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Labour & Employment Law Newsletter

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unyer GLOBAL ADVISORS

Content

Dear Readers,

We wish you a prosperous and happy new year! Just in time for the new year, we are pleased to offer you the English version of our newsletter. The latest edition of our newsletter focuses on two current topics. Experience shows that voluntary redundancy programmes are particularly attractive in the current economic situation. They enable employers to reduce staff by mutual agreement without having to lose valuable skilled workers. However, there are also legal hurdles to consider when concluding voluntary redundancy programmes. In their article, Prof. Dr Robert von Steinau-Steinrück and Paula Sophie Kurth shed light on the issues that employers need to consider when designing and introducing voluntary redundancy programmes.

The topic of ESG is currently on everyone's lips. ESG - Environmental, Social and (Corporate) Governance - shapes corporate practice. Even smaller companies can no longer avoid the issues of environmental protection, social responsibility and integrity in committee work. While, in practice, the focus is often on ecological issues, employment and labour law aspects must also be taken into account with regard to a sustainable business strategy. In his article, Paul Schreiner provides an overview of the employment and labour law issues arising in this context.

At the end of 2022, the Federal Labour Court decided that, in principle, employers can also transfer employees to foreign companies under their right to issue instructions. However, various follow-up questions remained unanswered. Axel Braun and Stephan Sura address these in their article.

In addition to our main topics, this issue also provides you with the usual overview of current decisions of the labour courts, which we consider to be of particular relevance to HR work. In this issue, we once again present our international newsflash from Unyer. Xavier Drouin from FIDAL in Strasbourg provides an overview of the employer's obligation to record working time under French law.

Have a good start into the new year!

Yours'

Achim Braner

Voluntary redundancy programmes – a means of reducing staff when there is a shortage of skilled labour

Employers often find themselves in a dilemma if they want to reduce staffing levels: On the one hand they are under pressure to reduce personnel costs, on the other hand they cannot afford to lose valuable skilled workers due to the pronounced shortage of skilled labour in Germany. Voluntary redundancy programmes are a solution for addressing this "balancing act". The following article examines what must be considered with regard to voluntary redundancy programmes and how they can be designed.

I. Introduction

The German economy finds itself once again in a situation in which many businesses are committed to cutting costs. According to a representative survey conducted at the end of 2022 by the Munich Ifo Institute on behalf of the Foundation for Family Businesses a quarter of the businesses surveyed is planning to reduce staff due to the financial burdens resulting from the energy crisis. At the same time skilled workers are becoming increasingly scarce on the labour market. There is therefore a problem in that such scarce and key skilled workers will be effectively lost as a result of reducing staffing levels. This could mean that, after the crisis is over, businesses will not be able to find any new skilled workers or only by paying significantly higher remuneration for them. The usual instrument used to reduce staff in times of economic crisis are dismissals for operational reasons. The social selection to be observed in this process could, however, lead to the unwanted situation at the present time of having to let highly qualified employees go, because these are considered to be less worthy of social protection in comparison to other employees.

II. The advantages of voluntary redundancy programmes

Voluntary redundancy programmes are particularly attractive at the moment for this reason. The aim behind the introduction of voluntary redundancy programmes is to encourage employees to leave the company voluntarily. Usually, this is implemented by a redundancy programme, the so-called "social plan", but also by means of upstream agreements. Phased turbo or sprinter bonuses and other benefits (e.g. outplacement counselling) are often used as an incentive for the early termination of the employment relationship. According to the case law that has been established in the meantime voluntary redundancy programmes are considered permissible by the courts. Care must only be taken to ensure that the voluntary redundancy programme is not seen as circumventing the limitations of the purposes intended by the social plan (Munich Higher Labour Court, judgment of 9 December 2015 - 5 Sa 591/15). Compared to dismissals for operational reasons voluntary redundancy programmes have the advantage that employers are in principle free to determine

the eligible participants. In this way employers can therefore retain skilled employees as required despite the reduction in staff without having to include them in the "risky" social selection process. Other unwelcome consequences of dismissals for operational reasons, particularly the costs and uncertainties associated with actions against unfair dismissal, can also be avoided.

III. Design of voluntary redundancy programmes

There are various options for designing voluntary redundancy programmes that can be combined with each other. The offer process can be designed in several ways:

- Open offer: All employees are offered the opportunity to leave the company voluntarily by means of a termination agreement. However, this is not recommended if the purpose is to retain highly skilled employees.
- Limited offer: Certain employees are excluded based on defined objective criteria, for example special qualifications or managers.
- Selective offer: Under this process the employer makes a pre-selection limited to divisions, departments or functions that can be objectively justified and only offers a termination agreement to employees included therein.

This can be combined with a process including a double voluntary nature that is recommended in practice. This is characterised by the fact that a reservation as to the voluntary nature is not only agreed on the employee side, but the employer also reserves the right to decide against concluding a termination agreement in the specific individual case without being required to give reasons.

IV. Typical practical problem areas and solutions

However, part of the compliance with the purposes intended by a social plan required by the Munich Higher Labour Court in its above-mentioned judgment is that the principles of equal treatment and non-discrimination are also observed. This is also mandatory as part of the voluntary redundancy programmes. Certain employees may not therefore be arbitrarily excluded from the limited or selective offer process. Furthermore, all eligible employees should have equal access to the offers. They should therefore be informed about the offer at the same time and have the same (technical) means to participate. The application deadline should also not be too short. Nevertheless, it is advisable to set a time limit for the voluntary redundancy programmes so that employers are not confronted with the unexpected departure of employees that they counted on after a long period of time. If there is a works council, it will generally have a right of co-determination in designing the voluntary redundancy programmes, as this might arise from Sections 111, 112 of the German Civil Code (*Bürgerliches Gesetzbuch*, BGB) mutatis mutandis, Section 87 (1) no. 10 or Section 95 (1) of the Works Constitution Act (*Betriebsverfassungsgesetz*, BetrVG). Jointly agreed selection criteria and the exact manner in which the process is conducted should therefore be considered with the works council and documented (in writing). Furthermore, it is also recommended that the process be documented in writing for individual voluntary redundancy programmes. Voluntary redundancy programmes implemented unilaterally entail the risk that the works council could take action against this by way of an interim injunction. The opportunities for working with the works council should therefore be used, as a common path agreed for the voluntary redundancy programme may increase acceptance within the company and the willingness to take advantage of the offer.

However, it is essential to bear in mind that, if the thresholds laid down in Section 17 of the Protection against Dismissal Act (*Kündigungsschutzgesetz*, KSchG) are reached and if termination agreements are concluded frequently as part of a voluntary redundancy programme, a collective redundancy

notification must be submitted to the Employment Agency. According to the Federal Labour Court termination agreements initiated by the employer are notifiable within 30 days under Section 17 KSchG (Federal Labour Court, judgment of 11 March 1999 - 2 AZR 461/98). The consultation process vis-à-vis the works council must also be conducted in a proper manner, so that the termination agreements are not invalid. In practice, employers are therefore advised to submit a collective redundancy notification as a precautionary measure as soon as the voluntary redundancy programme could even potentially lead to the thresholds being reached. The same applies to the consultation procedure. The employees, who then specifically accept the offer of the termination agreement, must then be subsequently reported.

V. Conclusion

Voluntary redundancy programmes are particularly attractive at the moment because they can be used to reduce staffing levels without having to lose valuable skilled staff. Nevertheless, legal hurdles must also be taken into account when using this instrument.

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ESG and labour law

ESG - environmental, social and (corporate) governance - is currently shaping the way in which companies want to communicate their awareness of sustainability. While the focus is usually on ecological issues, a sustainable business strategy can and must also be reflected in the basis of every company: in its employment relationships.

I. Background

It was just over ten years ago that the Corporate Social Responsibility (CSR) leitmotif found its way into the identity and corporate image of not only larger companies. Already at the beginning of the millennium, the European Commission defined CSR as a concept whereby companies integrate social and environmental concerns in their business operations and in their interaction with their stakeholders on a voluntary basis. The core ideas of CSR ultimately led to Directive 2014/95/EU at the European level, which was integrated for the most part in the German Commercial Code (*Handelsgesetzbuch*, HGB) in 2017; since then, certain large companies have been obliged to include a non-financial statement in their management report on policies, outcomes, risks and key performance indicators relating to environmental matters, social and employee aspects, respect for human rights and anti-corruption and bribery issues. The scope of this obligation will be further extended from 2024 by the Corporate Sustainability Reporting Directive (EU) 2022/2464 (CSRD).

The increased awareness of environmental and human rights issues, in particular as a result of the contents of the CSR model, has also subsequently manifested itself in other special laws, most recently in the Act on Corporate Due Diligence Obligations in Supply Chains (Lieferkettensorgfaltspflichtengesetz, LkSG), which has been in force since the beginning of the year. However, if one looks at corporate advertising and websites today, it is noticeable that a new term has gained the upper hand in explaining the corporate identity: ESG.

II. ESG and its content

Whether for reputation reasons or as a result of their actual strategic direction, even small employers can no longer ignore the issues of environmental protection, social responsibility and integrity in committee work because public awareness of problems in these areas has gradually increased in recent years. Specific steps taken by companies relate almost exclusively to the “E” of the term, i.e. to environmental aspects; the term ESG is often even understood to mean that ecological sustainability must also be embodied in social content and company regulations, for example in ecological initiatives in the company, in which the workforce and works council are involved.

However, a differentiated understanding of ecological, social and corporate governance sustainability issues reveals that employment-related topics often “only” target fundamental issues, such as the prevention of child labour or the observance of other human rights in the production chain; the OECD Guidelines for Multinational Enterprises, which were revised in 2011, also provide a list of general basic rights in this context that do not necessarily set out the details with regard to social welfare or organisational compliance with the law. However, the requirements set out in the CSRD and hence transposed into German law already include employee concerns at the local level, so that it is logical to ask how sustainability manifests itself in the individual core content of employment relationships (in Germany) and collectively under labour law - and not just by merely complying with laws, labour law

provisions or obligations regarding occupational health and safety. Sustainability from a social and corporate policy perspective is ultimately reflected in a satisfied and motivated workforce, which forms the basis for any company's success.

III. Remuneration

The employer's main obligation is the remuneration of employees. In this context, a sustainable remuneration strategy is not limited to the mere payment in accordance with the law, collective bargaining agreements or individual agreements; rather, a balanced overall remuneration structure plays a key role as an incentive system. It is precisely here that the awareness of social corporate governance becomes apparent, which is broadly expressed in two courses of action: fair remuneration linked to the company's success and balanced with regard to the workforce as a whole, and in the form of avoiding discrimination.

Fair remuneration is not only achieved by complying with the remuneration provisions set out in the law or (collective bargaining) agreements, but also by giving employees a stake in the company's progress. For example, variable remuneration components, which are incorporated into the employment relationship through target agreements, serve to motivate employees to achieve a certain level of success in the short, medium or long term by linking them to the achievement of personal and business targets. If this is done, for example, by granting share options or similar benefits, this can also encourage long-term identification with the employer. It is precisely here that sustainability can manifest itself by rewarding competence and motivation beyond the regular day-to-day work. In addition to the employer's basic remuneration obligations, instruments such as flexible working time, further training opportunities or enabling global mobility models can help to retain and motivate skilled workers. Basic trust in the employment relationship is also created by seemingly banal aspects such as adopting a serious approach to illnesses or family planning.

Discrimination - also and especially in the area of remuneration - is in general already sufficiently addressed by legal sanctions. In recent years, legislative initiatives on equal pay for men and women have played a key role in the area of remuneration, particularly in the form of the German Transparency of Pay Act (*Entgelttransparenzgesetz*, EntgTranspG). A recent decision by the Federal Labour Court (16 February 2023 - 8 AZR 450/21) has now taken this topic in a new direction: divergent qualifications are now to become an essential aspect in determining salaries. This is to be welcomed, as a coherent salary system promotes employee satisfaction and thus loyalty. The problem, however, is that the substantive requirements that this decision entails for the employer are so difficult to fulfil that it seems questionable whether differentiated salary systems can be designed in a legally secure manner. If this is not possible, the opposite effect is achieved, because the equal treatment of different circumstances is just as discriminatory as the unequal treatment of the same circumstances.

IV. Co-determination

CSR and ESG aspects are often only encountered in collective labour law in a rudimentary form, for example in relation to the freedom of action of trade unions - which is more of a problem in other countries. At the co-determination level, it should first be noted that the works council does not have any co-determination rights with regard to corporate policy or strategic decisions; for example, the corporate decision as to whether a change in business operations (possibly involving redundancies) takes place is not subject to co-determination. The regular participation rights of the economic committee are limited to information and consultation rights.

Meanwhile, works councils are already fundamentally involved through their duty under works constitution law to monitor compliance with laws, protective regulations as well as, for example, collective bargaining agreements. This monitoring right and the associated claims for injunctive relief against the employer mean that it is one of the original tasks of the works councils to be involved in most of the processes that are essential for social sustainability. Healthy interaction with the works council strengthens trust in the company at this point - although, of course, there are always two sides to this. If one looks at specific co-determination issues, constructive negotiations, for example on rules of conduct, dealing with violations or occupational health and safety at work, can attest to sustainable and competent corporate management in social issues; the works council's co-determination of remuneration in questions of the company pay structure should also be emphasised. The conclusion of voluntary company agreements not covered by the enforceable right of co-determination can also demonstrate social responsibility in certain areas. Company agreements that contain affirmative actions, i.e. positive discrimination measures, for example to create personnel and cultural diversity in the company, are one subject that has often been discussed in the recent past. As much as such measures can strengthen a company's reputation and promote innovation, they should be reviewed in advance, as the legal admissibility of individual measures may be debatable.

V. Conclusion

If one attempts to make the term ESG, which is also used in a catchy way at the international level, a reality from the perspective of national employment law, it must be noted that, in contrast to other countries, key contents have already been "processed" by the applicable laws. On the other hand, it would be premature to draw the conclusion that there is no need for further action in Germany. However, it must be noted that the mere reference to "ESG principles" does not suspend the legal system and therefore such measures, which apply to the promotion and thus preferential treatment of individual groups, must generally be justified separately.

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Transfer of employees abroad

At the end of 2022, the Federal Labour Court decided that, in principle, employers can also transfer employees to foreign companies under their right to issue instructions. However, various follow-up questions remained unanswered.

I. The employer's right to transfer employees

The working conditions, which are usually only set out in general terms in the employment contract, are put into concrete terms by the employer's right to issue instructions. This has its basis in Section 106 sentence 1 of the German Industrial Code (*Gewerbeordnung*, GewO) under which the employer is entitled to specify the content, place and time of the work performance at its reasonable discretion, insofar as the respective employment content is not already stipulated in an employment contract or collective bargaining agreement, in a company agreement or by statutory provisions. With regard to the place of work, almost all employment contracts contain transfer clauses that structure the right to issue instructions such that the employer can transfer an employee internally or externally to another establishment of the company.

The contents of such clauses must pass the test of reasonableness in accordance with Sections 307 et seq. BGB. In substantive terms, a clause must above all ensure that the activity carried out at the new place of work is equivalent in terms of content. Furthermore, it must satisfy the transparency requirement pursuant to Section 307 (1) sentence 2 BGB and therefore state in particular that a transfer will only take place having due regard to the employee's interests. In addition, the specific transfer is subject to a review of how it is executed. In doing so, the employer must weigh up the material circumstances of the individual case and take into account the interests of both sides, i.e. family concerns on the employee side, for example, and operational reasons on the company side. Furthermore, permanent transfers require the consent of the works council under Section 99 (1) BetrVG.

II. Federal Labour Court judgment of 30 November 2022

At the end of November 2022, the Federal Labour Court decided for the first time on the admissibility of a transfer to a foreign establishment (Federal Labour Court, judgment of 30 November 2022 - 5 AZR 336/21). The claimant was employed as a pilot by an Irish airline that maintains so-called home bases throughout Europe. According to the employment contract, the person concerned was "mainly" stationed at Nuremberg Airport, but could also be transferred to other company locations. After the employer decided to close down the Nuremberg home base and the employment relationship was transferred to the defendant, a Maltese airline, the claimant was transferred to Bologna Airport. He then demanded a declaration that the defendant's right to issue instructions did not include a transfer abroad and that this was unreasonable because, inter alia, it would deprive him of his right to remuneration under the collective bargaining agreement. The Labour Court and Higher Labour Court dismissed the action.

The Federal Labour Court confirmed this decision and found that the transfer was covered by the defendant's right to issue instructions. This was not limited to the Federal Republic of Germany because the claimant's place of work had not been fixed in absolute terms. In his employment contract, a company-wide stationing option had been explicitly agreed, which could also be abroad. The transfer itself was in accordance with equitable discretion, particularly as it was based on a business decision. The fact that the claimant loses his entitlement to remuneration under the collective bargaining agreement is irrelevant, as this is a consequence of the scope of the collective bargaining agreement, which can also result from a transfer within Germany. Other disadvantages are generally to be accepted, as a pilot working for an international airline must also expect to be stationed abroad.

III. Consequences

The judgment seems to indicate primarily that employers can also transfer employees abroad, provided that the place of work has not previously been specified as a domestic permanent establishment. Whether this is really the case in an individual case is nevertheless determined by carrying out the review, which may take other aspects into account.

1. Remuneration

The main aspect in this context concerns the employee's salary situation, whereby, according to the Federal Labour Court, the loss of a collectively agreed salary has no significance with regard to the fairness of the transfer. Differences in the regular remuneration level between Germany and abroad do not per se lead to the transfer being unfair, as the employee also retains at least the entitlement to the remuneration guaranteed in the employment contract when transferred abroad. If financial disadvantages are actually suffered, consideration must be given as to whether these can be compensated by a (collective bargaining) social plan if the measure is part of a business decision. Financial compensation paid by the employer may only be required for transfers to countries where the cost of living is significantly higher.

2. Non-applicability of the KSchG and BetrVG

A significant disadvantage for the employee, however, is that the Protection against Dismissal Act (*Kündigungsschutzgesetz*, KSchG) no longer applies abroad because it only covers establishments in Germany. The Federal Labour Court did not comment on this in more detail in its judgment and therefore does not appear to see this as such a significant loss of rights that would render the transfer unfair. In this context, the Second Panel of the Federal Labour Court, which is the competent court for matters relating to the right to terminate employment contracts, left open whether the scope of protection against unfair dismissal can be extended if a transfer clause also allows the assignment of a workplace in a foreign establishment or if the employment relationships of the employees working in the foreign establishment are subject to German (dismissal) law - for example due to a choice of law (Federal Labour Court, judgment of 29 August 2013 - 2 AZR 809/12). However, at least the possibility that the first option falls within the scope of protection is now clearly ruled out. An extension of the scope of protection is also excluded in case of dismissals based on operational reasons and social selection due to the fact that the social selection is based on an individual establishment.

A permanent transfer abroad also removes an employee from the scope of the BetrVG, to which the territoriality principle (also) applies. In general, it should be assumed that this law does not have any effect abroad (Ausstrahlung). With regard to the loss of rights, the elimination of the works council's right to be consulted in accordance with Section 102 BetrVG is primarily a "minus" for the employee. However, nothing else can apply here than in the case of protection against unfair dismissal.

3. Social security / other disadvantages

If an employee permanently works abroad, he or she is subject to the social security law of that country. If the posting is not temporary the continued application of the domestic social security status is out of the question, as is an effect of German

social security law abroad (*Ausstrahlung*) under Section 4 of the Social Code IV (*Viertes Sozialgesetzbuch*, SGB IV). In the context of the balancing of interests, the employer may be obliged to compensate for disadvantages suffered by the employee in his/her insurance status, for example by taking out private health/accident insurance or applying for an insurance relationship under an unemployment insurance scheme under Section 28a (1) sentence 1 no. 3 SGB III. Tax equalisation arrangements may also be appropriate.

Finally, there may be secondary aspects for which an employer must grant compensation, for example to cover the costs of relocation or language courses, possibly also for family members; the circumstances of the individual case are decisive here. In addition, the timing of the transfer must be weighed against the possible compulsory education of children. In general, the following should apply: The more effort and time the necessary adjustments require, the more likely they are to be taken into account when weighing up interests.

IV. Conclusion

The Federal Labour Court's judgment on the transfer of employees abroad clearly defines the requirements for such a transfer. Meanwhile, the Federal Labour Court has only discussed the extent to which the loss of rights and disadvantages of the person concerned should be included in the weighing of interests to be carried out for each transfer in relation to pay issues. Other factors can also influence the fairness of the transfer, particularly where individual measures are taken, which must therefore always be comprehensively reviewed.

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■ COMMENTS ON JUDGMENTS

Notifying the authorities of collective redundancies does not confer individual protection

Article 2 (3) subparagraph 2 of the Collective Redundancies Directive 98/59/EC, which provides for the forwarding of a copy of the works council's notification of the intended collective redundancy to the competent authority, does not confer individual protection for the employee affected by a collective redundancy.

CJEU, judgment of 13 July 2023 - C-134/22 (G GmbH)

The case

Insolvency proceedings were initiated in respect of the assets of G GmbH in 2019. The defendant insolvency administrator decided to completely discontinue the business activities of G GmbH by 30 April 2020 at the latest. The claimant had been employed at this company since 1981. The works council in its capacity as the employees' representative was consulted with regard to the collective redundancy pursuant to Section 17 (2) KSchG. However, a copy of this written notification to the works council was not forwarded to the competent Employment Agency. Finally, a notification of the intended collective redundancy was submitted to the competent Employment Agency in accordance with the Protection against Dismissal Act and Article 3 of Directive 98/59/EC. The claimant was then dismissed with effect from 30 April 2020. The claimant brought an action for unfair dismissal and argued that the dismissal was invalid due to a breach of Section 17 (3) sentence 1 KSchG, which transposed Article 2, subparagraph 2 of Directive 98/59/EC into national law. The action was unsuccessful both before the Labour Court and at the second instance. The Federal Labour Court referred the issue to the Court of Justice of the European Union (CJEU) for a preliminary ruling.

The decision

The CJEU rejected the individual protection of employees affected by collective redundancies as set out in Article 2 (3) subparagraph 2 of Directive 98/59/EC. According to the Court, the employer's obligation to provide the competent authority with a copy of at least the elements of the written notification referred to in Article 2 (3) subparagraph 2(b) (i-v) does not serve the purpose of granting individual protection to the

employees affected by a collective redundancy. The CJEU arrived at this legal opinion by interpreting the EU provision, taking into account the wording, logic, objectives and purpose of the provision as well as the legislative history. The wording itself did not indicate the purpose of the obligation to inform provided for in this provision. The logic shows that the information is forwarded at a time when collective redundancies are merely "intended". The aim and purpose of the forwarding of information is to enable the competent authority to assess the negative consequences of intended collective redundancies to the extent possible in order to be able to counter any redundancies that are subsequently reported and the resulting problems with measures that are as appropriate as possible. However, this results in the collective, and not individual, protection of employees. This is also supported by the legislative history of the provisions, under which such communication of information was considered necessary in order to give the competent authority the opportunity to prepare the necessary measures at an early stage.

Our comment

In its preliminary ruling, the CJEU has now clarified that Section 17 (3) sentence 1 KSchG does not constitute a protective law in the sense of Section 134 BGB. The failure to forward a copy of the notification sent to the works council to the Employment Agency does not mean that the notice of dismissal that was subsequently issued is invalid. It remains to be seen how the CJEU's decision will affect the Federal Labour Court's previous case law regarding other errors in collective redundancy proceedings. The case law of the CJEU and Federal Labour Court on the question of the requirements for the effectiveness of collective redundancy notifications has evolved steadily and become considerably stricter over recent years. Numerous decisions reached by the Sixth and Second Panel of the Federal Labour Court in recent years have drawn the particular attention of advisers and consultants to the topic of collective redundancies. Even minor errors can result in the invalidity of notices of dismissal, making the issue highly relevant in practice. There are now signs that the CJEU's decision could herald a turning point at the Federal Labour Court. Following the CJEU's decision, the Sixth Panel of the Federal Labour Court has, inter alia, suspended the legal dispute before the Federal Labour Court, on which the proceedings before the CJEU were based, and announced in parallel proceedings that it intended to abandon its case law that a notice of dismissal issued as part of a collective redundancy is rendered invalid due to an infringement of a statutory prohibition within the meaning of Section 134 BGB, if no notification pursuant to Section 17 (1), (3) KSchG exists at the time of the announcement of the dismissal or the notification is erroneous. As this constitutes a deviation from the previous case law of the Second Panel of the Federal Labour Court, which is material to the decision, the Sixth Panel has now asked the Second Panel whether it continues to abide by its legal opinion. If this were the case, the Great Panel of the Federal Labour Court would have to make a decision on this question of divergence. We will only find out in a few months' time whether there will be a change of direction in the case law of the Federal Labour Court and whether this will reduce the risks for employers in connection with collective redundancies. It would be very welcome if, in individual cases, a weaker legal consequence compared to the invalidity of the notification of collective redundancies were considered appropriate and expedient. In any case, the issue of collective redundancies will continue to pose challenges for employers in the future.

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Fate of final salary pension commitments after a business transfer

Final salary commitments, i.e. those where the amount of the subsequent pension benefits is based on the last gross salary received, are not "frozen" at the salary level reached at the time of a business transfer, but continue to increase even after a business transfer.

Federal Labour Court, judgment of 9 May 2023 – 3 AZR 174/22

The case

The parties are in dispute about the amount of the benefits payable under a company pension scheme. The claimant employee had been employed at the defendant and its legal predecessors since 1988. He received a pension commitment in April 1990. The basis for calculating the monthly pension payable was the "last gross monthly salary received". Special payments were not to be included when determining the qualifying earned income. In 1991, the pension commitment was increased to include a Christmas bonus ("pensioner Christmas bonus") in the form of a 13th monthly pension. The claimant received a 13th monthly salary until 1998, which was then allocated to the 12 gross monthly salaries on a pro rata basis from 1999. From 2011 the claimant's monthly income was also increased under a bonus conversion plan (so-called bonus swap). These increases were not to be included in determining the amount of the pension benefits (so-called shadow salary).

The claimant's employment contract was transferred to the defendant in 2017 in the course of the transfer of business. The defendant and the previous employer agreed that, upon the transfer of business, the previous remuneration structure was to be transferred to the system in place at the defendant. In the course of the transfer of business the claimant and defendant also concluded a new employment contract that provided for a higher monthly gross salary as compensation for the special payments no longer granted under the defendant's system. When the benefit payments started, the defendant compared the benefits under the pension commitment and the monthly gross salary paid by it to the monthly gross salary paid by the previous employer and also reduced the benefits by a factor of 12/13. The claimant then requested payment of a higher company pension in the form of 13 monthly pension amounts based on the monthly gross salary granted after the transfer of business. The Labour Court dismissed the action with regard to this. The Higher Labour Court upheld the action upon the claimant's appeal. The defendant's appeal on points of law was unsuccessful.

The decision

The Third Panel of the Federal Labour Court interpreted the pension commitment to mean that the last monthly gross salary received before retirement is to be used to determine the amount of the company pension. In this respect, the business transfer does not result in a "freezing or fixing" of the final salary pension benefit. Something different could only apply if the respective assessment basis is based on certain circumstances of the seller that are not covered by the acquiring party. However, this is not the case due to the fixed monthly gross salary granted by both the previous employer and the defendant. The defendant could also not rely on the conversion arrangement used by its legal predecessor. Although the regulations existing at the previous employer for allocating the bonus and Christmas bonus were also transferred to the defendant, the conversion arrangement does not apply as the bonus and Christmas bonus were not paid by the defendant and, in particular, the conversion arrangement could not be transferred through interpretation to the higher monthly gross salary granted by the defendant. In the Federal Labour Court's opinion this would require a specific agreement.

No other conclusion is supported even under the principles of the supplementary interpretation of contracts or frustration of contract. The pension commitment had not become incomplete as a result of the transfer of business. This is because the calculation basis did not cease to apply as a result of the adoption of the defendant's remuneration system. Although the application of the calculation basis results in higher pension benefits due to the higher monthly gross salary, this does not result in a loophole that would give rise to a supplementary interpretation of the contract. In the Federal Labour Court's opinion, an adjustment in accordance with the principles of frustration of contract had already been ruled out, because the defendant had not demonstrated that it could not reasonably be expected to continue the pension without the possibility of a reduction. Finally, the defendant had also made the separately granted commitment to pay the pensioner Christmas bonus, so that the claimant was entitled to 13 pension payments based on the last monthly gross salary received before the start of the pension.

Our comment

The seller's existing obligations arising from occupational pension commitments can have a considerable impact on the purchase price negotiations in a business transfer and can even represent a real "deal breaker" in individual cases.

However, caution is also required when harmonising pension and remuneration systems on a business transfer. In this decision, the Federal Labour Court confirms its previous case law, under which the acquiring party does not enter into a pension commitment "as it stands and lies" but as it has been promised where a business is transferred outside of insolvency. When assuming final salary-related benefits, the acquiring party faces considerable economic risks if the impact on pensions is overlooked when harmonising remuneration systems. In addition to the direct economic impact, errors in this area can also further jeopardise the often already strained working atmosphere during a business transfer. Harmonisation processes should therefore always be carried out on an integrated basis during a business transfer with special consideration given to the occupational pension scheme.

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A works council committee cannot be dissolved if it has a residual mandate

If the works council only exercises a residual mandate due to a business closure, it cannot be dissolved even in the event of gross breaches of duty - such as blatant violations of data protection law - due to the functional purpose of the residual mandate; however, the exclusion of individual, or possibly all, works council members may be considered.

Federal Labour Court, decision of 24 May 2023 – 7 ABR 21/21

The case

The two applicant employers maintained a joint operation whose business operations were to be discontinued as of 30 April 2019. Following the failure of the negotiations on a reconciliation of interests, the works council formed there objected to the intended dismissals. When the employers nevertheless announced the dismissals, the chairman of the works council sent an e-mail in December 2018 to various lawyers who represented the employees concerned in their proceedings concerning the protection against unfair dismissal. This e-mail gave the recipients access to an extensive bundle of company documents intended to prove that a (partial) transfer of operations was actually taking place. The business was then shut down. When the employers became aware of the disclosure of the documents, they applied to the courts to dissolve the works council and, alternatively, to exclude the chairman from the works council. The Labour Court granted the principal motion, the Higher Labour Court dismissed both motions.

The decision

The Seventh Panel of the Federal Labour Court in turn only granted the alternative motion. The principal motion is unfounded as the works council only has a residual mandate and therefore cannot be dissolved. If, for example, a business is shut down, its works council shall continue in office for as long as it is necessary to safeguard the rights to participate and of co-determination existing in this context pursuant to Section 21b BetrVG. Although, under Section 23 (1) sentence 1 second alternative BetrVG, the employer may apply, inter alia, for an order to dissolve the works council on the grounds of the serious breach of its statutory duties, this provision should not be applied to the works council's residual mandate by means of a teleological reduction, as the legislative objective of the dissolution procedure would otherwise not be achieved

and this would be inconsistent with the objective pursued with the creation of the residual mandate. The provision set out in Section 23 (1) sentence 1 second alternative BetrVG is not intended to punish past conduct; the decisive factor is that the further work of the works council performing its duties proves to be unacceptable in view of a gross breach of duty. The residual mandate that arises on the discontinuation of the operational organisation has a (limited) functional relationship to the participation and co-determination rights that have been triggered. The required prognosis of unacceptability does not therefore relate to the extensive further official activity of the works council; rather, it is marginalised due to the limited tasks in the residual mandate. The meaning and purpose of Section 21b BetrVG would, in turn, require that employee co-determination - particularly with regard to the conclusion of a redundancy programme - does not cease completely.

However, the fact that it is not possible to dissolve the works council that has a residual mandate does not give it "carte blanche" to commit gross breaches of duty, which could also lie in a serious breach of the duty of confidentiality under works constitution law or a blatant breach of data protection

regulations. Such conduct could fall under other legal provisions and trigger corresponding legal consequences. In particular, the exclusion of individual works council members pursuant to Section 23 (1) sentence 1 first alternative BetrVG may be considered where an objectively significant and obviously serious breach of duty has been committed by the works council member. The provision also applies to a works council that has a residual mandate and could even lead to its dissolution.

Our comment

Where there has been collective misconduct on the part of several or all works council members in carrying out the residual mandate, the only recourse available to the employer following the decision is to file time-consuming exclusion applications against each individual works council member. To make matters worse, a member who has been excluded from the works council does not automatically have to resign as a member of a conciliation committee set up to establish a redundancy programme if he or she has been appointed as such. The argument that sanctions may be imposed under other legal provisions has already reached its limits in this case.

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Discrimination in the job application process because of severe disability - requirements for the burden of production

The mere presumption that an employer has breached its duty to protect severely disabled people, for example by not informing the works council of a job application, is sufficient to demonstrate discrimination. Concrete evidence does not have to be provided.

Federal Labour Court, judgment of 14 June 2023 – 8 AZR 136/22

The case

The defendant had rejected the claimant's job application, in which he referred to his severe disability, whereupon the claimant demanded payment of compensation under the General Equal Treatment Act (*Allgemeines Gleichbehandlungsgesetz*, AGG). The defendant refused this demand, as the claimant had been rejected due to his lack of qualifications and not because of his severe disability. The defendant did not respond to the claimant's request for proof that it had treated all applicants equally with regard to its selection criteria. The claimant then brought an action for compensation before the Labour Court on the grounds that, inter alia, the defendant had failed as alleged by the claimant to inform the works council about the claimant's job application (Section 164 (1) sentence 4 SGB IX). The Labour Court and the Higher Labour Court dismissed the action. The claimant pursued his claim further before the Federal Labour Court.

The decision

The Federal Labour Court partially upheld the claimant's appeal on points of law and ordered the defendant to pay compensation, albeit not the two gross monthly salaries requested in total, but one and a half times the gross monthly salary, in this case EUR 7,500.00. In the Federal Labour Court's view, the claimant had suffered direct discrimination on account of his severe disability. There is a presumption of such discrimination because of the severe disability due to the failure to inform the works council about the job application. The claimant had met his burden of production by merely alleging a breach of Section 164 (1) sentence 4 SGB IX. As the claimant did not have access to internal sources, he could not, in the Federal Labour Court's opinion, obtain reliable knowledge of the failure to inform, so that his assertion was not merely made "out of the blue". The claimant could not reasonably be expected to present more specific facts. On the

other hand, the defendant would have had to produce as part of its secondary burden of proof the facts on the basis of which this presumption was rebutted, which it did not do. The defendant did not wish to comment in principle on the claimant's allegation.

The Federal Labour Court also did not consider the defendant's objection that the claimant did not meet the requirements set out in the job advertisement to be sufficient to rebut the presumption of discrimination on the grounds of severe disability. This is because the skills and knowledge required by the defendant were not essential prerequisites for the advertised position, as would be the case, for example, for certain professional requirements. As a further argument against a claim for compensation, the defendant claimed during the trial that the claimant had applied to various employers using identical documents in order to become a job applicant within the meaning of the AGG. He had also already prepared letters asserting claims for payment of compensation, submitted settlement proposals and threatened legal action. The Federal Labour Court did not consider this submission to be sufficient to assume an abuse of legal rights on the part of the claimant.

Our comment

The decision continues the Federal Labour Court's previous case law regarding the burden of production in compensation proceedings where there has been discrimination in the job application process. Under the Federal Labour Court's previous case law a breach of protective regulations on the part of the employer had already been sufficient grounds to justify the presumption of discrimination. However, until now, it had not yet been decided that the claimant's assertion of a breach of the provisions of SGB IX is sufficient in itself to meet the burden of production. This further increases the risk for employers of making formal errors in the job application process and having to pay compensation for this. This is because it must be expected that, following the Federal Labour Court's decision, every unsuccessful severely disabled job applicant will in future assert a breach of Section 164 (1) sentence 4 SGB IX if a works council exists in the company. In addition, the employer in this case could not successfully object on the basis of an abuse of rights, which plays into the hands of so-called "AGG hoppers". However, two recent decisions reached by the Hamm Higher Labour Court (judgment of 23 March 2023 - 18 Sa 888/22) and the Berlin-Brandenburg Higher Labour Court (judgment of 6 September 2023 - 4 Sa 900/22) show that an objection based on the abuse of rights can also prevail. So this topic will continue to be exciting.

Another noteworthy aspect of the Federal Labour Court's decision is the amount of compensation awarded, which falls short of the amount claimed. In its decision on the burden of production, the Federal Labour Court further lowers the requirements for asserting a claim for compensation on the one hand and therefore remains restrictive with regard to the amount of compensation on the other - the upper limit of three months' salary pursuant to Section 15 (2) sentence 2 AGG is once again not fully used. Litigation that can last for years is therefore not financially worthwhile for the unsuccessful applicant. Potential claimants could be deterred from taking legal action as a result despite the low requirements regarding the burden of production and burden of proof.

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An employer's reference cannot be subsequently amended to the employee's detriment without an objective reason

If a first reference contains thank you, regret and good wishes wording, this may not be deleted when a new reference is issued unless there is an objective reason for doing so.

Federal Labour Court, judgment of 6 June 2023 – 9 AZR 272/22

The case

The claimant was employed by the defendant employer, a chain of fitness studios. The employer issued a reference containing thank you, regret and good wishes wording on the date the employment relationship ended. The employee objected twice to the reference for various reasons. The thank you, regret and good wishes wording was omitted in the third version. The employee brought an action to have the thank you, regret and good wishes wording reinstated in the reference. The Labour Court upheld the action. Both the appeal to the Higher Labour Court and the defendant's appeal on points of law were unsuccessful.

The decision

In continuation of the previous case law, the Federal Labour Court stated first of all in its decision that a direct entitlement to the thank you, regret and good wishes wording cannot be derived from Section 109 (1) GewO. The principle of consideration laid down in Section 241 (2) BGB also does not require the employer to use the thank you, regret and good wishes wording in a reference. However, once the employer has issued a reference containing the thank you, regret and good wishes wording, it can no longer amend or delete this to the employee's detriment, unless there is an objective reason to do so. Such an amendment would violate the prohibition of victimisation pursuant to Section 612a BGB, under which the employer may not discriminate against an employee because the latter is exercising his or her rights in a permissible manner. Section 612a BGB thus protects the employee's freedom of will. Even the right to freely express one's opinion under Article 5 (1) of the German Basic Law (Grundgesetz, GG) does not give the employer the right to use a justified complaint by the employee as a reason to amend the reference to the detriment of the employee. In addition, the Federal Labour Court found that the temporal scope of applicability of Section 612a BGB is not limited to the current employment relationship, but also applies after its termination. The provision set out in Section 612a BGB therefore has a post-contractual effect, particularly in the area of references.

Our comment

While disputes about references may often try the patience of employers, the Federal Labour Court's decision demonstrates that disputes are generally not worthwhile for an employer. If the thank you, regret and good-wishes wording was voluntarily included, but deleted from a later version during a dispute on non-objective grounds, this also violates the prohibition of victimisation under Section 612a BGB after termination of the employment relationship.

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Determination of attachable earnings where a company car is used for private purposes

A company car that may also be used for private purposes must be included in principle in determining attachable earnings. The corresponding valuation is based on the so-called 1% method, whereas the surcharge (0.03%) pursuant to Section 8 (2) sentence 3 of the Income Tax Act (*Einkommensteuergesetz*, EStG) is not taken into account. If the value of the agreed benefits in kind exceeds the amount of the attachable portion of earnings, the employer is in breach of Section 107 (2) sentence 5 GewO.

Federal Labour Court, judgment of 31 May 2023 – 5 AZR 273/22

The case

The claimant had been employed by the employer since the summer of 2013. The parties agreed that a company car would be provided for both business and private purposes instead of a salary increase. The defendant employer settled the employment contract taking into account the non-cash benefit for the private use of the company car under the so-called 1% method and for journeys between home and work under the so-called 0.03% rule. In his action, the employee sought payment of net remuneration differences in the amount of EUR 29,639.14 He was of the opinion that the employer had not observed the attachment thresholds for a period of more than three years. On appeal by the employee the Higher Labour Court amended the judgment of the Labour Court and ordered the employer to pay the net remuneration differences claimed. The employer filed an appeal on points of law and requested that the action be dismissed.

The decision

The Federal Labour Court considered the appeal on points of law to be admissible and well-founded. However, the employee would be entitled to payment of the net remuneration differences claimed under Section 611a (2) BGB if the employer was in breach of Section 107 (2) sentence 5 GewO, but the Federal Labour Court was unable to decide this on the basis of the findings, which is why it set aside the judgment of the Higher Labour Court and referred the matter back to the Higher Labour Court. The judges in Erfurt emphasised that, under Section 107 (2) sentence 5 GewO, the value of the agreed benefits in kind may not exceed the amount of the attachable portion of the salary. The employee must be paid the amount of his non-attachable earnings in cash. The crediting of the non-cash benefit against earnings therefore constitutes a breach of Section 107 (2) sentence 5 GewO if the sum of the earnings payable in cash and the benefit in kind cannot be attached under Sections 850c, 850e no. 3 sentence 1 of the Code of Civil Procedure (*Zivilprozessordnung*, ZPO). In this case, the agreement on the benefit in kind would be null and void under Section 134 BGB and the employer would be obliged to pay the sum of money corresponding to the value of the benefit in kind.

In this context, the Federal Labour Court also clarified that cash and non-cash benefits are to be added together in

accordance with Section 850e no. 3 sentence 1 ZPO when determining the attachable earnings within the meaning of Section 107 (2) sentence 5 GewO. If the employer provides the employee with a company car for private use, this is usually a benefit in kind within the meaning of Section 107 (2) sentence 1 GewO. The Federal Labour Court added that the value of this non-cash benefit should generally be determined at 1% of the list price of the car plus optional extras and VAT at the time of initial registration when determining attachable earnings (Section 8 (2) sentence 2 in conjunction with Section 6 (1) no. 4 sentence 2 EStG). In addition, the surcharge for the use of the vehicle between home and work (so-called 0.03% rule) to be determined in accordance with Section 8 (2) sentence 3 EStG is not to be included. The employee would otherwise be able to influence the amount of remuneration by simply changing his or her place of residence.

Our comment

The provision set out in Section 107 sentence 5 GewO reflects the prohibition of truck wages, i.e. wages not paid in conventional money but in the form of payment in kind, and is intended to ensure that the employee is paid the portion of his earnings exempt from attachment in cash. The crediting of the so-called non-cash benefit for the provision of a company car for private use is also in breach of Section 107 sentence 5 GewO if the value of the agreed benefits in kind exceeds the amount of the attachable portion of earnings. The Federal Labour Court has now clarified how the employee's attachable earnings are to be determined for privately used company cars. The value of the benefit in kind is to be included under the so-called 1% method. The so-called 0.03% rule is not to be applied to the non-cash benefit on top of that. The judgment should prompt a review based on the deduction of income tax to determine whether employees who are granted benefits in kind (including goods and services of the employer provided to the employee as part of his/her wage (*Deputat*) and, if applicable, shares) retain the non-attachable portion of their remuneration. The employee would otherwise be entitled to payment of the monetary amount corresponding to the value of the non-cash benefit under Section 611a (2) BGB. In return, the employer's claim based on unjust enrichment for the return of benefits in kind granted in the past is likely to be opposed by the defence of disenrichment.

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Contesting a works council election due to a misunderstanding of the meaning of the term “establishment” after restructuring

If an establishment that holds elections under works constitution law as stipulated under a collective bargaining agreement is merged, changed or broken up, its underlying establishments may cease to exist such that the collective agreement under Section 3 BetrVG becomes ineffective. The next works council election will then be held in accordance with the legal definition of the term “establishment”.

Federal Labour Court, decision of 21 June 2023 – 7 ABR 19/21

The case

The employer is a company that took over its business from AWO Schleswig-Holstein and operates numerous outpatient and inpatient facilities. The AWO had an assignment collective agreement in place in accordance with Section 3 BetrVG, under which a company-wide works council was formed for the care and education centres divisions. The education division had already been transferred to another regional division of AWO as of 1 January 2019; when the care division was transferred to the employer involved, the number of members of the works council fell below the prescribed minimum number. The election committee formed for the new election assumed on the basis of the assignment collective agreement that the employer operated a company-wide “care” establishment. The employer contested the works council election held as a result and argued that the election should have been held on the basis of the legal definition of an establishment. This would not have resulted in a uniform establishment due to the numerous small establishments located far apart from each other as defined in Section 4 BetrVG. The Labour Court and Higher Labour Court declared the election invalid.

The decision

The Seventh Panel of the Federal Labour Court in turn upheld the (newly formed) works council’s appeal on points of law. A violation of essential electoral rules that warrants the contesting of a works council election exists, inter alia, if the term “establishment” under works constitution law has been misunderstood. Where there is an arbitrary representation structure, this could be the case if an election was held applying an ineffective collective bargaining agreement

pursuant to Section 3 (1) nos. 1-3 BetrVG, if the election committee misunderstood the relevant organisational unit under works constitution law when applying an effective collective bargaining agreement or if it was based on a representation structure that does not apply to the employer for other reasons.

The Higher Labour Court correctly assumed in this connection that the works council election could not be conducted on the basis of the assignment collective agreement because the arbitrary organisational unit governed by it, which does not include the education centres division, did not (or no longer) exist(ed) at the employer. As a result of structural changes, the basis of an organisational unit established by a collective bargaining agreement may no longer exist, with the consequence that the collective bargaining regulations become ineffective. In this case, no other conclusion can be reached from an interpretation of the collective bargaining agreement that preserves its validity with regard to potential restructuring or from the transition agreement - the latter even explicitly addressed the need for an adjustment based on the company’s development. However, the Higher Labour Court

wrongly assumed that the election of a company-wide works council could not also be considered on the basis of the legal framework of the works constitution. The Federal Labour Court therefore referred the case back to the Higher Labour Court for it to review whether or not the employer's facilities each constitute independent establishments within the meaning of Section 4 (1) BetrVG.

Our comment

Misunderstanding the term "establishment" does not generally result in the invalidity, but only the contestability, of a works council election, even in the case of elections to arbitrary representation structures. If an election is not (or no longer) to be held under a collective bargaining agreement pursuant to Section 3 BetrVG, the term "establishment" is (again) determined in accordance with Sections 1 and 4 BetrVG - and thus also whether, if applicable, a separate works council is to be formed for individual permanent establishments based on their geographical and organisational independence. It is often overlooked that the physical distance from the principal establishment alone is not sufficient to meet the qualifying conditions for forming a works council. In addition, the establishment must have its own local management structure, although the requirements are very low. In the absence of this, the employees must be counted as employees of the principal establishment anyway.

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■ CASE LAW IN A NUTSHELL

No protection against dismissal for members of executive bodies even if there is an underlying employment relationship

Federal Labour Court, judgment of 20 July 2023 – 6 AZR 228/22

If the legal relationship between the executive body and the company is based on an employment relationship, the rights and duties under the employment relationship are transferred to the acquiring party in the event of a business transfer pursuant to Section 613a BGB, but not the position on the executive body; as long as the position on the executive body exists, the person concerned nevertheless has no protection against dismissal beforehand.

The case

The claimant had been employed by the employer since 2000, which later became the insolvency debtor. He was appointed managing director in December 2013, although a service contract was not concluded either orally or in writing. Preliminary insolvency proceedings were opened in October 2019, but the debtor's business operations were continued. This consisted of the provision of logistics services for other subsidiaries of the shareholder and also for a newly formed company in the Netherlands from the end of 2019. Insolvency proceedings were then opened in respect of the debtor's assets in mid-January 2020 and the defendant was appointed insolvency administrator; the defendant terminated the claimant's employment relationship "as well as any existing managing director employment relationship" on the same day. The claimant received the letter on the morning of 16 January 2020, and, in the afternoon, he resigned from his position as managing director with immediate effect by sending an e-mail. In his subsequent action he asserted, inter alia, that the dismissal was invalid under Section 613a (4) BGB and that his employment relationship be transferred to the newly formed company in the Netherlands. The latter had in the meantime taken over a substantial part of the debtor's workforce, operating resources and business operations. In addition, the dismissal was not socially justified. The Labour Court upheld the action in its entirety, the Higher Labour Court dismissed it completely.

The decision

The Federal Labour Court upheld the claimant's appeal on points of law, but referred the case back to the Higher Labour Court. First of all, the dismissal did not require any social justification because the claimant was still managing director when he received the notice of dismissal. The provision set out in Section 14 (1) no. 1 of the Protection against Dismissal Act (KSchG), according to which the first section of the KSchG does not apply to members of the executive body appointed to legally represent the legal entity, is in any case fully applicable if the position as managing director of the executive body (still) exists at the time of receipt of the notice of dismissal. The fact that the managing director's activities were performed solely on the basis of an employment contract does not contradict this. A service contract had not been concluded nor even implied. The fact that a GmbH managing director regularly works on the basis of a service contract does not change this. The executive board members referred to in Section 14 (1) no. 1 KSchG are excluded from the general protection against dismissal regardless of any existing employment relationship.

However, the Higher Labour Court erred in law by assuming that Section 613a BGB did not apply to the claimant, which is why the dismissal per se could be invalid pursuant to Section 613a (4) BGB. Because the claimant's managerial activities were based on an employment contract, he was also an employee within the scope of application of Section 613a (4) BGB; the provision should not be teleologically reduced to the effect that it does not apply to executive board members if the executive board position is based on an employment contract. As, under Section 613a (1) sentence 1 BGB, only rights and duties arising from an employment relationship are transferred, but the position on an executive body itself does not have its legal basis in the employment relationship, this is not transferred in the event of a business transfer. However, it is not yet clear whether the claimant can base his claim on this provision, as the Higher Labour Court must first determine whether a business has actually been transferred.

Initiating the establishment of a conciliation committee where there are several works councils at the same level

Baden-Württemberg Higher Labour Court, decision of 11 September 2023 – 4 TaBV 4/23

The parties in dispute are to be involved in the procedure for the establishment of a conciliation committee pursuant to Section 100 of the German Labour Courts Act (*Arbeitsgerichtsgesetz*, ArbGG), even if the competence or even the legal existence of the works council is in question

because there is another possibly competent works council at the same or a different hierarchical level.

The case

The parties are in dispute about the establishment of a conciliation committee on the subject of time recording. The employer has two companies, each with a local works council. A central works council was established at the group level in its Group through a collective bargaining agreement pursuant to Section 3 BetrVG. The effectiveness of this was questioned by the chairman of one of the local works councils, which is why he convened the constituent meeting of an (alternative) central works council in March 2023, where he was elected chairman of the central works council and it was resolved to establish a group works council. Members of the other local works council did not attend. The constituent meeting of the group works council was then held in May 2023, where the chairperson of the central works council was also elected as chairperson of the group works council. It was also decided to initiate conciliation proceedings on the subject of time recording, including the appointment of a lawyer. Another constituent meeting of the group works council was held in August, at which the chairperson of the group works council was re-elected and it was decided to initiate the present proceedings. In the meantime, the employer concluded a general works agreement on time recording with the central works council. The group works council disputes the effectiveness of this agreement, as the central works council does not legally exist and requested that a conciliation committee be established to introduce a time recording system. The Labour Court rejected the application.

The decision

The Higher Labour Court reached the same decision. The elected central works council is not to be involved in the procedure pursuant to Section 100 ArbGG, but only the parties in dispute. This also applies if the competence of the body involved is questionable. The appointment of the conciliation committee pursuant to Section 100 (1) sentence 2 ArbGG may only be rejected if it is obvious that it is not competent. This principle applies to both vertical and horizontal conflicts of competence. Inherent in the standard of obviousness is the fact that even an incompetent body may establish a conciliation committee.

In this case, the applicant is capable of participating. A party whose legal existence is in question is to be regarded as capable of being a party with regard to the admissibility of an action brought to obtain a decision on the merits. This also applies in proceedings whose subject matter is not the existence of this party. However, in this case, there was a lack of proper procedural authorisation to initiate the complaint. Although the fiction of the parties involved also affects the capacity to act of a committee in question, the applicant's resolution to appoint the legal representative was not adopted at a meeting to which a proper invitation was issued with an agenda attached; the chairperson of the central works council was not authorised to determine the relevant agenda item.

Commencement of the limitation period for leave entitlements

Federal Labour Court, judgment of 20 December 2022 – 9 AZR 266/20

The limitation period for leave entitlements (as well as the expiry dates under Section 7 of the Federal Leave Act (*Bundesurlaubsgesetz*, BUrlG)) only commences when an employer specifically informs its employees about any remaining leave entitlements and any deadlines that lead to their forfeiture.

The case

The claimant was employed by the defendant for four days a week from 1 November 1996 to 31 July 2017. She had a leave entitlement of 24 days per calendar year. The defendant certified that she was entitled to 76 days of leave as at 31 December 2011. She also did not take all the leave she was entitled to in the following years. The defendant did not inform the claimant again about the amount of her leave entitlement and also did not explain their possible forfeiture and the limitation period if she did not take the leave in good time.

In the action served on 14 February 2018, the employee requested that the leave be compensated accordingly, as the defendant had previously only paid compensation for a few days of leave. The latter argued that it could not have been aware of and complied with its obligations to provide information and request that the leave be taken, as the relevant case law only changed after the employment relationship was terminated. Insofar as the leave entitlements originated from periods prior to 2015, they were also time-barred. The Federal Labour Court submitted the question regarding the start of the statute of limitations to the Court of Justice of the European Union (CJEU). In its judgment of 22 September 2022 - C-120/21 (LB / TO), the CJEU ruled that the limitation period

only commences when the employee is informed of the amount of the leave entitlement and its possible forfeiture.

The decision

Consequently, the Federal Labour Court ultimately upheld the action. The leave entitlements had neither expired nor were they time-barred. Forfeiture of leave entitlements requires that, in conformity with EU law and taking into account Article 7 of Directive 2003/88/EC, the employer informs the employee specifically and in a fully transparent manner about the amount of his or her paid leave entitlement. The employer must ask the employee - formally if necessary - to take his or her leave and inform him or her clearly and in good time that the leave will be forfeited if it is not taken. Forfeiture was therefore excluded in this case as such information was not provided to the claimant by the defendant. The defendant could not rely on the fact that the case law on an employer's obligation to cooperate was only established after the employment relationship was terminated. In its judgment of 6 November 2018 - C-684/16 (Max-Planck-Gesellschaft zur Förderung der Wissenschaften), the CJEU had already justified the obligations to cooperate without providing for a corresponding protection of legitimate expectations or a "transitional period". For this reason, national courts could not introduce any protection of legitimate expectations or a transitional period.

Furthermore, the defendant could not rely on a limitation period for claims from the period prior to 2015. The provision on the commencement of the limitation period (Section 199 (1) no. 1 BGB) needs to be interpreted in accordance with EU law. It commences at the end of the year in which the employer has fulfilled its obligations to cooperate in connection with the granting and taking of statutory minimum leave. As the parties had not agreed any special regulations for the contractual additional leave, the contractual additional leave shares the fate of the statutory leave entitlement.

Irrelevance of a matrix structure for the existence of a department pursuant to Section 15 (5) KSchG

Lower Saxony Higher Labour Court, judgment of 24 July 2023 – 15 Sa 906/22

The existence of a matrix organisation where only a single person of the cross-company unit is employed on site is not sufficient to assume that this is a department within the meaning of Section 15 (5) KSchG.

The case

The claimant had been employed by the defendant, a pharmaceutical company, in its Finance and Controlling department since 2003. Her duties included the development and implementation of SAP financial solutions and analysis of business processes. Since the defendant's departments are organised in a matrix structure, the claimant functionally reported to a director who - like the majority of her division - is based in Bangalore, India.

The claimant was also the chairperson of the works council formed at the defendant and a representative for severely disabled persons. In the summer of 2021, the defendant informed the works council about an intended change in operations, which also included redundancies. In May 2022, the defendant decided, inter alia, to transfer all the duties of the claimant's division to other locations abroad. When the works council was consulted, it objected to the intended dismissal of the claimant, but the defendant nevertheless terminated the employment relationship with notice as at 31 December 2022. The Labour Court upheld the subsequent action for unfair dismissal.

The decision

The Lower Saxony Higher Labour Court reached the same decision. The dismissal was invalid pursuant to Section 15 (1) KSchG, under which the dismissal of a works council member with notice is inadmissible. The conditions for admissibility of the dismissal by way of exception under Section 15 (5) KSchG were not met. The claimant was not employed in a department within the meaning of the Act, which was closed down, since her area of work did not constitute such a department. Such a department is a spatially and organisationally separate part of the company that requires a personnel unit, has its own resources and pursues its own business purpose, even if it is merely ancillary to the company's main purpose This was not the case here. The criterion of a geographically separate part of the business is necessarily not met as the claimant is the only employee of the alleged department in the local company. Nor could there be an organisational link within a department that employs a single person.

Nor does anything else follow from the matrix structure in place at the defendant. The claimant had been integrated into the company through her assignment and was therefore not organisationally independent. However, the assumption of a department pursuant to Section 15 (5) KSchG requires that the claimant is employed in an organisational structure created

by the defendant in the local company. Even the defendant did not assert this. Although it cannot be ruled out that independent departments may exist in a matrix structure, the mere existence of such an organisation is not sufficient to indicate this. The appeal on points of law was not allowed.

Repayment of training costs - failure to pass an examination

Federal Labour Court, judgment of 25 April 2023 – 9 AZR 187/22

Individual contractual agreements regarding the repayment of training costs for failure to complete the training course are permissible in principle. It is not permissible to link the repayment obligation per se to the repeated failure to take the intended examination without considering the reasons for this. The termination for which the employer is (partly) responsible must be taken into account in a hardship clause.

The case

The defendant was employed by the claimant. As part of the defendant's training, the parties concluded a training contract that contained, among other things, the provision in § 5 no. 3 of the contract that the training costs are to be repaid if the defendant repeatedly fails the tax advisor examination. The hardship provision stipulated that the repayment obligation would no longer apply if the resumption and completion of the examination should no longer be possible due to excessive time lapses or due to examination regulations after the reason, for which the defendant is objectively not responsible, ceases to exist. The defendant did not sit the examination and terminated the employment relationship. The claimant sought repayment of the training costs. The Labour Court upheld the action, the Higher Labour Court dismissed the appeal.

The decision

The Federal Labour Court upheld the appeal on points of law. The claimant is not entitled to be repaid for the subsidy amounts paid. § 5 no. 3 of the training contract is invalid pursuant to Section 307(1) BGB. The defendant is unreasonably disadvantaged by this provision in that the latter is linked to the repeated failure to take the examination without making the necessary distinction between the reasons why the examination was not taken. A repayment obligation is generally permissible if the employee does not complete the training. However, practical relevant situations in which the reasons for non-completion do not lie within the employee's area of responsibility, such as, in particular, the resignation of the employee (partly) caused by misconduct on the part of the employer, are to be excluded from this. The hardship provision does not lead to the appropriateness of the provision. It only governs the suspension of the obligation to take the examination, but not the setting aside of the repayment obligation. It cannot be assumed that it was intended to exclude the employee's own termination of employment caused by employer conduct - despite the lack of any mention of this in the wording - from the repayment obligation. However, this is not a rare and remote occurrence in working life, such that it must be mentioned separately.

In assessing the validity of the repayment clause, it is irrelevant what reasons prompted the defendant not to take the examination. Sections 307 et seq. BGB already disapproved of the use of inappropriate standard clauses. Clauses, which govern a risk in an objectionable manner that did not materialise in this case, are also subject to the legal consequence of invalidity.

Objection to a transfer of business - content of the information letter

Federal Labour Court, judgment of 29 June 2023 – 2 AZR 326/22

Information about the applicability of collective bargaining provisions at the party acquiring a business must generally be provided prior to a transfer of business within the meaning of Section 613a (5) no. 3 BGB. It is not necessary to inform non-tariff employees about a collective bargaining agreement that does not apply to them either normatively or by reference.

The case

The parties are in dispute about the existence of an employment relationship after the claimant objected to its transfer to a party acquiring a business. The claimant had worked for the defendant and its legal predecessors as a non-tariff employee since 2004. In 2004, the Group, which is the parent of the defendant, concluded a collective bargaining agreement for the socially acceptable support for personnel adjustment measures. This applied to all employees of the Group covered by collective bargaining agreements. The Group was to ensure that the collective bargaining agreement is applied to employees not covered by collective bargaining agreements. In the following year, the defendant decided to

transfer the IT services it had previously provided itself to an external service provider as well as all operating resources of the existing data centres with effect from 1 February 2017. The claimant was informed of this in a letter dated 2 December 2016. On 13 May 2019, the claimant objected to the transfer of his employment relationship in writing. The Labour Court dismissed the action, the Higher Labour Court upheld it.

The decision

The Federal Labour Court upheld the defendant's appeal on points of law. There is no employment relationship between the parties. The claimant's employment relationship was transferred to W GmbH by way of a (partial) transfer of business pursuant to Section 613a (1) BGB. The claimant had not objected in an effective manner. In principle, the claimant was entitled to object to the transfer of his employment relationship pursuant to Section 613a (6) sentence 1 BGB. The objection must be lodged within one month following receipt of the proper notification from the employer pursuant to Section 613a (5) BGB. The objection was time-barred. The notification by the employer took place in a proper manner, in particular the notification was neither unclear nor incomplete. It serves the right to object and the employee is to be informed in such a way that he or she can "form an impression" of the subject matter of the (partial) transfer of the business and the assuming entity as well as the circumstances referred to in Section 613a (5) BGB. In principle, this also includes the applicability of collective bargaining provisions and the extent to which collective bargaining agreements and company agreements applicable at the seller are replaced by collective bargaining agreements applicable at the acquirer. However, this information is not required if a collective bargaining agreement does not apply to the employee due to a lack of collective bargaining coverage or a reference clause at the seller of the business.

■ INTERNATIONAL NEWSFLASH FROM THE UNYER NETWORK

Obligation to record working time under French labour law

Since 1991, French labour law has stipulated that employees' working time must be recorded. There is in principle no obligation to record working time only if working time is organised on a collective basis, i.e. if all employees in an establishment or company have the same working time. If the employer introduces this collective working time, it must nevertheless inform the labour inspector and post the working time in the business premises.

However, in the case of individual, i.e. varying, working time, the daily working time worked by each employee must be recorded; this was already the case prior to the decision of the European Court of Justice in the CCOO case (CJEU, judgment of 14 May 2019 - C/55/18 [CCOO]). Under French labour law, no specific form or means of time recording is required, such as time sheet templates, a time clock or a digital method. In practice, it is nevertheless advisable to record working time, even if a collective working time system is in place. In the event of a dispute about the actual hours worked, it is incumbent upon the employer to prove how many hours were actually worked by the employee. Although, in all cases, the employee must first determine his claim with sufficiently precise information about the unpaid hours he has allegedly worked, the employer must then respond with their own proof, e.g. witness statements or written or digital evidence. In this context, it is recognised that a simple Excel spreadsheet or a statement not countersigned by the employer is sufficient information for the employee to be able to claim compensation for (previously) unpaid overtime. Irrespective of the primary burden of proof, the employer must therefore always be able to prove the hours worked by the employee. It is therefore necessary to record employees' working time at all times, in particular to counter the assertion of claims for overtime pay.

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■ GENERAL INFORMATION

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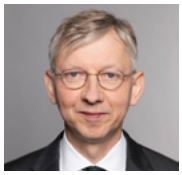

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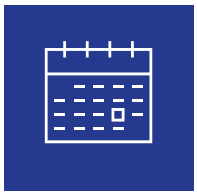
Events, publications and blog



You will find an overview of our events here.

You will find a list of our current publications here.

You will find our blog here.

Legal information

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