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Short-time working and Brexit

Labour & Employment Law Newsletter

Issue 4, 2020

Content

Dear readers,

Christmas is just around the corner. This is usually the time for merry songs, Christmas goose and the Christmas edition of our newsletter. Even though we are experiencing a special Christmas this year due to the difficult circumstances, we can at least - as usual - put our newsletter under the Christmas tree for you to read.

The Christmas edition of our newsletter deals with the currently very practice-relevant topic of short-time work and its distinction from dismissal for operational reasons. We also shed light on the exciting topic of Brexit. What are the implications for employers with regard to employment law?

In addition, this issue will of course also provide you with the usual overview of current decisions of the labour courts which we consider to be of particular relevance to HR work.

For all of us, Christmas this year will be different. Despite the challenging environment, we wish you a calm and peaceful Christmas season, relaxing days between the years and a happy, healthy and successful new year 2021, with more encounters, more fellowship and more hope again!

Have a good start into the new year and stay healthy!

Yours

Achim Braner

Coronavirus-related short-time work: risks and distinction from termination for operational reasons

Short-time working allowance is one of the most important instruments for overcoming the economic impact of the current coronavirus crisis. By taking over part of the wage costs, the Government helps to preserve jobs and relieve the burden on companies. According to estimates by the German Institute for Economic Research (ifo), around 2 million employees were working short-time in November 2020. This number is expected to increase sharply in the course of the current "hard lockdown". The Federal Government has extended the period of eligibility for short-time working allowance for companies that have started short-time work by 31 December 2020 to up to 24 months, at the longest until 31 December 2021.

However, with the continued payment of short-time working allowance, the focus is also shifting back to the risks. The Employment Agency successively checks whether the conditions for eligibility under social insurance law are met in each case. In the further course of time, however, questions of distinction from termination for operational reasons (betriebsbedingte Kündigung) will increasingly arise due to increasing long-term economic difficulties. Is it at all possible to terminate employment relationships for operational reasons while short-time working allowance is being received and what are the consequences of terminations for operational reasons for short-time working allowance?

Overview on the issue of short-time working allowance

Short-time work is the temporary reduction of the normal working hours in a company due to a lack of work, with a corresponding reduction in remuneration entitlements. The short-time working allowance replaces part of the remuneration that cannot be earned and paid as a result of the loss of working hours. Without the short-time working allowance, the economic risk would rest with the employer. If the employer could not employ his employees because of the coronavirus crisis, he would owe the full remuneration in the case of default in

acceptance (Annahmeverzugslohn) pursuant to Section 615 Sentence 1 of the German Civil Code (Bürgerliches Gesetzbuch, BGB). The instrument of short-time work relieves the employer of this burden. The short-time working allowance covers the so-called "net pay difference" between the previous "target pay" and the "actual pay" remaining after the reduction in working hours, amounting to 60% or, in the case of employees with children, 67% of the net pay difference. The instrument of short-time working allowance already proved its worth during the financial crisis of 2008/2009, enabling companies to retain their workforce so that they could "hit the ground running" again once the crisis was over.

Eligibility requirements for short-time working allowance

Section 95 Sentence 1 of the German Social Code, Book III (Sozialgesetzbuch, SGB) lists four eligibility requirements: firstly a so-called considerable loss of working hours with loss of pay within the meaning of Section 96 SGB III, then the fulfilment of company and personal requirements in accordance with Sections 90 and 98 SGB III and finally the notification of the loss of working hours in accordance with Section 99 Sentence 1 SGB III to the Employment Agency in whose district the business is located. In the context of the coronavirus crisis, the Federal Government significantly lowered the requirements for "considerable loss of working hours" by passing the Ordinance on relaxing the conditions for short-time working allowance (Verordnung über Erleichterungen der Kurzarbeit, KugV) published in the Federal Law Gazette 2020 volume I, page 595 and extended until 31 December 2021 for companies that began short-time work by 31 March 2021). According to Section 1 No. 1 KugV, a considerable loss of working hours already exists if at least 10% of the employed workers have a loss of pay of more than 10%. It is sufficient that this requirement is met either in the business or in a department of a business (Section 97 SGB III).

Pursuant to Section 96 (1) Sentence 1 No. 2 SGB III, the central prerequisite for a substantial loss of working hours is that it is "temporary". This is the case if, from an ex-ante perspective, there is a concrete probability that it will be possible to return to working at full capacity again in the foreseeable future. Conversely, if there is no such likelihood that the jobs will be retained, there is also no entitlement to short-time working allowance. It is therefore important, especially if short-time working allowance is applied for for a longer period, that the employer already explains in the notification in concrete terms what the expectation that the loss of working hours will be temporary (and not permanent) is based on. As always, in the end it depends on the specific circumstances. In the wake of the coronavirus crisis, therefore, circumstances have to be presented which indicate that it will be possible to return to work at full capacity within a certain period of time. One may use the duration of eligibility to short-time working allowance as an orientation for this period.

Distinction from termination for operational reasons

A further requirement for the receipt of short-time working allowance pursuant to Section 98 (1) No. 2, SGB III, is that the employment relationship has not been terminated or dissolved by a termination agreement.

The purpose of short-time working allowances is precisely to preserve jobs. Short-time working allowance and terminations for operational reasons are therefore mutually exclusive from the point of view of their requirements. If the requirements for short-time working allowance are met, the workplace will not be permanently lost. However, this is necessary in order to be able to terminate the employment relationship for operational reasons. The termination would therefore be ineffective. If, on the other hand, the conditions for a termination for operational reasons are met, short-time working allowance cannot be received. Since in this case, the loss of working hours is not temporary but permanent.

However, this does not mean that it is generally not possible to give notice of termination for operational reasons during short-time working; it is only opposed to the receipt of short-time working allowance. At the same time, in this case the employer has an increased burden of proof before the labour court as to why the need for employment has finally and not only temporarily ceased to exist. Particularly in the coronavirus crisis, it is difficult to distinguish between the preconditions for short-time working allowance and termination for operational reasons. The necessary predictive decision, whether the loss of tasks will be "temporary" or "permanent", cannot usually be made with a high degree of certainty and the assessment may change again in the course of time. It is not made any easier by the fact that the duration of eligibility to short-time working allowance is to be used as orientation. It is generally 12 months, but has been extended to up to 24 months (see above). This means that the only way to proceed is to exercise the greatest possible caution and to take as a basis the respective maximum period of eligibility. It is obvious that a predictive decision for such long periods will be difficult in most cases. In any case, whenever the maximum eligibility period is extended, predictions already made should be re-examined

and updated to the new maximum eligibility period. Irrespective of this, it is generally the case in practice that a forecast that has already been made can quickly change, e.g. if changed circumstances (now) suggest that the loss of working hours turns out to be permanent, despite a previous different assessment of the situation.

In this case, the employer must notify the Employment Agency that the loss of working hours is no longer temporary. The consequence would then be that short-time working allowance could no longer be received. It is then possible to give notice of termination for operational reasons, provided that the other requirements for this are met. If there is a company agreement in the respective company that allows for a reduction of the working hours, the employer may be required to first fully exploit this possibility due to the "ultima ratio" character of the termination for operational reasons (see Federal Labour Court, judgment of 23 March 2012, Neue Juristische Wochenschrift (NJW) page 2012, page 2747 et seq.). Employers must in any case be prepared for the effort to justify the question of the permanent loss of work tasks to increase in the case of contentious disputes about terminations for operational reasons. This can be particularly problematic if the employer has initially applied for short-time working allowance for the employee in question or comparable employees and has thus taken as a basis only a temporary loss of working hours.

According to the Federal Employment Agency's technical instructions, the basis for granting short-time working allowance ceases to exist in any case as soon as the employer initiates concrete implementation steps, for example, for shutting down the business or reducing the workforce. This may be, for example, the issuing of notices of termination or the conclusion of negotiations on the reconciliation of interests with final lists of names (see the technical instructions of the Federal Employment Agency on short-time working allowance, called "Fachliche Weisungen Kurzarbeitergeld (Kug)", bullet point 2.5 (para. 96.19 et seqq.), available in German only). At this stage, the employer should be careful that its actions cannot be interpreted as indicative of a permanent loss of working hours.

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Brexit - consequences in employment law

The Brexit transition period agreed between the EU and the UK ends on 31 December 2020. The question therefore arises as to which regulations in employment law, residence law and social security law will apply after the end of the transition period. The following article provides an overview of the legal situation that will apply from 1 January 2021 and obstacles to be expected. However, the comments are subject to the proviso that the EU and the UK do not reach an agreement "at the last minute".

End of the transition period

Due to the "Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community" (Withdrawal Agreement) concluded between the EU and Great Britain (including Northern Ireland), the consequences of the withdrawal from the European Union (EU), which has already taken place with effect from 31 January 2020, will initially be mitigated for a transition period. Therefore, for the transition period until 31 December 2020, the United Kingdom will in principle continue to be treated as a Member State. In German law, this has been implemented by the Brexit Transition Act (Brexit-Übergangsgesetz, BrexitÜG). This continues to guarantee the free movement of workers on both sides, the freedom of establishment for self-employed persons and the freedom to provide services, for example, in case workers from third countries are posted to the territory of another Member State or Great Britain. The period provided for in the Withdrawal Agreement for the UK agreeing on an extension of the transition period by a maximum of two years already ended on 30 June 2020. An agreement between the EU and Great Britain for the time after the expiry of the Withdrawal Agreement is currently not in sight, which is why the question arises as to which regulations will apply after the transition period.

Existing residence permits continue to be valid

Freedom of movement of workers gives a worker the right to take up and pursue employment in any other Member State of which the worker is not a national, under the same conditions as a national of that that Member State. The free movement of workers also includes a principle of equal treatment and prohibitions of discrimination as well as regulations on the recognition of professional qualifications. For EU citizens and British nationals and their respective family members, freedom of movement for workers already exercised in the respective other territory before the end of the transition period will be maintained. Workers who are already employed in the respective other territory before the end of the transition period may therefore continue to do so after the end of the transition period. With regard to the right of residence, it is possible in this case to obtain a long-term residence permit after five years, even after the end of the transition period.

On the other hand, workers who wish to take up employment in the other territory only after 1 January 2021 will be subject to general immigration law. In future, British nationals will be treated as third-country nationals in the EU and vice versa. If no agreement is reached between the EU and Great Britain, it remains to be seen whether statutory measures facilitating residence will be adopted in the respective national law even after the end of the transition period.

Cross-border deployment of employees

Even though residence permits and the freedom of movement of workers already used before the end of the transition period will continue to apply once the transition period ends, these fundamental freedoms do not extend to the freedom to provide services, which allows, among other things, posting workers within the EU under easier conditions, even if the workers in question come from third countries. In particular, this means that after the end of the transition period, Directive 96/71/EC concerning the posting of workers in the framework of the provision of services as well as Directive (EU) 2018/957 amending Directive 96/71/EC will not apply to workers from the UK posted to the EU or workers from the EU posted to the UK. Here, too, it remains to be seen whether free movement agreements will be concluded between Great Britain and the individual Member States or whether the respective provisions of national law will prevail.

Effects on social security law

In terms of social security law, there is the risks that postings will be treated in accordance with the German-British Social Security Agreement of 1960. After the end of the transition period, the regulations on the coordination of social security systems, in particular Regulation (EC) No 883/2004, will no longer apply to British nationals in the EU or nationals of EU Member States in Great Britain. However, the German-British Social Security Agreement regulates the treatment of posted workers under social security aspects only in an incomplete manner. For example, it does not contain any provisions on unemployment and long-term care insurance and also applies only to a narrower group of persons. Since the Social Security Agreement has been largely meaningless in the meantime, there is also the fundamental question of whether it revives.

Only in the case that a certificate of posting (A1 certificate) has been issued until 31 December 2020, this certificate will continue to be valid beyond 31 December 2020 for the duration of its validity.

Employee co-determination

There is also a need for regulation after the end of the transition period in the event that British employee representatives are represented in the European Works Council (EWC) or in works councils of a Societas Europaea (SE). During the transition period, this does not change, as Great Britain will continue to be regarded as a Member State of the EU (Arti-

cle 127(6) of the Withdrawal Agreement and Section 1 BrexitÜG). After the transition period, the question arises as to whether Great Britain will join the European Economic Area (EEA), so that the regulations on employee co-determination can continue to apply without restrictions (Section 3 (2) of the Act on the participation of employees in an SE (Gesetz über die Beteiligung der Arbeitnehmer in einer Europäischen Gesellschaft, SEBG) or Section 2 (3) of the Act on European works councils (Gesetz über Europäische Betriebsräte, EBRG).

Employee data protection

The requirements that companies operating across borders have to comply with in terms of employee data protection may also be affected. The EU General Data Protection Regulation (EU GDPR), which has been directly effective in all EU Member States since 25 May 2018, differentiates between EU Member States and third countries when transferring personal data abroad. Accordingly, a data transfer to other EU Member States is treated in the same way as a domestic data transfer. For the transfer of personal employee data to third countries, however, there is a preventive prohibition with a reservation of consent pursuant to Article 44 (1) of the EU GDPR. This difference must be taken into account when transferring and processing personal data in Great Britain after the end of the transition period.

Conclusion

Workers from European Member States who are already in the Great Britain, or vice versa, will retain their status at the end of the transition period. However, if employment is to be taken up for the first time in the other territory or if third-country nationals are involved, severe restrictions are to be expected. Moreover, due to the close intertwining of national law with the law of the Member States, many questions remain unanswered if no arrangement on the future legal relations between the EU and Great Britain can be found.

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■ JUDGMENT IN REVIEWS

Revocation of a pension commitment due to economic hardship by means of a general commitment

A company pension scheme which was granted by means of a general commitment may not only be replaced by a company agreement, but also by means of another uniform arrangement under labour law, such as an overall commitment.

Federal Labour Court, decision of 23 June 2020 – 3 AZN 442/20

The case

The defendant operates a clinic where the claimant has been employed as a nurse since 1981. A works council has not been formed in the company employing the claimant. The provisions of the collective bargaining agreement applicable to the employment relationship by virtue of reference made to it in the individual employment contract do not provide for any company pension scheme. The defendant's predecessor in title granted its employees - including the claimant - a general commitment under which a company pension financed by the employer was granted in accordance with a pension scheme of 1978. The term "general commitment" (Gesamtzusage) refers to the commitment of the employer to grant additional benefits to all staff members. The employees acquire a claim to the benefits promised in the form of an individual contract which they may accept or reject. The defendant filed an application for opening of insolvency proceedings for its assets under debtor-in-possession management in November 2017, which were opened on 1 March 2018. By letter dated 27 March 2018, the defendant revoked the general commitment concerning the company pension scheme due to the economic situation and the opening of insolvency proceedings. It informed its employees that pension right entitlements already earned would remain at the level earned up to 31 March 2018, but would not increase further and that no further pension right entitlements would be acquired. Subsequently, the insolvency proceedings were terminated with the conclusion of an insolvency plan.

The claimant successfully sued before the labour court against the revocation of the pension commitment. The defendant's appeal against this decision before the Higher Labour Court was unsuccessful. The Higher Labour Court gave as grounds for its decision, among other things, that the revocation of pension commitments due to economic hardship is no longer permissible since the deletion of the former Section 7 (1) Sentence 3 No. 5 BetrVG. In addition, the Higher Labour Court assumed that a general commitment cannot be replaced unilaterally by way of a new regulation of the employer but only by way of a company agreement. Moreover, in the present case there is no new regulation, but a complete revocation of future benefits. The Higher Labour Court did not allow the appeal on points of law against its judgment. The defendant then filed a complaint against denial of leave to appeal (Nichtzulassungsbeschwerde), arguing that the Higher Labour Court when assessing the possibilities of amending pension commitments by means of superseding company agreements, was contradictory in its judgment.

The decision

The Federal Labour Court dismissed the complaint against denial of leave to appeal as inadmissible because the defendant's substantiation of the complaint did not show a ground for admission with respect to each of the grounds supporting the decision of the Higher Labour Court. Where a decision is based on several grounds which support the decision, a complaint against a decision to deny leave to appeal may be allowed only if it is admissible and well founded in relation to all the grounds on which the decision is based. This is only possible if the substantiation of the complaint sets out a ground for admissibility for each of the grounds on which the decision is based. The Higher Labour Court based its decision on two main grounds: On the one hand, it has - based on decisions of the 3rd Senate (17 June 2003 - 3 AZR 396/02; 31 July 2007 - 3 AZR 373/06; 18 November 2008 - 3 AZR 417/07) - held that a revocation of pension commitments due to economic hardship is not permissible. However, these decisions were made in respect of current occupational pensions and not in respect of future increases. On the other hand, the Higher Labour Court assumed that a general commitment could not be replaced by a unilateral new regulation of the employer but only by a company agreement. Moreover, there was no new regulation but a complete revocation, so that even if the opposite view were taken, the conditions for revocation would not be met, in the view of the court.

The complaint against the decision to deny leave to appeal did not contain any grounds for admissibility with regard to the possibility of replacing the general commitment by a unilateral employer regulation. The Federal Labour Court therefore had to dismiss the complaint against the decision to deny leave to appeal as unfounded and did not have to decide whether sufficient economic reasons existed in the case under review for revoking the pension commitment for the future.

Our comment

The decision is procedurally unobjectionable. Since the Federal Labour Court is to decide on a question of fundamental importance (Section 72 (2) No. 1 of the German Labour Court Act (Arbeitsgerichtsgesetz, ArbGG), a legal question answered differently (Section 72 (2) No. 2 ArbGG) or an absolute ground for appeal on points of law (Section 72.2 No. 3 ArbGG) in the course of the appeal on points of law, on which the grounds are based, the complaint against the decision to deny leave to appeal must be admissible and well-founded with respect to each ground supporting the decision of the Higher Labour Court. If the complaint against the decision to deny leave to appeal fails to show a ground for admissibility for each substantive ground, the complaint is inadmissible. In the result, the inadmissibility of the complaint against the decision to deny leave to appeal is annoying for the defendant under two aspects. Not only did the defendant lose the case, but it also has to continue to grant the pension commitment to the claimant (and other employees), which will be a significant financial burden. The Federal Labour Court also pointed out that the decision of the Higher Labour Court contradicts the established case law of the Federal Labour Court. The Federal Labour Court has already ruled that a general commitment is in principle open to replacement by a new collective regulation. This collective regulation can be both a company agreement and a uniform contractual arrangement (vertragliche Einheitsregelung) and thus also a general commitment (Federal Labour Court, judgment of 11 December 2018 - 3 AZR 380/17). In addition, the Federal Labour Court has once again clarified in the present decision that the decisions on the revocation of pension commitments for economic reasons relate only to vested rights or current occupational pensions and not to future pension increases, which are at issue in the revocation declared by the defendant. If the complaint against the decision to deny leave to appeal had been admissible, it would therefore have been possible for the Federal Labour Court to rule in favour of the defendant.

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Further requests for a preliminary ruling submitted to the CJEU: a never-ending story of forfeited leave?

The CJEU will once again have to interpret Section 7 (3) of the BUrlG in conformity with Directive 2003/88/EC, since in July 2020 the Federal Labour Court has issued two requests for a preliminary ruling at the same time (case references 9 AZR 401/19 (A) and 9 AZR 245/19). Both cases deal with the question of whether a leave entitlement expires after the expiry of the 15-month period even though the employer has not complied with its duty to notify and the employee could have taken at least part of the leave until the occurrence of the respective event. The two cases differ only marginally. One case is based on a fully reduced earning capacity, the other on a long-term illness of practical relevance.

Federal Labour Court, decision of 7 July 2020 – 9 AZR 245/19 (A)

The case

Since the end of 2014, the severely disabled claimant had been receiving a temporary full-rate reduced earning capacity pension, which was most recently extended until August 2019. The claimant had not taken all of his statutory annual leave to which he was entitled in 2014, so there was now a dispute as to whether the days not taken in 2014 were lost after the 15-month period had expired. The defendant employer had not asked the claimant to take the leave, nor had it advised the claimant that the leave could be forfeited. For health reasons, the claimant had been unable to take leave for a long time. The employer takes the view that the forfeiture of leave nevertheless occurs after the expiry of the 15-month period, irrespective of the fulfilment of the employer's obligations to cooperate.

The action was not successful before either Frankfurt am Main Labour Court (judgment of 13 December 2016 - 3 Ca 8481/15) nor before the Hesse Higher Labour Court (judgment of 7 March 2019 - 9 Sa 145/17).

The decision

In its request for a preliminary ruling pursuant to Article 267 TFEU, the Federal Labour Court presents the previous case law on leave entitlements (Schultz-Hoff, KHS, King and MPI) in an exemplary way using interpretations in conformity with the Directive and explains the two questions referred to the CJEU which are decisive for the dispute. In order to decide whether the leave is forfeited, the CJEU would need to clarify "whether the law of the European Union permits the forfeiture of the leave entitlement in the case of uninterruptedly continuing fully reduced earning capacity 15 months after the end of the leave year or, as the case may be, a longer period, even if the employer has not fulfilled its obligations to request and notify and the employee could have taken at least part of the leave in the leave year until the occurrence of the full reduced earning capacity."

The forfeiture of leave would be prevented, and thus the claimant's claims would be well-founded, if EU law were to assume that the employer had an obligation to notify and cooperate in the present case as well. However, the Federal Labour Court also points out that there is basically no right to an unlimited accumulation of leave entitlements from several leave entitlement periods. On the contrary, such accumulation would be contrary to the recreational purpose of the leave.

If the answer to the first question is in the affirmative, the subsequent question of whether forfeiture would also be excluded at a later point in time in the event of a continuing reduction in earning capacity must be clarified.

Our comment

Leave forfeiture continues to be an explosive topic. The two referrals give the CJEU the opportunity to develop the German law on leave entitlements even further following the decisions Schultz-Hoff, KHS, King and MPI .

The claimant's entitlement asserted depends on an interpretation of Section 7 (3) of the German Federal Act on Minimum

Leave (Bundesurlaubsgesetz, BUrlG), which is in conformity with the Directive. According to the Act leave must be taken during the current calendar year. If there is specific personal or company reason for transfer, the time limit of the leave entitlement is shifted to 31 March of the following year. However, the occurrence of this 15-month period in the case of incapacity for work stands and falls with the fulfilment of the employer's obligations to cooperate.

The decisive factor in the two referrals will be whether the CJEU in the present case - with a view to the recreational purpose of the leave - affirms an exception to the principle of the obligation to cooperate. In this respect, the judges in Luxembourg will in any case also have to deal with the question of whether the requirement of a notification by the employer that leave may be forfeited is merely a superfluous formalism. We think that this is the case in the constellation to be decided. After all, if an employee is objectively unable to act on the notification of the employer or take leave due to a full reduction in earning capacity or a long-term illness, one must ask how meaningful the employer's notification can be at all. In its considerations, the CJEU will also have to take into account whether a further privileging of the already once transferred leave entitlement by 15 months is in conformity with EU law. Despite the fact that the leave entitlement is then transferred twice, we suspect that the CJEU will once again base its decision to deny a forfeiture of the leave entitlement on the employer's failure to cooperate and thus focus on the protection of employees in the decision.

Employers can therefore currently only be advised to comply with their obligations to inform and cooperate more precisely and in good time. We recommend informing employees accordingly at least twice a year and documenting the notifications for evidence purposes. Once at the beginning of the year and ideally another time in the second half of the year, i.e. after the full leave entitlement has accrued. The employee must be informed of the remaining leave entitlement, requested to take it and informed that the leave risks to be forfeited. If the employer does not comply with this, the employer will hardly be able to rely on the forfeiture of leave entitlements, at least if the CJEU - as feared - answers the questions referred for a preliminary ruling in favour of the claimants.

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Violation of the works council's co-determination right by tolerating overtime

Toleration of overtime violates the co-determination rights of the works council if there are sufficient indications that the employer does not take action and therefore accepts the overtime.

Federal Labour Court, decision of 28 July 2020 – 1 ABR 18/19

The case

The defendant employer had different shift models for the different parts of the company. The daily working time in the shift models is eight hours. Two employees working the early shift in one part of the company had repeatedly recorded more than eight hours per working day in the time recording system. The works council objected to this as overtime work and demanded that the employer clarify the circumstances and take countermeasures. The employer then stated that the two employees had been assigned to the wrong shift model by mistake and that the working times had therefore been incorrectly recorded. The error had been corrected and the staff had

been spoken to. When a team leader subsequently exceeded the working hours on two days on which works meetings had taken place, the works council initiated a resolution procedure and demanded that the employer refrain from tolerating or accepting overtime without first reaching an agreement with the works council or having this agreement replaced by a decision of the conciliation committee. The Labour Court dismissed the application, the Higher Labour Court granted the application.

The decision

The Federal Labour Court dismissed the complaint of the works council. It based its decision on the fact that the works council was not entitled to a general claim for injunctive relief pursuant to Section 87 (1) of the German Works Constitution Act (Betriebsverfassungsgesetz, BetrVG). There was no conduct by the employer in violation of the works constitution, which was also a prerequisite for the claim for injunctive relief pursuant to Section 23 (3) BetrVG. If the situation related to a matter of collective employment law, the ordering and also the toleration of overtime work by the employees was subject to co-determination pursuant to Section 87 (1) No. 3 BetrVG.

The fact that the hours normally worked in the company were only changed temporarily for individual employees did not mean that this situation does not refer to a collective matter. In this case, too, the collective interests of the employees in the company were affected. A temporary extension of the hours normally worked in the company within the meaning of Section 87 (1) No. 3 BetrVG existed if the working time volume regularly fixed for a certain working day was exceeded. If the co-determination rights of the works council were not observed, the works council was entitled to a general injunctive relief, the court held. In the event of gross violations of the employer's duties under works constitution law, a claim for injunctive relief also arose from Section 23 (3) BetrVG.

In the opinion of the Federal Labour Court, however, there was no tolerance of overtime by the defendant employer in the specific case under review. Toleration was to be assumed if the employer failed to take the necessary countermeasures.

This was the case, for example, if the employer remained inactive for a longer period of time in the knowledge that overtime had been worked and accepted this over a longer period of time. In the present case, however, there were insufficient indications that the employer tolerated the overtime. With regard to the first two violations, not only were the shift end times not observed, but also breaks and shift start times, and there had been an arbitrary "coming" and "going". Nevertheless, one of the employees concerned had not reached his hourly target. The employer had not paid overtime, nor were there any indications that the exceeding of working hours was due to organisational deficiencies. With regard to the violations on the days of the two works meetings, there was a lack of a certain permanence and redundancy in order to be able to conclude that the required countermeasures had not been taken and thus that there had been tolerance. It was not apparent that overtime work was regularly performed in connection with works meetings.

Our comment

One has to agree with the Federal Labour Court's judgment. However, it also makes clear what thin ice employers are walking on when the Federal Labour Court emphasises what a major role the actual circumstances of the individual case play in the legal assessment of any toleration of overtime. Overtime worked without the consent of the works council does not always constitute tolerance by the employer. However, employers are strongly advised to observe the co-determination rights of the works council pursuant to Section 87 (1) No. 3 BetrVG and to keep an eye on the working hours of their employees so that direct countermeasures can be taken if overtime is worked without the works council having exercised its co-determination right in advance.

Even in companies without a works council, however, it is worth keeping track of employees' overtime hours and intervening if the number of overtime hours reaches unimagined heights. It is true that the right to compensation for overtime requires that it be ordered by the employer. Here too, however, the devil is in the details, for such an order may also be implied if this is apparent from the further circumstances. This is particularly the case if the employer is aware of the overtime worked by the employee and approves of it or tolerates it. Caution should therefore be exercised when overtime is mentioned in the pay slip. This may indicate that the employer approved of the overtime worked, at least after the fact.

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Co-determination of the works council when recruiting temporary workers

Section 100 of the German Works Constitution Act (Betriebsverfassungsgesetz, BetrVG) allows the employer to take certain temporary staff measures, such as recruitment, despite the absence of the works council's consent, if this is urgently required for objective reasons. However, this does not release the employer from observing other participation rights of the works council.

Federal Labour Court, decision of 28 July 2020 – 1 ABR 45/18

The case

The employer - a logistics company - employs temporary workers in its warehouse as and when required, and in part also on a short-term basis. When the works council refused its consent under Section 99 BetrVG to the intended deployment of 47 temporary workers for the period from 8 September to 31 October 2017, the employer informed the works council that it would temporarily take the intended staff measure in accordance with Section 100 BetrVG. Accordingly, the aforementioned temporary workers worked in the employer's warehouse during the aforementioned period at the shift times agreed in a company agreement. The works council objected to this both in interlocutory injunction proceedings and principal proceedings. The works council requested the employer to refrain from using temporary workers in the employer's warehouse unless and until there was agreement between the employer and the works council on the assignment of temporary workers to the shifts specified in the company agreement. Otherwise, its co-determination right pursuant to Section 87(1) No. 2 BetrVG would be violated.

The decision

Neither the labour court nor the higher labour court considered the works council's participation rights to have been violated either in the interlocutory injunction proceedings or in the principal proceedings, so that the works council's applications for injunctive relief were unsuccessful in each case. The Federal Labour Court, however, granted the application for an injunction in the principal proceedings. By using the temporary workers, the employer had violated the works council's right of co-determination pursuant to Section 87 (1) No. 2 BetrVG.

The assignment of the temporary workers to the shifts stipulated in the company agreement is subject to the co-determination right of the works council pursuant to Section 87 (1) No. 2 BetrVG as a determination of the concrete start and end and distribution of the working time as well as the breaks. The right of co-determination pursuant to Section 87 (1) No. 2 BetrVG, to which the works council is entitled in the case of the employment - even if only for a short period - of a temporary worker in a hirer company, also applies to newly hired (temporary) workers. In this respect, the situation did relate to a matter of collective employment law and the right of co-determination of the works council pursuant to Section 87 (1) BetrVG was not superseded by the works council's rights of participation in personnel matters. The court also held that it does not matter whether the employer draws up a "shift plan".

In particular, Section 100 BetrVG would not become meaningless in the case of "employment in a shift operation with continuous shift work". The co-determination rights of the works council in personnel matters pursuant to Section 99 BetrVG on the one hand and in social matters pursuant to Section 87 (1) No. 2 BetrVG on the other hand refer to different issues. Accordingly, they each have their own conflict resolution mechanisms.

The permission to carry out unilateral measures conveyed by Section 100 BetrVG is limited exclusively to the hiring of the employee in the sense of the integration of the employee into the enterprise, which is only subject to approval pursuant to Section 99 (1) Sentence 1 BetrVG, according to the court. It does not cover the assignment of the employee to the shift times applicable in the enterprise, which is subject to the more extensive co-determination which can be enforced. Therefore, the authority granted to the employer by Section 100 BetrVG to temporarily recruit personnel does not exempt the employer from observing the works council's right of co-determination pursuant to Section 87 (1) No. 2 BetrVG before actually employing the employee concerned.

Our comment

The current decision of the Federal Labour Court is in the tradition of its previous case law and combines it in one decision - supplemented by the clarification on the coexistence of Section 100 BetrVG and Section 87 BetrVG. It is therefore important for employers with shift systems to note in future that the possibility granted by Section 100 BetrVG of implementing temporary staff measures without the consent of the works council in compliance with the provisions therein does not release them from the obligation to observe other works council participation rights under works constitution law or does not "cover" them as well. Otherwise, Section 100 BetrVG would quickly turn out to be a "toothless tiger", since the temporary recruitment/employment can be stopped by the works council in another way, namely via Section 87 BetrVG.

Since Section 100 BetrVG, as explained, only applies in cases of urgent necessity, this leads at first glance to a considerable restriction of flexibility on the part of the employer. In its decision, however, the Federal Labour Court has already indicated the way out to be taken in this respect: It is true that a measure which is subject to the co-determination of the works council pursuant to Section 87 (1) BetrVG may only be taken after the works council has given its consent or after its consent was replaced by a decision of the conciliation committee. Also, in the area of social matters, the law does not grant the employer a unilateral regulatory power, even in urgent and special cases, nor does it grant the employer the possibility of provisionally implementing a measure covered by Section 87 (1) BetrVG. However, the parties in the company and thus also a conciliation committee, which the parties may call upon in the event of a failure to reach agreement, are in principle at liberty to take into account any specific operational requirements when arranging the matter which is subject to co-determination pursuant to Section 87 (1) No. 2 BetrVG - which also includes a shift allocation which may be required at very short notice - and to determine the existence of the works council's consent if this relates to a narrowly defined, sufficiently concretely described and possibly frequently occurring case. As in comparable constellations, care must therefore be taken when drafting the company's shift regulations to include provisions which allow for shift allocation and thus the use of temporary workers - even at short notice.

The narrowest possible and most concrete procedural principles must be laid down for such shift allocations, which then simply have to be implemented by the employer and in this respect a "prior consent" of the works council must be obtained without the works council being deprived of its right of co-determination in an inadmissible manner. Insofar as this - quite demanding - task can be solved by the company partners, if necessary with the help of the conciliation committee, there is nothing to prevent the flexible deployment of temporary workers also in the future.

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Notice period for managing director service contracts

For the first time, the Federal Labour Court has ruled on the question from which norm the statutory notice period for service contracts of GmbH managing directors is derived and, in doing so, deviates from the (older) case law of the Federal Court of Justice.

Federal Labour Court, judgment of 11 June 2020 – 2 AZR 374/19

The case

The claimant initially worked for the defendant, the operator of a rehabilitation clinic, as a salaried administrative manager. In July 2009, she was appointed as managing director of the defendant with sole power of representation and was employed on the basis of a written managing director employment contract. The claimant received a basic annual salary of EUR 100,000 gross, payable in twelve equal monthly instalments. The employment contract did not contain an independent regulation of the notice periods, but referred to the statutory regulations in this respect.

Beginning in July 2017, there were disruptions in the employment relationship. After the claimant was initially warned, her authority to represent the company alone, was revoked in August 2017. Finally, on 28 February 2018, the defendant's shareholders' meeting adopted a resolution to remove the claimant from the office as managing director with effect from 1 March 2018, and to terminate the employment relationship with effect from 31 May 2018. The claimant received the corresponding notice of termination by post on 28 February 2018.

In her action, the claimant objected to the termination of the employment relationship, inter alia, on the grounds that she had been an employee at the time of receipt of the notice of termination, since she no longer had the responsibilities and decision-making powers that characterise the office of a managing director. She also objected that her employment could not be terminated until 31 August 2018 because of her length of service.

The Labour Court initially upheld the action. The Regional Labour Court set aside the judgment of the Labour Court and dismissed the action, with the exception of the finding that the employment relationship had ended at the end of 30 July 2018.

The decision

The claimant's appeal on points of law against the judgment of the Regional Labour Court was unsuccessful. The Federal Labour Court ruled that the termination pursuant to Section 14 (1) No. 1 of the German Protection against Dismissal Act (Kündigungsschutzgesetz, KSchG) did not require social justification within the meaning of Section 1 (3) KSchG, since the claimant had been the managing director and thus an executive body of the defendant at the time she received the notice of termination. The mere withdrawal of the sole power of representation did not change this. With regard to the notice period, the Federal Labour Court states that this is governed by Section 621 of the German Civil Code (Bürgerliches Gesetzbuch, BGB) and not by Section 622 (2) BGB. This is because, according to the court, Section 622 (2) BGB extends the notice periods in a staggered manner according to the respective length of service only for employees. The notice periods for service relationships, on the other hand, would result conclusively from Section 621 BGB. An application of Section 622 (2) BGB mutatis mutandis to managing directors was ruled out, since there was no unintended regulatory gap in the law in this respect. On this basis, the notice period resulted from Section 621 No. 4 BGB (six weeks to the end of a quarter), since the claimant had received a fixed annual salary. The fact that the annual salary was paid in monthly instalments as agreed does not change this, the court held. The Federal Labour Court therefore upheld the finding of the Regional Labour Court that the service relationship had ended at the end of 30 June 2018.

Our comment

At first glance, the decision of the BAG does not contain any surprises. The fact that Section 621 BGB regulates the notice periods for service relationships and Section 622 BGB regulates the notice periods for employment relationships is already clear from the wording of the respective norm. However,

the decision of the Federal Labour Court is in contradiction to the hitherto prevailing view in legal literature (cf. Erfurter Kommentar zum Arbeitsrecht/Müller-Glöge, 21th edition 2021, § 622 para. 7 just to name one example) as well as the older case law of the Federal Court of Justice (judgment of 26 March 1984, II ZR 120/83, as well as Federal Court of Justice, judgment of 20 January 1981 - II ZR 92/80), concerning managing directors who do not hold an equity interest in the company. The Federal Court of Justice had ruled for the version of Section 622 BGB valid at the time that its (extended) notice period applies accordingly to managing managers who do not hold an equity interest in the company.

Nevertheless, the Federal Labour Court did not feel compelled to refer this legal question to the joint senate of the supreme courts of the Federal Republic of Germany, since the Federal Court of Justice has not yet rendered a decision on the statutory notice period for GmbH managing directors since the revision of Section 622 BGB effective from 15 October 1993. According to the Federal Labour Court, there was therefore no (real) divergence between the decisions of the German supreme courts. It remains to be seen whether the Federal Court of Justice will follow this case law of the Federal Labour Court. This leaves uncertainty for those that have apply the law. Typically, however, managing director employment contracts contain independent provisions on the notice period, so that recourse to Section 621 or Section 622 BGB is rarely necessary in practice. The relevance of the Federal Labour Court's decision is therefore likely to be rather limited. However, if the managing director's service contract does not contain a corresponding provision, the contract should be revised with regard to the decision of the Federal Labour Court.

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Right to information on jobs offered when remuneration in the case of default in acceptance is claimed

The employer is entitled to information about the jobs offered by the Employment Agency and the Jobcenter if the employer needs this information in order to substantiate his objection of maliciously failing to achieve other earnings against a claim to remuneration in the case of default in acceptance (Annahmeverzugslohn).

Federal Labour Court, judgment of 27 May 2020, 5 AZR 387/19

The case

The parties are in dispute about remuneration in the case of default in acceptance and the existence of a right to information about jobs offered by the Employment Agency and the Jobcenter asserted by way of a counterclaim.

The claimant had been employed by the defendant as a construction worker since November 1996. The defendant terminated the employment relationship with the claimant repeatedly and for the last time on 30 January 2011. The claimant brought an action for unfair dismissal against this. The employment relationship continues. The defendant did not pay the claimant any remuneration from February 2013.

The claimant brought an action for payment of remuneration in the case of default in acceptance for the period from February 2013, crediting the unemployment benefit and unemployment benefit II received against him. The defendant objected that the claimant had maliciously failed to achieve other earnings. The defendant requested - insofar as relevant to the appeal on points of law - written information about the job offers of third parties submitted to the claimant by the Employment Agency and the Jobcenter in the period from 1 February 2013 to 30 November 2015 by way of a counterclaim. The defendant re-

quested information on the specific job, the working hours, the place of work and the remuneration in euros. The claimant moved to dismiss the counterclaim. A basis for the asserted right to information was not apparent, according to the claimant.

The Labour Court upheld the counterclaim to the extent relevant to the appeal on points of law by means of a partial judgment. The defendant's appeal before the Thuringia Higher Labour Court was unsuccessful.

The decision

The Federal Labour Court dismissed the claimant's appeal on points of law as without merit. The court held that the defendant was able to assert the right to information in court as an independent claim. The decision by partial judgment was also admissible and the defendant was entitled to the right to information to the extent asserted. First of all, the defendant's application was to be interpreted as meaning that it was seeking information in text form about the jobs officially offered by the Employment Agency and the Jobcenter. The defendant's obvious interest was directed solely towards the attempts made by the public authorities to find a job for the claimant. It did not cover job offers from other employers which the applicant received via the Employment Agency's job search portal.

The Federal Labour Court also pointed out that it was more reasonable under procedural aspects to introduce the right to information as pleas in law when wishing to assert this right and that it would accelerate the proceedings more. Within the framework of the burden of proof and production, corresponding information could also be obtained. Within the framework of his secondary burden of production (Section 138 (1) and (2) of the German Code of Civil Procedure (Zivilprozessordnung, ZPO), the employee had to provide more detailed information on circumstances of which the employer, who was primarily obliged to prove and produce his case, had no knowledge, insofar as the employer had no means of obtaining the information and the employee was at the same time easily able and could reasonably be expected to provide the information. The secondary burden of proof also did not result in a reversal of the burden of proof, in the view of the court, as the employer had to continue to produce and prove the legal and substantive context of its pleas in law.

The counterclaim was also well founded, the court held. The defendant had a right to written information on the jobs offered to the claimant by the Employment Agency and the Jobcenter to the extent requested. The claim arose from Section 242 of the German Civil Code (Bürgerliches Gesetzbuch, BGB) as a secondary obligation from the employment relationship. However, this only applied - in deviation from the duties to provide information under the German Code of Civil Procedure - if the information provided by the party obliged to provide information did not result in a change in the burden of proof under procedural law.

The requirements of Section 242 BGB were fulfilled, the court held. A special legal relationship existed between the parties in the form of the employment relationship. The defendant's contractual rights arising from the employment relationship were affected by the action for payment insofar as other earnings which the claimant demonstrably maliciously failed to achieve were credited against the employee by operation of law. The existence of the factual circumstances substantiating the objection is also sufficiently probable. There is no evidence that the authority did not fulfil its obligation to offer jobs or that it was no possibility to offer any jobs in the building trade during the period in question.

The defendant was excusably uncertain concerning the scope and existence of the job offers available. The employer had no right to information against the Employment Agency and the Jobcenter, since they were subject to social secrecy pursuant to Section 35 of the German Social Code, Book I (Sozialgesetzbuch, SGB). It was impossible for the defendant to remedy the existing uncertainty.

At the same time, the claimant could easily provide information on the jobs offered to him. There was also no interest of the claimant worthy of protection in the secrecy of the job offers in order to be able to avoid that other earnings which the claimant demonstrably maliciously failed to achieve were credited against him by operation of law. In particular, social secrecy, which is binding on the authorities, does not exist in the relationship between employer and employee. Thus, it follows from the crediting provided for in Section 615 Sentence 2 BGB and Section 11 No. 2 German Protection against Dismissal Act (Kündigungsschutzgesetz, KSchG) of other earnings maliciously not achieved that the employer may become aware of other employment opportunities in the course of the proceedings concerning remuneration in the case of default in acceptance.

Finally, the granting of the right to information did not result in an impermissible shift in the burden of proof and production in the course of the proceedings. Furthermore, the employer had to produce and prove the reasonableness of the jobs offered as well as the maliciousness of the failure to achieve other earnings. In this respect, the Federal Labour Court expressly clarified that it did not intend to adhere to the case law of the previously competent Ninth Senate on the characteristic of malicious failure if the employee did not report to the authorities that he was seeking a job. This case law was based on the old legal situation. Now, according to Section 2 (5) SGB III, the employee is required to actively cooperate in the avoidance or termination of unemployment and is obligated to personally report to be a job seeker immediately after becoming aware of the date of termination of the employment relationship. In terms of content, the right to information encompassed the job offers provided by the Employment Agency and the Jobcenter in the scope and content of the counterclaim as determined by interpretation. The employer could only assess whether the jobs offered were reasonable and whether the employee acted maliciously if he was aware of the working conditions in the job offers.

Our comment

The judgment of the Federal Labour Court is to be welcomed.

With this judgment, the Federal Labour Court strengthens the possibility of the employer to effectively oppose against claims of the employee for remuneration in the case of default in acceptance. Only with the help of this information is it possible for the employer to effectively present the reasons for his pleas in law or the prerequisites of the objection pursuant to Section 11 No. 2 KSchG.

Against the background of the judgment, it is advisable in practise to request such information already out of court. It is particularly important to ensure that the request for information is formulated clearly and comprehensively. By formulating the right to information, the employer can already improve the possibilities of having any additional earnings that may not have been earned maliciously credited against the employee. Of particular interest might be the extension of the request for information to such job offers of the employee which an employee receives on the initiative of third parties and rejects in bad faith. This is particularly true in view of the fact that this form of job placement, not only via the employer portals of the Employment Agencies and in view of the advancing demographic change as well as the increasing demand for skilled workers on the labour market, opens up an increasing number of other employment opportunities. At the same time, caution is also required when formulating the request for information in view of the rights of third parties.

If an action for payment is brought, it is advisable in practise to raise the plea of malicious failure to achieve other earnings as a simple plea of law. In this respect, in addition to the procedural arguments, time and financial resources can be saved.

Finally, the judgment of the Federal Labour Court is also to be welcomed from the perspective of social security law. The right to information increases the employer's ability to deduct maliciously unearned income. At the same time, it is therefore to be expected that employees will be more willing to cooperate in the termination of unemployment in order to keep wage losses caused by earnings that they have maliciously failed to achieve being credited against them low. In this respect, the judgment of the Federal Labour could lead to an increase in the effectiveness of the placement work of the Employment Agency and thus to a shortening of the periods of remuneration in the case of default in acceptance in the event of the continued existence of the terminated employment relationship.

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■ CASE LAW IN A NUTSHELL

Extraordinary termination due to deletion of data to a considerable extent

The unauthorised, intentional deletion of operational data stored in the employer's EDP systems constitutes good cause for termination without notice within the meaning of Section 626 (1) of the German Civil Code (Bürgerliches Gesetzbuch, BGB).

Baden-Württemberg Higher Labour Court, judgment of 17 September 2020 - 17 Sa 8/20 (final)

Reasons for the decision

The parties are essentially in dispute about a termination of the employment relationship without notice or, in the alternative, an ordinary termination of the employment relationship. The employee most recently worked as a key account manager for the employer and had a storage location assigned to him on the server of the employer. Due to tensions that had arisen, the managing director of the defendant held a meeting with the employee in order to offer him to dissolve the employment relationship by entering into a termination agreement. The employee refused, left the business premises and was available neither to the employer or nor the customers on the following days. On the second day of his absence, the employee accessed the data directory assigned to him on the employer's server from home and deleted a considerable amount of data (7.48 GB). The deleted data included almost all drafts and work results prepared by the employee. The IT manager of the employer informed the managing director on the same day that the data had been deleted. A subsequent data recovery was successfully carried out. On the basis of this conduct, the employer terminated the employment relationship without notice for serious violation of his duties or a suspicion of a serious violation of his duties, alternatively employer declared the ordinary termination of the employment relationship. The employee's action for unfair dismissal was only successful with regard to the extraordinary dismissal.

The Higher Labour Court amended the first-instance judgment and dismissed the action in its entirety. Taking into account all the circumstances of the individual case and weighing the interests of both parties, the claimant's conduct constituted good cause for termination without notice within the meaning of Section 626 (1) BGB. In view of the objective explanatory value, the employer was entitled to understand the employee's conduct as meaning that he wanted to leave his job burning bridges. A prior warning had not been necessary, since even a first-time acceptance of the employee's conduct had been unreasonable for the employer according to objective standards. It was irrelevant that the data could be restored. The question of whether and to what extent the employer is dependent on the data for the further course of business is also irrelevant, since in any case no justification or excuse for the employee can be derived from this.

No entitlement to work from home or to an individual office

A claim to work from home or to an individual office can regularly be derived neither from the employment agreement nor from the law.

Augsburg Labour Court, judgment of 7 May 2020 - 3 Ga 9/20 (appeal pending)

Reasons for the decision

The employee is seeking a court order requiring the employer to allow him to work from home during the time he is at risk of contracting Sars-CoV-2. If this is not possible for organisational reasons, the employer should be obliged to provide him with an individual office. The employee is 63 years old and shares an office with another employee at the employee's headquarters. The employee submitted a medical certificate in support of his claim.

The Labour Court dismissed the claimant's motion. An entitlement to a workstation at home resulted neither from the employment agreement nor from the law. It was up to the employer alone to decide how to meet its obligations under Section 618 BGB. The employee also was not entitled to an individual office. In this respect, too, there was no provision in the employment agreement or the law on which such a claim could be based. The employer was indeed obligated pursuant to Section 618 BGB to take the necessary and required measures to protect the employee. This is particularly true if there is a corresponding recommendation from a general practitioner. Depending on the conditions on site, however, an office with several persons could also satisfy the requirements of Section 618 BGB if corresponding protective measures are in place.

Business secrets in the form of private notes of the employee

If an employee takes private notes on customers, contact persons of his employer as well as their contact data, these notes are subject to the trade secret concept of Section 17 (2) of the German Act against unfair Competition (Gesetz gegen den unlauteren Wettbewerb, UWG) old version and Section 6 and Section 4 of the German Trade Secrets Act (Gesetz zum Schutz von Geschäftsheimnissen, GeschGehG).

Dusseldorf Higher Labour Court, judgment of 3 June 2020 – 12 SaGa 4/20 (final)

Reasons for the decision

The parties are in dispute about the former employee ceasing and desisting from using and exploiting the employer's trade secrets. The employer is a small enterprise engaged in the manufacture and sale of packaging materials. The employee had been employed by the employer for several years as a sales representative. At a trade fair, the employee met the managing director of a competitor. A few months later, the employee terminated his employment with his previous employer and then started working as a product manager for this competing company just a few weeks later. Against this background, the employee also wrote to customers of his former employer. The Labour Court dismissed the employer's motion to cease and desist from using its trade secrets.

The Higher Labour Court partially changed the first instance decision and ordered the employee to cease and desist in order to avoid enforcement measures from using or exploiting privately prepared notes on customers, contact persons and their contact data and turnover in business dealings for the purpose of competition. After an assessment of all the circumstances, there was an overwhelming probability that the employee had made use of private notes in his calendar when contacting the customers of his former employer. That conduct also gives rise to a risk of repetition, the court held. The employer's action was without merit insofar as it related to specific documents which the court was not convinced were actually in the employer's possession or in respect of which the employer did not take reasonable confidentiality measures within the meaning of Section 2 (1) letter b of the GeschGehG.

No obligation on the part of the employer to communicate exclusively in German

If the employer employs a female employee who also communicates with other employees in English, whereby the possibility of translation is guaranteed, the works council cannot base a right of co-determination on Section 87 (1) No. 1 of the German Works Constitution Act (Betriebsverfassungsgesetz, BetrVG) in order to demand that the employer communicate with employees exclusively in German.

Nuremberg Higher Labour Court, decision of 18 June 2020 – 1 TaBV 33/19 (final)

Reasons for the decision

The parties are in dispute about whether the employer is obliged to communicate with employees and works council members in German. The employer operates fashion stores throughout Germany. For the duration of the proceedings at first instance and above, the employer employed a branch manager in a shop who, at least initially, had only a limited knowledge of German. The branch manager often conducted conversations with employees in English, with other managers able to assist with translation. The works council accuses the employer of violating the requirement to use the German language and thus its co-determination rights pursuant to Section 87 (1) No. 1 BetrVG. The works council's application before the Labour Court to oblige the employer to refrain from communicating with employees and members of the works council in languages other than German under threat of enforcement measures was unsuccessful.

The Higher Labour Court upheld the first-instance decision and rejected the motions of the works council. The cease and desist order sought by the works council could not be based on Section 87 (1) No. 1 BetrVG with regard to the communication between the employer and the members of the works council. It was certainly not a question of general rules of order in the company, according to the court. At most, a claim under Section 78 BetrVG or under the principle of cooperation in a spirit of mutual trust pursuant to Section 2 (1) BetrVG could be considered. However, it could not be assumed that the work of the works council was significantly impeded if it was ensured that all non-German statements were translated for the works council. With regard to the communication between the employer and the employees, Section 87 (1) No. 1

BetrVG, could be considered as a possibly violated right of co-determination. In the present case, however, it had always been ensured that statements made by the branch manager were translated. In addition, the requested order refers to all forms of communication - i.e. also to those which have nothing to do with the performance of work - and should in any case be dismissed as unfounded as a too far-reaching general motion.

Compensation claim based on the question of confession

If a job advertisement contains a request to state one's confession, this circumstance constitutes sufficient evidence within the meaning of Section 22 of the German General Act on Equal Treatment (Allgemeines Gleichbehandlungsgesetz, AGG) for different treatment on the grounds of religion.

Karlsruhe Labour Court, judgment of 18 September 2020 – 1 Ca 171/19 (final)

Reasons for the decision

The parties are in dispute about compensation due to a violation of the prohibition of discrimination under the AGG. The defendant advertised for a secretarial post in the office of the managing senior church counsellor. The job advertisement contained the request to send in the application documents "stating the confession". The claimant's letter of application contained, inter alia, the following sentence: "I am non-denominational (atheist)". The claimant was invited to a job interview, during which she was also asked about her non-denominational status. After the claimant learned that she had not been considered for the position, she asserted claims for compensation against the defendant pursuant to Section 15 AGG.

The Labour Court upheld the claim for an amount corresponding to approximately 1.5 months' salary. The claimant had a claim against the defendant for compensation pursuant to Section 15 (2) AGG. In the present case, the request in the defendant's job advertisement to state the confession gave rise to the presumption that the claimant was discriminated against for religious reasons. The defendant has not been able to rebut that presumption. It is true that the defendant

submitted that the claimant was not selected on account of inadequate qualifications or suitability. However, this argument only explains why the applicant was not ultimately recruited; a contributory cause of her non-denominational status cannot therefore be ruled out. That argument is not, in principle, capable of rebutting the presumption of causality as a whole. Moreover, the defendant did not sufficiently demonstrate the existence of an abuse of rights by the claimant. The fact that the claimant, in addition to stating that she was non-denominational, added the phrase 'atheist' in brackets does not constitute sufficient evidence to allow it to be inferred that she had only applied in order to be able to claim compensation at a later date.

No discrimination in the reconciliation of interests and redundancy programme due to reference to the wage tax card

The decision to make the additional payment of a severance payment for children in a reconciliation of interests and redundancy programme dependent on the information in the wage tax card is within the scope of assessment and room for manoeuvre of the employer and the works council and does not constitute an unlawful discrimination of such employees who are listed with wage tax classes V or VI.

Nuremberg Higher Labour Court, judgment of 18 August 2020 – 7 Sa 354/19 (final)

Reasons for the decision

The parties are in dispute about the payment of severance pay for children under a reconciliation of interests and redundancy programme. The employee is married and has three children to support. She is listed with the employer with wage tax class V without child allowances. Due to the closure of the location where the employee was employed, the employer and the works council agreed on a reconciliation of interests and a adopted a redundancy programme. This provided, among other things, that employees would receive additional compensation for each dependent child, based on the information on the wage tax card. The employee did not receive an additional amount for her three children.

The Higher Labour Court upheld the decision of the Labour Court, which dismissed the employee's action for payment of the additional severance pay for her children. The employee was not entitled to such payment. This could not be derived from the corresponding agreement in the reconciliation of interests and redundancy programme to start with. The agreement explicitly only takes employees into account whose children are registered on the wage tax card. The employee herself had chosen tax class V, in which it is legally impossible to have child allowances entered. The employee also did not have such a claim based on Article 3 (1) of the German Basic Law (Grundgesetz, GG) or the principle of equal treatment under works constitution law or employment law based on this. Within the scope of their discretionary powers, the employer and the works council are entitled to compensate for economic disadvantages in a standardised and lump-sum form. The decision to grant additional compensation only to those employees who are liable to pay child support and who also have these children entered on their wage tax card is lawful. Wage tax classes V and VI would typically only be chosen by employees if they have a higher-earning spouse or higher-paying other employment, respectively. The employer and the works council could therefore also assume that these employees are typically less affected by the loss of income. Finally, the agreement in question in the reconciliation of interests and redundancy programme also does not violate Section 7 (1) of the German General Act on Equal Treatment (Allgemeines Gleichbehandlungsgesetz, AGG) in conjunction with Section 1 AGG. The claimant has not shown that female employees are particularly adversely affected by the agreement because of their sex.

■ GENERAL INFORMATION

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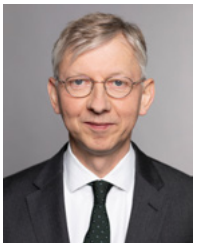

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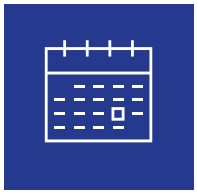
Events, publications and blog



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.

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