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Employment Tracker

APRIL 2023

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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		
Remuneration for default of acceptance after termination without notice	29.03.2023 - 5 AZR 225/22 -	**If the employer terminates the employment relationship without notice because he believes that he cannot reasonably be expected to continue the employment relationship, but at the same time offers the employee continued employment under unchanged conditions during the proceedings for protection against dismissal "in order to avoid default of acceptance", he is behaving contradictorily. In such a case, there is an actual presumption that the offer of employment is not meant seriously. This presumption can be invalidated by the reasons for the dismissal to the certainty or by corresponding explanations of the employer.** *The 5th Senate of the Federal Labour Court decided this.* Facts The parties are in dispute about remuneration for default of acceptance following the invalid termination of an employment relationship without notice. The plaintiff was employed by the defendant as a technical manager. On December 2, 2019, the defendant issued a termination without notice in which it offered the plaintiff a new employment contract as a software developer in return for a monthly reduction in remuneration. The termination letter further stated, "in the event that you reject the extraordinary termination (i.e. in the event that you assume an undissolved employment relationship) or in the

event that you accept the following offer, we expect you to start work on 05.12.2019 at 12:00 CET at the latest."

The plaintiff rejected the offer of change and also did not show up for work. As a result, the defendant gave the plaintiff another extraordinary notice of termination in mid-December 2019, effective December 17, 2019.

Furthermore, it pointed out that "in the event of rejection of this extraordinary notice of termination" it expected the plaintiff "to start work on 17.12.2019 at 12:00 CET at the latest". The plaintiff did not comply with this.

In the subsequent proceedings for protection against dismissal, it was determined that both notices of termination did not terminate the employment relationship of the parties.

After the defendant only paid gross compensation of EUR 765.14 for the month of December 2019 and the plaintiff was not able to establish a new employment relationship until April 1, 2020, he filed an action for compensation due to default of acceptance, demanding payment of the salary agreed in the employment contract minus the unemployment benefit received until he starts his new job.

He is of the opinion that the defendant was in default of acceptance due to its invalid notices of termination. He could not be expected to continue working for the defendant under changed or even the original working conditions, if the defendant had seriously offered this at all. The defendant had wrongly accused him of multiple misconduct and disparaged his person in order to justify the termination without notice. For its part, the defendant had asserted that it could not reasonably be expected to continue employing the plaintiff.

In contrast, the defendant argued that it was not in default of acceptance because the plaintiff had not continued to work for it during the proceedings to protect against dismissal. The plaintiff himself had assumed that continued employment was reasonable because he had filed an application for provisional continued employment during the proceedings for protection against dismissal.

The decision of the Federal Labour Court

The Federal Labour Court ruled in favour of the plaintiff.

Accordingly, the defendant was in default of acceptance due to its invalid terminations without notice, without the need for a job offer by the plaintiff. Because the defendant itself assumed that it could not be expected to continue employing the plaintiff, its contradictory conduct gives rise to a factual presumption that it did not make the plaintiff a serious offer of employment in the course of the proceedings.

Moreover, the rejection of such an "offer" does not indicate that the plaintiff is unwilling to perform. It would only be possible that any earnings he had maliciously omitted would have to be offset. In the case in dispute, however, this was not the case because the plaintiff could not be expected to work for the defendant until the end of the unfair dismissal proceedings due to the accusations made against him in the context of the dismissals and the disparagement of his person.

This is not contradicted by the fact that the plaintiff applied for provisional continued employment in the unfair dismissal proceedings. This application was directed to the process employment after the established inefficacy of the notices of termination. Only if the plaintiff had refused further employment in such a case would he have acted inconsistently. Here, however, it was a matter of continued employment in the period up to the first-instance decision. It makes a difference whether the employee is to continue working despite the (serious) accusations made against him in the context of a termination for behavioural reasons or whether he can return to work "rehabilitated", as it were, after first instance victory in the proceedings for protection against dismissal.

Effectiveness of a waiting period termination due to lack of corona vaccination	30.03.2023 - 2 AZR 309/22 -	**The dismissal of a medical assistant who has not been vaccinated against the SARS-CoV-2 coronavirus in order to protect patients and the rest of the workforce from infection does not violate the prohibition of disciplinary treatment under Sec. 612a of the German Civil Code.** *The 2nd Senate of the Federal Labour Court decided this.* Facts

In dispute was whether the termination of a medical assistant during her probationary period, who did not want to be vaccinated against the Corona virus, is effective.

The plaintiff worked for the defendant - a hospital - in patient care. The defendant made the plaintiff several offers of vaccination, which she did not accept. As a reason, the plaintiff stated that she did not want to be vaccinated against Corona.

As a result, the defendant terminated the employment relationship with due notice.

The plaintiff is defending herself against this termination with her lawsuit. She is of the opinion that the termination violates in particular the prohibition of measures pursuant to Sec. 612a of the German Civil Code.

The decision of the Federal Labour Court

The Federal Labour Court ruled that the plaintiff's termination is valid. There was no infringement of the prohibition of discrimination under Sec. 612a of the German Civil Code.

There was no causality between the exercise of rights by the employee and the disadvantageous measure taken by the employer. The essential motive for the dismissal was the intended protection of hospital patients and other staff from infection by unvaccinated medical personnel and not the plaintiff's refusal to be vaccinated against the Corona virus.

It is also irrelevant that the notice of termination was given before the introduction of mandatory vaccination.

European Court of Justice		
Meaning of the concept of weekly rest period within the meaning of the Working Time Directive	02.03.2023 - C-477/21 -	**The daily rest period is in addition to the weekly rest period, even if it immediately precedes it. This is also the case if national legislation grants employees a weekly rest period that is longer than that required by European Union law.** *This was decided by the European Court of Justice.*

Reference for a preliminary ruling from the Miskolci Törvényszék (Hungary)

Facts

The European Court of Justice decides on several questions concerning the interpretation of the concept of daily and weekly rest periods within the meaning of Art. 3 and Art. 5 of the Working Time Directive.

The background to the reference for a preliminary ruling is a case in Hungary. The plaintiff in the main proceedings works as a train driver for the defendant employer. The employee works based on a monthly work schedule, which does not specify any specific weekly rest days, but instead establishes a weekly rest period for all train drivers in accordance with a weekly reference period. According to the collective agreement applicable to the employment relationship, the employer granted the employee a daily rest period of twelve hours between two shifts, which he could spend at his home address, plus the so-called standard travel time or the time required to get to work or from work to his home address. With regard to the weekly rest period, if the employer could not guarantee the employee an uninterrupted weekly rest period of 48 hours in a given week, the employer nevertheless guaranteed an uninterrupted rest period of at least 42 hours in such a way that the employee was granted an average weekly rest period of at least 48 hours when scheduling his working time. The employee could not take a daily rest period or standard travel time before or after the weekly rest period or vacation. Indeed, the employer did not grant the employee a daily rest period when granting him the weekly rest period or vacation.

The plaintiff in the main proceedings is of the opinion that the daily rest period and the weekly rest period as well as the daily rest period and the vacation should be granted consecutively and independently of each other. Granting them at the same time or combining them is unlawful.

The court in Hungary suspended the proceedings and submitted a reference for a preliminary ruling to the European Court of Justice. The Court had to decide in particular whether a daily rest period granted in conjunction with a weekly rest period is part of the weekly rest period under the Directive.

The decision of the European Court of Justice

The European Court of Justice has ruled that the daily rest period must be granted regardless of the duration of the weekly rest period provided for in the applicable national regulation.

The European Court of Justice based its decision mainly on the fact that the daily rest period and the weekly rest period are two autonomous rights with different objectives. The daily rest period allows the employee to withdraw from his working environment for a certain number of hours, which must not only be connected, but must also immediately follow a work period. The weekly rest period allows the employee to rest for each seven-day period. Accordingly, employees must be guaranteed the actual enjoyment of both rights.

In particular, the daily rest period is not part of the weekly rest period, but is in addition to it, even if it immediately precedes it.

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		
Admissibility of a fixed-term agreement under the Part-Time Employment Act	05.04.2023 - 7 AZR 223/22 -	The Federal Labour Court decides on the admissibility of the limitation of an employment relationship according to the German Part-Time Employment Act (TzBfG). The plaintiff had been employed by the company A.V. der Personaldienstleister GmbH & Co. OHG (hereinafter: A.V.) since 2016. The employment relationship was fixed-term and the parties agreed on several extensions of the contract. Within the scope of this employment relationship, the company A.V. placed the plaintiff at the disposal of the defendant by way of employee leasing. The defendant, A.V. and IG Metall had concluded a collective agreement on the remuneration and employment conditions of temporary workers (TV VEZ) on December 5, 2013. In 2019, the plaintiff concluded a temporary employment contract with the defendant and had been working as a production helper since September 1, 2019. According to this contract, the employment relationship was limited until May 31, 2020. The collective agreements concluded between the defendant and the IG Metall district management of Lower Saxony and Saxony-Anhalt applied to the employment relationship of the parties. In a letter dated May 12, 2020, the defendant notified the plaintiff of the termination of the employment relationship due to the expiry of the time limit. The plaintiff defended himself against this with his claim.

		While the Labour Court dismissed the action, the Regional Labour Court granted the plaintiff's request. It stated that the objective-based fixed-term employment contract was inadmissible due to a violation of the TzBfG. In its appeal to the Federal Labour Court, the defendant seeks to have the judgment of the Regional Labour Court set aside.
Existence of an employment relationship **Distinction from service on the basis of membership in a religious community**	25.04.2023 - 9 AZR 253/22 -	In dispute are the plaintiff's claims for payment and, in this context, in particular whether the plaintiff's services were rendered on the basis of an employment relationship or membership in a religious community. The plaintiff is a fully qualified lawyer and concluded a contract with the defendant - a non-profit association - to work as a member of a so-called ashram community. This is a spiritual community that lives according to ancient Indian religious ashram and monastic traditions. The members of the association, the so-called sevaka, devote their lives entirely to practicing and spreading the yoga teachings in order to develop spiritually and achieve enlightenment. The plaintiff worked 42 hours a week for the association and received an allowance. In addition, the association took care of a comprehensive subsistence allowance and provided room and board. The plaintiff, who has since left the association, is now demanding remuneration for the services she provided in the amount of the statutory minimum wage. She is of the opinion that an employment relationship existed between her and the defendant. The defendant pursued economic goals by marketing yoga. Her spiritual development, which had been the motive for her to establish the contractual relationship, had always taken place outside the regular working hours and, moreover, had decreased over time. Rather, the work had been in the foreground, in which she had been subject to the defendant's right to issue instructions.

		The Labour Court allowed the action, the Regional Labour Court dismissed it. In her appeal to the Federal Labour Court, the plaintiff seeks to have the decision of the Labour Court reinstated.
Statutory prescription of vacation pay claims **Compensation for damages if no reference is made to an existing holiday entitlement**	25.04.2023 - 9 AZR 340/20 -	The Federal Labour Court has to decide on the prescription of claims to compensation for vacation and damages from a terminated employment relationship. The plaintiff was employed as a lawyer at the law firm (hereinafter: C&C) until the end of July 2012. A written employment contract was not concluded. The plaintiff was not usually active in the law firm on Thursdays as agreed due to other professional activities. The plaintiff was granted his full vacation entitlement from his other employment. At C&C, he always took less than 24 days of vacation each year. The employment relationship ended due to the plaintiff's resignation. At the same time, he applied for the granting of the vacation he was still entitled to. In 2015, C&C's attorneys issued a transcript under the Evidence Act stating that the plaintiff would be granted recreational leave of 24 working days per year. With his claim, the plaintiff demands payment of damages for the vacation not taken, in total 138 vacation days, due to breach of an accessory duty of the employment contract. Background of the demand is that the employer did not point out to the plaintiff a possible expiration of the vacation, with the consequence that it is now no longer possible for the plaintiff to take the vacation. The plaintiff submits that when the proof was issued, he learned for the first time that he would have been able to take 24 working days of paid vacation leave during the entire duration of the employment relationship with a four-day week in each calendar year, which he would have done if he had known about this entitlement. In contrast, the defendant objected that the plaintiff was fully aware of his vacation entitlement throughout the entire duration of the current employment relationship and relies on the fact that the claim is now time-barred.

		The lower courts dismissed the action. The plaintiff continues to pursue the claims asserted in the action before the Federal Labour Court.
Collective bargaining provision on granting days off as impermissible discrimination against part-time employees?	26.04.2023 - 10 AZR 84/22 -	The Federal Labour Court has to decide whether the collective agreement provision in the collective agreement for the metal and electrical industry in North Rhine-Westphalia on the granting of days off unlawfully discriminates against part-time employees because it is linked to a weekly working time of 35 hours. The plaintiff works part-time for the defendant. The collective bargaining agreements for the metal and electrical industry in North Rhine-Westphalia apply to the employment relationship. Sec. 25.1 MTV provides that employees with a weekly working time of at least 35 hours may claim additional days off under certain further conditions. On the basis of a so-called solidarity collective agreement, it is regulated at the defendant in a "Corona-Group Works Agreement" that in the calendar year 2020 all employees receive six days off to avoid short-time work. Those who meet the requirements under Sec. 25.1 MTV will receive two additional days off under the company agreement. The defendant granted the plaintiff six free working days instead of the additional allowance. In her lawsuit, the plaintiff, who does not meet the requirements of Sec. 25.1 MTV, is demanding the granting of two additional days off. She argued that the provisions of the collective bargaining agreement violate the prohibition of discrimination against part-time employees insofar as they tie the entitlement to additional days off to a weekly working time of 35 hours. The entitlement to time off under the collective agreement was intended to compensate for special burdens to which part-time employees were also subject. The defendant took the view that the provisions of the collective agreement were effective. They do not discriminate against part-time employees. The plaintiff was therefore not entitled to further days off. Both the Labour Court and the Regional Labour Court dismissed the action. Before the Federal Labour Court, the plaintiff is seeking to have two additional days off granted.
European Court of Justice		

Forfeiture of vacation entitlements in part-time employment for older employees in the event of a breach of the obligations to request and provide information **Preliminary ruling of the Federal Labour Court**	27.04.2023 - C-192/22 -	The European Court of Justice decides whether Union law permits the forfeiture of the vacation entitlement after the expiry of the vacation year or, if applicable, a longer period, even if the employee changes from the working phase to the release phase of his part-time employment relationship for older employees without having taken - in full - his vacation from the same calendar year. In particular, the question is whether Union law precludes forfeiture if the employer has not fulfilled its obligations to request and notify an employee, but has granted the employee the remaining leave in accordance with the application and the - complete - fulfilment of the leave entitlement could only not occur because the employee became incapacitated for work after the leave was granted. The plaintiff in the main proceedings is claiming compensation from the defendant for statutory minimum leave from 2016, among other things. The plaintiff was employed by the defendant until 2019. Upon the plaintiff's request, he was granted full leave from 2016. During this leave, the plaintiff fell ill. Subsequently, the previously agreed release phase of the partial retirement employment relationship began. The defendant had not previously requested the plaintiff to take his leave, nor had it pointed out that leave not requested may expire at the end of the calendar year or carryover period. The plaintiff in the original proceedings is therefore of the opinion that the vacation has not expired and that he is therefore entitled to compensation for vacation. The Federal Labour Court has suspended the proceedings and requested a preliminary ruling from the European Court of Justice.

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
Law for the further development of skilled labour immigration	29.03.2023 *Government draft*	The cabinet has approved a new Skilled Worker Immigration Act, which is intended to make it easier to recruit skilled workers from third countries and thus counter the shortage of skilled workers. The government draft contains the following key points: ▪ The immigration of skilled workers is to rest on three pillars in the future: the skilled workers pillar, the experience pillar and the potential pillar. ▪ The skilled labor pillar remains the central element of immigration. As before, it includes the EU Blue Card for foreign university graduates and the national residence permit for foreign skilled workers with a German degree or a degree recognized in Germany (university graduates or those with vocational qualifications). In the future, anyone who is a skilled worker should be able to pursue any qualified employment. The EU Blue Card is to be accessible to even more skilled workers with a university degree in the future. In addition, it should become even more attractive to come to Germany for vocational training or studies and to stay here. ▪ The experience pillar focuses on professional experience. This makes immigration possible for workers who have at least two years of professional experience and a professional qualification recognized by the state in their country of origin. However, a salary threshold must be met and the employer must be bound by collective bargaining agreements. In future, the vocational qualification no longer has to be recognized in Germany. In future, anyone wishing to have their professional qualification recognized in Germany will be able to do so only after entering Germany. To this end, skilled workers and employers must commit to a recognition partnership.

		▪ The third pillar focuses on people's potential. An opportunity card for job-seeking based on a points system is being newly introduced. The selection criteria include qualifications, German and English language skills, work experience, reference to Germany, age and the potential of the accompanying spouse or partner. In addition, contingent short-term employment is being created for the first time for sectors with particularly high demand. Those who come via this route are allowed to work in Germany for eight months, regardless of their qualifications. The prerequisite is an employer who is bound by collective agreements. Employment will be subject to social security contributions from day one.
Act to strengthen the promotion of education and training	29.03.2023 *Government draft*	The Federal Cabinet has approved the draft of the Act to Strengthen the Promotion of Training and Further Education (so-called Further Education Act). The Further Training Act expands and supplements the options for promoting vocational and labor market-oriented training and further training. <u>Central regulatory elements:</u> <u>Introduction of a training guarantee</u> ▪ Promotion of vocational orientation internships: Young people can find out about occupational profiles at training companies and, if possible, start training in the same year. ▪ Travel costs and, if necessary, accommodation costs can be covered. Young people can receive a mobility allowance so that they can leave their previous home environment for training in another region. ▪ The regulations for introductory training will be made more flexible. More young people will be given the opportunity to take this long-term internship and move directly into in-company training. ▪ Young people who are unable to find an in-company training place despite extensive efforts and who live in a region with too few training places are entitled to extra-company training. <u>Further training support for employees</u> ▪ The aim of the reform of further training support for employees is to make the support system more predictable and reliable by setting the maximum support rates for training costs and wage subsidies according to company size. In addition, access to further training support for employees will be opened up to all employers and employees. To

this end, the previous eligibility requirements "activities in the context of structural change or further training in a bottleneck occupation" will be eliminated.

- Introduction of a qualification allowance: During the further training, the company is relieved of the payment of wages for the employees to be qualified, but bears the further training costs. During the training, the employees to be qualified receive the qualification allowance, the amount of which is based on the short-time allowance. Top-ups by the employer are possible. The duration of the subsidy is up to 3.5 years, so that it is also possible to acquire newly qualified vocational qualifications at the same level. The requirements for funding include at least 20 percent of the employees in a company having a need for training as a result of structural change within three years (ten percent in companies with fewer than 250 employees), as well as a company agreement, a company-related collective agreement or - in companies with fewer than ten employees - a declaration by the employer that regulates the need for training as a result of structural change, the associated prospects of the employees for sustainable employment in the company and the use of the training allowance in the company. The sponsor of the training measure must be approved for the subsidy. Certification of the measures is not envisaged in order to allow companies more flexibility.

Extension of the possibility of reimbursement for continuing vocational training during short-time work

- The possibility of reimbursement for continuing vocational training during short-time work will be extended by one year until July 31, 2024. Pursuant to Sec. 106a of the Third Book of the German Social Code (SGB III), companies can be reimbursed for half of the social insurance contributions borne solely by the employer for the further training of their employees during short-time working, if the training measures meet certain standards. In addition, course costs can be reimbursed in full or in part.

The extension of reimbursements for continuing vocational training during short-time working is to come into force on July 1, 2023, the reform of continuing training support for employees and the introduction of the qualification allowance on December 1, 2023, and the training guarantee in substantial parts on April 1, 2024.

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