YOUR BUSINESS LAW FIRM

Employment Tracker

MAY 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		
Effectiveness of an agreed contractual penalty **Set-off with remaining remuneration**	20.10.2022 - 8 AZR 332/21 -	**A contractual penalty provision according to which the employee must pay a contractual penalty of three gross monthly salaries in the event that he or she terminates the employment relationship in breach of the contract after the end of the probationary period is unreasonably disadvantageous. Such a provision leads to an overprotection of the defendant, as it would entitle the defendant to demand a contractual penalty of three gross monthly salaries from the plaintiff even if the plaintiff had already terminated the employment relationship immediately after the expiry of the probationary period of five months stipulated in the employment contract.** *The 8th Senate of the Federal Labour Court decided this* Facts The Federal Labour Court had to decide whether the plaintiff has claims to remuneration against the defendant and whether the defendant has a claim to payment of a contractual penalty. In particular, the parties dispute whether the contractual penalty was validly agreed. The plaintiff was employed by the defendant as a physician and, within the scope of the employment relationship, completed further training as a specialist, which was to last 42 months at the defendant.

After the end of the probationary period, the employment contract excluded ordinary termination for both parties for the duration of the further training. In the event that the employee terminated the employment relationship after the end of the probationary period in breach of the contract, the employment contract provided for a contractual penalty for remuneration. The contractual penalty was limited to the amount of the monthly remuneration lost because of the premature termination of the employment relationship up to the end of the 42-month period.

While still undergoing further training, the plaintiff terminated the employment relationship with effect from February 28, 2018. The defendant employer then did not pay the plaintiff any remuneration in February, but instead asserted a contractual penalty against the plaintiff and offset this against the plaintiff's remuneration claim.

In her action, the plaintiff demands payment of the remuneration for the month of February 2018. She is of the opinion that the defendant is not entitled to the contractual penalty. Due to the agreed minimum term of the contract, which is many times longer than the statutory notice period, it is unreasonably disadvantaged. The contractual penalty provision was therefore invalid.

The defendant took the view that the claim to remuneration had lapsed. The agreed minimum term of the employment contract did not violate good faith and the contractual penalty was effectively agreed in other respects and forfeited by the plaintiff's premature termination.

The lower courts found in favour of the plaintiff and ordered the defendant to pay the claimed compensation. The defendant's counterclaim for payment of the contractual penalty was dismissed. The defendant appealed against this decision to the Federal Labour Court.

The decision of the Federal Labour Court

The Federal Labour Court rejected the defendant's appeal. It awarded the plaintiff a claim for payment of wages for the month of February.

The claim was not extinguished by the declared set-off because the agreement on the amount of the contractual penalty of three gross months' remuneration unreasonably disadvantaged the plaintiff.

The provision leads to an overprotection of the defendant, as it would entitle the defendant to claim a contractual penalty of three gross months' earnings from the plaintiff even if the plaintiff had already terminated the employment relationship immediately after the expiry of the probationary period of five months stipulated in the employment contract.

Something else does not follow from the circumstance that the deplored one wants to reach with the contract penalty regulation that the long-term notice exclusion of over three years regulated in the contract of employment is kept by the contracting party. It is true that the employer can demand work performance from the employee for a long period based on an agreed long-term exclusion of termination. The employer thus has an increased interest in securing the high value of the work performance contractually promised for a long period by means of a contractual penalty provision. However, this would not entitle him to demand a contractual penalty from an employee who terminates the employment relationship before the expiry of the long-term commitment and thus in breach of the contract, the amount of which would reach the remuneration outstanding until the expiry of the agreed exclusion of termination. Otherwise, no consideration would be given to the fact that it is precisely the combination of a long-term exclusion of termination with a high contractual penalty that would have a particularly adverse effect on the employees concerned.

The contractual penalty is also not appropriate due to the employer's expenditure on the employee's training in the form of monitoring the further training and checking the further training certificates, for which 20 to 40 minutes are spent daily. These could justify an increased interest of the employer to be recognized, to secure the retention of the employee with a contractual penalty, so that the expenditures in the training were not in vain. In this case, however, the contractual penalty of three months' gross salary is already owed if the employee terminates the employment relationship immediately after the probationary period of five months. At this point in time, the doctors providing the training had only made comparatively manageable expenditures for the training, which, when viewed from an evaluative

perspective, were not able to justify a contractual penalty of three months' gross remuneration.

Finally, the contractual penalty provision cannot be justified by the fact that the position could not have been filled within one month. It is true that contractual penalties, in addition to their function of compensating for damages, have the primary purpose of securing the performance of work. Since in the present case, according to the employment contract of the parties, the employment relationship can be terminated after the end of the exclusion of notice with statutory notice period, which is only one month to the end of the calendar month, the defendant would have been faced with the same problem in the event of termination of the employment relationship after the end of the exclusion of notice as if the plaintiff had given ordinary notice of termination as of August 31, 2019.

Effectiveness of an ordinary termination due to illness

Presumption of futility of company integration management with the consent of the integration office

15.12.2022

- 2 AZR 162/22 -

The approval of the Integration Office for a termination due to illness does not justify the assumption that (omitted) company integration management could not have prevented the termination.

The 2nd Senate of the Federal Labour Court decided this.

Facts

In the context of an ordinary termination due to illness, the Federal Labour Court had to clarify in particular the question of whether the uselessness of a company integration management (so-called "bEM") can be assumed based on the approval of the integration office for a termination.

The plaintiff, who was treated as a severely disabled person, was continuously on sick leave from December 2014 until May 2020. In May 2019, the defendant invited the plaintiff to a bEM. The plaintiff agreed to participate, but refused to sign the data protection consent sent in this regard. The defendant informed the plaintiff in the first conversation in July 2019 that the bEM procedure could not be carried out without signing the data protection declaration. The bEM procedure was then not continued, and no further bEM was offered. After approval

The decision of the Federal Labour Court

The Federal Labour Court rejected the defendant's appeal.

The dismissal based on sickness-related absences was socially unjustified and therefore invalid. The defendant had not demonstrated that there was no reasonable possibility of avoiding the termination by taking less severe measures. Before issuing the notice of termination, the defendant was required to conduct a job evaluation with the plaintiff. The lower court had correctly assumed that it could not be established that a bEM could not have contributed to preventing sick leave and maintaining the employment relationship.

The lower court was also correct in assuming that the approval notice from the Integration Office did not give rise to a presumption that a bEM could not have prevented a dismissal. In an earlier decision, the Senate had assumed that after the Integration Office had given its approval to a termination for reasons of conduct, it could only be assumed if there were special indications that a prevention procedure in accordance with Section 167 (1) SGB IX could have prevented the termination. However, this legal principle could not be transferred to the relationship between a bEM and the approval procedure before the Integration Office.

A presumption of validity of the approval decision of the Integration Office assumed by the Senate in this decision already finds no support in the wording of the provision on bEM. The bEM and the approval procedure by the Integration Office also had different objectives, procedural processes and participants. The bEM is an open-ended search process that is intended to identify individually tailored solutions to prevent future incapacity to work. A large number of people – in particular from the company – can be involved in this process, looking for appropriate solutions to improve the working environment. The result of this is to prevent the dismissal of the employee.

In contrast, the Integration Office reviews a decision to terminate already made by the employer and makes a discretionary decision in which the employer's interest in preserving its options must be weighed against the interest of the severely disabled employee in preserving his or her job. In making this decision, the Integration Office is in part subject to restrictions according to which it "shall" grant approval in a number of cases. Finally, the approval of the Integration Office cannot be of any significance for the employer's extended burden of proof, since the validity of a subsequently declared termination is assessed in accordance with labour law standards on the basis of the facts presented by the parties in

		the proceedings for protection against dismissal and is the sole responsibility of the labour courts.
Employee status of an association member in the yoga ashram **Distinction from service on the basis of membership in a religious community**	25.04.2023 - 9 AZR 253/22 -	**The constitutionally guaranteed right of self-determination of religious and ideological communities can only be claimed by an association that has a sufficient degree of religious system formation and world interpretation. Otherwise, it is precluded from agreeing with its members to perform externally determined work in personal dependence, bound by instructions, outside of an employment relationship, unless they are socially protected in a manner similar to an employee.** *The 9th Senate of the Federal Labour Court decided this.* Facts In dispute were the plaintiff's claims for payment and, in this context, in particular whether the plaintiff's services were rendered based on 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 spiritual community 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 for 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 decision of the Federal Labour Court

The Federal Labour Court ruled in favour of the plaintiff and granted her the claimed status of employee and accordingly also a claim to statutory minimum wage.

In its reasoning, the Federal Labour Court essentially stated that the plaintiff was contractually obligated to perform sevaduty and thus, within the meaning of Sec. 611a (1) of the German Civil Code (*Bürgerliches Gesetzbuch - BGB*), to perform work in personal dependency under instructions and under the control of others. In particular, neither the special rights of religious and ideological communities nor the autonomy of associations under Article 9 (1) of the German Constitution prevented the defendant from being an employee.

The defendant was to be regarded neither as a religious community nor as an ideological community because it lacked the necessary minimum degree of system formation and world interpretation.

The autonomy of the association protected by the Constitution (Article 9 (1) of the German Constitution) also permits the performance of externally determined work in personal dependence outside of an employment relationship, at most if mandatory protective provisions under labor law are not circumvented. These also include a remuneration commitment that guarantees the general statutory minimum wage. This is because the purpose of the minimum wage is to secure a livelihood through earned income as an expression of human dignity (Article 1 (1) sentence 1 of the German Constitution).

European Court of Justice

General clauses in employee data protection inadmissible	30.03.2021 - C-34/21 -	**National regulations on employee data protection are contrary to Union law if they merely repeat the content of the General Data Protection Regulation (GDPR).** *The European Court of Justice decided this.*

Reference for a preliminary ruling by the Wiesbaden Administrative Court		Facts The European Court of Justice had to decide on the interpretation of Article 88 (1) and (2) of the GDPR. The reference for a preliminary ruling in the main proceedings is based on a legal dispute between the Main Staff Council of Teachers at the Ministry of Education of the State of Hessen and the Minister of the Ministry of Education of the State of Hessen on the lawfulness of livestream teaching by video conference. Livestream teaching was carried out at schools in the state of Hessen without the prior consent of the teachers concerned. The Hessian Ministry of Education and Cultural Affairs considered the consent of the teachers to be dispensable. The data processing in employment relationships was permissible on the basis of Sec. 23 (1) sentence 1 of the Hessian Data Protection and Freedom of Information Act (HDSIG). The content of this provision corresponds to Section 26 (1) sentence 1 of the Federal Data Protection Act (*BDSG*). The Wiesbaden Administrative Court had doubts about the conformity of Sec. 23 (1) sentence 1 of the HDSIG with European Union law and decided to refer the matter to the European Court of Justice. The decision of the European Court of Justice The European Court of Justice confirmed these doubts. Sec. 23 (1) sentence 1 HDSIG does not comply with the requirements of Article 88 (1) and (2) of the GDPR. The standard ultimately only repeats the requirements for data processing that already exist at the level of Union law and therefore does not represent a "more specific" national provision within the meaning of Article 88 (1) of the GDPR. Due to the primacy of Union law, such merely repetitive national data protection provisions are in principle inapplicable. Something else could only arise if the relevant standards pursuant to Art. 6 (3) sentence 1 lit. b), (1) lit. c) and e) of the GDPR constitute a suitable legal basis for data processing.
Forfeiture of vacation entitlements in part-time employment for older employees in the event of a breach	27.04.2023 - C-192/22 -	**A national provision which provides that the entitlement to paid annual leave acquired by an employee through the performance of his work under a partial retirement scheme expires at the end of the leave year or at a later date if the employee**

of the obligations to request and provide information

Preliminary ruling of the Federal Labour Court

was prevented from taking that leave prior to the leave on account of illness is contrary to Union law. This also applies if the absence is not long.

The European Court of Justice decided this.

Facts

The European Court of Justice had to decide 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 might 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 decision of the European Court of Justice

The European Court of Justice has ruled that it is contrary to Union law if the entitlement to paid annual leave acquired by an employee through the performance of his work under a

partial retirement scheme expires at the end of the leave year or at a later point in time if the employee was prevented from taking this leave due to illness before the leave phase.

According to the case law of the European Court of Justice, the entitlement to paid annual leave cannot expire in principle if the employee was unable to take his or her leave. However, the forfeiture of leave entitlement after the expiry of 15 months is exceptionally permissible if the employee concerned was permanently incapacitated for work.

However, according to the European Court of Justice, circumstances such as those at issue in the main proceedings cannot lead to the expiry of vacation entitlement. First, the absence in the present case was not long for health reasons, but very limited in duration. Second, the inability to take all of the accrued vacation did not result from a prolonged absence of the employee due to illness, but from the fact that the employer released the employee from work. Thirdly, the absence of an employee for health reasons is not foreseeable for the employee. However, the fact that such an absence may prevent the employee from exhausting his or her entitlement to annual leave in the case of part-time employment for older employees is not normally unforeseeable. The employer is in fact in a position to exclude or reduce such a risk by agreeing with the employee that he will take his leave in due time. Moreover, the denial of leave compensation rights in a situation where the employee was prevented by an unforeseen circumstance, such as illness, from exercising his or her right to paid annual leave before the termination of the employment relationship would deprive the right provided for in Article 7 of the Working Time Directive in conjunction with Article 31(2) ECHR of its substance.

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		
Termination for operational reasons – notification of collective redundancies	11.05.2023 - 6 AZR 157/22 -	The parties are in dispute about the validity of a termination for operational reasons. The plaintiff had been employed at V.-GmbH as a machine fitter and service technician since 1994. Until September 2020, the employer employed 25 employees. At the end of September 2020, the managing director of the employer filed an insolvency petition with the competent district court. On the same day, the district court ordered provisional insolvency administration and appointed the defendant as provisional insolvency administrator. It then opened insolvency proceedings against the employer's assets and appointed the defendant as insolvency administrator. At the beginning of December 2020, the insolvency administrator gave the plaintiff and ten other employees notice of termination for operational reasons. He had not previously filed a mass dismissal notice. In his action, the plaintiff objected to the dismissal and requested his continued employment until the legal conclusion of the proceedings. He claimed that the termination was invalid. Among other things, the required mass dismissal notice was missing. The defendant took the view that there was no need for a mass dismissal notice before the notice of termination was issued. The size of the company of generally more than 20 employees employed in the company, which is decisive for the notification, had not been reached. In order to determine the regular size of the company, it is necessary to consider the situation on the day of the dismissal in relation to the reporting date. On this day, there were less than 20 employees. Of the 25 employees originally still employed in September,

		two had already left the employment relationship with the employer on September 30, 2020. Four further employment relationships had ended in November based on termination agreements. The lower courts allowed the action. The defendant is contesting this with its appeal.
Termination date of a fixed-term employment relationship	24.05.2023 - 7 AZR 169/22 -	The parties are dispute over the extension of their fixed-term employment relationship based on a contractually agreed deployment-dependent extension clause. The plaintiff is a professional soccer player and concluded a fixed-term employment contract with the defendant as a contract player for the period from September 2019 to the end of June 2020. The 1st team of the defendant played in the regional league in the 2019/2020 season. If the plaintiff made at least 15 appearances in championship matches of the 1st team, the employment contract was to be extended by a further season in accordance with the agreements of the parties. An assignment is counted if the plaintiff has played at least 45 minutes. The plaintiff was used 12 times for at least 45 minutes between September 7, 2019 and February 15, 2020. Thereafter, the coaching staff, which was reappointed in December 2019, decided not to continue to use the plaintiff for athletic reasons. As of mid-March 2020, there was no further play due to the pandemic. In May 2020, the season, which was originally scheduled to last 34 game days, was declared terminated prematurely. In his action, the plaintiff claims the continuation of the employment relationship for a further playing season until June 30, 2021 based on the agreed deployment-dependent extension clause. He argued that the contract should be amended due to the unforeseeable end of the season. If the parties had foreseen the end of the season, they would have agreed on a reduced number of 10 minimum assignments or a percentage assignment quota in line with the reduced number of assignments actually possible. Since this minimum number of assignments had been reached, his employment relationship had been extended. The defendant, on the other hand, took the view that the condition for the contract extension had not been met because the plaintiff had not achieved the required 15 assignments. The ability to achieve the minimum number of appearances depended solely on the sporting decisions of the trainer. This had not changed because of the pandemic and the termination

of the season, which were not attributable to it. An adjustment of the contract was therefore ruled out.

The lower courts dismissed the action. In his appeal, the plaintiff continues to seek a declaration that his employment relationship will continue until June 30, 2021.

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
Draft bill on amendments to the Working Hours Act and other regulations published	27.03.2023	The Federal Ministry of Labour and Social Affairs recently published a draft bill on the recording of working hours. The draft bill contains the following regulations: ▪ The employer is to be obligated to electronically record the beginning, end and duration of the daily working time of employees in each case on the day of work performance (Sec. 16 (2) ArbZG-E). ▪ Recording by the employees themselves or by a third party (e.g. supervisors) is to be possible (Sec. 16 (3) ArbZG-E). ▪ The employer can waive the control of the contractually agreed working time. As a result, trust-based working time is to remain possible. However, according to the draft, even in the case of trust-based working time, the employer must ensure that it becomes aware of violations of the provisions of the Working Time Act on the duration and location of working and rest times (Sec. 16 (4) ArbZG-E). ▪ The draft bill also contains information obligations on the part of the employer with regard to working time records. He must inform employees of the recorded working time upon request. In addition, the must provide a copy of the records upon request (Sec. 16 (4) ArbZG-E). ▪ Certain deviations are to be possible by collective agreement or based on a collective agreement in a works or service agreement (Sec. 16 (7) ArbZG-E).
Federal Minister of Labour plans further minimum wage increase	09.04.2023	In an interview, German Labour Minister Hubertus Heil announced that a further minimum wage increase is planned for next January.

		A general statutory minimum wage of 12 euros gross per hour worked has been in force in Germany since October 1, 2022. The amount to which the new minimum wage is to rise in January 2024 has yet to be determined. According to the Federal Minister of Labour, the Minimum Wage Commission will make a proposal for increasing the minimum wage in the summer.
EU adopts pay transparency directive	24.04.2023	On April 24, 2023, the European Council adopted the Pay Transparency Directive. According to Art. 1, the purpose of the directive is to create minimum requirements to strengthen the application of the principle of equal pay for equal work or work of equal value for men and women, in particular through pay transparency and strengthened enforcement mechanisms. The Directive essentially contains the following provisions: ▪ Art. 5 of the Directive provides that job applicants have a right to information under national law about the starting pay for the job in question or its range and, where applicable, about the relevant provisions of the collective agreement applied by the employer in relation to the job. This information must be provided by the employer in such a way as to ensure informed and transparent negotiations on pay, such as in a published job advertisement. ▪ According to Art. 7 of the Directive, employees shall have the right to request and receive in writing information on their level of pay and on average levels of pay, broken down by gender and for groups of employees performing the same work as them or work of equal value. ▪ In addition, Art. 9 of the Directive contains extensive reporting obligations that apply to companies with at least 100 employees. The frequency of the reports depends on the size of the company. ▪ If the reporting in accordance with Art. 9 shows a difference in the average level of pay of at least 5 percent, employers must, in accordance with Art. 10 of the Directive, carry out a joint pay assessment in cooperation with their employee representatives if the difference is not justified based on objective, gender-neutral criteria and the employer does not correct such an unjustified difference within six months of the date of the report. ▪ Art. 16 (1) of the Directive stipulates that the Member States must ensure that employees who have been disadvantaged with regard to pay on the grounds of their sex receive compensation.

	▪ Art. 18 (2) of the Directive contains a far-reaching reversal of the burden of proof in favour of the employee. ▪ Furthermore, the Member States must establish sanctions that are effective, proportionate and dissuasive in order to enforce the principle of equal pay for equal work (Art. 23 (1) of the Directive).

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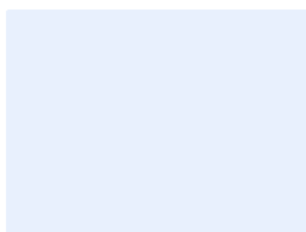

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