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Employment Tracker

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Stay up to date with us

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.

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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		
Entitlement to part-time employment during parental leave	05.09.2023 - 9 AZR 329/22 -	**In the context of a claim for part-time employment pursuant to Sec 15 (7) of the Parental Allowance and Parental Leave Act (BEEG), there is no presumption under Sec. 1 (5) Sentence 1 of the German Unfair Dismissals Act (KSchG), that there are operational reasons for opposing the request, as this presumption is limited to dismissals for operational reasons due to the clear wording of Sec. 1 (5) Sentence 1 KSchG, and therefore cannot be applied by analogy to a request for part-time employment.** *This was decided by the 9th Senate of the Federal Labour Court on September 5, 2023 and the reasons for the decision were recently published.* Facts The plaintiff applied to the defendant employer for parental leave for his son and at the same time for part-time employment for this period pursuant to Sec. 15 (7) BEEG. Shortly before this application, a general works agreement on a reconciliation of interests and social plan was concluded at the defendant, according to which several areas of activity were to be eliminated. The employees affected by the measure through job loss – including the plaintiff – were designated by name.

		The defendant rejected the plaintiff's application for part-time work during parental leave, citing urgent operational reasons. The reason given was the partial relocation of the plaintiff's area of activity and the associated restructuring, for which reason the plaintiff's job would be eliminated without replacement. In his lawsuit, the plaintiff is seeking, among other things, employment during parental leave in the amount of 30 hours per week. He is of the opinion that the defendant has already rejected his application for parental leave in the letter of rejection in an inappropriate form. He also doubted that urgent operational reasons precluded his request for parental leave, and in particular that there was no statutory presumption in this regard under Sec. 1 (5) of the German Unfair Dismissals Act (KSchG). The decision of the Federal Labour Court The Federal Labour Court ruled in favour of the plaintiff and held that the defendant was obligated to approve the plaintiff's request for part-time work. Accordingly, the claim for payment was justified. The Federal Labour Court found that the requirements of Sec. 15 (7) sentence 1 BEEG were met. In particular, there were no urgent operational reasons within the meaning of Sec15 (7) sentence 1 no. 4 BEEG. The existence of such reasons is not to be presumed pursuant to Sec. 1 (5) KSchG, as the clear wording of Sec. 1 (5) sentence 1 KSchG limits this statutory presumption to dismissals for operational reasons that are issued to an employee named in the reconciliation of interests. In the case of a request for part-time work, the presumption cannot be applied by analogous application of Sec. 1 (5) Sentence 1 KSchG.
Indications of discrimination according to Sec. 22 of the General Equal Treatment Act (AGG) in the case of the "third sex".	21.11.2023 - 8 AZR 164/22 -	**The obligation of a public employer to invite severely disabled persons to a job interview pursuant to Sec. 165 sentence 3 SGB IX, also includes the obligation to offer an alternative date if the severely disabled applicant notifies the employer of his or her inability to attend the job interview before the scheduled date, citing a sufficiently important reason, and the employer can be reasonably expected to offer an alternative date.**

This was decided by the 8th senate of the Federal Labour Court and the reasons for the decision were recently published.

Facts

The plaintiff applied for a job with the defendant. In her application, the plaintiff referred to her binary sex and her existing severe disability. The defendant invited her for an interview, which she was unable to attend due to time constraints. The plaintiff therefore requested an alternative date, which, according to the defendant, could not be granted because the selection committee could not meet promptly due to other commitments.

After the selection process was completed, the plaintiff was informed that her application had not been successful.

The plaintiff is now seeking compensation for discrimination based on her gender and severe disability. The plaintiff considers that the job advertisement in question was not gender neutral, inter alia because of the gender asterisk used in the advertisement. The defendant also failed to use gender-neutral language in its letter, despite the fact that the plaintiff expressly indicated that she wished to be addressed by the abbreviation "Herm". Furthermore, the defendant violated its obligation to invite severely disabled persons to an interview pursuant to Sec. 165 sentence 3 SGB IX, because it did not offer an alternative date.

The decision of the Federal Labour Court

The Federal Labour Court ruled in favour of the defendant and accordingly dismissed the plaintiff's appeal.

The 8th Senate of the Federal Labour Court based its decision primarily on the fact that the plaintiff had not sufficiently proven that the plaintiff had been discriminated against based on her sex or her severe disability.

The term "sex" within the meaning of Sec. 1 of the AGG also includes the gender identity of persons who are neither male nor female. However, the plaintiff had not provided sufficient evidence to prove with a high degree of probability that they had been discriminated against because of their binary sex.

		It could not be inferred from the use of the gender asterisk in the job advertisement that persons with binary sex, who were not hired, were disadvantaged in the selection process because of their gender. Objectively, the gender asterisk expresses that all people of all genders are meant. The reference to "severely handicapped applicants" in the rest of the advertisement did not indicate discrimination against people of two sexes. The wording referred only to men and women. However, it is clear from the overall context of the advertisement that severely disabled persons with two sexes were also invited to apply. Finally, the omission of the salutation "Dear* Herm" in the defendant's email does not indicate gender discrimination. It is true that the plaintiff had already expressed their wish to be addressed in this way in their application. However, the fact that this request was not taken into account did not indicate discrimination, as the employer was not obliged to use a rather unknown and unusual form of expression for reasons of protection against discrimination. The plaintiff also failed to prove discrimination based on her severe disability. In the present case, the failure to conduct an interview did not constitute such discrimination. According to Sec. 165 sentence 3 SGB IX, a public employer is also obligated to offer an alternative date if the severely disabled person notifies the employer prior to the date of his, her or their inability to attend, stating a sufficiently important reason, and if the employer can reasonably be expected to offer an alternative date in terms of time and organization. In the present case, the defendant was not obliged to offer an alternative date because the plaintiff's cancellation did not reveal anything about the importance or postponability of the conflicting date.
Compensation under the AGG **Protestant church as part of the public administration?**	25.01.2024 - 8 AZR 318/22 -	**A church body under public law is not obliged to invite severely disabled applicants to a job interview. Sec.165 sentence 3 SGB IX only provides for the basic obligation to invite public employers. A church corporation under public law is not a public employer.** *This was decided by the 5th Senate of the Federal Labour Court.* Facts

The Federal Labour Court had to decide in the context of a claim for compensation pursuant to Sec. 15 (2) of the German Equal Treatment Act (AGG), whether the Evangelical Church is to be regarded as part of the public administration.

The defendant, a corporation under public law, is a district of the Evangelical Church. The severely disabled plaintiff applied for a position advertised by the defendant church district, citing his severe disability. The defendant rejected the plaintiff's application without first inviting him for an interview.

The plaintiff's claim is for damages pursuant to Sec. 15 (2) AGG. He is of the opinion that the defendant is a public employer. Therefore, the established case law of the Federal Labour Court, according to which a public employer's violation of the obligation to invite a severely disabled applicant to an interview pursuant to Sec. 165 sentence 3 of the German Social Code, Book IX (SGB IX), regularly leads to the presumption of discrimination on the basis of severe disability, also applies to the defendant. The defendant was not part of the state administration. What is decisive, however, is that the defendant is recognized by the state as a legal entity and acts as such to the outside world. Like all church associations under public law, the defendant enjoys certain rights similar to those of the State as a corporation under public law, such as the right to levy taxes from its members and the status of employer. Consequently, it should also be treated as a public employer. The equality provision at issue in Sec. 165 sentence 3 SGB IX can be regarded as an expression of Christian ideas and therefore does not conflict with the churches' constitutionally guaranteed right to self-determination.

The decision of the Federal Labour Court

The Federal Labour Court did not award the plaintiff the requested compensation. The decision was essentially based on the fact that the failure to invite the employee to an interview could not be considered a disadvantage because the defendant church district was not one of the obligated parties within the meaning of Sec. 165 sentence 3 SGB IX.

The obligation to invite exists for corporations under public law. However, church corporations under public law do not primarily perform state functions, but rather church functions. It is not evident that the legislator intended to extend the invitation obligation to church corporations under public law.

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 due to "resignation" from the Catholic Church	01.02.2024 - 2 AZR 196/22 -	At issue is the validity of an extraordinary, or alternatively ordinary, termination of employment following an "ecclesiastical resignation". The plaintiff last worked for the defendant association in its pregnancy counselling centre. While on parental leave, she left the Catholic Church. Upon her return from parental leave, Defendant terminated Plaintiff's employment for cause or, alternatively, with notice because Plaintiff refused to re-join the Catholic Church. The defendant is under the ecclesiastical supervision of the diocesan bishop. According to its guidelines for pregnancy counselling, its purpose is to protect the unborn child and to encourage the woman to continue the pregnancy. At the time of the termination, the defendant employed four Catholic and two Protestant employees in the pregnancy centre. The plaintiff filed suit against the dismissal. She claimed that both the extraordinary and ordinary dismissals were invalid because they unlawfully discriminated based on religion. Both lower courts ruled in favour of the plaintiff. With the appeal to the Federal Labour Court, the defendant is pursuing its motion to dismiss.
Exemption of a staff representative from the costs of classroom training	07.02.2024 - 7 ABR 8/23 -	The parties are in dispute about the exemption of the costs for board and lodging when attending a classroom-training course. In particular, the Federal labour Court had to clarify

		whether the works council must allow itself to be referred to a possible webinar as part of the training required under Section 37 (6) BetrVG. The employer's works council informed the employer that it intended to send two members of the works council to a seminar on works constitution law in Binz/Rügen. For cost reasons, the employer referred to a nearby seminar or a webinar, which was even offered during the chosen period. As a result, the staff representatives decided to attend a seminar in Potsdam, which cost the same as a nearby classroom seminar or webinar. After attending the seminar in Potsdam, the seminar organizer charged the staff representatives for accommodation and meals, which the employer refused to reimburse. In their request, the staff representatives seek to be exempted from the costs of accommodation and meals. It is of the opinion that it should not be obliged to refer its members to a webinar pursuant to § 37 (6) BetrVG, because the learning success of webinars is not as good as that of face-to-face events. The employer argues that because participants feel more confident to ask questions and interact with other participants online, the learning effect of a webinar is higher. The better networking opportunities of a face-to-face seminar would have to be disregarded, as this is not directly related to the statutory duties of employee representation. In addition, "online learning" is common practice in the employer's company for continuing education. The lower courts granted the employee representatives' request. The employer is appealing.
Compensation for damages due to breach of the obligation to provide evidence	29.02.2024 - 8 AZR 67/23 -	The Federal Labour Court ruled on the plaintiff's claim for damages based on the defendant employer's breach of its duty to provide evidence of working conditions. The plaintiff, who was employed by the defendant, received a monthly child allowance. In July 2019, the defendant stopped paying the child allowance. In November 2020, the plaintiff contacted the defendant and requested a recalculation. The defendant paid the child allowance retroactively for six months and also invoked a statute of limitations.

According to the employment contract, the employment relationship is governed by the "Guidelines for Employment Contracts in the Institutions of the German Caritas Association" (AVR), as amended. Section 23 of the AVR contains a preclusion period according to which claims arising from the employment relationship lapse if they are not asserted within a preclusion period of six months after the due date. This preclusion period was referred to in each account statement.

The plaintiff is of the opinion that the defendant cannot invoke the preclusion period contained in the AVR. It is true that the preclusion period has become part of the contract. However, he is entitled to damages in the amount of the unpaid child benefit, because the defendant did not prove the preclusion period in accordance with Sec. 2 (1) NachwG.

According to the defendant, there is no claim for damages in the amount of the forfeited claim. The reference to the limitation periods contained in the pay slips satisfied the requirements of Sec. 2 (1) Sentence 1 NachwG.

The Regional Labour Court (Saxony, judgment dated September 19, 2022 – 1 Sa 60/22) upheld the claim. The Regional Labour Court based its decision primarily on the fact that the claim for payment of a child allowance had become time-barred due to the limitation period contained in Sec. 23 AVR. The claim for damages also did not exist. It is true that a claim for damages in the event of a breach of the duty to produce evidence pursuant to Sec. 2 (1) sentence 1 NachwG could in principle be considered. The reference in the pay slips also did not meet the requirements of written evidence. However, the plaintiff's claim for damages failed because the employee did not take note of the pay slips in a timely manner. Therefore, he had to be treated as if he had been aware of the limitation period.

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
EU states vote against directive on platform work	22.12.2023	The provisional agreement for the Platform Work Directive did not receive a qualified majority in the Committee of Permanent Representatives of the EU Member States on December 22, 2023. This makes it less likely that a directive on platform work will be adopted before the EU elections.
Draft bill for the Bureaucracy Reduction Act	11.01.2024	On January 11, the Ministry of Justice published a draft bill for the Fourth Bureaucracy Reduction Act. Of particular relevance to employment law are the planned changes to the German Act on Evidence (NachwG): Among other things, the obligation to provide proof is not only to be waived in future if the employee has been given a written employment contract. Instead, in future it will be sufficient for the employee to have received an employment contract in electronic form in a printable format. However, employees who work in an economic sector or branch of industry pursuant to Sec. 2a (1) of the Act to Combat Clandestine Employment are to be exempt from this regulation.

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