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Labour & Employment Law Newsletter

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unyer GLOBAL ADVISORS

Content

Dear Readers,

We hope you had a nice summer and returned from leave with recharged batteries. It is that time of the year when new projects are initiated, or ongoing projects are resumed. It is therefore also a good time to get an overview of current developments and issues in the field of employment and labour law. Our Newsletter is the right read here to keep track of the latest employment and labour law topics.

Due to current developments, the topic of pay structures and pay transparency is increasingly affecting practice. For a long time, pay issues could still be addressed with a considerable degree of freedom. However, the world of work is currently changing in this area. Earlier scope for setting pay structures is now being further restricted by European legislation and the case law of the Federal Labour Court. In this issue, Dietmar Heise therefore looks at the topic of pay structures, taking into account the current EU Pay Transparency Directive of 10 May 2023 (Directive (EU) 2023/970) and the Federal Labour Court's decision of 16 February 2023 on equal pay.

Companies have long reported the shortage of skilled workers that is hampering economic growth in Germany. The legislature has recognised the need for action. With the Act on Further Development of Skilled Worker Immigration, amendments were again made to the Residence Act and other laws governing foreigners, that will come into force in 2024. In his article, Lukas Beismann provides an overview of the basic elements of the law on immigration of skilled workers and presents the recently passed reform of the law for the further development of skilled worker immigration.

In the area of occupational pensions, Dr Annekatrin Veith addresses issues relating to the employer's obligation to adjust company pensions and presents options for action. Against the backdrop of the sharp rise in the rate of inflation in Germany since 2020, companies are increasingly focussing on this topic.

Monique Figueiredo from our unyer network law firm, FIDAL, in Paris provides an overview of the legal framework and recent legal developments in the field of teleworking in France in her contribution.

In this issue, of course, we again deal with the latest developments in case law and hope that the selected decisions will be of particular interest to you in practice. We would be very pleased to receive your feedback on our topics. Please do not hesitate to contact us if you have any suggestions or questions.

We hope you enjoy reading this issue!

Yours

Achim Braner

Pay structures squeezed in a legal vice

For a long time pay issues have been a complex area of employment and labour law that could still be addressed with a considerable degree of freedom without being subject to statutory requirements: Collective agreements fulfilled their most specific purpose in setting collective pay; the works council did not (and still does not) have a comprehensive say regarding employees not covered or not bound by collective agreements. Only compliance with the principle of equal treatment supplemented since 2006 by the German General Equal Treatment Act (*Allgemeines Gleichbehandlungsgesetz*, AGG) and since 2017 by the equal pay requirement laid down in the Transparency of Pay Act (*Entgelttransparenzgesetz*, EntgTranspG) together with the accompanying regulations was (essentially) subject to review. This freedom is now being squeezed in a vice by European legislation and the Federal Labour Court.

I. The EU Pay Transparency Directive

The aim of the EU Pay Transparency Directive of 10 May 2023 (Directive (EU) 2023/970) is to promote **pay equality** between the sexes and eliminate the structural causes of existing pay gaps. According to the EU, greater transparency is intended to reduce pay gaps between women and men and thus enforce the objectives of the Directive. Under the current rules, equal pay shall be established not only for equal work, but also **for work of equal value**. In fact, the measures go well beyond the current rules, which the German legislator will have to significantly expand. The transposition deadline for Member States is 7 June 2026.

Key requirements of the EU Pay Transparency Directive are:

- The existing **obligation to provide information** provided for in Section 10 EntgTranspG **will be extended**: Companies (of any size!) shall be required to provide information on their individual pay levels (in future: gross annual pay including all direct and indirect cash benefits and benefits in kind) and on average pay levels. The information must be broken down by sex and for categories of workers who perform the same work as the person requesting the information. The employer shall **inform** all workers **on an annual basis** of their **right to receive such information**. Until now, under the EntgTranspG, the person requesting information had to be able to name at least six other persons of the opposite sex from a comparison group, and the employer had to have more than 201 employees.
- **Transparency for job applicants** is to be created even **prior to employment**, and the **employer** shall be required

to provide information accordingly: Job applicants shall have the right to receive information about the initial pay attributable to the position concerned or its range as well as, where applicable, the relevant provisions of the collective agreement. Conversely, **a lack of transparency** is created for **the employer**: the employer will be prohibited from asking about the applicants' previous pay progression and current pay.

- **Transparency of pay progression:** Companies must specify criteria on how workers can improve their pay and develop themselves further. Member States may exempt companies with fewer than 50 employees from this obligation.
- **Confidentiality clauses** in employment contracts with regard to the respective worker's own pay shall become invalid.
- **Claim for damages or compensation**: Workers who have suffered damage in connection with pay discrimination shall have the right to claim full compensation for this. In addition to cases of sex discrimination, such claim shall also apply in cases of pay discrimination based on the worker's ethnicity or social environment. It is expressly intended to be not only proportionate but also dissuasive. An upper limit – for compensation in money provided for in Section 15 (2) AGG – is prohibited by the Directive. Nevertheless, it is to be hoped that the legislature will see little need for change compared to the already existing claim under Section 15 AGG.
- Bureaucracy in the form of **reporting requirements** is to be expanded: Employers (companies) with more than **250 workers** will be required to disclose the gender pay gap **annually**. Employers with more than **100 employees** will be required to disclose data **every three years**. Reporting is voluntary for employers with fewer than 100 employees. The reporting obligation begins for companies with at least 150 employees on 7 June 2027, for companies with at least 100 employees on 7 June 2031.
- The current EntgTranspG requires companies with more than 500 workers to report every five years if they have concluded collective agreements, otherwise every three years.
- Companies shall be further required to conduct a **joint pay assessment and, if necessary, to develop measures with employee representatives if**:
  - the pay gap is more than 5%,
  - this gap is not justified and explained by objective, gender-neutral criteria, and
  - the company has not remedied the differences in pay within six months of the reporting date.
- Reversal **of burden of proof**: If a worker presents facts from which discrimination may be presumed, the company must prove that there is no pay discrimination. This measure is also already known from the AGG, at least in its approach.
- **Collective actions and rights of employee representatives**: Associations, organisations, equal opportunities bodies and employee representatives shall be able to participate in proceedings regarding the infringement of the right to equal pay both on behalf of workers and in support of them to prevent "victimisation" of workers who have been allegedly discriminated against. This will result in legal action being taken by associations and in the right to information for works councils or trade unions which may further increase the bureaucratic burden of justification for employers.
- Sanctions **for companies**: Member States must introduce sanctions in case companies fail to comply with the regulations.
- Lastly, there may also be a change in **labour court proceedings**: Whereas at present, at first instance, each party bears its own **costs of the proceedings** regardless of the outcome of the case, the Member States shall ensure that the courts can decide on whether an **unsuccessful (!) claimant plaintiff** (usually the employee) is not required to pay the costs of the proceedings where there are "reasonable grounds" for bringing the action. Whether the State or even the successful employer must then pay these legal costs is not specified.

II. Federal Labour Court: Equal pay is not a matter of negotiation

The Federal Labour Court also restricts the leeway that employers have in matters of pay against the background of gender equal pay: The Federal Labour Court, in its judgment of 16 February 2023 (case reference 8 AZR 450/21), precludes employers from differentiating pay by negotiation, even if the different treatment stems from the workers or job applicants. It grants workers, who, in its view, have been discriminated against, **the right to an upward salary adjustment** both under Article 157 of the Treaty on the Functioning of the European Union (TFEU) and Sections 3 (1) and 7 EntgTranspG.

In the case under review, the Federal Labour Court compared a sales employee, who was hired with the prospect of subsequently moving into a management role, with a female sales employee who was hired at almost the same time. The employer originally offered both of them the same (!) monthly salary. However, to its detriment, the employer agreed to the different demands made by both applicants: The male applicant asked for about a 28% increase in pay, and the

female applicant asked for 20 “days” of annual unpaid leave. The employer agreed to both demands. After a union/company collective agreement entered into force, both employees were classified in the same pay scale, which resulted in a higher basic pay for both employees. However, both still received different amounts of pay due to a cap on the pay adjustment in the collective agreement negotiated with the trade union (!).

The key points of the Federal Labour Court’s judgment may have a considerable impact on a company’s pay structure and on an employer’s negotiating position in recruitment negotiations:

- The Federal Labour Court does **not permit an overall assessment of all salary components** to be used in a salary comparison between employees but restricts the comparison to the basic salary. It therefore denies an employer the option of making it easier to reach an agreement on the terms of an employment contract through tax optimisation or optimisation regarding the personal situation of employees (as in the case of requests regarding leave).
- **Contractual components other than remuneration** that have been negotiated are also **not taken into account** in the equal pay comparison based on the Federal Labour Court’s intention. In particular, the Federal Labour Court did not therefore take into account the unpaid leave granted to the employee at her request.
- The Federal Labour Court assumes a certain immaturity on the part of employees: It contends that employees cannot **properly articulate** their **pay expectations if** they have **no knowledge of agreements entered into with other employees**. If an employer wants to differentiate between the pay of comparable employees because of different negotiating situations, it shall be required in the Federal Labour Court’s view to disclose to job applicants the conditions negotiated with comparable employees. If this really is the Federal Labour Court’s intention, pay negotiations are then likely to become absurd.

At least the Federal Labour Court allows employers to prove that the **higher pay of** an employee was **necessary due to the situation on the labour market** to fill the vacant position with a suitable employee. That sounds nice. But what bureaucracy does this force the employer into? Will it have to document and store all job applications received in the future, including the demands of the job applicants (relating to the base salary)? The Federal Labour Court’s requirements seem to run counter to all efforts of data protection law to ensure data economy.

The Federal Labour Court even explicitly expresses its deep mistrust of proper pay negotiations conducted by companies: It “*cannot be ruled out...that gender was a contributing factor in the employer’s giving in to the job applicant’s demands*.”

III. Criticism and need for action on the part of employers

The Federal Cabinet recently agreed on welcome relief for companies in terms of bureaucracy (including the restriction of the written form requirement for evidence of contract terms under the Act on Written Evidence of the Essential Conditions Applicable to an Employment Relationship (*Nachweisgesetz*, NachwG). The European Parliament and Federal Labour Court are counteracting this and overwhelming employers with new, sometimes absurd, bureaucracy. This does not show any insight of both institutions into the practical needs of companies.

Implementation of the EU Pay Transparency Directive will likely require employers to collect, analyse, justify to the works council and publish extensive information about their pay structures. It is clear that the Directive is intended to take into account smaller companies: “*Member States shall provide support, in the form of technical assistance and training, to employers with fewer than 250 workers and to the workers’ representatives concerned, to facilitate their compliance with the obligations laid down in this Directive*” – as stated in Article 11 of the Directive. This shows that the drafters of the Directive themselves recognise that bureaucracy is becoming too excessive. But practical assistance and training by the State? That sounds somewhat sarcastic. The implementation date of the Directive still gives employers a few more years of breathing space.

The Federal Labour Court’s requirements, which should be observed with immediate effect and – as in the case decided by it – may even have an effect on the past, are different. These requirements in particular will not only create bureaucracy, but are also likely to have an impact on the design of pay structures: In the future, pay bands will probably need to be more called into question than in the past and will need to be supported by proper arguments. The combination of base pay and other pay components will have to be reassessed. Designing pay structures without obtaining legal advice is made more difficult. Individual deviations from pay structures for the purpose of attracting particularly desirable job applicants will need to be thoroughly considered, reviewed and documented. Otherwise, there is a risk that the pay of existing employees, who have been paid less up to now, needs to be adjusted, and that this will lead to an unintentional change in pay structures.

It would therefore be sensible to analyse current pay structures and identify any gender-specific pay gaps, even if they could only be regarded as such indirectly or if they do not relate to the same jobs but only to comparable jobs. Recruitment processes and pay negotiations in particular should also be critically analysed and improved where necessary. Lastly, raising the awareness of and training for managers with hiring authority is also recommended.

A high price for (even) more pay equality.

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New law on immigration of skilled workers

Economic growth in Germany is slowing down as a result of the shortage of skilled workers. In view of this, employers have a keen interest in attracting foreign skilled workers. The following article provides an overview of the basic elements of the law on immigration of skilled workers and presents the recently passed reform of the law for the further development of skilled worker immigration. Lastly, it sets out the liability risks that employers may face when employing foreigners.

I. Residence permit and access to gainful employment for foreign skilled workers

According to the legal definition set out in Section 18 (3) of the German Residence Act (*Aufenthaltsgesetz*, AufenthG), skilled worker means a foreigner who has successfully completed qualified vocational training that is recognised in Germany or holds a university degree. The general conditions for issuing a residence permit for the purpose of gainful employment are set out in Section 18 (2) AufenthG. The current residence permits for foreign skilled workers include, inter alia, the temporary residence permit for employment of foreign skilled workers with vocational training qualification under Section 18a AufenthG, the temporary residence permit under Section 18b (1) AufenthG and the "EU Blue Card" (Section 18b (2) AufenthG) for skilled workers holding a university degree as well as the temporary residence permit for skilled workers seeking employment under Section 20 AufenthG. As a rule, in addition to the temporary residence permit pursuant to Section 39 AufenthG, the granting of approval by the Federal Employment Agency is also necessary for taking up employment. Exceptions to this approval requirement are laid down for certain cases in the Ordinance on the Employment of Foreigners (*Beschäftigungsverordnung*, BeschV).

II. Immigration Act for Skilled Workers

The German Immigration Act for Skilled Workers (*Fachkräfteeinwanderungsgesetz*), which came into force on 1 March 2020, was intended to facilitate the influx of qualified skilled workers from abroad and improve the securing of skilled labour in Germany. The Act introduced the so-called "fast-track procedure for skilled workers" in Section 81a AufenthG. This is of interest to companies that want to hire a specific skilled worker who is still abroad. Employers must pay a fee for the fast-track procedure for skilled workers and in return receive, inter alia, advice from the immigration authorities, a simplified approval procedure from the Federal Employment Agency, assistance with the recognition of foreign degrees and an appointment within three weeks for the issuance of a visa at the competent German mission abroad.

III. Act on Further Development of Skilled Worker Immigration

With the Act on Further Development of Skilled Worker Immigration (*Gesetz zur Weiterentwicklung der Fachkräfteeinwanderung*), the German government has again amended the Residence Act and other laws relating to foreigners. These amendments were announced in mid-August 2023 and will enter into force in 2024. As a result of the reform, skilled worker immigration will be based on three pillars in the future: the "skilled worker pillar," the "experience pillar," and the "potential pillar." In particular, the Act specifically provides for a new "Opportunity Card" which comes under the potential pillar and is intended to make it easier for foreign skilled workers to come to Germany and take up employment here. To this end, the new Sections 20a and 20b AufenthG have been introduced, which regulate the group of eligible persons and a points system for awarding the Opportunity Card. In this respect, the new Opportunity Card is a residence permit for the purpose of seeking employment. This allows foreigners to enter the country without a job offer or an employment contract for a maximum period of twelve months in order to seek work, training or qualifications within the framework of the recognition procedure.

The amended law also provides for further changes in various other areas. For example, the salary threshold for issuing an EU Blue Card in Section 18g of the draft AufenthG is to be lowered to 50% of the annual earnings ceiling of the general pension scheme in case of an EU Blue Card granted without the consent of the Federal Employment Agency or to 45.3% in case of an EU Blue Card granted with consent of the Federal Employment Agency. Under Section 18b (2) AufenthG, this was previously two-thirds or 52 per cent of the annual earnings ceiling. Furthermore, in future, it will also be possible for skilled workers to complete the procedure for recognition of their degree while they are already Germany. The prerequisite for this is an agreement between employer and employee, the so-called recognition partnership. This entails the obligation to initiate the recognition procedure promptly after entering Germany. Until now, this procedure had to be applied for and gone through in accordance with Section 16d AufenthG before entering the country from abroad.

The overall objective of the reform is to further facilitate the employment of foreign skilled workers in Germany and to promote their integration into the German labour market. Nevertheless, the fact that the immigration authorities are currently still considerably overburdened may hinder this approach. Whether the ambitious plans are compatible with administrative reality will only become clear once the amended law has been implemented.

IV. Liability risks for employers due to illegal employment of foreigners

Employers must always check whether the requirements regarding the employment of foreigners pursuant to Section 4a (5) AufenthG are met. Employment of foreigners without a residence permit or work permit is a punishable offence; the criminal and administrative offences are spread over several laws. Under Section 404 (3) of the German Social Code (*Sozialgesetzbuch*, SGB) Book III a fine of up to EUR 500,000 can be imposed if an employer employs foreigners who do not have the required residence or work permit. Sections 10, 10a, 11 of the Act to Combat Undeclared Work and Unlawful Employment (*Schwarzarbeitsbekämpfungsgesetz*, SchwarzArbG) contain conditions for criminal offences. For the cases referred to therein, sentences of imprisonment of up to five years may be imposed where the offender acts "out of gross self-interest". Section 98b AufenthG may also be of considerable economic significance: Under this provision the competent authority may deny applications for subsidies within a period of five years if the applicant has been subject to a fine of at least EUR 20,000 under Section 404 (2) No. 3 of Book Three of the Social Code (SGB III) or if an offence under Sections 10, 10a, 11 SchwarzArbG has been committed. Section 98c AufenthG contains an equivalent provision for the awarding of public contracts.

V. Conclusion

The reform of the regulations for skilled worker immigration entails a wealth of new provisions that lead to selective relief for foreign skilled workers and their potential employers. However, there are no signs of a fundamental reorganisation of immigration law regarding skilled workers. It is crucial for companies to carefully consider the conditions for employing foreign skilled workers due to the significant liability risks that may arise in this context. Nevertheless, uncertainties remain due to the continuing bureaucratic burden and the complex legal framework.

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Pension adjustment and inflation

The rate of inflation in Germany has risen significantly since 2020 due to the disruption to supply chains since the SARS-CoV-2 pandemic and commodity shortages resulting from the war in Ukraine. This also affects the amount of the adjustment to be made to company pensions under Section 16 of the German Company Pensions Act (*Betriebsrentengesetz*, BetrAVG): The consumer price index (CPI, base 2020 = 100) increased by 16.3% between June 2020 and June 2023 (adjustment date 1 July 2023), while the increase between June 2017 and June 2020 was only 4% (adjustment date 1 July 2020). Employers should therefore carefully check whether and to what extent an adjustment to the current benefits of the company pension scheme is required. Answers to the most important questions.

I. When is an adjustment to the company pension scheme not required?

Indirect way of implementation: The company pension scheme is implemented by direct insurance or by a pension fund and from the start of the pension all shares in surpluses accruing to the pension portfolio are used to increase the current benefits, Section 16 (3) No. 2 BetrAVG.

Commitment type: The pension commitments are structured as defined contribution plans with minimum benefits.

Poor economic situation of the employer: The employer is in a poor economic situation. It records losses or only a low return on equity.

II. If the company pension is to be adjusted in principle: when does an employer not have to adjust the pension based on the increase in the consumer price index?

1% adjustment: The pension scheme or pension commitment contains an explicit provision regarding the adjustment to company pensions, whereby the employer has undertaken to adjust current benefits by at least 1% annually, Section 16 (3) No. 1 BetrAVG. Such a provision is not permitted for commitments made before 1999 (Section 30c BetrAVG).

Increase in net wages: The employer chooses the increase in net wages of comparable groups of employees in the company as the yardstick. Where the "net wages of comparable groups of employees" yardstick is used, the question arises not only of selecting the right comparison group, but also of determining the net wages.

III. If an adjustment to the company pension has to be made, can the employer avoid this obligation by referring to the exceptional nature of the inflation increase? No, that is not possible. In detail:

No partial revocation: A pension commitment is a long-term contractual relationship in which changes in external circumstances may occur over time that affect the respective value of the benefit. Insofar as such changes are foreseeable or they are likely to occur, they fall under the mutual assumption of risk and do not justify revocation due to interference with the basis of the transaction (*Störung der Geschäftsgrundlage*). The Federal Labour Court (judgment of 22 April 1986 – 3 AZR 496/83) does not recognise an inflation adjustment for company pensions as an objective reason for a pension reduction because the company pension adjustment is itself an expression of good faith. In this respect, a pension adjustment cannot be completely or partially omitted against the backdrop of high inflation.

A one-off lump-sum payment instead of a regular company pension adjustment is not permitted: A structure under which only part of the compensation for inflation to be paid is granted as an increase in the current pension together with a one-off lump-sum payment, which, however, does not permanently increase the pension, is not permitted. According to another older decision of the Federal Labour Court (judgment of 31 January 1984 – 3 AZR 514/81), it is permitted to pay the pension adjustment in the form of a lump sum – but only if the lump-sum payment is the only way to do justice to the company's economic situation.

IV. What is the risk if the company pension is wrongfully not adjusted?

If the company pension adjustment is not made or is too low, there is a risk that the company pensioners will successfully sue for the full adjustment amount. An adjustment to the company pension that is unjustifiably omitted shall only be deemed to have been justifiably omitted if the employer has explained the company's economic situation to the pension recipient in writing, the pension recipient has not objected in writing within three calendar months of receipt of the notification and he/she has been informed of the legal consequences of not objecting within the time limit, Section 16 (4) sentence 2 BetrAVG.

V. What courses of action are available to an employer if an adjustment to the company pension below the increase in the consumer price index or below the increase in the net wages of comparable groups of employees is out of the question?

Change in the pension commitment: Changes in the implementation method (to direct insurance or a pension fund) or in the form of payment (from pension to lump sum) can eliminate an obligation to perform an adjustment review on future adjustment dates. However, as with all changes in pension commitments, care must be taken to ensure that the correct instruments are selected to make such changes and that the three-step theory and the principles of the protection of legitimate expectations are complied with where the changes reduce the pension benefits or, in the case of individual commitments, that the consent of the pension beneficiary is obtained.

Legal exemption from pension obligations: The obligation to perform an adjustment review ceases to apply as soon as the employer has been legally released from its pension obligations. This can take the form of severance payments, for example – insofar as this is permitted in individual cases.

The outsourcing of the pension obligations vis-à-vis pensioners and former employees to a so-called pensioner company is also conceivable.

VI. Advice

If the next pension adjustment date is approaching and you, as an employer, would like to have a review performed to determine whether you need to make an adjustment and in what amount, please contact our pension team specialising in company pensions at assistants.pensions@luther-lawfirm.com. The pension team will also advise you on the possible restructuring of pension obligations in order for you to no longer be subject to the adjustment review obligation on the next adjustment date.

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Additional information: "Quick check of remuneration paid to members of corporate bodies"

Compliance with employment and labour law is an integral part of responsible corporate governance. The issue of the appropriateness of the remuneration of members of corporate bodies has increasingly become the focus of both the public and tax authorities due to current legal developments and court proceedings that have attracted a great deal of media attention. Members of supervisory boards and other management bodies are faced with ever-increasing requirements and, not least, liability risks when determining the remuneration of managing directors, board members and other members of corporate bodies. A periodic, external review of current and planned remuneration structures is therefore essential. In our view, it is recommended that advice be obtained prior to making any decision regarding remuneration, because, on the one hand, this can prevent costly and protracted consequences and, on the other, also significantly reduces the personal liability risk of the decision-makers involved. As a rule, this does not require a comprehensive assessment to be made as a first step. Problematic structures can often be reliably identified and remedied on a cost-effective basis as part of a summary review. Our services: The "Quick check of remuneration paid to members of corporate bodies". Our experts review your company's current levels of remuneration by means of a questionnaire and give an assessment of any planned remuneration decisions. Please do not hesitate to contact Annekatrin Veit, the author of the above article, if you wish to know more (annekatrin.veit@luther-lawfirm.com). We will of course also assess the remuneration currently being paid and assist you in solving any subsequent problems.

■ COMMENTS ON CURRENT COURT DECISIONS

Use of evidence obtained from overt video surveillance even when this is in breach of data protection law

The use of recordings from overt video surveillance in proceedings for protection against unfair dismissal is in principle not prohibited, even if this does not fully comply with the requirements of data protection law.

Federal Labour Court, judgment of 29 June 2023 – 2 AZR 296/22

The case

The claimant was employed in the defendant's foundry. The latter accused him of not having worked an overtime shift on a Saturday with the intention of nevertheless being paid for it. Although, on the day in question, the claimant had entered the factory premises, the analysis of the recordings taken by a video camera located on one of the gates of the factory premises, which was identified by a pictogram and was otherwise in plain sight, showed that he had left the factory premises before the start of his shift. The defendant then terminated the employment relationship without notice and later again with notice. The claimant filed an action for protection against unfair dismissal. The Labour Court and Higher Labour Court upheld this action.

The decision

However, the Federal Labour Court upheld the defendant's appeal. There is no lack of good cause for dismissal without notice, as neither the submission of facts nor the obtaining of evidence from the video recordings that substantiate the facts are prohibited. The protection of personal data is not an unrestricted right, but must be weighed against other fundamental rights while complying with the principle of proportionality. The prohibition of use can only be considered if non-inclusion of the evidence is mandatory due to a legal position of the claimant that is protected by EU law or fundamental rights. This is usually not the case in the event of a breach of duty committed intentionally and captured by overt surveillance. The right to informational self-determination may

not be used to evade responsibility for deliberate unlawful acts - which the Federal Labour Court pointed out with the sentence “Data protection is not the protection of crimes”.

It is irrelevant that the pictogram above the video surveillance camera at the defendant did not separately refer to recording and storage pursuant to Articles 13 (1) and (2) EU GDPR, because the claimant should have expected this in view of the overt video recording. Lastly, the use of the video recording was also not prohibited on the basis of an existing works agreement concluded at the defendant on electronic attendance recording, which contained a provision under which “personal data shall not be analysed”. The parties to the works agreement lack the regulating power to establish a use requirement that goes beyond the formal procedural law of the Code of Civil Procedure (*Zivilprozessordnung*, ZPO) or to restrict the employer’s ability to submit factual evidence on incidents that occur at the company in an individual legal dispute.

Our comment

The decision is convincing and does not allow the offender to be protected instead of the victim of a breach of duty for data protection reasons. Even under current data protection law, both overt and covert video surveillance are permitted. If recordings are made secretly, however, they must be the only means available to determine whether a criminal act or other serious breach of duty has been committed – only then does the employer’s interest in evidence outweigh the protection of the employee’s personality rights. In the context of conduct in breach of data protection law, the Federal Labour Court previously ruled that evidence obtained from covert video surveillance of publicly accessible workplaces is not inadmissible solely because it was obtained in violation of the requirement (now standardised in Section 4 (2) of the Federal Data Protection Act (*Bundesdatenschutzgesetz*, BDSG)) to identify the circumstances of the surveillance and the responsible body where video recordings of publicly accessible areas are made (Federal Labour Court, judgment of 21 June 2012 – 2 AZR 153/11). Lastly, the key point in the decision presented here is the unambiguous clarification that it is not possible to regulate the use of surveillance recordings as evidence in a works agreement. Regulations that already exist to this effect can be ignored in the future.

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Dismissal of unvaccinated employees during the waiting period is not a violation of the prohibition of disciplinary action

If the employer's primary objective in dismissing an unvaccinated employee is to achieve the best possible protection for patients and the rest of the staff, such dismissal does not violate the prohibition of disciplinary action under Section 612a of the German Civil Code.

Federal Labour Court, judgment of 30 March 2023 – 2 AZR 309/22

The case

The claimant had been employed since February 2021 as a medical assistant by the defendant, a limited liability company administered by a local authority and operator of a hospital. The claimant did not make use of the defendant's offers nor other options regarding the possibility of being vaccinated against SARS-CoV-2. The defendant then terminated the employment relationship within the waiting period and justified this to the works committee by referring to the fact that the claimant was not vaccinated and refused to be vaccinated. The defendant had to give priority to the protection of patients over the claimant's interests.

The Labour Court assumed that the prohibition of disciplinary action (Section 612a BGB) had been violated and upheld the claimant's action for protection against unfair dismissal; the Higher Labour Court in turn upheld the defendant's appeal.

The decision

The Federal Labour Court concurred with the Higher Labour Court's decision and dismissed the claimant's appeal on points of law. The dismissal was not void due to a violation of the prohibition of disciplinary action pursuant to Section 612a BGB in conjunction with Section 134 BGB and Sections 242, 138 (1) BGB. There was no causality between the exercised right and the discriminatory measure required for a violation of Section 612a BGB.

The defendant's main motive in dismissing the claimant was not solely her refusal to be vaccinated. Instead, the dismissal was aimed at providing the best possible protection for patients and the rest of the staff. A violation of the prohibition of disciplinary action under Section 612a BGB only exists if the permissible exercise of the employee's rights is the underlying motive for the discriminatory measure. However, if the employer acts on the basis of a number of motives, the

main motive must be taken into account. No motives beyond the optimal patient protection pursued by the defendant were apparent in this case; in particular, it was not apparent that the defendant had issued the notice of dismissal as an “act of revenge” because the claimant did not want to be vaccinated.

The dismissal was also not void pursuant to Section 138 (1) BGB for reasons other than those covered by Section 612a BGB. Above all, the dismissal was not arbitrary, as a legitimate purpose had been pursued with the dismissal. The fact that other unvaccinated employees had not been dismissed did not result in a breach of good faith either, as these employees had already completed the waiting period under Section 1 (1) of the Protection against Dismissal Act (*Kündigungsschutzgesetz*, KSchG) and were therefore not comparable to the claimant.

Our comment

The decision helps clarify one of the many legal issues that have arisen in the wake of the SARS-CoV-2 pandemic. The case illustrates the conflict between an employee’s interest in safeguarding his or her job, which is protected by Article 12 (1) of the Basic Law (*Grundgesetz*, GG), and the aim of employers to protect the fundamental right to life and physical integrity of other employees and customers, in this case the particularly vulnerable patients in a hospital. It is now clear at least with regard to a notice of dismissal given during the waiting period that greater weight can be given to the protection of patients than the interest of an unvaccinated employee in continuing his or her employment relationship.

Furthermore, the Federal Labour Court’s judgment also contains general statements on the requirements for dismissals during the waiting period, which are not only of interest in connection with the pandemic: In its weighing of interests protected by fundamental rights, the Federal Labour Court places decisive weight on the fact that an employee may only rely to a limited extent on the continuation of the employment relationship during the waiting period.

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Collectively agreed exclusion periods continue to apply to claims for an allowance in lieu of leave

If an employer has not complied with its obligations to notify and cooperate regarding leave prior to publication of the judgment of the Court of Justice of the European Union (CJEU) of 6 November 2018 – C-684/16 (Max-Planck-Gesellschaft zur Förderung der Wissenschaften), the exclusion period only begins on the day after publication of the judgment. This results in the protection of legitimate expectations provided that conflicting supreme court decisions have made the successful assertion of a claim for an allowance in lieu of leave appear futile.

Federal Labour Court, judgment of 31 January 2023 – 9 AZR 244/20

The case

The claimant initially worked for a newspaper publisher as a freelancer for a flat-rate fee, and was later employed as an online editor. Under the applicable framework collective agreement for editors of daily newspapers (*Manteltarifvertrag für Redakteurinnen und Redakteure an Tageszeitungen, MTV*), claims arising from the employment relationship must be asserted within three months of their due date in order not to expire. The claimant was not granted leave during his freelance employment. For the first time in August 2018, the claimant requested an allowance in lieu of leave for 65 days in the amount of EUR 14,391.50. The defendant referred to the fact that the claim had lapsed and was time-barred. The Labour Court and Higher Labour Court dismissed the action.

The decision

However, the claimant's appeal on points of law was successful. The Federal Labour Court confirmed that claims for an allowance in lieu of leave, which are purely monetary claims, are subject to exclusion periods stipulated in collective bargaining agreements. The employer's obligation to request employees to take their leave and the employees' structurally weaker position ends upon the termination of the employment relationship. The claim for an allowance in lieu is then subject to the standard three-year limitation period, beginning with the end of the year in which the claim arose as a result of leaving the employment relationship. Until the CJEU's judgment in the *Max-Planck-Gesellschaft zur Förderung der Wissenschaften* case was handed down, the statute of limitations had nevertheless been suspended: The Federal Labour Court had previously assumed that leave entitlements would expire at the end of the leave year or a permissible carryover period, irrespective of whether the employer had met its obligation to cooperate. At the relevant valuation date (the claim arose in 2014) it was unreasonable to assert the claim by way of a legal action, as supreme court case law would not have supported a positive outcome. It was only when the legal situation changed that the obstacle to asserting the claim was removed and the statute of limitations was no longer suspended.

As a monetary claim, the claim for an allowance in lieu of leave is subject to the exclusion period stipulated in the collective bargaining agreement, whereby this begins when the claim becomes due and must be interpreted here in such a way that it does not conflict with higher-ranking law (specifically the Federal Leave Act (*Bundesurlaubsgesetz,* BUrlG), which in turn must be interpreted in accordance with EU law. Since the claimant could not reasonably be expected to assert his claims due to the Federal Labour Court's case

law then in force regarding the expiry of leave entitlements, the exclusion period consequently only started on 7 November 2018 – the day after the CJEU judgment was proclaimed.

Our comment

The Federal Labour Court confirms that, even before the employer meets its obligations to notify and cooperate, claims for an allowance in lieu of leave can be forfeited due to exclusion periods stipulated in collective bargaining agreements. At the same time, it modifies the point in time at which the exclusion period starts in cases in which it appeared unreasonable for employees to bring an action due to its conflicting case law. However, this "transitional period" will only be relevant in the few cases in which proceedings concerning allowances in lieu of leave are already pending; otherwise, the forfeiture and limitation periods have now expired. Notwithstanding the above, employers who do not warn employees of the impending expiry of their leave at the end of the year and request that they take their leave shall continue to pay the vested minimum leave pursuant to Section 3 (1) BUrlG upon termination of the employment relationship. It is only from this point onwards that the legal obligation to cooperate is no longer relevant. The claim for an allowance in lieu of leave then becomes time-barred after three years – insofar as it has not already lapsed due to exclusion periods.

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Admissibility of a “zero redundancy programme” if the benefits provided by the redundancy programme are not economically justifiable

The threshold of the economic justifiability of a redundancy programme is usually exceeded if settlement of the resulting liabilities leads to the company’s illiquidity, its overindebtedness on the face of the balance sheet or a reduction in equity that is no longer acceptable.

Federal Labour Court, decision of 14 February 2023 – 1 ABR 28/21

The case

The employers involved in the proceedings operated a joint business. The first company involved had been making losses for years, which the other company compensated for until 2015 under a control and profit and loss transfer agreement. The first employer’s equity was exhausted as of 2017. Its balance sheet showed a deficit not covered by equity of about EUR 12 million in October 2019 and of EUR 15.8 million plus liabilities of about EUR 19 million at the end of 2019. A UK group company had already provided the faltering company with a restricted liquidity commitment of EUR 4 million in October 2018 for the purposes of closing the factory by the end of 2019 in order to avoid insolvency proceedings, which was explicitly not to be used to provide benefits under a redundancy programme. The factory was closed on 30 April 2019.

At the end of 2019, the court-appointed conciliation committee adopted a redundancy programme, which was to be provided with a total amount of EUR 3 million. The employers involved then challenged the ruling, claiming that the conciliation committee had exceeded its discretionary powers because the amount of the redundancy programme was not economically justifiable for the first company, which was in a financial crisis. The lower instance courts dismissed the application for a declaratory judgment that the ruling was invalid.

The decision

However, the First Senate of the Federal Labour Court upheld the appeal of the employers on points of law. The conciliation committee’s decision was invalid as it had exceeded its discretionary powers because the amount of the redundancy programme exceeded the threshold of economic justifiability for the first company. Even in the case of group companies, this threshold is based on the circumstances of the employer that is required to establish the redundancy programme. A redundancy programme is no longer economically justifiable if its implementation results in illiquidity, overindebtedness or a reduction in equity that is no longer acceptable. This also applies if there are no jobs available after a factory closure. In this case, the amount of the redundancy programme was not economically justifiable because the company concerned was overindebted and its equity had been exhausted for years. The liquidity commitment of the UK sister company also did not support any other conclusion, as it only applied until the end of 2019 and was not to be used to provide benefits under a redundancy programme.

Our comment

The Federal Labour Court does not mention the term “zero redundancy programme”, but by overturning the decision of the lower instance courts and its reasoning shows that even an extremely low or unfunded redundancy programme must be permissible if financial resources are not available for severance payments. In practice, the conciliation committee almost always treats the company’s economic situation as a poor relation and focuses primarily on providing compensation to or mitigating the economic disadvantages suffered by the employees affected by the operational change. If the employer’s financial situation is not examined in detail, a redundancy programme for a company in crisis may be provided with the same amount as for a high-performing company. Although, in principle, the Federal Labour Court permits amounts to be allocated to the redundancy programme up to a limit that may endanger the company’s continued existence, this does not mean that the decision of the conciliation committee may lead to insolvency. Fortunately, the judges in Erfurt are now giving more weight to the corrective function of economic justifiability, which should also result in the financial situation being taken into account to an even greater extent in conciliation proceedings.

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“Negotiate better” is not a legitimate criterion for pay gaps

Individual negotiating skills are not an argument for justifying different pay for men and women for the same work or work of equal value. If employers want to use pay gaps, they must adhere to factual reasons such as relevant work experience or recruitment difficulties.

Federal Labour Court, judgment of 16 February 2023 – 8 AZR 450/21

The case

An employee who had been working in sales since March 2017 sued for payment of remuneration in arrears and compensation in the amount of EUR 6,000 because she felt she had been discriminated against on the basis of her gender. In doing so, she referred to a male employee who had been employed alongside her since January 2017, to whom the defendant employer had initially offered – as it had to the claimant – a basic gross salary of EUR 3,500 per month. Unlike the claimant, however, who had accepted the offer, the man demanded that his basic gross salary be increased by EUR 1,000 per month. The defendant agreed to this and then paid the male employee a correspondingly higher salary.

The decision

In contrast to the lower court instances, the Federal Labour Court upheld the action on almost all points, but it awarded the claimant compensation of EUR 2,000. There was a presumption of gender discrimination for the same work due to the claimant’s lower basic salary. The Erfurt judges had already ruled regarding the burden of proof that the presumption of gender discrimination pursuant to Section 22 of the German General Equal Treatment Act (*Allgemeines Gleichbehandlungsgesetz*, AGG) is established if a female employee can show that she earns less than a comparable male colleague (Federal Labour Court, judgment of 21 January 2021 – 8 AZR 488/19). It would subsequently be incumbent upon the employer to rebut the presumption of discrimination under the standards of full proof. If it fails to do so, this will be at its expense.

In this case, the employer had not been able to rebut the presumption of discrimination based on gender. Although the arguments put forward by the company, such as difficulties in recruiting staff and the situation on the labour market, were certainly appropriate for this purpose, the prerequisite was that the higher remuneration had in fact been unavoidable in order to fill the vacant position. This was not demonstrated in this case.

Similarly, in the Federal Labour Court's opinion, "better negotiating skills", which the employer had also invoked, is not in itself a sufficient criterion for pay gaps. If this were to be allowed as a justification, employers could too easily evade compliance with the principle of equal pay based on gender. Although better qualifications could justify higher remuneration, this had also not been demonstrated in this case.

Our comment

Do these standards mean the end of salary negotiations? Probably not, since it is still possible to argue that an employee is better qualified, for example because of specialised training or relevant professional experience and therefore deserves a higher salary. Both reasons have been explicitly recognised by both the Federal Labour Court and the CJEU (judgment of 28 February 2013 – C-427/11 [Kenny et al.]) to rebut a presumption of discrimination based on gender. Similarly, higher salary demands may be addressed due to recruitment difficulties. Nevertheless, the requirements as to the explanation of these reasons have now increased. If employers wish or are required to use pay gaps, they must strictly adhere to "the criteria relating to the labour market, to performance and to work results" set out in Section 3 (2) sentence 2 of the German Transparency of Pay Act (*Entgelttransparenzgesetz*, EntgTranspG). However, there is scarcely any previous case law on this; if an employer wants to pay an urgently sought specialist more than a comparable person of the other sex, the employer is well advised to carefully document the (unsuccessful) search at the previous remuneration level.

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Validity of collectively agreed remuneration regulations as the overall company pay scheme

An employer bound by a collective bargaining agreement shall be required under works constitution law to apply the collectively agreed remuneration regulations to the entire workforce irrespective of whether the employees are bound by a collective bargaining agreement, insofar as their subject matter is subject to enforceable co-determination pursuant to Section 87 (1) No. 10 of the Works Constitution Act (*Betriebsverfassungsgesetz*, BetrVG); this shall also apply in the event that the collective agreement subsequently becomes binding.

Federal Labour Court, decision of 14 February 2023 – 1 ABR 9/22

The case

Until the end of 2020, the employer concerned was a member of a sub-association of METALL NRW, which concluded a framework agreement on pay (*Entgeltrahmenabkommen Nordrhein-Westphalen*, ERA NRW) with IG Metall in 2003. This regulates, inter alia, the grouping into pay grades, whereby the specific salaries were determined in a further pay agreement, which IG Metall terminated on 31 December 2020. Between the summer of 2018 and autumn of 2020, the employer hired and transferred 28 members of staff, most of which were grouped into an alternative remuneration system. The works council consented to the hirings and transfers, but not to the intended groupings; the employer did not initiate proceedings to replace its consent. The works council then claimed that the employer should continue to group the employees covered by the ERA into the pay scales provided for therein and that it should involve the works council in this. The action brought in this regard was upheld by the Labour Court, whereas the Higher Labour Court dismissed it on appeal by the defendant.

The decision

The Federal Labour Court in turn upheld the works council's appeal on points of law. The latter could demand that the employer group employees falling under the personal scope of the ERA NRW into the pay groups provided for therein, and that the employer follows the co-determination procedure under Section 99 (1) BetrVG or applies to the labour court for a decision in lieu of consent pursuant to Section 99 (4) BetrVG. The right derives from Section 23 (3) sentence 1 BetrVG, under which, where the employer has grossly violated its duties under the BetrVG, the works council may apply to the Labour Court for an order enjoining the employer to cease and desist from an act, allow an act to be performed or to perform an action. Because the employer in this case had repeatedly violated its duties under works constitution law by not taking

into account the co-determination procedure or the procedure for replacing the consent of the works council, the requirements of the legal provision were met. The obligation to group and regroup employees and to involve the works council served to ensure the uniform application of the applicable remuneration regulations and thus ensured transparency and pay equity within the company. Where an employer is bound by a collective agreement, the remuneration regulations contained in the relevant collective bargaining agreement also represent the system applicable in the company for assessing pay. An employer bound by a collective bargaining agreement is required under works constitution law to apply the collectively agreed remuneration regulations irrespective of the question of the employees being bound by the collective agreement insofar as their subject matter is subject to an enforceable right of co-determination pursuant to Section 87 (1) No. 10 BetrVG. The pay scheme of the ERA NRW had therefore been the applicable remuneration regulations in this case.

Our comment

In order to ensure that the remuneration regulations contained in the relevant collective agreement represent the remuneration system applicable in the company to all employees falling within its scope and that there are no loopholes in the protection of employees not bound by the collective agreement, it is not relevant whether they are bound by the collective agreement by virtue of membership or by reference in their employment contract (as previously decided by the Federal Labour Court, decision of 18 October 2011 – 1 ABR 25/10). This shall also apply during the period in which the collective agreement is subsequently binding and effective pursuant to Section 3 (3) and Section 4 (5) of the Collective Agreements Act (*Tarifvertragsgesetz*, TVG). The collectively agreed remuneration regulations are only replaced by a new collectively agreed pay scheme - which must then also apply if the employer changes its association membership. Fortunately, the Federal Labour Court also rejects a general right to injunctive relief on the part of the works council and instead retains the options available under Section 101 and Section 23 (3) sentence 1 BetrVG. The provision set out in Section 23 BetrVG is linked to the existence of specific conditions, so that not every violation by the employer can be prosecuted.

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Co-determination of the works council in designing the system for recording working time

Notwithstanding any future statutory provisions the works council has the right of co-determination and the right to take the initiative with regard to the design of a system for recording working time pursuant to Section 87 (1) No. 7 of the Works Constitution Act in conjunction with Section 3 (2) No. 1 of the Occupational Health and Safety Act (*Arbeitsschutzgesetz*, ArbSchG).

Munich Higher Labour Court, decision of 22 May 2023 – 4 TaBV 24/23

Summary of the facts

The employer, which is a member of a group, and the works council established at the employer are in dispute about the establishment of a conciliation committee for the purposes of designing a system for recording the working time of field staff. The working time of the office staff at the company is already recorded by means of a system co-determined by the group works council. The employer is of the opinion that, due to the already existing legal obligation to record working time, the local works council has no right of co-determination on the "whether" and that the group works council is responsible for the "how" because different treatment of the employee groups is not possible. The Munich Labour Court nevertheless granted the works council's application to establish a conciliation committee.

Decision

The Higher Regional Court ruled in the same way and rejected the employer's appeal. Pursuant to Section 100 (1) sentence 2 of the German Labour Courts Act (*Arbeitsgerichtsgesetz,* ArbGG) there were insufficient grounds to raise doubts regarding the appointment of a conciliation committee. The permissible subject matter is based on the right of co-determination of the local works council in matters of health protection (Section 87 (1) No. 7 BetrVG). There would in fact be no right of co-determination as to "whether" working time is recorded, since, in this respect, a legal obligation already follows from Section 3 (2) No. 1 ArbSchG and there is no leeway, but there is as to the "how", i.e. with regard to the specific design of the system for the daily recording of working time, for example with regard to the type of recording or differences between the employee groups. Notwithstanding any deviating new provisions enacted by the legislature, the works council therefore has a right of initiative under Section 87 (1) No. 7 BetrVG in conjunction with Section 3 (2) No. 1 ArbSchG. The right of co-determination does not depend on the employer's willingness to implement the system, as there is a legal obligation to act with regard to time recording. Although the law does not specify a particular form of recording, the right of co-determination serves precisely to take account of the needs of the employees concerned to be able to exercise control by giving them an equal say within the framework of the existing scope for action in implementing health protection in their respective companies as effectively as possible. The local works council, as the body closer to the matter, is always responsible for this.

Our comment

The Higher Regional Court follows the highly regarded decision of the Federal Labour Court on the recording of working time from last year (Federal Labour Court, judgment of 13 September 2022 – 1 ABR 21/22) and with its decision contributes to the further enforcement of co-determination rights with regard to designing the system for recording working time. At present, the Court rightly rejects the consideration of possible new legal regulations. A look at the draft bill on the amendment of the Working Time Act published by the Federal Ministry of Labour and Social Affairs (BMAS) just one month before the decision also shows that this would probably not result in any changes to the issue of co-determination in designing the system for recording working time (see the article in our Newsletter 2/2023 for more details). By the way, the draft bill states that a form of time recording is not to be specified; it remains to be seen whether and how the legislative reform enters into force.

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Assignment of staff in the public sector is no temporary agency work

The Temporary Agency Work Directive 2008/104/EC does not apply to a situation in which the duties performed by an employee are permanently transferred to a third-party undertaking and the employee is henceforth subject to the direction of the third-party undertaking on the basis of a provision of a public sector collective agreement even if the employee has exercised his right to object with regard to the transfer of the employment relationship and the latter thus continues to exist per se with the previous employer.

Court of Justice of the European Union, judgment of 22 June 2023 - C-427/21 (ALB FILS KLINIKEN)

The case

The original legal dispute arose in Germany. The claimant's employment relationship was governed by the public sector collective agreement (TVöD). In the summer of 2018, the defendant, a clinic, spun off several parts of the business to a newly formed subsidiary, as a result of which the claimant's employment relationship was also to be transferred to the latter. Although the latter exercised his right to object under Section 613a (6) BGB, so that his employment relationship with the defendant continued, he was nevertheless required to perform his duties for the subsidiary by way of assignment pursuant to Section 4 (3) TVöD. The claimant then sought a declaration that he was not required to perform his duties at the subsidiary. The Labour Court and Higher Labour Court dismissed the action, the Federal Labour Court referred the question to the CJEU whether the assignment of staff in accordance with the TVöD falls within the scope of the Temporary Agency Work Directive.

The decision

According to the CJEU, the applicability of the Temporary Agency Work Directive already follows from its Article 1 (1) in that a contract of employment or employment relationship must be entered into for the purpose of assigning the worker – repeatedly – to user undertakings. Furthermore, the employment relationship with a user undertaking must be temporary in nature. As a result, there must be an intention to assign the worker temporarily to the user undertaking both on the conclusion of the employment contract and on each actual assignment. In this case, the employee performs his duties for a third-party undertaking and is subject to its supervision and direction within the meaning of Article 1 (1) of Directive 2008/104/EC, but at no time was it intended to assign him temporarily to a user undertaking. Furthermore, the employment relationship with his previous employer only continued to exist because he had exercised his right to object at the time the business operations were transferred. This is not contrary to the objectives of the Directive, which is intended to strike a balance between entrepreneurial flexibility and employee protection – which, however, is insignificant in this case.

Our comment

The CJEU had already recently emphasised the nature of temporary agency work with regard to the maximum duration and number of assignments (CJEU, judgment of 14 October 2020 - C-681/18 [KG - Missions successives dans le cadre du travail intérimaire]). However, the assignment of personnel in the public sector is generally of a permanent nature – unlike the assignment pursuant to Section 4 (2) TVöD – and is therefore not comparable even with a longer temporary employment assignment. The employees therefore do not have the same need for protection as temporary agency workers. This applies even more if the employment relationship was actually intended to be transferred and now only exists due to the systematics of the law applicable to the transfer of undertakings.

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■ CASE LAW IN A NUTSHELL

Discrimination on the grounds of sexual orientation in the event that a service contract is not concluded

CJEU, judgment of 12 January 2023 - C-356/21 (TP [Monteur audiovisuel pour la télévision publique])

National legislation on the freedom to choose the contractual partner that legitimises that service contracts regularly agreed with an employee can no longer be concluded or renewed on the grounds of the contractual partner's sexual orientation is not compatible with the Equality Framework Directive 2000/78/EC.

The case

The original legal dispute arose in Poland. The claimant had concluded service contracts with the defendant, a TV station whose sole shareholder is the Polish state, since 2010. At the end of November 2017, the parties concluded a new contract with a term of one month. After the claimant and his partner posted a Christmas music video on YouTube promoting tolerance for same-sex couples, the claimant's services were cancelled again; to that end, the defendant no longer entered into new contracts with him. The claimant then claimed damages and compensation for pain and suffering due to discrimination on the grounds of his sexual orientation. The court hearing the case then referred to the CJEU the question of whether a provision in the Polish Equal Treatment Act, which excludes the freedom to choose the contractual partner from the scope of application of the Act, is compatible with Article 3 (1) (a) and (c) of Directive 2000/78/EC.

The decision

According to Article 3 (1) (a) of Directive 2000/78/EC the Directive applies to all persons, as regards both the public and private sectors, including public bodies, in relation to conditions for access to employment or self-employment, including selection criteria and recruitment conditions. According to the CJEU, the concept of recruitment conditions is to be interpreted broadly and includes access to any professional activity, not only for employees. The only condition that is required is that a professional activity differs from the mere delivery of goods or the provision of services and that it is carried out within the framework of a legal relationship characterised by a certain stability. The refusal to conclude any more service contracts on the grounds of sexual orientation therefore falls within the scope of the Directive as discrimination. According to Article 3 (1) (c) of Directive 2000/78/EU, the Directive also applies "in relation to [...] employment and working conditions, including dismissals [...]". The term "dismissal" is also to be interpreted broadly, so that other forms of an involuntary termination of a contract are also to be included.

Electronic legal transactions and Word files

Federal Labour Court, decision of 29 June 2023 – 3 AZR 3/23

The Federal Labour Court had to deal with the question of whether an appeal filed via the special electronic lawyer mailbox (beA) in Word format satisfies the formal requirements of electronic legal transactions.

The case

In a legal dispute concerning retirement benefits, the Frankfurt am Main Labour Court dismissed the action on 12 January 2022. The judgment was served to the claimant's representative on 21 January 2022. A duly authorised and appointed new representative of the claimant filed an appeal on 21 February 2022. The submission was sent to the Hesse Higher Labour Court by electronic means via beA - however, it was submitted as a Word file as the claimant's representative stated that he temporarily lacked the technical capability to convert the document into a PDF. The submission was printed by the Higher Labour Court, stamped "21 Feb. 2022", and placed in the main paper file. The Higher Labour Court subsequently complained that the submission of the notice of appeal in Word format instead of PDF format did not comply with the statutory form requirements. It subsequently dismissed the appeal as inadmissible. The claimant lodged an appeal on points of law against this decision.

The decision

The Federal Labour Court upheld the appeal on points of law, overturned the Higher Labour Court's decision and referred the case back to the Higher Labour Court. Although the notice of appeal was not submitted as a PDF document as required under Section 46c (2) sentence 2 ArbGG in conjunction with Section 2 (1) sentence 1 of the Electronic Legal Transactions Ordinance (*Elektronischer-Rechtsverkehr-Verordnung*, ERVV), this is not a prerequisite for the effective filing of an electronic document if the court – as in this case – continues to keep a paper file, the submission was printable and was then also

printed out within the meaning of Section 298 (1) sentence 1 ZPO and added to the paper file. In this case, the submission is "suitable for processing by the court" pursuant to Section 46c (2) sentence 1 ArbGG.

Basis for determining whether business targets were achieved when granting a bonus

Federal Labour Court, judgment of 25 January 2023 – 10 AZR 319/20

If both individual and business targets are determined as a prerequisite for granting a bonus as part of a target agreement, the latter shall only relate to the achievement of the business targets of the employer company and/or the business division of the beneficiary in the absence of clear provisions to the contrary.

The case

The claimant works for a pharmaceutical company which is part of an international group. She receives an annual bonus which is dependent on achieving a target, the conditions for which are governed in a works agreement. This provides, inter alia, that the company or the business division shall determine the business targets to be achieved and the calculation factor to be used. In April 2017, the defendant communicated the business targets and key financial indicators for the upcoming bonus year, but subsequently none of the defendant's employees received a bonus for 2017 due to negative results recorded by the Group as a whole. The claimant nevertheless demanded that she be paid the full bonus, as the achievement of the business target should only be determined for her business division and amounted to 98.58%. The defendant claimed that the business targets are to be considered on a Group-wide basis and would not have reached the 80% threshold required for a bonus to be paid. The subsequent action was upheld by the Labour Court and Higher Labour Court.

The decision

The Federal Labour Court, however, upheld the defendant's appeal on points of law. Although the requirements for the claimant's entitlement to a bonus are met per se, the amount of the bonus entitlement for 2017 remains open, as the lower courts should not have simply assumed a target achievement level of 100%. The determination of the business-specific targets is at the discretion of the defendant. It is clear from the works agreement that only targets relating to the business division and company can be relevant for bonuses, which is why setting the factor at "zero" on the basis of the Group's results is not in line with reasonable discretion. The Higher Labour Court's determination of compensation pursuant to Section 315 (3) sentence 2 BGB does not stand up to an even limited review by the court because the Higher Labour Court assumed that the defendant had not produced anything regarding the achievement of the business targets, although this had been done. This resulted in material circumstances regarding the bonus amount not being taken into account. Contrary to the defendant's submission, the defendant's own figures indicate that the target has been achieved by more than 80%, with other individual targets tending to increase this figure.

Downgrading in the social selection process due to closeness to retirement

Federal Labour Court, judgment of 8 December 2022 – 6 AZR 31/22

In the social selection process, age may be taken into account to the detriment of employees not only if they can already draw a standard old-age pension, but also if this becomes possible within two years of the intended end of the employment relationship without deductions.

The case

The claimant had been employed in the employer's sales department since 1972 and could draw a pension as a particularly long-term insured person from December 2020. At the beginning of March 2020, insolvency proceedings were opened against the employer's assets, whereupon the insolvency administrator and the works council reached an agreement on the reconciliation of interests that included a list of names. The claimant was the oldest in her comparison group and the only employee from this group included on the list of names because she was downgraded in the underlying point scheme due to her being close to retirement. Her employment was terminated on 30 June 2020 and again in the autumn of 2020; her action for protection against unfair dismissal was upheld by the Labour Court and the Higher Labour Court dismissed the appeal against this judgment.

The decision

However, the Federal Labour Court partially upheld the appeal on points of law of the insolvency administrator as the defendant in the proceedings. The first dismissal did not terminate the employment relationship, as it was not socially justified due to gross errors made in the social selection process. Pursuant to Section 125 (1) No. 2 of the German Insolvency Code (*Insolvenzordnung*, InsO), the social selection of employees, disregarding any severe disability, is only subject to judicial review with regard to the length of service, age and maintenance obligations and in this respect only for gross errors. However, the selection in the reconciliation of interests is found not to be grossly erroneous in this case because the claimant's closeness to retirement was taken into account. The weighting of age could include not only the possibility of an employee drawing a standard pension, but that of drawing the standard pension or another (early) pension without deductions within two years of the intended end of the employment relationship at the latest. The latter does not apply only if the pension is for severely disabled persons (Sections 37, 236a of the Social Code Book VI (SGB VI)); furthermore, employees who have not yet fulfilled the qualifying period for a pension for particularly long-term insured persons at the end of the employment relationship are exempt, as well. The claimant could therefore have been classified as being close to retirement, but the social selection was nevertheless grossly flawed because the criterion of "length of service" was inadequately assessed. However, the second termination ultimately ended the employment relationship.

Works council's right to the indemnification of costs where an invoice is addressed to the employer

Federal Labour Court, decision of 8 March 2023 – 7 ABR 10/22

The works council's claim against the employer for indemnification of costs does not require an invoice addressed to the works council for the liability incurred.

The case

The employer, a public transport operating company, and the works council established at the company are in dispute about the indemnification of costs incurred for the legal representation of the works council in conciliation committee proceedings. Before the start of the conciliation committee proceedings, the works council decided to appoint a lawyer via an agency, with which the fee was agreed. The employer did not pay an invoice addressed by the latter to the employer. After the works council unsuccessfully sought indemnification of the costs from the employer in court, the lawyer invoiced the employer. This also remained unsettled. The works council then again applied for indemnification of the legal fees incurred. The Labour Court and Higher Labour Court dismissed the action.

The decision

The Federal Labour Court came to the same conclusion. Although the judges in Erfurt rejected as legally erroneous that, in the absence of an invoice addressed to the works council, there was no claim against it and that the lawyer's claim for the fee was time-barred, an indemnification claim requires that a liability be effectively created by the works council in the first place. The fee agreement was undoubtedly made with the agency, which is a compelling argument that the latter had the mandate. A claim by the lawyer could therefore not form the basis of an indemnification claim in this case.

Extension of the maximum assignment duration for temporary agency workers under a works agreement

Federal Labour Court, judgment of 8 November 2022 – 9 AZR 486/21

A maximum assignment duration for temporary agency workers of 48 months in a works agreement based on a collective agreement in the industry of assignment is still to be regarded as "temporary".

The case

The claimant had been employed by a temporary-work agency since the end of October 2015 and had been assigned to the defendant since then. Since 1 April 2017, the latter has been subject to the "LeiZ" collective bargaining agreement (TV Leiz), which, by derogation from Section 1 (1b) sentence 1 of the German Temporary Employment Act (*Arbeitnehmerüberlassungsgesetz*, AÜG), stipulates a maximum duration of 48 months for temporary agency work. Furthermore, the TV LeiZ contains an opening clause for works agreements. In the autumn of 2017, the legal

predecessor of the defendant agreed with the central works council established at the defendant on an annex to a central works agreement regarding temporary agency work, in which a maximum duration for temporary agency work assignments of 48 months was set. In addition, it was stipulated therein that, after 48 months of employment, the employee would be taken on as a permanent employee unless there are certain grounds for exclusion. The claimant's assignment ended on 30 April 2020, whereupon he claimed that an employment relationship had come into existence between him and the defendant, since his assignment had lasted more than 54 months, and he was employed in a permanent position. In the alternative, he brought an action to require the defendant to offer him a permanent employment contract, since he was entitled to this after 48 months of working for the defendant. The lower courts dismissed the action.

The decision

The Federal Labour Court upheld the claimant's appeal on points of law only with regard to the alternative claim. An employment relationship had not been established between him and the defendant because the maximum permitted assignment duration was exceeded, since the legally permitted maximum duration of 18 months had been effectively extended to 48 months by the TV LeiZ and the related annex to the general works agreement. A duration of 48 months was within the scope of what was to be regarded as "temporary" under EU law. It is only inadmissible if the assignment is made without any time limit and the temporary worker is to be permanently deployed in place of a permanent employee. A duration of 48 months is not permanent and does not significantly exceed the limits provided for in Section 1 (1b) sentences 1 and 6 AÜG. Furthermore, in calculating the 48-month maximum assignment duration, assignment durations prior to 1 April 2017 were not to be taken into account because of Section 19 (2) AÜG. The appeal is nevertheless well-founded with regard to the alternative claim, whereby the Higher Regional Court must still determine whether a claim for permanent employment in fact exists under the conditions set out in the annex to the general works agreement.

■ INTERNATIONAL NEWSFLASH FROM THE UNYER NETWORK

Telecommuting in France: a guide for foreign companies

Telecommuting, as defined in article L. 1222-9 of the French Labor Code (Code du travail), has become an inescapable reality in the world of work. In France, the legal framework for teleworking is well established, but is constantly evolving to adapt to the changing needs of workers and employers. The following article provides an overview of the most recent legal developments especially with regard to home office activities.

I. Formalising telecommuting: a mandatory written agreement?

Prior to Order No. 2017-1387 of 22 September 2017, teleworking was formalised in the employee's employment contract or in a contract amendment. From now on, formalisation by employment contract is abolished. The ordinance makes a distinction between regular and occasional teleworking. Thus, regular telecommuting is organised within the framework of a collective agreement or, failing that, within the framework of a charter drawn up by the employer after consulting the CSE (works council in France, Comité social et économique - CSE), if such exists (C. trav., art. L. 1222-9). In practice, the employer is advised to use a collective agreement, as the charter is not binding on the employee unless it is incorporated into the internal regulations. Occasional teleworking is set up by mutual agreement between the employer and the employee. This double agreement is "obtained by any means". This can be by e-mail, text message or even verbal agreement. However, the employer is advised to frame the use of telecommuting in a written document detailing the terms and conditions, so that in the event of a dispute, he can prove that he has informed the employee of the conditions for implementing telecommuting.

II. The right to disconnect

The right to disconnect has become a major concern, especially following the rise of telecommuting. French case law is increasingly focused on protecting workers from excessive workloads. Courts tend to support employees in cases of violation of the right to disconnect, especially when telecommuting is associated with abusive use of professional communication tools outside working hours. The document formalising the organisation of teleworking must above all clearly define the limits of working time and disconnection periods, to avoid any risk of harm to employees' physical and mental health.

III. Teleworking accidents

Another area of concern is the classification of accidents occurring while teleworking, in the teleworker's home, as accidents at work. This raises the question of how to prove that they are work-related. Order No. 2017-1387 of 22 September 2017 has provided some answers: "an accident occurring at the place where telework is carried out during the performance of the teleworker's professional activity is presumed to be an "accident at work" (C. trav., art. L. 1222-9). However, reservations may be expressed more often, due to the difficulty of distinguishing whether the employee was teleworking or not. Consequently, if the teleworker, who is supposed to be teleworking at home, suffers an accident while away from home, the company should not be held liable. If the teleworker has an accident on the way to and from work, this may constitute a commuting accident covered by workers' compensation legislation. In this case, the teleworker must provide proof of the causal link between the journey and the work.

IV. Coverage of teleworking expenses

The issue of telecommuting costs has become a hotly debated topic. Case law has evolved to recognise the right of employees to be reimbursed for related expenses such as electricity, Internet access, or the purchase of necessary equipment. This reinforces the need for employers to put in place precise telecommuting agreements on this subject. In a ruling dated 23 May 2023 (No. 21/08088), the Paris Court of First Instance even ruled thatthe latest statutory amendment to the law on telecommuting (pour une mise en œuvre réussie du télétravail), which has been mandatory since April 13 2021, does not call into question the previous 19 July 2005 agreement on teleworking, which already obliged employers to reimburse professional expenses linked to teleworking. As a result, the employer is obliged to reimburse teleworking expenses – even in exceptional circumstances such as a health crisis. The Court added that this obligation is a matter of public policy. It

is therefore impossible to derogate from it by collective agreement. As a result, collective bargaining on telecommuting – if it takes place at all – can only cover the terms and conditions for meeting these costs, and not the principle itself, which is binding on the employer. This reinforces the need for employers to draw up specific telecommuting agreements.

V. The right to privacy and data protection

Finally, the protection of privacy and personal data is a major issue in teleworking. The employer must take the necessary measures to ensure the protection of data used and processed by the teleworker for professional purposes, in compliance with French CNIL (Commission Nationale informatique et Libertés) regulations or, since 25 May 25 2018, in compliance with the General Regulation on the Processing of Personal Data (GDPR). It informs the teleworker of the legal provisions and rules specific to the company relating to the protection of such data and its confidentiality, of any restrictions on the use of IT equipment or tools such as the Internet, and of the penalties for non-compliance with the applicable rules. Finally, the employer's surveillance of teleworkers must not infringe on their privacy. As the French CNIL (had occasion to point out in one of its questions and answers on teleworking on 12 November 2020. For example, it specified that constant surveillance using video (or audio) devices, such as webcams, is excessive. An employer cannot ask an employee to video-conference throughout his or her working hours to ensure that he or she is present behind the screen. It also recommends that employers do not require telecommuting employees to activate their cameras when taking part in a videoconference; participation via the microphone is sufficient. In conclusion, the French legislative framework on telecommuting continues to evolve to meet the challenges posed by this new form of work organisation. It is essential for employers to keep abreast of recent legal developments, and to put in place clear policies to ensure that employees' rights are respected, while promoting the effective use of teleworking.

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■ GENERAL INFORMATION

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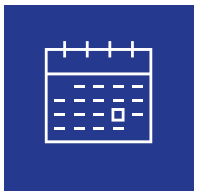
Events, publications and blog



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You will find a list of our current publications here.

You will find our blog here.

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