GÖRG

YOUR BUSINESS LAW FIRM

LEGAL UPDATE LABOUR AND EMPLOYMENT LAW

Cologne, 09. January 2023

Default of acceptance claims do not accumulate without intensive job application efforts

Meganush Hambarsoomian

With its judgment dated 30 September 2022 (6 Sa 280/22), the Berlin-Brandenburg Regional Labour Court (Landesarbeitsgericht, LAG) reached a decision that will please employers. According to this decision, employees who do not make sufficient efforts to obtain a new job have no right to claim default of acceptance. From the perspective of employees the court has now deprived them of a fundamental tactical instrument in the unfair dismissal process. In the event that the dismissal is held invalid in the course of the intensive unfair dismissal proceedings, which often last for years, the accumulation of default of acceptance claims becomes possible only in very few cases. The judgment is final; the LAG did not allow the decision to be appealed.

I. Facts of the matter and decision

In these proceedings an employee claimed default of acceptance for a period of nearly 4 years due to multiple invalid dismissals by his employer. The employer opposed this stating that the employee must allow the claim to default of acceptance to be credited against him the amount he could have earned if he had not wilfully failed to secure reasonable employment elsewhere in accordance with section 11 no. 2 German Protection Against Unfair Dismissal Act (Kündigungsschutzgesetz, KSchG).

In the (accurate) opinion of the LAG, wilfully refraining is justified in accordance with section 11 no. 2 KSchG and reduced the claim to default of acceptance if the employee does not make any or sufficient efforts to obtain employment. The employer, upon whom the burdens of demonstration and proof lie, specifically objected to the assumption that the employee had only made few and insufficient efforts to obtain employment although he had received a number of suggested vacancies from the Federal Employment Agency and the Job Centre.

Both the Berlin Labour Court (Arbeitsgericht, AG) and the Berlin-Brandenburg LAG ruled in favour of the employer in this case. The LAG based its decision, in particular, on the fact that number of efforts made by the employee to obtain employment was objectionable, as the employee had only submitted 103 applications in a period of 29 months, which works out as less than one application per week. The employee was out of work during the time in question and therefore had the equivalent of full time hours where he could and should have made efforts to secure employment. The LAG also found the quality of the applications questionable, which

is a further indicator that the employee was wilfully refraining from securing reasonable employment in accordance with section 11 no. 2 KSchG.

II. Practical significance

The decision is of great practical significance and is certainly welcomed by employers. Until this point employers were often faced with high default of acceptance claims from successful employees after unfair dismissal proceedings that had lasted several years. Employees often utilised these circumstances in settlement negotiations, deploying the ever-increasing threat of default of acceptance as leverage for above average settlement payments. This approach has been made much more difficult by this new judgment of the Berlin-Brandenburg LAG, as either the employee will either not display sufficient efforts to secure a new job, in which case there will be no default of acceptance risk, or they do show effort and, in most cases, will succeed in securing employment over a longer period of time, resulting in a significantly reduced risk of default of acceptance. The risk for employers themselves remains significant in cases where the employee has been unsuccessful in acquiring new employment, despite intensive efforts, and therefore continues to be looking for work.

Whether an employee has put in sufficient effort to look for a job remains to be decided on a case-by-case basis. A particularly skilful, procedural approach is required on part of the employer, as the burden of producing evidence and burden of proof initially lie on the employer to show that the employee wilfully failed to secure employment elsewhere.For this the employer must show that the Federal Employment Agency offered the employee who brought the action reasonable work, however the employee wilfully did not take advantage of these options.In view of this, it is recommended that employers assert their right to information against the employee in good time regarding the suggested vacancies provided by the Federal Employment Agency (see the judgment of the BAG dated 27 May 2020 - 5 AZR 387/19) on the right to information.This right to information of the employer covers the vacancies suggested by the Federal Employment Agency and the Job Centre stating the position, working hours, location and remuneration, so that the employer is in a position to present evidence of the reasonableness of the work and the possibility that the employee wilfully refrained from obtaining employment elsewhere.After the information has been received, the employer must materially substantiate the objections to the reasonableness of the work and the possibility that the employee wilfully refrained from obtaining employment elsewhere, so that the employee can oppose this by way of the graduated burden of producing evidence and burden of proof.

The question whether the right to information covers the employee's own efforts to obtain employment has up to now remained unanswered; neither the Berlin-Brandenburg LAG nor the BAG have had to adopt a position on this in their judgments.

For employees, in any case, the judgment of the Berlin-Brandenburg LAG has the consequence that they should not let the job application process during a termination dispute slide in the hope that the termination is invalid from their point of view. This applies in particular with regard to the quantity, but also the quality of the job applications. Last but not least, this also applies to sincere consideration and appreciation of reasonable job offers.

Note
This overview is solely intended for general information purposes and may not replace legal advice on individual cases. Please contact the respective person in charge with GÖRG or respectively the author Meganush Hambarsoomian on +49 221 33660 503 or by email to MHambarsoomian@goerg.de. For further information about the author visit our website www.goerg.com.

Our Offices

GÖRG Partnerschaft von Rechtsanwälten mbB

BERLIN
Kantstr. 164, 10623 Berlin
Phone +49 30 884503-0
Fax +49 30 882715-0

HAMBURG
Alter Wall 20 - 22, 20457 Hamburg
Phone +49 40 500360-0
Fax +49 40 500360-99

FRANKFURT AM MAIN
Ulmenstr. 30, 60325 Frankfurt am Main
Phone +49 69 170000-17
Fax +49 69 170000-27

COLOGNE
Kennedyplatz 2, 50679 Cologne
Phone +49 221 33660-0
Fax +49 221 33660-80

MUNICH
Prinzregentenstr. 22, 80538 Munich
Phone +49 89 3090667-0
Fax +49 89 3090667-90