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Employment Tracker

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With our Employment Tracker, we regularly look into the "future of labour law" for you!

At the beginning of each month, we present the most important decisions expected for the month from the Federal Labour Court (BAG) and the European Court of Justice (ECJ) as well as other courts. We report on the results in the issue of the following month. In addition, we point out upcoming milestones in legislative initiatives by politicians, so that you know today what you can expect tomorrow.

Recent decisions

With the following overview of current decisions of the past month, you are informed which legal issues have been decided recently and what impact this may have on legal practice!

Subject	Date/ AZ	Remark/ note for practice
Federal Labour Court		
Consideration of pension proximity in the social selection process	08.12.2022 - 6 AZR 31/22 -	**In the event of termination for operational reasons, the employee being terminated must be selected on the basis of the criteria set out in Section 1 (3) sentence 1 of the German Dismissals Protection Act (*Kündigungsschutzgesetz - KSchG*) and Section 125 (1) sentence 1 no. 2 of the German Insolvency Code (*Insolvenzordnung - InsO*). In the weighting of age, it may be considered that the employee is already entitled to an (early) pension due to old age without deductions. The same applies if the employee is close to retirement age because he or she can draw such a pension without deductions or the standard old-age pension within two years at the latest after the intended end of the employment relationship. Only an old-age pension for severely disabled persons may not be considered in this respect.** *This was decided by the 6th Senate of the Federal Labor Court.* Facts The Federal Labor Court had to decide on the validity of a termination for operational reasons and, in this context, on two details regarding social selection: In particular, the Federal Labor Court had to clarify whether the pension proximity of an employee can be considered in the social selection and whether a further social selection has to be made in the case of a gradual shutdown.

The plaintiff, who was 63 years old at the time of termination, had been employed by the debtor in the area of distribution logistics since 1972. Insolvency proceedings were opened against the debtor's assets in 2020 and the defendant was appointed as insolvency administrator.

The reconciliation of interests concluded with the works council provided that initially 61 employees would be dismissed for operational reasons, one of them in the area in which the plaintiff worked. The other employees working in this area were younger than the plaintiff and had less years of service with the company.

The defendant terminated the plaintiff's employment as of June 30, 2020. The plaintiff was named in the reconciliation of interests.

As no purchaser was found for the business, the business was to be shut down after a period of phase-out. The defendant concluded another reconciliation of interests on this with the works council. This provided that the employees required for the phase-out would not receive notice of termination until May 31, 2021. These employees were named in the reconciliation of interests. Only one employee from the sales logistics area was retained. The other employees who were not required for production were each terminated on the next permissible date. The reconciliation of interests did not provide for any social selection. The plaintiff's employment was also terminated again as of September 30, 2020 as a precautionary measure.

The plaintiff is of the opinion that both terminations are invalid due to grossly incorrect social selection. With regard to the first termination, she is clearly worthier of protection due to her age and length of service. In addition, social selection should also have been carried out before the second termination.

The defendant, on the other hand, is of the opinion that the plaintiff is not clearly worthier of protection with regard to her age because she is only dependent on receiving unemployment benefits for a short period of time and will be able to draw an early retirement pension for particularly long-serving insured persons in December 2020. Before the second notice of termination was issued, there was no need for social selection because all employees had been dismissed – although on different dates.

The decision of the Federal Labor Court

The Federal Labor Court partially upheld the defendant insolvency administrator. The 6th Senate found the first dismissal to be invalid. However, according to the Federal Labor Court, the parties were allowed to take the plaintiff's proximity to her pension into account in the social selection process.

It is true that the need for social protection increases with age, because older employees still have poorer chances of being placed on the labor market. However, if the employee is able to draw a replacement income in the form of a retirement pension without deductions within two years of the end of the employment relationship at the latest, the need for social protection decreases again. These circumstances may be considered by the employer to the disadvantage of the employee in the context of social selection.

The Federal Labor Court nevertheless found the first dismissal to be invalid because the social selection was made without considering the other factors (length of service and maintenance obligations) and was therefore grossly flawed.

The second, precautionary notice of termination, on the other hand, was effective according to the Federal Labor Court.

Limitation of vacation entitlements

20.12.2022

- 9 AZR 266/20 -

An employee's statutory entitlement to paid annual leave is subject to the statutory limitation period. However, the three-year limitation period does not begin until the end of the calendar year in which the employer instructed the employee about his or her specific vacation entitlement and the expiration periods and the employee nevertheless did not take the vacation of his or her own free will.

This was decided by the 9th Senate of the Federal Labor Court.

Facts

In dispute before the Federal Labor Court was whether vacation claims are subject to the regular limitation period of three years.

The plaintiff asserted a claim for vacation compensation for a total of 101 vacation days from the years 2013 to 2017. Due to a high workload, the plaintiff was unable to take her annual leave in full for years. The defendant did not ask the plaintiff to take further leave, nor did it inform her that leave not requested could expire at the end of the calendar year or the carryover period.

The defendant is of the opinion that the plaintiff is not entitled to compensation for vacation because the plaintiff's vacation has expired. The defendant could not have been aware of and complied with its obligations to notify and request the plaintiff to take leave, since the case law of the Federal Labor Court in this regard did not change until after the termination of the employment relationship. In any case, the claim for vacation had become time-barred.

The plaintiff, on the other hand, is of the opinion that the vacation claim is not subject to the statute of limitations because the defendant neither requested her to take her vacation nor pointed out a possible expiration.

The Labor Court granted the asserted vacation claim in part, the Regional Labor Court in full. In its ruling of September 29, 2020, the Federal Labor Court referred the question to the European Court of Justice as to whether the statute of limitations for vacation entitlement is compatible with European law if the employer has not complied with its obligations to inform and request. In its judgment of September 22, 2022, the European Court of Justice ruled that the Working Time Directive and the European Charter of Fundamental Rights preclude the limitation of vacation entitlements if the employer has not actually enabled the employee to exercise this entitlement.

The decision of the Federal Labor Court

The Federal Labor Court has ruled that the regular limitation period of three years does not begin to run until the end of the year in which the employer informed the employee of his or her specific vacation entitlement and the expiry periods if Section 199 (1) of the German Civil Code is interpreted in accordance with the Directive. The Federal Labor Court thus implements the requirements of the European Court of Justice.

		Since the defendant had not fulfilled its obligations to request and inform, the plaintiff had not been able to exercise her vacation entitlement. Therefore, the plaintiff's vacation entitlement did not expire.
Expiry of vacation entitlements in the event of long-term incapacity for work **Obligations of the employer to co-operate**	20.12.2022 - 9 AZR 401/19 -	**The entitlement to statutory minimum leave from a leave year in which the employee actually worked before he was prevented from taking his leave for health reasons regularly only expires after the expiry of a carryover period of 15 months if the employer has enabled him to take his leave in good time. This follows from an interpretation of Section 7 (1) and (3) of the German Federal Leave Act (*Bundesurlaubsgesetz - BUrlG*) in conformity with the Directive.** *This was decided by the 9th Senate of the Federal Labor Court.* Facts The proceedings before the Federal Labor Court to be heard on the same day also dealt with details of vacation entitlement, considering a ruling of the European Court of Justice of September 22, 2022. The focus of the expected decision is the question of whether the vacation entitlement expires 15 months after the end of the vacation year in the event of continued incapacity for work, even if the employee was not notified of the expiration. The plaintiff seeks a declaration that she is still entitled to 14 vacation days for 2017. She became ill during 2017 and was unable to take 14 vacation days in that year. The employer had not pointed out the expiration of the vacation entitlement. The defendant is of the opinion that the vacation entitlement expired at the latest at the end of March 31, 2019. According to the plaintiff, an expiration of the vacation entitlement cannot be considered because the defendant did not point out the expiration in time. The lower courts dismissed the action. The Federal Labor Court then referred the question to the European Court of Justice as to whether such an expiration of vacation entitlements is compatible with European law. In its judgment of September 22, 2022 (C-727/20), the European Court of Justice ruled that the Working Time Directive and the European Charter of Fundamental Rights preclude such

an expiration of vacation entitlements if the employer has not fulfilled its obligations to co-operate. Taking this decision into account, the Federal Labor Court had to decide on the plaintiff's appeal.

The decision of the Federal Labor Court

The Federal Labor Court ruled in favor of the plaintiff. The unfulfilled vacation entitlement could not expire at the end of March 31, 2016 solely because the plaintiff had been incapacitated for work since her illness in the course of 2017 and was therefore unable to take her vacation. Rather, she retained the remaining vacation for that year because the defendant did not fulfill its obligations to cooperate, according to the Federal Labor Court.

The Federal Labor Court stated that vacation entitlements are generally only extinguished if the employer has previously enabled the employee to exercise his vacation entitlement by fulfilling his obligations to request and notify. However, if the employee was unable to take his vacation for health reasons, special rules apply, according to the Federal Labor Court.

According to this, vacation entitlements continue to expire at the end of the 15-month period if the employee was prevented from taking his vacation for health reasons from the beginning of the vacation year until March 31 of the second calendar year following the vacation year. In this case, it is not important whether the employer has fulfilled his obligations to cooperate, because these could not have contributed to the taking of the vacation.

The situation is different, however, if the employee actually worked in the leave year before he or she became incapacitated for work or fully disabled due to illness. In this case constellation, the limitation of the vacation entitlement regularly requires that the employer has enabled the employee to actually take his vacation in good time before the onset of the incapacity for work.

European Court of Justice

Conformity with European Law of National Provisions on the Derogation from the Principle of Equal Treatment of Temporary and Permanent Employees by Collective Agreement

Preliminary ruling of the Federal Labor Court

15.12.2022

- C-311/21 -

A collective agreement that stipulates lower pay for temporary workers than for directly hired employees must provide for compensatory benefits. Such a collective agreement must be subject to effective judicial review.

This has been decided by the European Court of Justice.

Facts

The European Court of Justice had to rule on questions relating to the deviation from the principle of equal treatment of temporary and permanent employees by collective agreement. The decision focused on the question of whether Sec. 8 (2) Sentence 1 Temporary Employment Act (AÜG), which allows a deviation from the principle of equal treatment by collective bargaining agreement, sufficiently respects the "overall protection" stipulated by the Directive.

The background to the pending decision is a request for a preliminary ruling by the Federal Labor Court:

The plaintiff in the main proceedings was employed by the defendant as a temporary worker on the basis of a fixed-term employment contract and was assigned to a retail company. She claims differential remuneration under the aspect of the equal pay principle because comparable permanent employees received higher remuneration at the hirer.

The collective wage agreements concluded between ver.di and the Association of German Temporary Employment Agencies (iGZ e.V.), which apply to the employment relationship of the parties by virtue of their membership, provide for deviations from the principle of equal pay stipulated in Sec. 8 (1) AÜG. Among other things, the collective agreements provide for lower remuneration of temporary workers compared to permanent employees.

The plaintiff is of the opinion that these collective agreements are not compatible with Union law (Art. 5 (1) and (3) of Directive 2008/104/EC). The defendant, on the other hand, is of the opinion that due to the fact that both parties are bound by collective agreements, it only owes the collectively agreed remuneration provided for temporary workers, and that Union law has not been violated.

The European Court of Justice now had to clarify detailed questions regarding the respect for the overall protection of temporary workers required by Article 5 (3) of Directive 2008/104/EC.

The decision of the European Court of Justice

The European Court of Justice has ruled that, in principle, it is permissible to regulate unequal treatment with regard to essential working and employment conditions to the detriment of temporary workers by means of collective agreements. However, in order to respect the overall protection of the temporary workers concerned guaranteed by European law, such collective agreements must compensate for this unequal treatment with other advantages with regard to essential working and employment conditions.

Whether this compensation is sufficient must be assessed in the specific individual case. For this purpose, a comparison of the essential working and employment conditions of the permanent employees of the hirer and the temporary workers must be made.

In addition, it must be ensured that collective agreements which permit unequal treatment are subject to effective judicial review.

However, the obligation to respect the overall protection does not require that the temporary workers concerned be bound to the temporary employment agency by a permanent employment contract. Nor is it necessary for the Member States to regulate by law the conditions and criteria with which collective agreements must comply.

Upcoming decisions

With the following overview of upcoming decisions in the following month, you will be informed in advance about which legal issues will be decided shortly and what consequences this may have for legal practice!

Subject	Date/ AZ	Remark/ note for practice
Federal Labour Court		
Trade union claim to refrain from implementing a works agreement	25.01.2023 - 4 ABR 4/22 -	It is in dispute before the Federal Labor Court whether the applicant trade union can demand that the employer refrain from implementing a works agreement concluded with the works council on shift and deployment planning. The employer involved - a railroad company - had concluded independent collective agreements with the applicant trade union and another trade union, each of which provided for regulations on duty and shift planning and contained opening clauses for company regulations. The parties to the collective agreement have agreed that the collective agreements exist side by side in the employer's plants. The parties to the collective agreement have also waived the application of Sec. 4a TVG - according to which only the majority collective agreement is applicable in the company in the event of conflicting collective agreements. However, this provision expired at the end of 2020. The employer has concluded a works agreement with the works council on shift and deployment planning. The regulations correspond to the collective bargaining regulations of the union making the application. The union is now demanding that this works agreement not be implemented. The reason given is that the works agreement is invalid because it means that the provisions of the collective agreement also apply to employees who are not members of the union.

This is a violation of Sec. 77 (3) of the German Works Constitution Act (BetrVG). The provisions of the works agreement are also not covered by the opening clause of the collective agreement.

The employer is of the opinion that the regulation block of Sec. 77 (3) BetrVG does not apply because a more detailed definition of the collectively agreed working time regulations is required at the company level. The opening clauses in the collective bargaining agreements also permitted the regulations made.

The lower courts upheld the employer's claims and dismissed them. In its appeal to the Federal Labor Court, the union is pursuing its claim for injunctive relief.

Legislative initiatives, important notifications & applications

This section provides a concise summary of major initiatives, press releases and publications for the month, so that you are always informed about new developments and planned projects.

Subject	Timeline	Remark/ note for the practice
Easier access to short-time work allowance is extended	14.12.2022	The ordinance on extended access to short-time allowance extends the facilitation of access to short-time allowance and the opening of short-time allowance to temporary workers until June 30, 2023. The ordinance regulates in detail: ▪ The number of employees who must be affected by the work injury remains lowered for companies from at least one-third to at least 10 percent. ▪ The build-up of negative working time balances prior to the granting of short-time allowances will continue to be completely waived. ▪ Temporary workers will continue to be able to receive short-time allowance. The regulations come into force on January 1, 2023.
Whistleblower Protection Act passed by the German Parliament	16.12.2022	On December 16, 2022, the German Parliament (*Bundestag*) approved the government draft of the German Whistleblower Protection Act. The bill was forwarded to the German Federal Council (*Bundesrat*), which is expected to reach a decision in February 2023. Overview of the provisions of the German Whistleblower Protection Act: ▪ Obligation for companies to set up and organize internal whistleblowing units ▪ Designation of at least one suitable and competent person as an internal reporting office ▪ Information and documentation obligations for employers ▪ Prohibition of sanctions: Sanctions (e.g. dismissal, transfer, etc.), attempted sanctions or threats of sanctions against whistleblowers are prohibited.

		▪ Reversal of the burden of proof: If a sanction is imposed after a report or disclosure, it is presumed in favour of the whistleblower that the disadvantage occurred as a reaction to the report.
Act on the further implementation of the directive on work-life balance for parents and family caregivers entered into force	24.12.2022	The draft legislation for the further implementation of the European Compatibility Directive, which was launched by the German government on June 8, 2022, entered into force as law on December 24, 2022. The following regulations were introduced to implement the directive: ▪ Employers must provide reasons for rejecting a request for flexible working arrangements during parental leave, regardless of the size of the company. ▪ Employers of small businesses must respond to applications from employees to conclude an agreement on time off under the Caregiver Leave Act as well as the Family Caregiver Leave Act within four weeks of receipt of the application and provide reasons in the event of rejection. ▪ Employees in small businesses who agree with their employer on a leave of absence under the Nursing Care Leave Act or the Family Care Leave Act have the associated rights and legal consequences, in particular they also have protection against dismissal for the duration of the agreed leave of absence. ▪ The competence of the Federal Anti-Discrimination Agency has been extended with regard to issues relating to discrimination covered by the Compatibility Directive.
Fifth Regulation on a Wage Floor in the Temporary Employment Sector	01.01.2023	On January 1, 2023, the Fifth Regulation on a Wage Floor in Temporary Employment entered into force. The ordinance is valid until March 31, 2024 and sets the following wage floors: ▪ €12.43 from January 1, 2023 to March 31, 2023 ▪ €13 from April 1, 2023 to December 31, 2023 ▪ €13.50 from January 1, 2024 to March 31, 2024

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