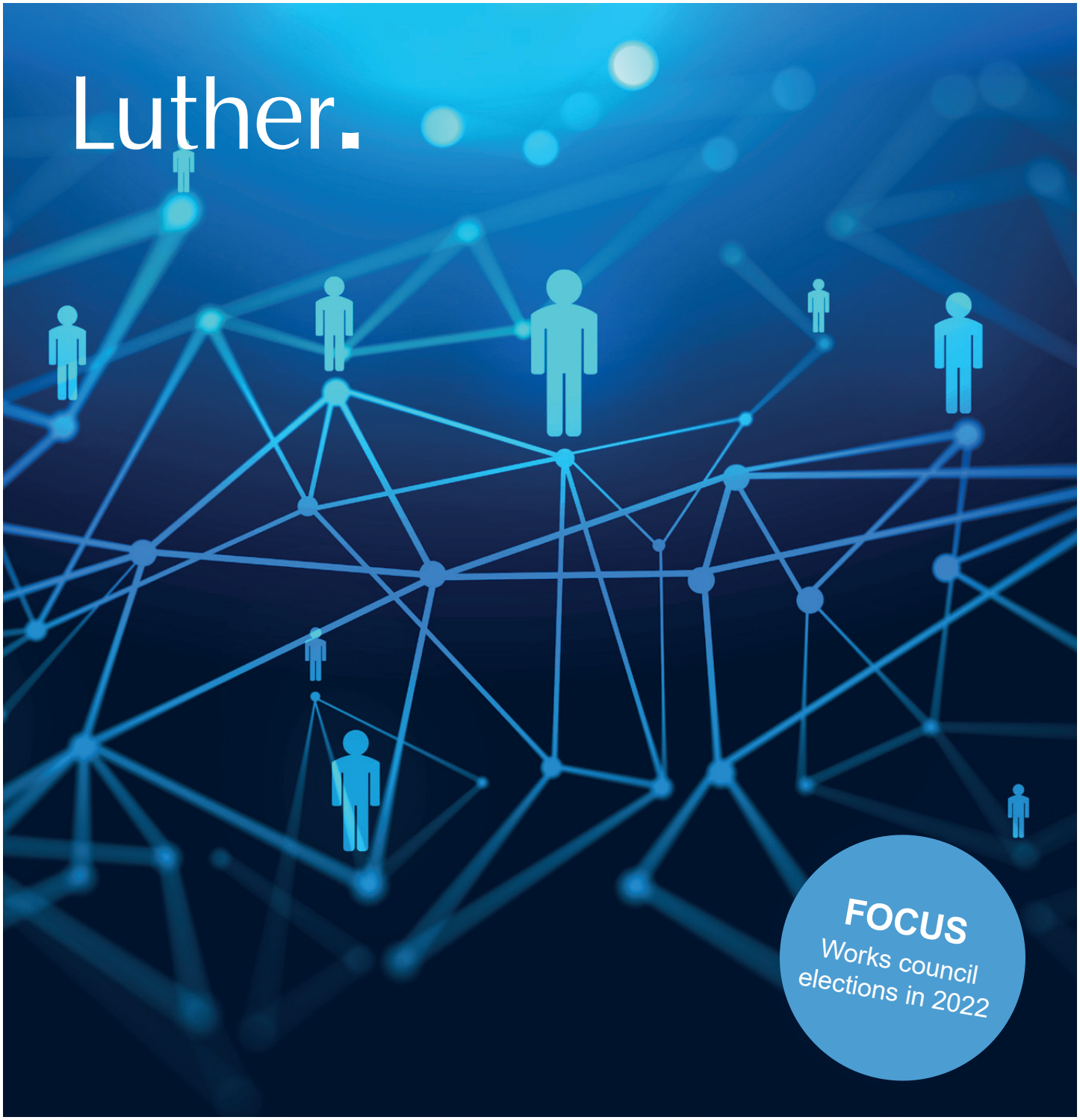

Labour & Employment Law Newsletter

Issue 3, 2021

Content

Dear readers,

Following the elections to the German parliament, works council elections are now due next year. Works councils will again be elected in Germany's companies in the period between 1 March and 31 May 2022. With the German Works Council Modernisation Act (Betriebsrätemodernisierungsgesetz), the legislator created new rules for the election procedure this year. Moreover, the election campaign has already begun in most companies. The ongoing pandemic raises new questions in this regard. Reason enough for Dietmar Heise to give you a first overview in our current newsletter. Dietmar Heise informs you about the basic points that companies should pay attention to now! In addition, we will be taking a closer look at the topic of "2022 Works Council Elections" in the coming weeks with current articles on this topic on our website. So, please take advantage of this and come and visit our website on a regular basis. There you will also find our Luther Labour Law Blog, in which we provide information on current topics in the area of labour law.

As of 1 July 2021, the two renowned experts for occupational pension schemes, Dr Marco Arteaga and Dr Annekatrin Veit, will join our practice group. In this issue of our newsletter they introduce themselves with a first article. Dr Marco Arteaga and Dr Annekatrin Veit take a look at what the political parties have planned for private pension provision and occupational pension provision in the wake of the elections to the German parliament. A look at the election manifestos of the parties shows that their ideas on strengthening statutory, occupational and private pension provision differ substantially. Get a first overview with the contribution of Dr Marco Arteaga and Dr Annekatrin Veit.

Naturally, we will also consider the latest developments in jurisdiction in this newsletter. We have again made a selection that we hope will be of particular interest to you.

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.

Yours

Achim Braner

Modernised (?) works council elections in 2022

Timid steps and populism instead of bold reform

The next regular works council elections are due to be held in spring 2022. The Works Council Modernisation Act (*Betriebsrätemodernisierungsgesetz*, BRMG) introduced only a few, rather populist changes. Somewhat more significant amendments have recently been made to the Rules for Election. Nevertheless: A big step towards a works council election 4.0 was missed. The opportunities offered by digitalisation have not been fully exploited.

Essentially nothing new: works council election procedure

The electoral board is in control of the election procedure. If a works council already exists, it appoints the electoral board. If this is not done, the labour court (upon application) or the joint works council (*Gesamtbetriebsra*t) - or a group works council (*Konzernbetriebsrat*) in the absence of a joint works council - may appoint the members of the electoral board. An electoral board can only be set up by the employees themselves at an election meeting in an establishment (*Betrieb*) that does not have a works council.

The further course of the works council election depends on the size of the establishment: a "simplified" election is held in smaller establishments with up to 100 employees entitled to vote, a more complex election, which is less prone to errors, is held in larger establishments.

The regular works council election (establishments with more than 100 employees entitled to vote) - rough outline

The electoral board has a wide range of tasks: it has to initially define the establishment in the sense of works constitution

law. This will not be a problem in many cases, but can lead to challenging issues, for example in the case of a joint establishment (*Gemeinschaftsbetrieb*), branch entities and, more recently, increasingly in the case of home and mobile working. This raises the question of who is an employee of the establishment. The employer shall assist in this determination by providing information. The electoral board can agree with the employer in medium-sized establishments with 101 to 200 employees entitled to vote to apply the "simplified" election procedure.

As part of the further preparations, the electoral board sets the election date (between 1 March and 31 May 2022). It draws up a voters list and publishes a (complex and usually error-prone) election notice. The electoral board displays these two documents and the applicable Rules for Election in an appropriate place. The electoral board decides on any objections raised by employees regarding the correctness of the voters list up to the day before voting begins.

Members of the works council are elected on the basis of lists of candidates. Employees entitled to vote as well as the trade unions represented in the establishment can draw up such lists and submit them to the electoral board within 14 days of the election notice being published. The electoral board checks these lists preferably when they are submitted, otherwise immediately thereafter and no later than two working days after submission and - where necessary - object to them.

The lists of candidates shall be made public at least one week before voting takes place. If there are several lists of candidates, members of the works council are elected by proportional representation. Voters can (only) choose the lists but cannot decide on the order of the candidates on the lists. Majority voting is applied if there is only one valid list: each voter has as many votes as there are seats on the works council. He or she may distribute these freely among the candidates; he or she may not, however, "heap" several votes on one candidate.

The actual election is held in a suitable polling station using a ballot box. The secrecy of the vote must be safeguarded throughout the entire voting procedure. Absentee voting is - unlike e.g. elections to the German parliament - only permitted in exceptional cases.

After the voting has closed, the votes are counted in open session. The election minutes must be signed by the chairperson and one other member of the electoral board. Those elected shall be notified and can refuse to take up their position as an elected member within three days, otherwise the election shall be deemed to be accepted.

Finally, the electoral board must announce the final election results and send a copy of the election minutes to the employer and, if applicable, to the trade unions represented in the establishment. It must then invite the new works council to a constituent meeting and conduct the election of an election officer for the election of the works council chairperson. This terminates the term of office of the electoral board. However, the term of office of the new works council does not commence until that of the previous works council has expired.

"Simplified" election procedure (establishments with up to 100 employees entitled to vote)

To make the "simplified" election "simple": there are two different variants, namely a so-called one-step and a so-called two-step procedure.

The one-step procedure is used if a works council already exists, i.e. if there is "only" a new election and not a first election. Under this variant, the incumbent works council appoints the electoral board. Its initial duties have already been outlined above (preparatory checks, drawing up the voters list and issuing the election notice). Lists of candidates may be submitted by eligible voters and published after being checked by the electoral board. The election takes place at an election meeting. The election, counting of votes and announcement of the results are also essentially the same as in the "normal" election. However, in any case, candidates are elected directly by majority vote; proportional representation is excluded if there are competing lists. Absentee voting is intended to be a retrospective written vote; the absentee votes will therefore not be counted until after the election meeting.

The election is also held under the one-step procedure in establishments with at least 101 and up to 200 employees entitled to vote if the electoral board agrees with the employer to apply the "simplified" election procedure. This is only recommended if the electoral board is very experienced or if in-depth, expert advice is ensured.

If a works council is elected for the first time (or after an interval in which a works council was not elected), the two-stage procedure is applied. The main events of the election procedure take place at two consecutive election meetings. At least three employees entitled to vote or a trade union represented in the establishment may be invited to the first election meeting. At this meeting, the electoral board is elected, which then

also has to make further preparations, e.g. draw up a voters list, publish an election notice and obtain lists of candidates. This cannot be done without preparing the members of the electoral board for this task (which is not explicitly provided for in the German Works Constitution Act) and is anything but "easy". This procedure is therefore either very prone to errors or can only be carried out by making preparations with the support of external consultants.

The election in the second election meeting corresponds to that of the one-stage procedure.

Changes arising from the "Works Council Modernisation Act" and amended Rules for Election

With the adoption of the Works Council Modernisation Act, which came into force on 18 June 2021, the legislator also pursued the goal of promoting works council elections. However, the concrete support measures mean that a minority of the workforce should be able to push through the formation of a works council more easily. This is probably not the general understanding of what democracy means. In detail, the "modernisation" of works council elections is limited:

- the "simplified" election procedure previously applied only to establishments with up to 50 employees entitled to vote (optionally by agreement with the employer for up to 100 employees entitled to vote). The thresholds were doubled, as described. This only speeds up the formation of the works council and gives an advantage to those employees who have previously dealt with the formation of a works council.

- Lists of candidates submitted require the support of a quorum of the workforce. So-called supporting signatures for lists of candidates must therefore be collected from the workforce. In this way, "splinter parties" should be prevented. The thresholds have been significantly reduced. In future, the requirement to obtain signatures is waived for establishments with up to 20 employees entitled to vote, (previously: two); two supporting signatures will suffice for 21-100 employees (previously: 1/20, minimum three). A list of candidates will still require support from one twentieth of the employees entitled to vote starting from 101 eligible voters. The upper limit remains at 50 signatures.

- Employees now have the active right to vote if they have reached the age of 16 (previously: 18), while the eligibility to be elected (passive right to vote) still requires the employee to be at least 18 years old. This is likely to mostly affect apprentices. They are allowed to increase the electorate, but the legislator does not yet consider them mature enough to share in the work of the works council.

- The initiative to elect a works council is rewarded with protection against dismissal for a larger number of employees - if it is done properly: now the first six employees instead of the first three as before benefit if they are named in the invitation to a works meeting. Only the seventh, who has not paid attention to the order, is unlucky. The situation is different in case of a request to be appointed by the Labour Court. If this route is taken, only the first three applicants are protected, as has been the case up to now. New addition: Whoever makes a publicly certified (!) declaration stating that he or she intends to establish a works council, he or she will now also be protected against dismissal. However, he or she must then issue an invitation to a works council election meeting within three months - or possibly issue a new declaration. A similar certification bureaucracy was introduced with the "declaration of retention" for temporary workers hired out to work - on 1 April (2017), the day of April fool's tricks. Was this a coincidence?

The ability to contest the election results has been restricted: it can only be based on the incorrectness of the list of candidates if an(y) employee had previously objected to its correctness. This restriction does not apply where it was not possible for the contesting party to raise an objection. The employer is now prohibited from raising an objection if the incorrectness of the list of candidates is based on the information provided by it.

The changes to the Rules for Election in October 2021 go a little deeper:

- The electoral board may, by resolution, hold non-public meetings by video or telephone conference. This does not apply in the case of an election meeting, the checking of the lists of candidates submitted or the assignment of sequence numbers to lists of candidates by drawing lots. The legislator did not dare to be more "digital". Curious: The procedure for drawing lots to assign numbers to the lists has not been defined. A digitalised drawing of lots would therefore also be possible. But only in a meeting attended in person.

- There is a novel change regarding the deadlines to be set for the actions of eligible voters in the works council election: In future, the electoral board may not only determine a day but also a time. This time must not be before the end of the working hours of the majority of voters on that day. How is the electoral board to determine this majority? Is the em-

ployer required to provide support? What happens if the person forming the majority is absent on the day the deadline expires? And why do voters count and not eligible voters? The Federal Ministry of Labour and Social Affairs (BMA) refers to the decisions of the Federal Labour Court. However, the Federal Labour Court had taken a much narrower view of this indication of time.

- A minor change applies to the election notice: exclusion of contestation based on the incorrectness of the voters list and the deadline for contestation (see above) as well as the legal consequences of missing it are to be pointed out.

- The electoral board must send the election notice and the absentee ballot documents without being requested to do so to the employees who are known not to be in the establishment on election day and are therefore entitled to vote by absentee ballot. Until now, this requirement only arose if the nature of the employment relationship was the reason for the absence - for example, in the case of working from home or in the field. Now it extends to all other causes, especially inactive employment contracts or the incapacity to work. The election notice may even be transmitted electronically (absentee ballots may not).

- The voters list may be corrected up to the close of the voting (previously: up to the day before).

- Ballot envelopes are to be dispensed with for elections where the vote is cast in person but are still necessary for absentee ballots. There are now rules regarding the folding of ballot papers for this. Hopefully every worker will succeed in doing what Armin Laschet, the chancellor candidate of the Christian Democrats, failed to do when casting his vote in the parliamentary elections.

The role of the employer - duties and rights

The new regulations are intended to simplify the election of a works council. However, they also affect the employer in its duties and rights with regard to a works council election.

The employer has always been required to support the election and must not hinder it. It shall provide the information required by the election board to conduct the election. The most comprehensive task to date has been to provide all the information on employees necessary for establishing the voters list. The employer must now also look ahead and provide information as to which employees will not be at work on election day.

In addition, the employer shall bear the necessary costs of the election.

The employer does not have many options to intervene. It may observe the preparation of the election. It may also provide the electoral board with information - even if this is not expressly regulated. However, the employer is scarcely in the position to compel the electoral board to correct mistakes: according to case law of the Federal Labour Court, the employer is in particular not entitled to object to the voters list if, for example, the electoral board incorrectly assesses the employee status.

An interim injunction to cancel an election is only granted if the election is likely to be null and void (see Federal Labour Court, decision of 15 April 2006 - 7 BAR 61/10). That is a very high hurdle. It remains to be seen whether, in the case of identified errors, the employer can also bring about a change in the procedure via an interim injunction as a milder measure. What speaks in favour of this is the fact that the employer would otherwise have to tolerate an error in order to assert this later in an election contestation. The framework to do so has remained unchanged for the employer.

Conclusion

There is talk everywhere of the upheavals in the world of work due to ongoing digitalisation (and due to the new findings on working from home and mobile working as a result of COVID-19). The legislator did not dare to introduce the possibility of holding the works council elections in digital form (currently not permitted, Hamburg Higher Labour Court, decision of 15 February 2018 - 8 TaBV 5/17). Instead, the Federal Ministry of Labour and Social Affairs is celebrating the elimination of ballot envelopes: they “incur costs and consume natural resources.” Well done!

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Politics, parties and pensions: Plans of the political parties for the reform of our old-age provision

Elections were held in Germany on 26 September 2021 to elect the members of the German parliament. The Social Democrats (SPD) narrowly beat the Christian Democrats (CDU). Bündnis 90/Die Grünen ("the Greens") and the Liberals (FDP) were in third and fourth place, respectively. Signs of a traffic light coalition government (a coalition of Social Democrats, Liberals and the Greens) are beginning to emerge. Time to take a look at what each of the parties have resolved to do with private pension provision and occupational pension plans.

Three pillar system

Our pension system in Germany is based on three pillars: The first pillar is compulsory insurance, which is the statutory pension scheme for most people. Persons insured under the compulsory scheme do not include civil servants, members of freelance professions and other self-employed persons. Civil servants receive their pension directly from the state. The freelance professions have their own compulsory insurance schemes. Self-employed persons have so far not been required to take out compulsory insurance. The second pillar is the occupational pension scheme. This is organised by the employer. Employees are entitled to receive a self-financed occupational pension (conversion of part of the salary into a contribution to an occupational pension plan). The third pillar includes all forms of private pension provision. Here, the individual is completely free to decide on whether or how he makes private provision for old age. If he decides in favour of a so-called Riester or Rürup pension, he receives an additional subsidy from the state.

- The **SPD** seeks to include the self-employed, civil servants, members of the freelance professions and elected representatives in the statutory pension scheme. In the view of the SPD, it is time to include the entire working population in this pension scheme and do away with special pension plans over the long term. If the pension plans for civil servants are combined with the statutory pension scheme, the overall level of their old-age provision will not be reduced.

- The plans of the Greens are along similar lines: They wish to gradually further develop the statutory pension scheme into a citizens' insurance scheme that will in future include everyone. In a first step, self-employed persons, who were not compulsorily insured hitherto, and members of parliament are to be included in the statutory pension scheme. Already existing private forms of pension provision and age limits are to be taken into account in so doing.

- The **FDP** wants to organise pension provision based on the building block principle. Building blocks comprising statutory, occupational and private pension provision are to be flexibly combined depending on the circumstances and can be adapted to modern career paths. All benefit entitlements arising from this "pension building block" can be flexibly transferred (portable) when changing jobs or on a change between employment and self-employment. Furthermore, the compulsory first pillar of our pension system is to be based on two pillars in the future. Approx. 90% of the contributions are to continue to flow into the levy-based pension scheme. Approx. 10% of the contributions are to be invested in a long-term, opportunistic and funded pension plan. The respective fund(s) is/are to be managed independently (statutory equity pension (gesetzliche Aktienrente)).

- The **Christian Democrats** are strongly committed to old-age provision based on the existing three pillars. They also seek to achieve a pension provision obligation for all self-employed persons. Self-employed persons are to be able to choose between the statutory pension scheme and other forms of provision. The Christian Democrats want to stick with the occupational pension schemes for freelance professions.

Statutory pension: pension level, basic pension, pension age

The statutory pension level is currently 48% as measured by the so-called standard pensioner, which represents a reduction compared to previous years (2000: 53%; 2010: 51.6%). The reasons for the reduction are the past pension reforms, which were a response to demographic trends. The pension level is to be maintained at this "stop line" of 48%. The retire-

ment age for the normal pension is being increased to 67 by 2029. Some pensions such as pensions for insured persons, who have a long or exceptionally long contribution history, can be drawn earlier without any deductions. The law for the introduction of the basic pension entered into force at the beginning of 2021. The basic pension is an individual supplement to the pension, especially for pensioners who have earned a below-average income during their period of employment.

- The **Social Democrats** want to increase the statutory pension and call for sustainable and stable pension benefits and a permanent pension level of at least 48%. They are against a further increase in the retirement age. Furthermore, they plan to improve disability pensions.

- The **Christian Democrats** are in favour of pensioners continuing to participate in the general income trend. They are against double taxation of pensions and for allowing voluntary contributions up to the relevant income threshold (Beitragsbemessungsgrenze). A new pensions advisory committee (Alterssicherungsbeirat) is to develop recommendations for the stop lines regarding the pension level and contribution rate.

- The long-term securing of the pension level at 48% is a high priority for the Greens. To this end, the situation regarding women in employment in particular and the employment of older employees are to be improved. The tax subsidies are to be increased where necessary. The basic pension is to be evolved into a genuine guaranteed pension. The retirement age will be kept at 67.

- The Liberals want to make the retirement age flexible based on the Swedish model. Those who retire early shall receive a lower pension, those who retire later shall receive a higher pension. Furthermore, they propose to increase disability pensions and introduce a statutory equity pension.

Private pension provision: Riester pension and alternatives

The so-called Riester pension is a private pension scheme and is subsidised by the state through allowances and tax deductions (*Sonderausgabenabzug* - deduction of special expenses for tax purposes). This pension scheme was introduced in 2002. Since then, approx. 16 million Riester policies have been entered into. The Riester pension is subject to much criticism, particularly because of the high costs, low revenues and complexity of the subsidy procedures.

- The **SPD** describes the results so far for the Riester pension as “unsatisfactory”. It therefore wants to dismantle bureaucratic barriers faced by private pension products and reduce costs. Furthermore, it supports a new standardised pension product that is cost-effective, digital and cross-border and (based on the Swedish model) is also offered by a public institution. The subsidising of new policies in the form of allowances is to be restricted to lower- and middle income groups.

- The **CDU** also wants a “new start” for the private, state subsidised pension provision. It should become “more efficient, more transparent and, as a result, more attractive and simpler”. It is proposed that criteria be defined for a standard pension product. This is to be mandatory for all employees, unless they opt out. The standard product is not to be subject to policy acquisition costs and managed with the lowest possible administrative costs. This is to be supported by an attractive and unbureaucratic state subsidy.

- **The Greens** want to replace the Riester and Rürup pensions with a publicly managed citizens fund (*Bürgerfonds*). The vested rights of persons with an existing Riester policy are to continue to be protected. Everyone is to pay into the Bürgerfonds who does not actively opt out. This will ensure that a volume is generated that keeps administrative costs at a low level, spreads the risks widely and can eliminate the need for expensive guarantees. The Bürgerfonds will be

managed in a publicly and politically independent manner and is to invest in accordance with the ESG sustainability criteria.

- The **FDP** wants to introduce a custody account for pension provision. Its aim is to combine the best aspects from the Riester pension (allowances - subsidy), Rürup pension (tax subsidy) and American "401K" model (flexibility and yield opportunities). Investment rules for state subsidised pensions, e.g. for Riester policies, are to be eased. This will not affect the Wohn-Riester (owner-occupied home pension).

Occupational pension plans

According to the BMA research report "*Alterssicherung in Deutschland 2019*" (Old-age Provision in Germany 2019) 24% of men and 8% of women receive an occupational pension from the age of 65. When looking only at employees in the private sector, these percentages increase to 34% of men and 11% of women. The average occupational pension of men from the age of 60 is EUR 605 per month and that of women EUR 238 per month. A large proportion of the pensions paid from occupational pension plans is between EUR 50 and up to under EUR 200 (men 34%; women 50%). The so-called pure defined contribution plans (*reine Beitragszusage*) were introduced in 2018 in the Act to Strengthen Occupational Pensions (*Betriebsrentenstärkungsgesetz*) to encourage the use of occupational pension plans. If an employer sets up a defined contribution plan, its liability is limited to the contributions promised and not to the later performance of the plan, as is the case for other types of promises. However, a pure defined contribution plan requires a collective wage agreement (so-called "social partner model"), which has not yet been implemented in practice.

- The aim of the **SPD** is that significantly more employees are covered by an occupational pension plan. Collectively agreed forms of pensions are to be preferred for this purpose. The SPD also supports the total abolition of the full contribution and double contribution of occupational pensions to the statutory health insurance scheme.

- The **CDU** wants to evaluate the impact of and requirements for the social partner model and eliminate possible obstacles to its wider use. With respect to low earners, it wants to develop a concept of an "occupational pension for everyone" to further strengthen this important pillar of pension provision.

- **The Greens** propose that employers offer an occupational pension plan in future, make an own financing contribution and are able to use the Bürgerfonds as the standard for this. In order to make it easier for small enterprises to offer an occupational pension plan, the pure contribution guarantee is to be introduced for small enterprises, releasing them from any liability and thereby ensuring the better spread of occupational pensions.

- The **FDP** wants to provide all enterprises with the option of a "pure defined contribution plan" (higher proportion of equities) and automatic inclusion of the entire workforce (with an "opt-out" option for individual employees). The double contribution to the statutory health and nursing care insurance scheme for all forms of occupational and private pension provision is to be ended.

Conclusion

All parties included ideas for strengthening the statutory, occupational and private pension provision in their election manifestos. This is urgently required and is also to be welcomed. However, there are very significant differences in detail between the proposals of the parties. It remains to be seen which parties form a coalition government and how the election manifestos are ultimately implemented.

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■ JUDGMENT IN REVIEWS

Taking a leave without approval of the employer may also be grounds for termination in the case of continuing employment during litigation proceedings

In the case of mutually agreed continuing employment during litigation proceedings, the same rights and obligations exist between the parties to the employment contract as they do in an employment relationship which has been terminated but has not yet ended. This also includes the prohibition against taking leave without approval. An infringement may result in extraordinary termination of the employment relationship without notice.

Federal Labour Court, judgment of 20 May 2021 – 2 AZR 457/20

The case

The employer terminated the employment relationship with the employee for the first time in April 2018 by giving due notice. The employee filed an action against this for unfair dismissal and, in the context of this, asserted, among other things, a general claim for continued employment. Even during the first instance proceedings before the Labour Court, the employer and the employee concluded an agreement after expiry of the notice period on *"a continuation"* of the employment relationship *"subject to the resolutory condition that the validity of the notice of termination be established"*. During the said continuing employment during the litigation proceedings, the employee requested, inter alia, in an email at 11:17 p.m. on a Friday, leave for a period of one month beginning on the following Monday, and also failed to show up for work as of that day even though the employer had not granted the leave. The employer then terminated *"the employment contract concluded with you"* in April 2019 with immediate effect on extraordinary grounds or, in the alternative, with ordinary notice.

The decision

Whilst the employee's claim against the April 2018 termination was successful on appeal, he was completely defeated regarding the April 2019 termination. The Federal Labour Court found that the employment relationship had been terminated on extraordinary grounds with immediate effect by the said notice of termination.

The federal judges first held that the employer and employee did not, by the continuing employment during litigation proceedings, which was agreed upon in this case, create a second employment relationship apart from the one originally agreed upon between them. The judges considered that with the continuing employment during litigation proceedings they had instead entered into a valid agreement under which they continued their employment relationship under a condition subsequent.

Furthermore, the Federal Labour Court found that by arbitrarily taking the leave not granted by the employer the employee had committed a significant breach of duty such as to justify extraordinary termination. Where the terminated employment contract is continued subject to a condition subsequent until dismissal of the unfair dismissal action has become *res judicata*, the Federal Labour Court is of the opinion that the same rights and obligations exist between the parties to the employment contract - irrespective of the invalidity of the notice of termination - as in an employment relationship which has been terminated but has not yet ended. This also includes the prohibition against the employee taking leave without approval and violating the obligation to work which continues to exist where leave is not granted by the employer. According to the Federal

Labour Court, this prohibition follows directly from the statutory provisions and does not require a separate agreement; the *"ambivalent consequences of the agreement of an employment relationship which is subject to a resolutory condition"* could and must be recognised by the parties themselves. Accordingly, in the opinion of the Federal Labour Court, it was also irrelevant that the employee says he thought that by his conduct he was risking solely an employment relationship during litigation proceedings which was independent of the original employment relationship.

Our comment

The decision of the Federal Labour Court once again makes clear that the continued employment of an employee after notice of termination has been given or at least after the expiry of the notice period can be tricky. First of all, it must be pointed out that a necessary distinction must be made whether, as is the case here, the employee continues to be employed by mutual agreement or whether such continuing employment is solely for the purpose of avoiding compulsory enforcement (so-called forced employment during litigation proceedings). Both have different prerequisites and legal consequences and are therefore to be treated differently. The employee in the present case appears to have drawn at least the wrong legal conclusions in this respect.

Prior to any intended employment during litigation proceedings, there must be a careful examination of whether and to what extent such employment may have a detrimental effect on the unfair dismissal proceedings. Both employee representatives and labour courts regularly point out to employers in unfair dismissal proceedings that the risk of having to pay compensation for unpaid wages in the event of losing the case can be reduced by employing the employee during the proceedings. That is indeed true in principle. At the same time, however, it should also be borne in mind that the termination grounds underlying the termination in dispute can be rendered absurd by employment during litigation proceedings, e.g. if, despite the termination for operational reasons, there is clearly still a job available in which the dismissed employee can continue to be employed. This can then have a serious impact on the outcome of the unfair dismissal proceedings.

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Ineffectiveness of overly broad forfeiture clause

Federal Labour Court, judgment of 26 November 2020 – 8 AZR 58/20

A change in the case law of the Federal Labour Court leads to a need to adjust limitation or forfeiture clauses which do not explicitly exclude liability for intentional breach of contract or intentional tort.

The case

In the appeal proceedings before the Federal Labour Court, the parties disputed the employer's claims for payment against the employee for damages in the amount of more than EUR 100,000.00. The employee was employed as a commercial clerk. She was responsible, among other things, for financial and payroll accounting and for carrying out accounting transactions, which she was supposed to perform on the instructions of management.

The employment contract on which the employment relationship was based, contained a blanket forfeiture clause. According to the contractual provision, *"all claims arising from the employment relationship"* were to be forfeited unless they were asserted in writing within a limitation period and sued for within a further limitation period (so-called two-stage limitation period).

The employee's husband, who has since divorced, admitted to having settled private invoices and liabilities in the amount of approximately EUR 230,000.00 in a number of cases using, among other things, company funds of the employer by paying bogus invoices by means of transfers from the employer's business accounts. The employee confirmed that she had booked transfers debiting the employer in favour of her then husband.

The employer then took the claimant to court for payment of damages. The employee invoked the limitation clause in the employment contract. The employer's claim was allegedly forfeited.

The decision

The Federal Labour Court ruled that the asserted payment claims were not forfeited. The 8th Senate of the Federal Labour Court, unlike the lower courts, based its decision on the fact that the blanket forfeiture clause in the employment contract, which does not explicitly exclude claims for intentional breach of contract and intentional tort, is void pursuant to Section 134 German Civil Code (*Bürgerliches Gesetzbuch*, BGB) because it violates Section 202 (1) BGB. This is because Section 202 (1) BGB prohibits in advance the relaxation of the statute of limitations in the case of liability for intentional conduct, and this also applies to limitation periods, which are agreed in (employment) contracts and which do not explicitly exclude such claims. According to the Federal Labour Court, the clause lapsed completely as a result of the nullity, with the rest of the contract remaining in force (Section 306 BGB).

With this decision, the 8th Senate of the Federal Labour Court has abandoned its previous case law. According to the Federal Labour Court's previous interpretation, blanket forfeiture clauses in general terms and conditions were not meant to cover claims for intentional liability even without an explicit exception. Such clauses were instead to be interpreted to the effect that the parties would not have intended the clause to violate the statutory prohibition rule of Section 202 (1) BGB without providing specific information in the individual case. Claims for liability arising from intentional acts were thus not previously covered and the clause was valid although these claims were not explicitly excluded *(Federal Labour Court, judgment of 20 June 2013 - 8 AZR 280/12, para. 22, juris).* As a result, claims for intentional breach of contract or intentional tort became time-barred according to the statutory limitation periods, and all other claims expired according to the agreed shorter forfeiture period. The Federal Labour Court now assumes that forfeiture clauses are void unless they expressly exclude claims for intentional breach of contract and intentional tort from forfeiture.

Furthermore, the Federal Labour Court ruled, in respect of the legal consequences, that the employer can also invoke the nullity of the clause even though the employer had drafted the void clause in the employment contract. The nullity worked not only in favour of the employee but also in favour of the employer, the result being that the employer too could rely on the fact that the clause was void, and the claims were not forfeited. The legal consequence would be different if the ineffectiveness had resulted from the law on general terms and conditions since in those cases a user of ineffective clauses (generally the employer) is not protected, the consequence being that only the employee and not the employer can invoke the ineffectiveness.

Our comment

The case concerns the requirement for a clause which is widely used in practice in employment contracts to be legal. This is because a large number of employment contracts contain forfeiture or limitation clauses in order to provide the employer and employee quickly with certainty and clarity regarding mutually existing claims. However, the claims are only forfeited if the clause is validly formulated. In the past, the Federal Labour Court has regularly tightened the requirements for a validly formulated forfeiture clause in its rulings (most recently concerning the exception of indispensable claims such as minimum wages) and in this way elicited the need for adjustment with regard to the drafting of forfeiture clauses.

Although today, as in the past, claims for intentional breach of contract and tort are ultimately not forfeited and can therefore still be asserted within the statutory limitation periods, the change in case law has an effect on the forfeiture of all other claims arising from the employment relationship which were previously still covered by the forfeiture clause and would have been forfeit after expiry of the time limit. Due to the change in case law, blanket forfeiture clauses are now void. The fact that this decision is an actual change of course is evidenced by the fact that the 8th Senate has also confirmed this case law in another decision *(Federal Labour Court, judgment of 25 February 2021 - 8 AZR 171/19).*

It is advisable to review the forfeiture clauses previously used in model contracts to see whether they expressly exclude liability for intentional breach of contract and tort, and to adapt the clauses where necessary.

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Definition of “employee” in dismissal of managing director of a limited liability company

Federal Labour Court, judgment of 27 April 2021 – 2 AZR 45/20

The Federal Labour Court has ruled that (outside) managing directors can in principle be counted in calculating the threshold for the applicability of the German Protection against Dismissal Act (*Kündigungsschutzgesetz*, KSchG). However, the prerequisite is that a (an outside) managing director must exceptionally qualify as an employee.

The case

The defendant employer terminated the claimant’s employment, which had existed since December 2016, with due notice by letter dated 21 June 2019, to take effect on 31 July 2019. At the time of termination, the defendant employed 8.5 employees and 2 outside managing directors.

The claimant argued that the Protection against Dismissal Act applied since the two outside directors of the defendant were to be considered employees and the dismissal was not socially justified.

The Labour Court dismissed the action. The claimant’s appeal against the first-instance judgment was unsuccessful. The Higher Labour Court essentially dismissed the appeal by referring to the provision in Section 14 (1) No. 1 KSchG. According to this, the provisions of the first part of the Protection against Dismissal Act (Sections 1 - 14 KSchG) do not apply to the members of the body appointed to legally represent the legal entity, i.e. to managing directors, among others. The Higher Labour Court concluded from this that it must follow from this provision, in order to avoid inconsistencies within the legal system, that managing directors are also not to be counted in the number of employees pursuant to Section 23 (1) KSchG.

The decision

The claimant’s appeal on points of law against the judgment of the Higher Labour Court was unsuccessful.

Although the decision of the Higher Labour Court proved to be correct in the view of the Federal Labour Court, the Federal Labour Court deviated from the opinion of the Higher Labour Court in its reasoning.

The Federal Labour Court explains that the way in which Section 14 KSchG is constructed does not provide for a general exclusion of managing directors when considering the threshold values of Section 23 KSchG. This is because the wording of Section 14 KSchG expressly states that only the provisions of **this** part are not applicable. However, the provisions of “this part“ only include Sections 1 - 14 KSchG, but not Section 23 KSchG.

The Federal Labour Court then discusses whether Section 14 KSchG is to be interpreted beyond its wording, on European law grounds or constitutional law grounds, to the effect that managing directors are generally not to be taken into account in calculating the threshold value pursuant to Section 23 KSchG. However, this is ultimately not the case here. In detail:

The Federal Labour Court states in this regard that this is not result from the definition of “employee” under EU law. This is because the national definition of employee, as shown in sec-

tion 611a of the German Civil Code (*Bürgerliches Gesetzbuch*, BGB) and to which a (an outside) managing director is generally not subject, applies without restriction where EU law is not concerned. However, this is the case here since the general law on protection against dismissal is not determined under EU law.

Nor, according to the Federal Labour Court, is a general exclusion of managing directors from the calculation of the threshold values pursuant to Section 23 KSchG required under constitutional law. The legislator has broad discretion in determining the relevant size of a company in order for the Protection against Dismissal Act to apply. The legislator has made use of this by setting the threshold for small enterprises as the employment of no more than 10 **employees**. The special features of a small business with few employees are not called into question by the employment of outside managing directors. The services rendered by outside managing directors are not comparable with those of an employee in terms of their social typology. Outside managing directors instead represent the legal entity directly as an employer. The national legislature has therefore made a constitutionally permissible distinction.

From the point of view of the Federal Labour Court, the decision of the Higher Labour Court proves to be correct in terms of its conclusion, since the above (narrow) interpretation of Section 14 of the KSchG does not entail an extension of the term "employee" in Section 23 (1) sentence 3 KSchG to outside managing directors of a private limited liability company *[GmbH]*. This means that under certain circumstances an outside director may be included in the threshold value of Section 23 (1) sentence 3 KSchG, since Section 14 KSchG does not expressly exclude this. However, these will be rare exceptions. This is because the Federal Labour Court emphasises its previous case law that a situation where a managing director of a GmbH is required to follow instructions to such an extent that it suggests he or she has the status of an employee can only be considered in extreme exceptional cases (Federal Labour Court, judgment of 11 June 2020 - 2 AZR 374/19). Such an exceptional case would presuppose that the company also has power to issue instructions (going beyond its right to issue instructions under company law) with regard to the circumstances under which the managing director has to render his services and can determine the specific methods and procedures for rendering the services by issuing work-related and procedural instructions. In any case, such an exceptional case cannot be derived from the mere fact that an outside managing director is dependent under social security law (like an employee) and thus subject to social security contributions.

Our comment

The Federal Labour Court 's decision is counter to a widespread opinion in legal literature according to which, irrespective of the circumstances of the individual case, (outside) managing directors must always be disregarded when calculating the threshold values for applicability of the general Protection against Dismissal Act. The BAG makes it clear that it cannot be concluded from the way in which KSchG is structured, in particular not from Section 14 KSchG, that managing directors must be disregarded in this way.

It should be emphasised that the Federal Labour Court consistently differentiates between the national and the EU law definition of employee. The (narrower) national definition of employee always remains decisive if regulatory matters of EU law are not concerned. It can therefore be expected that the Federal Labour Court will also strictly adhere to this differentiation in future decisions.

Apart from this, however, the Federal Labour Court 's decision contains few surprises. The Federal Labour Court adheres to its line that outside managing directors are only to qualify as employees in extreme exceptional cases. Only if these preconditions should exist in individual cases are outside managing directors to be included in the threshold values of Section 23 KSchG. From a procedural point of view, the burden of submitting and proving the facts lies with the dismissed employee, who must therefore, as part of the graduated burden of submitting and proving the facts, present the circumstances from which the managing director's employee status exceptionally arises. The employee is unlikely to succeed in this. In particular, and this is also made clear by the Federal Labour Court, employee status of the managing director cannot be inferred from the assessment under social security law according to which outside managing directors are employed and thus subject to social security contributions. The reason for this is that since these definitions are not consistent, the assessment of the outside managing director under social security law has no effect on the assessment under employment law.

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Statute of limitations on claims for breach of the statutory prohibition of competition

The Federal Labour Court had to decide on the commencement date for the limitation period for asserting claims for breach of the statutory prohibition of competition pursuant to Section 60 (1) of the German Commercial Code (*Handelsgesetzbuch*, HGB).

Federal Labour Court, judgment of 24 February 2021 – 10 AZR 8/19

The case

The claimant sought information and damages from the defendant employee for the defendant's anticompetitive conduct. In the appeal on points of law, the Federal Labour Court had to decide on the existence of a right to information and the statute of limitations of such a claim pursuant to Sections 60, 61 HGB.

The defendant was employed by K KG, the claimant's legal predecessor, which primarily manufactured friction belts and leather brake pads for industrial use and traded in belts and straps for drive and conveyor technology. In the summer of 2010, the defendant founded B-GmbH, of which the defendant is the majority shareholder and sole managing director. The object of the company is trade in technical leather goods. Subsequently, the defendant and B-GmbH entered into competition with K KG. In June 2013, the managing director of K KG instigated research on the defendant and in doing so came across B-GmbH and its website. Upon inquiry, the defendant stated that the business of B-GmbH was partially dormant and that, in respect of the rest, it was currently only selling jewellery, which the auditor of K KG considered plausible on the basis of a balance sheet for the year 2011. In September 2013, the managing director learned through a customer's phone call that the defendant had engaged in competition.

The claimant asserted rights to information and, if applicable, damages for the defendant's anticompetitive conduct. It said that the rights were not time-barred under section 61(2)(1) HGB because it only became aware of the competitive activity

as a result of a call from a customer on 20 September, and therefore, it had complied with the three-month limitation period by filing its claim with the Labour Court on 28 November 2013. The defendant took the position that any claims by the claimant were time-barred, relying on the fact that B-GmbH's website had existed since 20 July 2012.

The decision

The Federal Labour Court dismissed the appeal and rejected the claimant's claims because they were time-barred. The relevant question was whether commencement of the three-month limitation period pursuant to Section 61 (2), first half-sentence, HGB is to depend on when a specific individual transaction was known about or not known about due to gross negligence, or whether, in cases in which the violation of the prohibition of competition consists in the operation of a commercial business, the limitation period commences upon the employer learning of the operation of the competing commercial business or not learning of it due to gross negligence. The Federal Labour Court has decided this question, which is greatly debated in the literature, in favour of the latter view. Even if the employer knows, or is grossly negligent in not knowing, that the employee is carrying on a trade or business contrary to the prohibition in Section 60 (1) HGB, he must react quickly and assert his claims within the three-month limitation period. Since the claimant was aware as early as June 2013 of B-GmbH's entry in the commercial register and of the website, it was even at that time grossly negligent in not knowing of the business activities of B-GmbH and the anti-competitive conduct of the defendant. The three-month limitation period under Section 61 (2) HGB had already begun to run as of that time.

Section 60 (1) HGB stipulates a prohibition of competition for the entire legal term of the employment relationship. According to this, the employee may not engage in a trade or conduct business in the employer's trade for his own account or for the account of a third party without the employee's consent. In the event of a breach of this obligation, the employer may, pursuant to Section 61 (1) HGB, claim damages or, in lieu thereof, demand that the employee surrender the remuneration received from transactions for third-party accounts or assign the right to remuneration. Difficulties of delimitation often arise from the fact that if no post-contractual non-compete clause pursuant to Section 74 HGB has been agreed the employee may nevertheless prepare to form a company or to switch to a competing company for the period after his departure even before the employment relationship ends. The employee is prohibited merely from commencing a promotional activity, e.g., by brokering competing business or actively soliciting customers or employees. In the opinion of the Federal Labour Court, the threshold between a permissible preparatory act and the impermissible operation of a competing commercial business is similarly crossed, irrespective of the activity carried out in the employment relationship, if the employee approaches his employer's customers with the aim of winning over the customer for himself at a later date. Preparatory measures are therefore permitted only up to, and no further than, the point where the business interests of the employer may be affected. This is generally the case with an activity which advertises externally, something which can exist even in the maintenance of an online presence.

The right to information, which is the subject matter of the present dispute derives from good faith. In the case of an infringement of competition, the party who is under a contractual obligation to refrain from competition is obliged to provide information as soon as he has given sufficient reason for suspicion that he has infringed his contractual obligation.

Our comment

The Federal Labour Court decision deals with two aspects that are important in practice in connection with a competitive activity in an ongoing employment relationship. Firstly, the Federal Labour Court comments on the demarcation between a (permissible) preparatory act and the (impermissible) commencement of a competitive activity. A competitive activity within the meaning of Sections 60, 61 HGB can also lie in the maintenance of an online presence, since this already represents an advertising activity. Secondly, the commencement of the three-month limitation period is linked to knowledge or grossly negligent ignorance of the operation of a commercial business. As soon as there are indications that an employee is engaging in or seeking to engage in competitive activity, there must therefore be a careful examination as to whether the threshold for unlawful competitive activity has already been reached so that the short limitation period of Section 61 HGB can be complied with.

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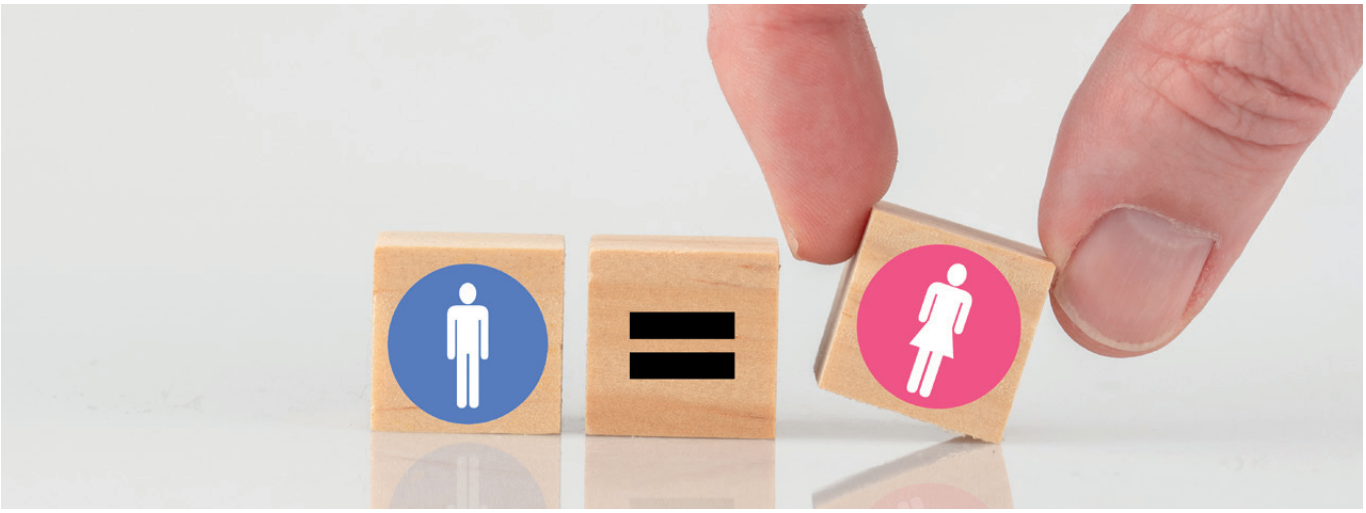
Compliance with the principle of equal treatment under employment law when issuing a job description for in-house counsel

The Federal Labour Court once again dealt with the question of the duty of employers to cooperate in the admission of their in-house lawyers to the bar with regard to the issuance of a job description. The particular focus was on the principle of equal treatment under employment law.

Federal Labour Court, judgment of 27 April 2021 – 9 AZR 662/19



Authors' headnotes:

- **The principle of equal treatment under employment law also applies if the employer makes payments on a discretionary basis or according to criteria that are not appropriate or cannot be determined.**
- **There must be objective grounds for complying with the principle of equal treatment under employment law if a distinction is made between the individual businesses.**

The case

In 2013, the trade union Ver.di hired a fully qualified lawyer as "*Gewerkschaftssekretär mit Rechtsschutzaufgaben*" (trade union secretary with legal protection responsibilities). Since the latter was seeking admission as in-house counsel, he asked his employer in 2017 to issue a job description describing the activities required for this for submission to the competent bar association.

In the past, the defendant union had allowed union secretaries employed in other districts to become in-house counsel by issuing an appropriate job description and it continued this practice after the claimant filed suit. In the claimant's case, however, the union refused to issue the certificate. The employer believed that the claimant was only employed as a union secretary and not as in-house counsel. There was, in the employer's view, no entitlement to be admitted as in-house counsel because, as a trade union representative, his activities were related to ideological purposes (*"tendenzbezogen"*) and he was subject to instructions under his employment contract. The claimant, in the employer's view, was not eligible for a secondary employment permit.

Because 19 employees are similarly employed by the defendant union, the claimant based his claim on the principle of equality under employment law.

In the first instance, the Offenbach Labour Court had upheld the claim (judgment of 25 July 2018, file ref. 10 Ca 48/18) on the basis of a violation of the principle of equal treatment. The Higher Labour Court of Hesse (judgment of 18 September 2019, file ref. 18 Sa 1225/18) dismissed the action on appeal. In the opinion of the Federal Labour Court, on the other hand, a violation of the principle of equal treatment under employment law is a matter that should be considered. However, since this still had to be clarified in the matter, it referred the case back to the Higher Labour Court for further clarification of the facts.

The decision

A final decision on the existence of the claimant's claimed entitlement to the requested job description was not possible for the Senate based on the findings of the lower courts.

Nevertheless, the Federal Labour Court stated that the Higher Labour Court should not have dismissed the claimant's claim on the grounds that the defendant's handling of the issue in allowing other employees qualified to hold judicial office to be admitted as in-house counsel was not based on a distributive decision.

With regard to the principle of equal treatment under employment law derived from Article 3 (1) of the Basic Law, from which a claim to the issuance of a declaration of intent can also result, employers are required to treat comparable employees (groups of employees) equally when employers apply a rule they themselves have issued. According to the Federal Labour Court, this also applies across businesses. The Federal Labour Court 's guiding principles have far-reaching consequences, even beyond the question of granting the certificate of activity as in-house counsel.

The Federal Labour Court made clear that an arbitrary decision by the defendant as to which - comparable - employees it allows to be admitted as in-house counsel was inadmissible. In evaluating the case, the question of whether "the defendant made a company-related distributive decision or arbitrarily or capriciously permitted or denied admission as in-house counsel to the union secretaries employed by it" is of particular importance.

However, it must be borne in mind here that, insofar as the decision to participate in the admission process is made by the respective district, competence is in each case limited to its own area of jurisdiction and cannot influence the area of competence of other districts. In that case, the plaintiff is not entitled to equal treatment with comparable employees in other districts and to issuance of the relevant job description. A different decision could be made if the Higher Labour Court found that there were objective reasons for the unequal treatment.

Taking into account the principle of equal treatment under employment law, the Higher Labour Court must now determine whether the trade union, either centrally or within the framework of its own organisation, is treating comparable trade union secretaries unequally with regard to admission as in-house counsel.

Our comment

Since the Federal Social Court decision in 2014 (Federal Social Court, judgment of 3 April 2014, file ref. B 5 RE 13/14 R et al.), the issuing of the job description pursuant to Section 46 (2) to (5) of the German Federal Lawyers' Act (*Bundesrechtsanwaltsordnung*, BRAO), which enables in-house counsel to join the Bar or the pension scheme, is understandably of great importance to lawyers. This is because the Federal Social Court established in principle that salaried lawyers at non-lawyer employers are liable to pay pension insurance under the statutory pension insurance scheme.

The decision of the Federal Labour Court is of great interest and importance as it once again specifies the principle of equal treatment under employment law. In terms of employment law, the Federal Labour Court still ruled at the end of 2018 (judgment of 24 October 2018, file ref. 10 AZR 69/18) that an employee could not demand that his employer cooperate in the admission to the Bar. Compared to the current case, however, the employer there generally did not cooperate. In the present case, however, the union's support in the admission to in-house counsel was arbitrary. The Federal Labour Court now emphasised the problem of an employer's discretionary approach and made it very clear that in the absence of an objective reason the principle of equal treatment must be taken into account even across businesses.

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Unequal treatment regarding supplements for night work

Many collective bargaining agreements contain supplements for night work, which are intended to compensate for a particular burden on employees in terms of their health. Many collective bargaining agreements distinguish between night work performed regularly in a shift system and irregular night work performed outside a shift system and compensate the latter with significantly higher bonuses. The Federal Labour Court has now ruled that this differentiation constitutes unequal treatment pursuant to Article 3 (1) of the Basic Law, which must be compensated for by "upward" adjustment.

Federal Labour Court, judgment of 9 December 2020 – 10 AZR 334/20

The case

The parties dispute the amount of collectively agreed bonuses paid for hours worked by the claimant on the night shift.

The defendant is a Hamburg brewery and a member of the trade union Nahrung-Genuss-Gaststätten. The general collective bargaining agreement for employees in breweries and their branches in Hamburg and Schleswig-Holstein dated 29 October 2005 (*Manteltarifvertrag*, MTV) applies to the employment relationship between the parties. The MTV provides for a 50% bonus for night work. For night work performed during a night shift, the MTV stipulates a bonus of 25%. The claimant works for the defendant in a shift system. For his night shifts, he received the 25% bonus stipulated in the MTV. He is of the opinion, that the distinction in the MTV between work performed during a night shift and irregular night work outside a night shift violates the principle of equal treatment and, in his action, seeks the higher bonus for irregular night work of 50%. The defendant takes the view that workers are subjected to a greater burden in the case of irregular night work, justifying a higher bonus. In addition, the higher bonus

was intended to compensate for the impromptu loss of employees' freedom to dispose of their free time. Moreover, in the case of regular night shifts, there is further compensation, not taken into account by the claimant, in the form of paid time off for shifts, and paid breaks.

The Labour Court dismissed the action and the Higher Labour Court dismissed the appeal in part as inadmissible and rejected it in part.

The decision

The Federal Labour Court allowed the appeal on points of law and awarded the claimant a bonus of 50% for the work performed on the night shift.

In the view of the Federal Labour Court, the distinction made in collective bargaining agreements between bonuses for night work on the one hand and for night shift work on the other hand violated Article 3 (1) of the Basic Law since night shift workers were, contrary to the principle of equality, placed in a worse position than employees who performed night work irregularly outside of shift systems. The precept of equality, against which collective bargaining provisions are to be measured without restriction, implies a prohibition against granting benefits to one group of persons and not to another group of persons in violation of the principle of equality. Differentiations require objective reasons. The Federal Labour Court does not see such objective reasons in the present case. According to the Court, employees who work regular night shifts are comparable to employees who work irregular night shifts. Night work leads to adverse health effects regardless of whether it occurs unexpectedly and irregularly or regularly within a shift system. An objective justification cannot therefore be seen in the fact that workers in a shift system can better adapt to night work. In addition, according to medical findings to date, it can be assumed that adverse health effects in particular increase with an increased number of night shifts, as is the case in the shift system. The Federal Labour Court considered that even compensation for the loss of freedom to dispose of free time does not constitute justification for the unequal treatment since such justification does not derive from the MTV. No other objective reasons are apparent in the MTV. Nor is the difference between the bonuses for night work and night shift work compensated for by other benefits under the collective bargaining agreement, such as time off for shifts or paid breaks in the case of night shifts. According to the provisions of the MTV, these benefits are intended to compensate for particular hardships associated with work in alternating shifts or constant night work.

The general right to equality can only be satisfied by treating the claimant in the same way for night shift work as employees who work night shifts irregularly, so that a further bonus of 25% is paid in addition to the bonus already paid.

Our comment

The provision of the MTV on which the legal dispute is based is not an isolated case and can also be found in other collective bargaining agreements or works agreements. The Federal Labour Court 's decision to adjust the bonuses for night work "upwards" therefore means a considerable additional burden for many employers.

Nevertheless, the decision of the 10th Senate is not surprising, being in line with the previous case law of the Federal Labour Court. However, the Court is not issuing a blanket rejection of differentiations in the remuneration of night work bonuses. It makes clear instead that a differentiation is possible in principle if there are sufficient objective reasons and if these result from the collective bargaining agreement. On the basis of the autonomy of collective bargaining protected by Article 9 (3) of the Basic Law, the parties to collective bargaining agreements have broad latitude in determining the content of collective bargaining agreements. In doing so, the bargaining parties do not have to find the most reasonable or fairest solution. However, an objective reason is required for employees to be treated differently from each other, with the constitutional requirements becoming more stringent the fewer differentiating characteristics that are present in the employees. In the present case, however, the differences between the groups of night workers were of such minor importance that there should have been substantial objective reasons for them to be treated in differing ways. The MTV itself, however, did not contain any evidence of objective grounds for doubling the bonus for irregular night work. The parties to a collective bargaining agreement are therefore well advised not only to measure objective grounds for differentiation against the standard in Article 3 (1) of the Basic Law, but also to include them in the collective bargaining agreement.

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Creativity in voting jeopardises a successful outcome

Even a smiley face on the ballot paper is a special feature within the meaning of Section 11 (4) German Election Regulations implementing the Works Constitution Act and invalidates the vote.

Federal Labour Court, judgment of 28 April – 7 ABR 20/20

A ballot paper marked with a special feature leads to the vote being invalid in accordance with Section 11 (4) of the Election Regulations implementing the Works Constitution Act (*Wahlordnung zum Betriebsverfassungsgesetz*, WO BetrVG). The question arises as to the conditions under which marking of the ballot paper which goes beyond casting a vote constitutes such a special feature. There is hardly any case law on this subject.

However, there are parallel provisions in other electoral regulations that can be applied to the above case. Section 11 (4) WO BetrVG has an equivalent in section 13 (3) of the Ordinance on the Election of Employee Supervisory Board Members under the Act concerning One-Third Employee Representation on the Supervisory Board (*Verordnung zur Wahl der Aufsichtsratsmitglieder der Arbeitnehmer nach dem Drittelbeteiligungsgesetz*, WODrittelbG). With regard to the latter, the following decision of the Federal Labour Court was issued, which substantively concerns the question of whether a ballot paper which has a smiley face on it is valid.

The case

In the election of the Supervisory Board of a group of companies, Parties 1 and 6, among others, stood as employee representatives. During the count, one ballot paper, which was cast in favour of Party 1, was declared invalid as there was a smiley face with a diameter of approx. 1 cm drawn on it in the upper left-hand corner outside the field provided for the casting of the vote. Excluding this vote, Party 1 and Party 6 each received 221 votes.

Party 1 was unsuccessful in the subsequent drawing of lots, as a result of which Party 6 became a member of the Supervisory Board.

Party 1 demanded that the election result be corrected and wanted to take his seat as employee representative on the Supervisory Board instead of Party 6 because the ballot paper

with the smiley face had been wrongly counted as invalid by the electoral board.

The decision

The Federal Labour Court rejected this position, stating that, contrary to the opinion of Party 1, the substantive prerequisites for contesting the election had not been met.

It held that Section 13 WODrittelbG constitutes an essential electoral provision within the meaning of Section 11 (1) of the Act concerning One-Third Employee Representation on the Supervisory Board (*Drittelbeteiligungsgesetz*, DrittelbG). This takes account of the principle of electoral equality and of ballot secrecy as fundamental principles by ensuring that votes cannot be traced back to a specific voter. This possibility of drawing conclusions about a specific voter is enabled even by a “smiley face”, and this is accordingly a special feature leading to the invalidity of the ballot paper within the meaning of Section 13 (3) No. 3 WODrittelbG.

It is considered that it is not necessary in this context for the specific person to be actually identifiable. It was sufficient instead that the additional marking of the ballot paper, which went beyond the casting of the vote, could, in conjunction with other circumstances, be abstractly such as to allow conclusions to be drawn as to the identity of the person voting. In case of doubt, this must always be the assumption if the ballot paper contains an additional marking. Any marking of the ballot paper, apart from a cross placed in the designated place in the case of elections for individuals, therefore constitutes, in case of doubt, a special feature within the meaning of Section 13 (3) No. 3 WODrittelbG.

Our comment

The decision was issued with regard to the election regulations under the DrittelbG but it is likely that it can be applied to the election regulations implementing the Works Constitution Act. In the passage which is of interest here, the provisions are identical in wording and pursue the same protective goal.

The decision is also substantively persuasive. The freedom to vote requires the voter to be justified in assuming that the vote will be cast in secret. If a vote can be traced back, this trust is violated. For this reason, it is logical for the Federal Labour Court to take the position that the abstract risk of identifiability is sufficient to invalidate the vote. If further indications are taken into account, the abstract risk of identification quickly becomes a concrete one, given sufficient resources and time. This in turn precludes the voter from relying on the fact that the ballot is secret.

However, it remains somewhat unclear why the Federal Labour Court assumes that the additional marking only leads to invalidity "in case of doubt". If a mark can be recognised as a mark at all, this "automatically" establishes the abstract risk of identification. In practice, the assumption must therefore be that only cases in which one can already argue about whether the ballot paper was marked (e.g. single dot in the same colour as the colour used for the cross) are possibly to be treated according to the "in case of doubt" sentence.

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■ CASE LAW IN A NUTSHELL

No gender discrimination in the use of the gender asterisk in job advertisements

Schleswig-Holstein Higher Labour Court, judgment of 22 June 2021 – 3 Sa 37 öD/21

The use of the so-called gender asterisk (*) in a job advertisement does not constitute discrimination against people who are intersex at birth. The asterisk is intended not only to make women and men equally visible in the language but also to symbolise all other genders and to serve the purpose of treating all genders equally in linguistic terms.

Reasons for the decision

The defendant local authority had advertised several positions for qualified social education workers (*Diplom-Sozialpädagog*innen*), qualified social workers (*Diplom-Sozialarbeiter*innen*) and qualified special education teachers (*Diplom-Heilpädagog*innen*) and used the so-called gender asterisk for this purpose. The job posting states: "For further details, please refer to the following requirements profile for a specialist (m/f/non-b)" and "Severely disabled male or female applicants* (*Bewerber*innen*) will be given preferential consideration if they are equally suitable". The claimant, who was intersex at birth and severely disabled, received a rejection letter after his/her application. In his/her complaint he/she asserted claims for compensation under the General Equal Treatment Act (*Allgemeines Gleichbehandlungsgesetz*, AGG). The claimant took the view that he/she had been discriminated against on the grounds of gender since the gender asterisk used by the defendant in the wording "severely disabled male or female applicants (*Schwerbehinderte Bewerber*innen*)" referred to the aspect of gender. The claimant felt that contrary to the requirements of Social Code IX, this wording was not gender-neutral. At first instance, the court awarded the claimant compensation; however, it did not base its decision on the existence of discrimination on the grounds of gender, but on the insufficient involvement of the representative body for severely disabled persons.

The claimant then applied to the Schleswig-Holstein Higher Labour Court for legal aid to conduct the appeal proceedings; the aid was denied because there were insufficient prospects of the appeal being successful. The court ruled that the use of the gender asterisk in a job advertisement did not discriminate

against people born with more than one gender. According to the court, the gender asterisk serves to ensure gender-sensitive and non-discriminatory language and is also based on a recommendation by the Federal Government's Anti-Discrimination Agency. Its use is intended to make not only women and men but also all other genders equally visible in the language. Moreover, the addition of the words 'm/f/non-b' in the text of the job vacancy notice makes it clear that the vacancy notice was intended to be gender-neutral. The appeal on a point of law was not allowed. The decision is final.

Corona pandemic - no permanent loss of employment opportunity

Munich Higher Labour Court, judgment of 5 May 2021 – 5 Sa 938/20

The simultaneous introduction of short-time work for employees with the same tasks argues against the assumption of a permanent cessation of the need for employment which could socially justify a termination for operational reasons.

Reasons for the decision

The parties are disputing the legal validity of an ordinary termination for operational reasons.

The claimant was employed by the defendant as a "city guide and tour guide". In March 2020, the defendant employer approached its employees and asked them to give their consent to the introduction of short-time work in view of the restrictions in place due to the Corona pandemic. However, the employee did not meet the social security requirements for receiving short-time working allowance. Therefore, an agreement on reducing the pay was to be reached between the parties to the employment contract. After no such agreement was reached, the employer issued the employee with an ordinary notice of termination "due to the Corona crisis and the economic situation in terms of incoming orders". The employee filed an action against this, requesting a declaratory finding that the employment relationship had not been terminated as a result of the notice of termination. The Passau Labour Court dismissed the employee's action brought against the dismissal, and the appeal filed against it was successful.

The dismissal was not socially justified due to the lack of urgent operational requirements and was therefore invalid. A dismissal for operational reasons would be effective if it was projected that the employment opportunity would be permanently lost. The introduction of short-time work in the company was an argument against a permanently reduced employment need since the prerequisite for receiving short-time allowance was that employment was only temporarily interrupted.

The Munich Higher Labour Court based its decision on the legal situation applicable at the time of the notice of termination with regard to the maximum period of twelve months for receipt of the short-time allowance. Accordingly, a cessation of employment is to be regarded as only temporary if the projection is that a period of 12 months will not be exceeded. The introduction of short-time working in March 2020 supports the view that at the time of the termination in April 2020 it was projected that the need for employment would not cease for more than 12 months and was therefore temporary in nature. The Munich Higher Labour Court emphasises that terminations for operational reasons remain permissible even in a company in which short-time work is generally performed. It is accordingly conceivable in principle to introduce short-time work only partially in the same company with regard to different areas of work. However, if at the same time short-time working is introduced for some of the employees within a department and terminations for operational reasons are imposed on another part of the workforce, the projections are mutually exclusive in substantive terms.

Termination agreement contested due to unlawful threat

Berlin-Brandenburg Higher Labour Court, judgment of 31 March 2021 - 23 Sa 1381/20

If the employer holds out the prospect of extraordinary termination in the event that a termination agreement is not concluded, this constitutes an unlawful threat if a reasonable employer could not seriously contemplate such termination.

The threat of an extraordinary termination is also unlawful if the employer could no longer have validly declared a termination due to the expiry of the notice period pursuant to Section 626 (2) of the German Civil Code (*Bürgerliches Gesetzbuch*, BGB).

Reasons for the decision

One of the matters disputed by the parties is the validity of a contested termination agreement.

The claimant has been employed by the defendant as a production worker for more than 20 years and cannot be dismissed due to the special protection against dismissal which was agreed under the collective bargaining agreement. A blue pill, presumably a narcotic, was found in a child's toy egg in a locker provided to the employee at the premises of the defendant employer. Video surveillance showed the employee and another co-worker placing and removing the child's toy egg. After hearing both the individuals, it was revealed, based on the information given by the co-worker, that the latter had been supplied with ecstasy by the employee in return for money. The employee disputed this. After hearing the works council, a personnel interview was conducted with the employee regarding the planned termination of the employment relationship. During the interview, the employee was presented with two draft documents - an extraordinary termination notice and a termination agreement. To this end, he was informed that extraordinary termination would be declared if he did not sign the termination agreement. The employee signed the contract at the end of the personnel interview, but contested it shortly thereafter on the grounds of unlawful threat. Thereupon, the employer gave two extraordinary notices of termination in succession. The employee filed an action against this and demanded that he continue to be employed. The Labour Court upheld the action. The appeal filed by the employer against this remained unsuccessful. The termination agreement did not terminate the employment relationship because it was validly contested on the grounds of unlawful threat and was therefore void ab initio. The threat of termination is unlawful if a reasonable employer could not seriously contemplate such a termination because he had to assume that the threatened termination would in all likelihood not withstand a review by the labour court if it were issued. Although the employer was entitled to assume there was a reason for extraordinary termination in the specific case, in view of the expiration of the notice period pursuant to Section 626 (2) BGB of two weeks after obtaining knowledge of the reason for termination, it could no longer be expected that an extraordinary termination pronounced at the time of the personnel interview would in all likelihood withstand review by the labour court. Clarification of the facts had been completed upon hearing the employee and the other co-worker, which is why the two-week notice period had started to run at that point and ended before the time of the personnel interview. Based on this, the employer was not allowed to threaten termination in order to induce the claimant to enter into the termination agreement.

Delivery service must provide its employees with a bicycle and smartphone

Hesse Higher Labour Court, judgment of 12 March 2021 – 14 Sa 306/20

Under Section 611a, Section 615 sentence 3 and Section 618 BGB in conjunction with the employment contract, bike delivery persons have a claim against their employer to be provided with a roadworthy bicycle and an internet-capable mobile phone for use on duty, unless the employment contract provides otherwise. General terms and conditions cannot validly create an obligation of providing oneself with work equipment that is absolutely necessary without financial compensation since such a regulation unreasonably disadvantages employees.

Reasons for the decision

The defendant operates a food and beverage delivery service. The claimant has been employed by the defendant as a bike delivery person for several years. The parties agreed in the employment contract that the employee would be provided with some work equipment (specified in a lien agreement) by the employer, for which a lien would be retained by the employer. This work equipment did not, however, include a smartphone or a bicycle. However, these are absolutely necessary in order to perform the job as a bike delivery person because the schedules, the addresses of the restaurants and those of the customers are communicated to the employee via an app on his smartphone. The employment contract also included a requirement that the claimant use a roadworthy bicycle. The employee unsuccessfully sued the defendant before the Frankfurt am Main Labour Court for the provision of a company bicycle and an internet-capable mobile telephone with a monthly data usage volume of 2 GB. The employee appealed. The Hesse Higher Labour Court overturned the lower court decision and awarded the employee both a bicycle and a mobile telephone with data usage volume. The court held pursuant to Sections 611 a, 615 sentence 3, 618 BGB that the employer had to provide the equipment needed to perform the work and had to bear the associated costs. The latter also had to bear the risk that the work could not be performed due to a lack of functioning equipment. The employer would accordingly have to provide a bicycle and mobile phone during working hours. The clause in the employment contract was indeed to be interpreted to the effect that only the work equipment mentioned in the lien agreement had to be made

available, i.e. precisely not an internet-capable mobile telephone and not a bicycle. But the clause is a general term and condition which deviates from the basic legal rule that the employer must provide the work equipment. However, a clause which obliges the employee to provide work equipment without financial compensation is not compatible with the fundamental ideas of the statutory provision. In this respect, such a clause constituted an unreasonable disadvantage for the employee and was therefore invalid.

Termination without notice because of theft of a bottle of disinfectant

Dusseldorf Higher Labour Court, judgment of 14 January 2021 – 5 Sa 483/20

The theft of a bottle of disinfectant provided by the employer to its employees during the Corona pandemic justifies the extraordinary termination of a long-standing employment relationship, taking into account the special circumstances of the individual case. A prior warning is not required.

Reasons for the decision

The Dusseldorf Higher Labour Court had to decide whether the theft of disinfectants justified the termination without notice of an employee who had been employed for many years. The claimant had been employed by the defendant parcel delivery company since 2004 as a loader, unloader and washer for the vehicles. During a random exit inspection in late March 2020, plant security found a bottle containing one litre of disinfectant and a towel roll in the claimant's car boot. The value of the disinfectant at the time was about 40 euros. The employer used this discovery as a reason to terminate the employment relationship without notice. The employee brought an action for unfair dismissal before the Mönchengladbach Labour Court, stating that he had gone to his vehicle every hour during work to disinfect and dry his hands. He had wanted to use the product for himself and possibly for his colleagues, especially as it had not always been available in the washrooms. On the way out, he had not thought about the things in the car boot. The Labour Court's judgment dismissing the case was upheld by the Dusseldorf Higher Labour court. There was good cause for termination without notice. The Court was not convinced by the claimant's account. In the opinion of the Court, the employee had taken the disinfectant with him in order to use it himself. Insofar as he actually wanted to use the disinfectant at work, he did not have to at least put it in the boot of his private vehicle. Furthermore, the bottle that was discovered had not been opened, which is why he could not have used it yet. A prior warning had not been necessary. The employee had stolen a not insignificant quantity of disinfectant at a time during the pandemic when disinfectant was in short supply and in the knowledge that the employer was also struggling with supply shortages. At the same time, he accepted that his colleagues at work would go away empty-handed. In addition, the employer had recurring experiences of disinfectant going missing at this time. For this reason, notices had already been posted in the sanitary area indicating that taking away disinfectants would result in termination without notice and a report to the police. It should have been clear to the employee that he was jeopardising his employment relationship by taking the disinfectant with him. In view of these circumstances, the weighing up of interests was also to the employee's detriment despite his long service with the company.

Extraordinary termination due to threat of sick leave

Mecklenburg-Western Pomerania Higher Labour Court, judgment of 4 May 2021 – 5 Sa 319/20

An employee's threat to take sick leave can justify an extraordinary termination of the employment relationship due to a serious breach of the duty of consideration under the employment contract.

Reasons for the decision

The parties are in dispute about the validity of an extraordinary termination. The claimant had been working for the defendant as a sales assistant in one of the bakery branches since 2010 and had threatened to go on sick leave after the shift assignment during a particular week was not as requested. After the employee submitted a certificate of incapacity for work a few days later for the week in question together with a letter of termination, the employer issued a notice of termination with immediate effect, referring to the threatened sick leave. The employee filed an action against this, requesting a finding that the employment relationship was not terminated by the employer's termination without notice but continued until the ordinary termination by the employee herself took effect. The Labour Court upheld the action, and the employer's appeal against it was unsuccessful. The extraordinary termination was considered to be disproportionate when the mutual interests were weighed up. The Higher Labour Court

of Mecklenburg-Western Pomerania basically stated in this regard that the threat to take sick leave if the shift was not assigned as desired constituted a serious violation of the duty of consideration under the employment contract, which could justify an extraordinary termination. The breach of duty constituted by such a declaration in the case of an objectively non-existent illness lies in particular in the fact that the employee expresses her willingness, if necessary, to abuse her rights arising from the right to continued payment of remuneration in order to obtain an unjustified advantage. By behaving in this way, the employee is considered to be in serious breach of her fiduciary duty to perform in accordance with her duty of consideration. Furthermore, the breach of duty seriously impaired the employer's trust in the employee's honesty and loyalty, so that such a statement duly constituted grounds that in themselves justified the extraordinary termination for conduct-related reasons, even without a prior warning. Since good cause for termination is to be seen in the employee's expressly or impliedly declared willingness to obtain for herself the requested leave of absence, if necessary, by means of an incapacity to work which does not actually exist, it is no longer relevant whether or not the employee actually falls ill later (BAG, judgment of 12 March 2009 - 2 AZR 251/07). The employee is, according to the Court, prevented from using the illness as a means of exerting pressure on the employer in order to induce the latter to behave in a desired manner, even if the illness actually exists, due to the principle of consideration (Federal Labour Court, judgment of 12 March 2009 - AZR 251/07). In the present case, however, it was reasonable for the employer, after weighing up the mutual interests, to continue the employment relationship for around another month until the date of the employee's own termination. In view of the imminent termination of the employment relationship, disruptive effects on peace within the company or significant impairments of the operational processes were no longer to be expected.

■ GENERAL INFORMATION

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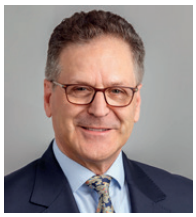

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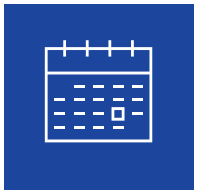
Events, publications and blog



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You will find a list of our current publications here.

You will find our blog here.

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