



## FEDERAL LABOR COURT ON THE VALIDITY OF A DISMISSAL FOR TRIVIAL REASONS (“EMMELY CASE”)

**HEADNOTE** In the case of an unlawful act resulting in a loss on the part of an employer, a formal written warning may be required when an individual has been working for an employer for a long period time without any record of misconduct and the loss is insignificant (Federal Labor Court, 10 June 2010, 2 AZR 541/09).

**FACTS** In a recent case, the claimant, a cashier employed by a retail establishment, redeemed two vouchers worth a total of € 1.30. She had been working for the employer, who was the defendant in the action, for approximately 30 years and had an unblemished employment record. On 12 January 2008, two vouchers that had been found in the store where she worked were entrusted to her for safekeeping. On the basis of the findings of the lower courts, the Federal Labor Court concluded that the claimant had had the vouchers redeemed by a co-worker when she made a purchase 10 days later. Although the claimant consistently denied this allegation, the defendant terminated her employment without notice, or, in the alternative, with due notice, over the objections of the works council.

**DECISION** The Federal Labor Court has since declared the dismissal invalid since there was no compelling reason for dismissal within the meaning of section 626(1) of the German Civil Code. According to section 626(1), it is necessary to determine whether there was a compelling reason for dismissal, “taking all the circumstances of the individual case into account and weighing the interests of both parties to the contract”. The judges explicitly state that a breach of a contractual duty can justify termination of an employment relationship for cause even “if the concomitant economic loss is insignificant”. However, they add that this does make it possible to infer that the mere fact of unlawful conduct must necessarily inure to the detriment of the employee when the interests of the two parties are weighed as required by law. The court listed, albeit not conclusively, some of the interests that must be taken into account. For example, it is necessary to take into account the extent to which trust has been damaged, the interest of a business in proper compliance with instructions, the “trust bonus” earned over a longer period of employment with no record of any misconduct and the severity of the economic implications of the breach of contract. Referring to these circumstances, the Senate came to the conclusion that a serious breach of contract had been committed and to be sure one that also involved the core responsibilities of a cashier. Nevertheless, the court felt that the trust earned by the claimant through over 30 years of employment with no record of misconduct outweighed the infraction. According to the court, this trust could “not be completely destroyed by the circumstances involved in the dismissal, which were in many respects untypical and exceptional.” The court reasoned that this was especially the case in view of the fact that the economic loss caused by the wrongful act of the claimant was so insignificant.

**COMMENTS** Both the public and the legal profession awaited the decision with considerable interest since a fundamental statement was expected from the Federal Labor Court with respect to the treatment of dismissals for what are considered trivial reasons. Up to now, the principle to the effect that unlawful conduct directed

against the financial interests of an employer constitutes reason for dismissal for cause even if the concomitant economic loss is insignificant has prevailed in the case law of the labor courts. The Second Senate also upholds this case law in principle, but at the same time makes it clear that this does not necessarily always make a dismissal valid and that the interests of the parties involved in the individual case must consistently be weighed against one another.

Although the press release issued by the Federal Labor Court on 10 June 2010 makes it explicitly clear that the decision pertains to a specific case and that previous standards retain their validity, the decision will entail a few risks in practice. The decision could trigger a wave of actions and result in decisions by the courts that are also predicated on the existence of exceptional circumstances in reliance upon the decision of the Federal Labor Court. In any case, the clear line drawn in case law and legal practice up to now, i.e., to the effect that unlawful conduct involving the property of an employer constitutes grounds for dismissal for cause no matter what the extent of the loss, has been crossed. It will therefore be necessary to await further decisions of the Federal Labor Court to see whether it will continue to apply the standards that prevailed previously or whether it increasingly finds in favor of the existence of mitigating circumstances.

In cases involving unlawful conduct on the part of an employee, it will in the future in any case also always be necessary to fully weigh the interests of both parties, taking into account the “trust bonus”, as it were, that employees may have earned through long years of employment with a record of irreproachable conduct.