

# Legal Update

## Labor and Employment

### Dismissal due to Lengthy Prison Sentences

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#### Headnote

A prison sentence of several years is a sufficient reason for giving notice of dismissal even if the underlying conviction has nothing to do with the employment relationship.

#### Facts

The complainant had already been working for his employer as an industrial mechanic for 14 years when he was arrested in November 2006 and held for trial. The employee was not released on bail and was finally sentenced to 4 years and 7 months in prison in May 2007. In addition, a previously suspended sentence of confinement for one year and 10 months was activated. The complainant was not able to serve his sentence in an open prison. A decision in this regard was not expected until December 2008. Given this situation, the claimant's position within the company was permanently filled. The employer then terminated the employment relationship in February 2008. The Higher Labor Court upheld the action filed to seek protection against dismissal. The employer then appealed this decision.

#### Decision

The Federal Labor Court (Federal Labor Court, judgment of 24 March 2001, 2 AZR 790/09) overruled the original decision, finding that dismissal for reasons lying in the person of the claimant was legally valid. The court found that it would be unreasonable to expect the employer to keep the position unfilled or to simply make do with a temporary substitute, for it was necessary to take into account the fact that the convicted employee was himself responsible for the circumstances causing his absence, which is not true in cases involving dismissal due to illness. In view of this situation, the employer could not be expected to go to any greater trouble for the claimant or accept greater inconvenience. In any case, the court was of the opinion that an employment relationship may be terminated for reasons lying in the person of the claimant in the case of incarceration of more than two years.

#### Comment

This judgment can only be welcomed in every respect. Nevertheless, this outcome is more surprising than it might initially appear. After all, the court of appeal did

previously grant the complainant's motion. The Higher Labor Court most likely based its decision on different grounds, namely prospects for employment in the future and the reasonableness of the burden imposed upon the employer. As a result, dismissal is not necessarily an option in the case of shorter sentences, in any case not unless the conviction is related to the employment. It is also necessary to take into account that an individual serving a prison sentence cannot claim payment of wages because the employer refuses to accept his services. At best, expenses are incurred by the employer due to

reorganization. The decision of the Federal Labor Court has shown that the interest of an employer in dismissal will regularly prevail over the interest of an employee in continuation of employment. This will be all the more so the case if the criminal offence is related to employment (e.g., driving while intoxicated on the part of a truck driver or fraud by a bookkeeping clerk).



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