abstract standard of review, it is also irrelevant to the invalidity of the clause whether an employee actually resigns for personal reasons through no fault of their own. Rather, such a clause is already invalid if the employer provides the clause by introducing it into the contract.

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Employee's obligation to provide evidence of overtime does not change as a result of the CJEU's "Time Clock" decision of May 2019

In order to substantiate a claim for overtime pay, the employee must further show that he worked beyond the normal working hours or stood by at the employer's instruction and that the overtime worked was expressly or impliedly ordered, tolerated or subsequently approved by the employer.

Federal Labour Court, judgment of 4 May 2022 – 5 AZR 359/21 - Press release

The case

The defendant operates a retail business. The claimant was employed by the defendant as a delivery driver. The claimant recorded his working hours by means of technical time recording. However, only the start and end of daily working hours were recorded. Break times were not recorded. After evaluating the records of his working hours, there was a positive balance of 348 hours in favour of the claimant at the end of the employment relationship. In his claim, the claimant demanded overtime pay in the gross amount of EUR 5,222.67. In support of his claim, he stated that he had worked the entire recorded time. He had not been able to take breaks because otherwise he would not have been able to process the delivery orders. The defendant has disputed this submission.

The Emden Labour Court (partial judgment of 9 November 2020 - 2 Ca 399/18) had upheld the claim. It was of the opinion that the burden of proof in overtime pay proceedings was modified by the judgment of the CJEU of 14 May 2019 (C-55/18) to the effect that positive knowledge of overtime was not required as a prerequisite for employer-initiated overtime, in any case, if the employer could have obtained the knowledge by introducing, monitoring and controlling the recording of working hours. In the judgment of 14 May 2019, the CJEU had stated that Member States must require employers to implement an objective, reliable and accessible working time recording system. Therefore, the claimant would only have to present the number of overtime hours worked in order to conclusively substantiate his claim. For its part, the

defendant would then have had to demonstrate the claimant's use of break times. However, it had not done so.

The Lower Saxony Higher Labour Court (judgment of 6 May 2021 - 5 Sa 1292/20), on the other hand, dismissed the claim for the most part, with the exception of overtime, which the defendant had already settled. Pursuant to Article 153 (5) TFEU, the CJEU lacks jurisdiction for questions of remuneration for labour. The CJEU's decision of 14 May 2019 dealt exclusively with occupational health and safety issues. Therefore, the distribution of the burden of production and proof previously assumed by case law remains unchanged. However, the claimant had not sufficiently demonstrated that the work could only have been performed by working overtime. The claimant had also not sufficiently presented evidence that the defendant had ordered, tolerated or approved the alleged overtime.

The decision

The defendant's appeal on points of law to the Federal Labour Court has not been successful. The Federal Labour Court has upheld the decision of the Lower Saxony Higher Labour Court. The reasons for the decision have not yet been published. The press release states that the Lower Saxony Higher Labour Court correctly recognised that, despite the CJEU's decision of 14 May 2019, it must continue to be adhered to that the employee must demonstrate the employer's cause and attribution of the overtime in a claim for overtime pay. The overtime proceedings concerned the issue of the claimant employee's remuneration. The decision of the CJEU, on the other hand, concerns the interpretation and application of the Working Time Directive 2003/88/EC and Article 31 of the Charter of Fundamental Rights of the European Union, which, according to the case law of the CJEU, are limited to regulating the aspects of working time organisation under occupational health and safety law.

Our comment

One has to agree with the Federal Labour Court's decision. The Federal Labour Court adheres to its case law on the burden of production and proof in overtime remuneration proceedings and clearly differentiates between the aspects of working time law and the remuneration issues that arise in relation to overtime.

For the overtime proceedings, this means that - as before - the employee must first specifically state on which days and at which times he worked beyond the usual working hours. In addition, the employee must specifically show that the employer expressly or impliedly ordered the overtime worked or in any case tolerated it or subsequently approved it. Only when the employee's submission meets this requirement must the employer comment on it.

However, the Federal Labour Court's judgment does not change the CJEU's decision on the employer's obligation to record working time. It remains to be seen when and how the national legislator will implement this obligation.

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Interim injunction on the employment of unvaccinated persons in nursing home dismissed: Release of employee not vaccinated against COVID-19 justified

An employee's claim to employment is opposed by the employer's overriding interest in wanting to protect its vulnerable residents of the retirement home it operates from harm to life and limb. In this case, the employer is not prevented from releasing the claimant from work.

Comment on Giessen Labour Court judgment of 12 April 2022 - 5 Ca 1/22

The case

A residential manager of a nursing home sued in interim relief proceedings for employment despite failure to provide proof of vaccination or recovery. The claimant had been working at a nursing home run by the defendant since October 2020. The home provides care and accommodation for the elderly and people in need of care. The claimant has not been vaccinated against the SARS-CoV-2 virus and did not provide proof of vaccination or recovery to the defendant by the relevant cut-off date of 15 March 2022. The claimant does not have a medical contraindication to vaccination.

In March 2022, the defendant revocably released the claimant from the obligation to perform work from 16 March 2022 until further notice, until no longer than 31 December 2022, because he had not complied with the obligation to provide evidence. In justification, the defendant referred to Section 20a (1) of the German Act on the Prevention of and Fight against Infectious Human Diseases (Gesetz zur Verhütung und Bekämpfung von Infektionskrankheiten beim Menschen, IfSG), according to which persons working in nursing facilities or outpatient nursing services, for example, must be vaccinated or recovered as a matter of principle and provide proof of their vaccinated/ recovered status as of 16 March 2022.

In the proceedings, the claimant took the view that he was entitled to employment. Because for persons already employed before the cut-off date of 16 March 2022 - like the claimant the defendant would only have to inform the health department of his vaccination status. There would be no employment ban. In the view of the claimant, the defendant was not authorised to release the claimant from work, since the release was not covered by the employer's right to give instructions. There would be no justification for the defendant to invade the claimant's private life in such an ultimate way that it could impose a vaccination obligation on the claimant.

The decision

The claimant's motion was rejected for lack of grounds for injunction. The employee's general entitlement to employment exists pursuant to Sections 611a, 613 in conjunction with Section 242 of the German Civil Code (*Bürgerliches Gesetzbuch*, BGB) only to the extent that the employee's interest in his employment outweighs the employer's interest in his non-employment. However, the claimant's employment was opposed

by the defendant's overriding interest, worthy of protection, in protecting the residents of the retirement home it operates from harm to life and limb. Thus, there would be no obligation for the defendant to actually employ the claimant, who had not been vaccinated against the SARS-CoV-2 coronavirus, at its facility. In addition, it could release the claimant from the obligation to work. The appeal was not allowed.

In its decision, the Giessen Labour Court also referred to the legislative materials on the facility-based vaccination requirement (Bundestag printed paper 20/188). It is the legislative intention that, as a matter of principle, no persons should be employed at the above-mentioned facilities who have not been vaccinated or have not recovered. An express ban on employment is only stipulated in Section 20a (3), sentences 4 and 5 IfSG for those persons who are newly employed at the above-mentioned facilities after 16 March 2022 and who do not have or do not present proof of vaccination or recovery. For existing employees (i.e. those already employed before the cut-off date), employers would initially only have to file a report with the health department. The legislative intent, however, is not altered by the law's provisions, as unvaccinated persons are generally not to be deployed at the facilities. This also affected unvaccinated persons - such as the claimant - who were already employed before the cut-off date, from which it follows that unvaccinated persons who are already employed do not necessarily have to be actually employed.

The defendant was not prevented from releasing the claimant from work. The risk of harm to life and limb of the residents of the nursing home to be avoided by the defendant outweighed the disadvantages of his non-employment to be accepted by the claimant.

Our comment

This decision, which was obtained by Luther Rechtsanwaltschaftgesellschaft mbH, is the first labour court decision on this topic in Germany and at the same time a landmark decision.

In the run-up, the publication of the handout on vaccination prevention in relation to facility-based activities "*Handreichung zur Impfprävention in Bezug auf einrichtungsbezogene Tätigkeiten*" published by the Federal Ministry of Health of 22 March 2022 caused highly controversial discussion. In the handout, the Federal Ministry of Health took the view that the public law provision of Section 20a IfSG does not establish a right of the employer to release the employee from work. In our opinion, the Ministry's interpretation, which was primarily politically motivated, was already untenable in March 2022. For, particularly from the point of view of the separation of powers, there may well be a question mark over the extent to which the Federal Ministry of Health can and should make judgements under labour law, especially without sufficiently distinguishing between the labour and regulatory levels. The regulatory powers of a sovereign are subject to severe limitations under fundamental rights. In the case of the employer's interest in releasing the employee from work, the scope is much wider, even if fundamental rights and, above all, aspects of the general personality right must also be taken into account in the balancing process.

The issue of the discontinuation of the obligation to pay compensation during the release phase was not the subject of the interim relief proceedings. However, since the subjective capacity of unvaccinated persons is lacking, we believe that the release of the employee can also be without compensation, true to the principle of "no work, no pay." In any case, in the case of persons who are unwilling to be vaccinated, Section 297 BGB precludes a claim for compensation for default of acceptance. At most, this may be judged differently for individuals who have a medical contraindication to the COVID-19 vaccination. However, since medical contraindications (e.g. due to immunosuppression) are regularly also likely to result in the employee's incapacity for work, the cases are extremely rare.

Moreover, the tendency of the labour courts to value the health protection of the general public more highly than the entitlement to employment of the individual in matters related to COVID-19 is to be welcomed (cf. e.g. Dusseldorf Labour Court, judgment of 18 February 2022 - 11 Ca 5388/21; Hamburg Higher Labour Court , judgment of 13 October 2021 - 7 Sa 23/21; Cologne Higher Labour Court, judgment of 12 April 2021 - 2 SaGa 1/21). On 19 May 2022, the Federal Constitutional Court also ruled that the facility-based vaccination requirement of Section 20a IfSG is permissible. The constitutional complaint filed against this was unsuccessful (decision of 27 April 2022 - 1 BvR 2649/21).

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Prohibition of secret justice: No waiver of compliance with the principle of publicity in labour court proceedings

Access to the courtroom must be granted to arbitrary members of the audience as representatives of the public, and not only to the parties to the proceedings. This is also true in times of the COVID-19 pandemic. There is a violation of the principle of publicity and thus an absolute ground for appeal on points of law if there is not even a single place for the public.

Comment on Federal Labour Court decision of 2 March 2022 – 2 AZN 629/21

The case

In proceedings for protection against unfair dismissal (file no. 4 Sa 86/20), Hamburg Higher Labour Court only admitted seven other persons (all parties to the proceedings) to the courtroom in addition to the three judges because of the COVID-19 situation during the chamber session. There was no room for further audience members in the courtroom. The hearing was held without reprimand.

The decision

In the course of the appeal on points of law against the judgment of Hamburg Higher Labour Court, the violation of the provisions on the publicity of the proceedings was complained of (absolute ground for appeal on points of law under Section 547, No. 5 of the German Code of Civil Procedure (*Zivilprozessordnung*, ZPO). The Federal Labour Court affirmed the existence of the absolute ground for appeal on points of law due to the violation of the principle of publicity. Any arbitrary audience members - even very limited in number - would have to have the possibility of access, otherwise the principle of publicity would not be respected. A reduction in the number of audience members in a courtroom is permissible in order to be able to comply with distancing regulations in the course of measures to fight a pandemic. However, Hamburg Higher Labour Court had not granted access to the hearing to arbitrary audience members, i.e. persons who could not be assigned to the respective parties to the proceedings. There was not even room for a single audience member representing the public.

Our comment

Despite the necessity to fight the pandemic, the principle of publicity is an undisputed, fundamental principle of the German legal system and is enshrined, for example, in Section 52, sentence 1 of the German Labour Court Act (*Arbeitsgerichtsgesetz*, ArbGG) and Section 169 (1) of the German Courts Constitution Act (*Gerichtsverfassungsgesetz*, GVG). Therefore, the approach of Hamburg Higher Labour Court is surprising. According to the principle of publicity, everyone must be given access to the hearing. Among other things, this is intended to prevent “secret justice” and ensure a fair trial.

The principle finds its limits in the actual impossibility, which gives rise to the following questions for practice:

Who is the public?

All non-parties to the proceedings present at the place of the hearing shall constitute the immediate public.

Can the public be dispensed with?

No, the public cannot be dispensed with. In particular, the parties to the proceedings cannot waive for the public (see e.g. Federal Labour Court judgment of 22 September 2016 - 6 AZN 376/16).

Are restrictions on the principle of publicity possible at public sessions?

Restrictions may be ordered if there are compelling reasons such as an impossibility. This may be, for example, an actual space restriction due to size or reduction in audience size to

comply with distancing regulations. However, the reduction must not lead to the total exclusion of the public. At the end of November 2020, the Federal Court of Justice (BGH) already ruled that a lockdown was not a valid reason for excluding the public (BGH judgment of 6 January 2021 - 5 StR 363/20).

Furthermore, children and persons who do not appear in a manner befitting the dignity of the court may be refused entry. The public may also be excluded for reasons of danger to public order or morality, protection of personality or expediency (Section 52, sentence 2 et seq. ArbGG).

Is there a difference between a request or demand by the court?

Whether a request to leave the room constitutes a violation of the principle of publicity is assessed differently. Thus, the threshold would not be crossed until there was significant pressure from the court. We think that there is regularly no difference between a mere request and an instructing demand. This is because the public will leave the courtroom out of respect for the court (and possibly for lack of better knowledge and psychological inhibition), regardless of whether it is formulated as a request or a demand.

How many standing/seating facilities must be provided for the public?

There is no need to hold as many places as there are interested parties. No differentiation is made between standing and seating areas. What is clear, however, is that the public is effectively excluded if there is only room for a single member of the audience.

What remedies are available?

In all jurisdictions, a violation of the principle of publicity generally constitutes an absolute ground for appeal on points of law, albeit weakened in the case of the Federal Social Court, the Federal Administrative Court and the Federal Fiscal Court.

The ground for appeal must be asserted within a peremptory period of one month. The prerequisite is that there has been a violation attributable to the court, so that now, with appeal periods still running, the appeal on points of law may well be based on a breach of publicity - in our view, even in the case of a mere request not to enter the courtroom. A submission and filing of a motion during the hearing without objection - as in the proceedings before Hamburg Higher Labour Court - does not lead to a waiver of the ground for appeal on points of law.

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■ CASE LAW IN A NUTSHELL

No right of co-determination of the works council in the regulation of smoking breaks

Mecklenburg-Western Pomerania Higher Labour Court, decision of 29 March 2022 – 5 TaBV 12/21

The instruction issued by an employer that smoking is only permitted during the specified breaks is not regularly subject to the right of co-determination of the works council under Section 87 (1) no. 1 of the German Works Constitution Act. The instruction is intended to ensure compliance with working hours and therefore does not concern matters relating to the rules of operation of the establishment and the conduct of employees in the establishment, but rather the way the work itself must be performed.

Reasons for the decision

The parties are in dispute about the co-determination requirement of an employer's instruction according to which smoking is only permitted during breaks.

The employer, a logistics company at a seaport, agreed on company regulations with the works council in 2011, which stipulated, among other things, that smoking would be prohibited throughout the company premises. Smoking is expressly permitted only in the designated areas.

The newer 2020 instruction now specified that smoking would only be allowed in the designated areas during breaks. In the opinion of the works council, the instruction affects the rules of operation of the establishment and the conduct of employees and therefore required co-determination. The complaint of the works council was unsuccessful.

It is true that the works council has a right of co-determination in accordance with Section 87 (1) no. 1 of the German Works Constitution Act (Betriebsverfassungsgesetz, BetrVG) in "matters relating to the rules of operation of the establishment and the conduct of employees in the establishment" insofar as "they are not prescribed by legislation or collective agreement" (so-called *"Ordnungsverhalten"*). On the other hand, regulations and instructions which directly specify the obligation to work or the way the work itself must be performed (so-called *"Arbeitsverhalten"*) are not subject to co-determination. According to the Mecklenburg-Western Pomerania Higher Labour Court, in the case of a measure that affects both matters relating to the rules of operation and the conduct of employees (*Ordnungsverhalten*) and the way, the work itself must be performed (*Arbeitsverhalten*), the decisive factor is which objective regulatory purpose prevails. This is determined by the content of the measure and the type of operational event to be influenced. In the view of the Court, in the case of the instruction to smoke exclusively during breaks, only the way, the work itself has to be performed is affected. The instruction serves the purpose of observing the working hours of the employees and does not have the purpose of coordinating the cooperation between colleagues. Moreover, the employer did not have to tolerate the work interruptions caused by the smoking breaks.

The sender bears the full burden of production and proof for the receipt of an e-mail

Cologne Higher Labour Court, judgment of 11 January 2022 – 4 Sa 315/21

Pursuant to Section 130 of the German Civil Code, the sender of an e-mail bears the full burden of production and proof that the e-mail was received by the recipient. The burden of proof is not eased for him due to the fact that he did not receive a message that the e-mail could not be delivered.

Reasons for the decision

The parties are in dispute as to which party has to prove that an e-mail was received by the recipient in time.

The defendant had sent an e-mail on the last day of a five-year period, the receipt of which by the claimant was undisputed, but the time of receipt was disputed.

The timely receipt of the e-mail was a prerequisite for the repayment of a loan granted to the claimant to finance further training. The loan agreement stipulated that the defendant would waive repayment if, for operational reasons, she did not offer the claimant an employment relationship within five years of completion of the training. The disputed e-mail contained a corresponding offer of employment. The claimant stated that the e-mail did not arrive until three days after the defendant claimed it was sent. The sender invoked the relaxation of the

burden of proof by means of prima facie evidence. In fact, in her "Sent" box, the e-mail was marked as "sent" and she argued that she had not received any message that the e-mail could not be delivered, either.

Higher Labour Court Cologne dismissed the defendant's appeal. The sender must prove and demonstrate that the e-mail was received. The sending of the e-mail does not constitute prima facie evidence of receipt by the recipient. There would still be a risk that the e-mail would not reach the recipient server after being sent. This risk would exist in the same way as for letters sent by ordinary post. The recipient cannot be burdened with this risk because the recipient is not the one who chooses the type of transmission. For e-mail correspondence, the sender would also have the option of requesting a read receipt. As long as the sender has not received such a read receipt, the sender must assume that the e-mail has not yet been received.

Civil service termination for criticising corona policy effective - violation of constitutional fiduciary duty

Baden-Württemberg Higher Labour Court, judgment of 2 February 2022 - 10 Sa 66/21

Employees in the public service can be expected to have a special fiduciary duty towards the German constitution, to the free democratic basic order and to the foundations of the respective country. A public statement by an employee disparaging state authorities shall justify termination.

Reasons for the decision

The action for protection against dismissal brought by the public sector employee, who was employed as a police doctor, was also dismissed in the second instance.

The employee had published a classified ad in her name in a free Sunday magazine in the autumn of 2020 with the title *"Infektionsschutzgesetz=Ermächtigungsgesetz"* (Infection Protection Act=Enabling Act). In the article itself, she compared the Nazi Enabling Act of 1933 with the Infection Protection Act, equating the laws to the greatest extent possible. She made comments about "forced vaccination, taking away children, closed borders and a ban on work" and referred to a demonstration in front of the Bundestag against the Infection Protection Act.

The ordinary notice of termination issued by the Land of Baden-Württemberg was based, in particular, on the claimant's lack of suitability for the job of police doctor. In addition, she had violated her obligations under her employment contract through her conduct. The fiduciary duties of her position also included the state, the Constitution and state authorities, i.e., not to disparage them.

The Baden-Württemberg Higher Labour Court has now confirmed that not only ordinary termination but also termination without notice is justified in such a case. As a public service employee, the police doctor had a heightened political fiduciary duty. By using the term "Enabling Act," she had deliberately referred to the National Socialists' Enabling Act, thereby disparaging and debasing state authorities. She had accused the Bundestag of anti-democratic sentiments and called for resistance against the police by referring to the demonstration. She had violated her obligation to support the free democratic basic order as defined in the Basic Law.

Unauthorised data processing within the group - compensation

Hamm Higher Labour Court, judgment of 14 December 2021 /– 17 Sa 1185/20

Data processing under the General Data Protection Regulation (EU GDPR) shall only be necessary if no milder, equally effective means is available to meet the interests of the controller. In addition to the data subject's legitimate expectations, when balancing the different interests, it must also be taken into account whether the controller has fulfilled its obligations to inform the data subject under the EU GDPR and has given the data subject the opportunity to exercise its rights under the EU GDPR.

Reasons for the decision

The parties are in dispute about claims for damages and injunctive relief due to an unauthorised transfer of personal data. The data, which was transferred by the employer, a hospital operator, to a group-affiliated company, contained the claimant employee's surname, first name(s), employment contracts, dates of hire, salaries and claims to bonuses. They were neither anonymised nor pseudonymised.

The EU GDPR requires that the principle of lawfulness must be observed when processing data, Article 5 (1) (a) EU GDPR.

For this, one of the permissible circumstances for data processing in Article 6 (1) (a) to (f) EU GDPR must be present.

In the opinion of the court, however, the transfer of data within the group was not covered by any of the aforementioned permissible circumstances. The claimant had neither consented to the data processing nor was the data processing necessary for the performance of the employment relationship. The recipient, the company belonging to the group, performed tasks relating to organisation, management and personnel controlling within the hospital group and was not involved in personnel administration. As a result, the data processing was not necessary for the employment relationship.

Within the weighing of legitimate interests, a legitimate interest may exist in the case of intragroup data transfer for administrative purposes. In this case, however, a milder, equally effective remedy would already have existed: The transfer of data in anonymised form. In addition, other data privacy goals were violated by the employer, the hospital operator. The claimant had not been informed in advance about the data transfer and had not been given the opportunity to comment. The defendant employer was ordered to cease and desist from further data processing in violation of the EU GDPR. It was also ordered to pay damages in the amount of 2,000 euros. The decision has now been submitted to the Federal Labour Court after an appeal on points of law was allowed (Federal Labour Court case number: 2 AZR 81/22).

Sending a substitute member of the works council on a basic training course

Hesse Higher Labour Court, decision of 17 January 2022 – 16 TaBV 99/21

According to the case law of the Federal Labour Court, sending a substitute member of the works council on a basic training course is only possible in exceptional cases (19 September 2001 - 7 ABR 32/00). An exception to this is when the only member of a three-member body familiar with works constitution law has been absent for months and further absences can be expected in the future.

Reasons for the decision

The three-member works council disputed in court with the employer about the assumption of costs for the participation of a substitute member in a basic training course. In the opinion of the employer, the training had not been necessary.

At the training session in dispute, it was decided that the chair should pass to another works council member, as the works council chair had been ill for a longer period of time and had planned to take a longer holiday after his period of incapacity for work. In addition, a longer recovery time was predicted based on the disease history. Hesse Higher Labour Court obliged the employer to reimburse the costs. According to the Higher Labour Court, the point in time at which the works council passed the resolution was to be considered. In doing so, the works council had to make a forecast based on facts. On the one hand, the past could have a certain indicative effect. On the other hand, other circumstances, such as the size of the works council, the existence of company holidays or the ongoing absence of individual works council members could have an influence on the forecast. At that time, the substitute member had to assume that it would be acting as a substitute more often, as the chairperson had, to date, been consistently ill with an incapacity for work. In addition, due to the COVID-19 pandemic, the dates of his therapy and the subsequent several weeks of rehabilitation were postponed several times, making it difficult to plan the works council activities. The Higher Labour Court was of the opinion that a limited capacity of the chairman to hold office was to be seen in the fact that he had resigned from office and in the future only wanted to be deputy chairman of the works council. It therefore had to be expected that the previous chairman will be absent for a longer period of time and that the substitute member will therefore be frequently called upon. In addition, the two regular works council members and the successor had no experience whatsoever in works council work. Accordingly, it would not be possible to impart knowledge to the members of the works council due to their inexperience. Therefore, it was necessary for the substitute member to attend the training and the costs were to be reimbursed.

Compliance with the notice period in the event of maternity or parental leave

Mecklenburg-Western Pomerania Higher Labour Court, judgment of 15 March 2022 – 5 Sa 122/21

The two-week notice period under Section 626 (2) Civil Code is observed if, in the case of maternity or parental leave, the employer has applied for the official declaration of admissibility within the two-week period, has filed an objection or action against the refusal of the declaration of admissibility in good time and then gives notice of extraordinary termination immediately after becoming aware that the requirement for consent no longer applies (end of maternity or parental leave).

Reasons for the decision

The parties are in dispute about the validity of an extraordinary termination, in particular about compliance with the two-week notice period. The claimant was employed by the defendant to rent, broker and manage holiday homes and was entrusted with payment orders, which required her to regularly receive money from customers. In May 2019, the claimant did not put two cash payments in the amount of 20 and 56 euros into the cash register and did not enter the payment in the cash book or subsequently cancelled the entry from the booking system. At that time, the claimant was pregnant, so the employer's extraordinary notice of termination depended on a declaration of admissibility in accordance with Section 17 (2) of the German Maternity Protection Act (*Mutterschutzgesetz, MuSchG*) issued by the Mecklenburg-Western Pomerania State Office for Health and Social Affairs (LaGuS). The LaGuS refused to grant consent for the termination and rejected the defendant's objection, whereupon the employer filed an action with the administrative court. One day after the end of the parental leave, the defendant terminated the employment relationship extraordinarily and without notice, alternatively as of the next possible date. The extraordinary termination with the end of parental leave was effective and did not violate Section 626 of the German Civil Code (Bürgerliches Gesetzbuch, BGB), according to the labour court and the higher labour court. There was good cause for extraordinary termination without notice. The theft significantly violates the employee's duty of consideration and significantly damages the relationship of trust. The claimant also no longer offered the necessary reliability for handling customers' money. With regard to the two-week notice period in accordance with Section 626 (2) BGB, it was to be noted that this period had been observed. The defendant could not have terminated at an earlier date, since the LaGuS had declared the termination inadmissible and no decision to the contrary had been issued either in the opposition proceedings or in the administrative court action. Rather, the notice of termination was given at the earliest possible time, namely actually on the day after the end of the parental leave. At that time, the requirement for an official declaration of admissibility had ceased to apply. The official declaration of admissibility is equivalent to the elimination of the consent requirement. It was not necessary to wait for the outcome of the administrative court proceedings.

■ INTERNATIONAL NEWSFLASH FROM OUR GLOBAL NETWORK UNYER

French Highest Civil Court confirms validity of the dismissal scale

On May 11, 2022, the French Highest Civil Court (*"Cour de cassation"*) confirmed the validity of the French scale introduced in 2017.

Such scale at Art. L. 1235-3 of the French Labor Code sets minimum and maximum court-awarded damages in case of unfair dismissal depending on the employee's seniority and the company's headcount (min. 0.5 and max. 20 months of salary). It may be discarded only when the dismissal is deemed null and void in case of a violation of a fundamental right.

The scale was criticized by employee's unions and judges arguing that it deprives tribunals from their liberty to judge and possibility to award an adequate reparation to dismissed employees which would be contrary to (i) Art. 10 of Convention 158 of the International Labor Organization (ILO) and (ii) Art. 24 of the European Social Charter (ESC)[1].

The French Highest Administrative Court (*Conseil d'Etat*)[2] and the French Supreme Court (*Conseil Constitutionnel*)[3] already judged that the scale complies with the French Constitution and International Treaties ratified by France as well as the French Highest Civil Court in a non-binding opinion[4]. Some tribunals resisted and tried to create additional *in concreto* exceptions.[5]

The French Highest Civil Court definitively judged that the scale is valid, does not violate Art. 10 of the ILO, may not be discarded when applicable, and that Art. 24 of the European Social Charter is not directly applicable in private disputes[6].

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1 The European Committee of Social Rights considers in non-binding decision that Italian scale is contrary to the European Charter (art. 24 b.). It has recently judged the same for France in a decision of June 17, 2022
2 Decision CE n°415243 of December 7, 2017
3 Decision CC n°2018-761 of March 21, 2018
4 Opinion Cass. n°15012 and n°15013 of July 17, 2019
5 Such approach would have opened the pandora box to circumvent the scale on every occasion.
6 Cass. soc. n°21-14.490 and n°21-15.247 of May, 11 2022

■ GENERAL INFORMATION

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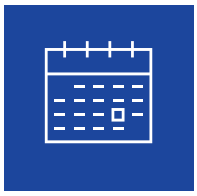
Events, publications and blog



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.

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Luther.

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