GÖRG

YOUR BUSINESS LAW FIRM

LEGAL UPDATE LABOUR AND EMPLOYMENT LAW

Berlin, 19. September 2023

BAG on repayment of training costs on not taking the exam

BAG: Resignation by the employee for which the employer is (partly) responsible must be an exception to a contractually regulated obligation to repay training costs.

Irfan Doğan, Dr Axel Dahms

The Federal Labour Court (Bundesarbeitsgericht, BAG) continues its strict case law on the validity of clauses about the repayment of training financed by employers. Its most recent judgment (BAG, judgment dated 25 April 2023 – 9 AZR 187/22) consistently fits in with the previous series of case law. The court (unfortunately) does not seem to be easing up from the employer's point of view.

1. Outline of the issue

Agreements to repay education and training costs have been the subject of the BAG's judgements multiple times in the past.

In principle agreeing such clauses is permitted. Since the employer who financed the education or training of its employee has a legitimate interest in its ability to use the qualification obtained by the employee for as long as possible for its commercial goals. Repayment clauses therefore regularly state that the employee is tied to their employer for a certain period of time after the training has been completed. As a general rule, the longer the duration of the training, the longer the tied period may be (cf. the Legal Update of 22 August 2022.

To offset its financial outlay for an employee who leaves prematurely (in relation to the agreed tied period) or does not complete their training, the employer should, of course, be able to demand the entire or partial costs of the training be repaid.

Not every (premature) termination of an employment contract is sufficient under the case law. A repayment clause may not impose a blanket repayment obligation on the employee, i.e. without taking the reason for termination of the employment contract into account. It should be up to the employee to decide whether they avoid the repayment obligation due to their loyalty to the company in continuing to work for them. The employer should not (be able to) remove this option from the employee by dismissing the employee for reasons for which the employer is responsible. Repayment clauses must therefore strictly differentiate between the exact reason for termination of the employment contract as some reasons will be excluded as they are no longer in the employee's sphere of influence. This is often the case when an employee resigns on operational grounds.

A short while ago, the BAG held that a clause on the repayment of training costs was also then

invalid if the employee prematurely resigned due to her ongoing inability to perform her work which she was not responsible for and was not expressly excluded from the repayment obligation (BAG, judgment dated 1 March 2022 – 9 AZR 260/21). This is even more likely to apply to dismissals by the employer on the basis of personal grounds for which the employee is not responsible.

The BAG has now clarified (judgment dated 25 April 2023 – 9 AZR 187/22) that repayment clauses must also expressly exclude any other dismissals by the employer for which the employee is at least partially responsible from the repayment obligation. This also applies if the repayment obligation is triggered due to repeatedly not taking the (final) exam. Otherwise the employer must worry that it will have to bear the costs of the training after the litigation is concluded at the latest.

2. Facts of the matter and decision

An employee who worked as a bookkeeper (the respondent), had the costs of preparing for the tax consultant exam financed by her employer (the claimant), a tax consultancy and corporate law firm. The respondent had been given a budget of up to EUR 10,000.00 for her free and further use. The Education and Training Agreement concluded by the parties for this purpose stated that the respondent had to repay the entire funding amount if she repeatedly failed to take the exam after receiving the funding. A hardship provision provided that in the event that the respondent was unable to take the exams for an objective reason for which she was not responsible, she would be obligated to take and pass the exams after the reason preventing her from taking the exams had ended.

The respondent did not sit the tax consultant exam in 2018, 2019 or 2020 and resigned from her job with effect from 30 June 2020.

The claimant employer demanded repayment of the funding amount paid to the respondent. The respondent was successful before both the Labour Court (Arbeitsgericht, ArbG) and the Regional Labour Court (Landesarbeitsgericht, LAG).

The BAG ruled in favour of the employee,

holding that the repayment clause intended by the parties, which was to be treated like standard business terms, did not withstand the test of reasonableness of Section 307 (1) sentence 1 of the German Civil Code (Bürgerliches Gesetzbuch, BGB) and was therefore invalid. The provision contained in the Education and Training Agreement is based on the employee repeatedly not taking the exams without differentiating the reasons on which the exam was not taken to the extent required.

The BAG first established that agreements where the employee must contribute to the costs of the employer financing their education are, as a general rule, permissible provided the education has not ended, and the employee is not disproportionately disadvantaged.

It is not permissible, however, where the employee's repayment obligation is, in particular, based on them repeatedly not taking the planned exam, without taking into account the reasons for this. The court said that such a clause was intended to put pressure on the employee to stay in her current job and this therefore restricted her basic right to choose her place of work as per Art. 12 (1) sentence 1 of the German Basic Law (Grundgesetz, GG). Therefore in any case the practical, relevant circumstances in which the employee cannot be held responsible for the grounds for not taking the exam must be excluded from the repayment obligation.

Such exceptions were not agreed in this case.

Even the agreed hardship provision does not cover the repayment situation and falls short, as it only covers one part of the case that is practically relevant, however fails to take into consideration the (partial) responsibility of the employer for the employee's resignation due to a wrongful act on the part of the employer. This then results in an unreasonable disadvantage for the employee. Resignation for which the employer is (partly) responsible occurs so infrequently in working life that it did not have to be mentioned separately.

3. Evaluation

The legal profession should have understood by now that drafting repayment clauses for employers is no easy feat.

In the judgment dated 13 December 2011 (3 AZR 791/09) the BAG had already held that repayment obligations are expressly excluded in the event of resignation by the employee for which the employer is (partly) responsible. From then on, the BAG transferred this case law to other repayment scenarios than premature dismissal - in this case to repeatedly not taking a final exam.

There is nothing wrong with the BAG's (dogmatic) approach. Having to spell out every conceivable situation in which premature dismissal applies or, as in this case, not taking the planned exam associated with the education provided by the employee was also only partly responsible, seems even formalistic at first, in particular if the dismissal (as so often is) actually occurs as a result of something for which the employee is at fault. The employer may therefore refuse on purely formal grounds to demand the repayment of costs for education or training it has financed which can be seen as unfair.

This formal approach is intrinsic to the law governing German Terms & Conditions, however, as currently (merely) placing unreasonable clauses in contracts is prohibited by law. The unreasonableness also need not have been realised, but only that it *could be realised* (i.e. the employee actually resigns for a reason for which the employer is responsible).

If there are doubts about the interpretation to the detriment of the person using the clause (the employer), the clause will therefore in the event of doubt be interpreted to be as unreasonable for the contractual partner (the employee) as possible (principle of interpreting in a manner that is most disadvantageous for the customer). As a result, the majority of claims submitted to the courts by employers demanding payment in practice fail on the fact that the agreed repayment clause does not expressly foresee the corresponding exception scenario. The case law for such clauses states that there is no "clear" corresponding exception scenario. One example is the decision in this case where even a relatively generous hardship clause had been agreed to the benefit of the employee.

On the other hand, if a valid clause is present, it must be conceptually interpreted with the "(partial) responsibility" of the employer. It should be questioned where the qualitative or quantitative threshold lies for the partial responsibility of the employer for resignation and which (objective or even subjective) connecting factor should be determined here. We can hope that the case law is further shaped in this respect on the grounds of legal certainty.

4. Practical relevance

Employer financed education and training has proved to be a popular and often used incentive for employees in practice. Offering and completing such education and training satisfies both

the commercial interests of the employer as well as the professional interests of the employee. In the meantime this is shown very clearly in the previous, extensive case law.

It is becoming more and more difficult for employers to navigate through the jungle of case law on the validity of repayment clauses (with their corresponding very high requirements) on their own. As the most recent decision shows, the case law is continuing its strict course and is even expanding this. The risk of agreed repayment clauses not standing up to judicial scrutiny has never been so high. Employers should have their existing agreements reviewed by a lawyer and at the least make sure that any future potential incidents will hold up in court.

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