Legal Update
Labor and Employment

When does service of notice of dismissal occur?

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Headnote

When spouses live together in a joint household and each of them is for that reason generally considered authorized to receive notices on behalf of the other, service will regularly be considered valid if made to the addressee's spouse outside the shared domicile (Federal Labor Court 9 June 2011 – 6 AZR 687/09).

Facts

On 31 January 2008, the employer in the case at hand, whose business involves the sale of pallets, served proper notice of dismissal on a managerial assistant with effect as of 29 February 2008. The dismissal resulted from a disagreement between the parties that ended with the employee leaving her workplace on 31 January 2008. Her employer, who operates a small enterprise and is therefore not subject to the Employment Protection Act (Kündigungsschutzgesetz – KSchG), then decided to dismiss her the same day. Since it no longer seemed possible to reach his employee that day, he had the notice of dismissal hand delivered to the employee's husband by another employee. The other employee knew where the husband worked, namely, for a DIY retail store. The employee then went to this DIY outlet and gave the husband the notice of dismissal in an envelope at his place of work. The employee subsequently claimed that her husband did not give her the notice of dismissal on 31 January 2008 and that she did not receive it until 1 February 2008, which in her opinion meant her employment contract could not be terminated prior to 31 March 2008.

The employer, on the other hand, rebutted that service of the employee's husband was valid so that the employee did in effect constructively receive notice at the end of January 2008. The employee petitioned the responsible labor court to rule that her employment relationship was not terminated until 31 March 2008. Although the Lower Labor Court granted her motion, the Cologne Higher Labor Court reversed that decision.

Decision

The Federal Labor Court denied the appeal of the plaintiff and upheld the judgment of the Higher Labor Court. The Federal Labor Court first of all established that the

husband of the employee to be dismissed did receive the notice of dismissal on the afternoon of 31 January 2008 and that that constituted "normal" delivery since the notice of dismissal was hand delivered to the employee's husband by another employee of the employer. The court also stated that it was important that the employer be able to use a messenger if this is the only way to comply with a period of notice or if the employer wants to be able to provide proof of service of notice and the time of service. The Federal Labor Court also rejected the employee's argument to the effect that her husband was not authorized, either explicitly or tacitly, to receive notices intended for her and that receipt by her husband did not constitute receipt by her. The Federal Labor Court refuted this argument first of all by making reference to existing case law according to which each of the spouses living in a joint household is considered authorized to receive notices on behalf of the respective other spouse. This is considered to be the case since common experience shows that it can be regularly assumed that a notice intended for one spouse will be received if delivered to the addressee's spouse such that the intended recipient will be able to take cognizance of the notice. The Federal Labor Court also extended the scope of this legal doctrine to include cases in which a notice of dismissal is served on a spouse outside their shared dwelling. According to the court, the employee did to be sure not constructively receive the notice of dismissal as soon as it was served on her husband, but only when it could be assumed, under normal circumstances and taking into account prevailing opinion, that her husband would give her the notice of dismissal.

In the present case, the Federal Labor Court ruled that one would assume, under normal circumstances, that the employee's spouse would give his wife the notice of dismissal after work on the same day. Since the notice of dismissal was therefore delivered to her on 31 January 2008, the employment relationship was also properly terminated as of 29 February 2008.

Comment

Although the financial ramifications of an adverse ruling would not have been particularly onerous for the employer in the present case since the employment relationship would have been terminated a month later, namely, as of 31 March 2008, timely delivery of a notice of dismissal can be of significant financial importance. If, for example, an employer wants to give an employee notice on the final day of the sixth month of employment, and as a result immediately prior to the day on which the provisions of the Employment Protection Act would apply, the notice of dismissal absolutely must be received by the employee by this day; if it is received only one day later, the provisions of the Employment Protection Act will apply and the dismissal may be invalid due to the absence of a reason for dismissal. In the case of a dismissal with a notice of six months effective as of the end of the first six months of the year or the end of the year, receipt of delivery of the notice of dismissal is also very important. The implications can be even more dramatic in the case of employment contracts with managing directors and executive officers that, for example, call for an extension of three or five years unless terminated by one of the parties with six months' notice effective as of the end of the initial term of the agreement. If notice of termination is not received by the employer or the employee on a timely basis in such cases, employment may be inadvertently extended by a period of three or five years and costs incurred in the six- or even seven-figure region.

Especially when the day of receipt of notice of dismissal or termination is important – which means in particular in the case of dismissal or termination with effect as of the end of a given month, all precautions must be taken to ensure proper service of notice. In the ideal case, a notice of dismissal will be prepared by the responsible individuals on the employer side and the original put into an envelope in the presence of a messenger who will then hand deliver the notice to the employee to be dismissed

or put the notice in the latter's mailbox. The messenger should then make a note of the delivery of the notice of dismissal ("mental note") and possibly even take a photograph of the place of delivery (for example, door or mailbox) in order to eliminate all doubt as to whether the messenger delivered the notice to the right address. Notice of dismissal should definitely not be sent by mail since it is not possible to obtain proof of delivery. In such cases, an employee can simply claim to have never received a notice of dismissal. Employees have even been known to claim that they did to be sure receive an envelope, but that it was empty. In order to preclude this possibility, it is advisable to adopt the procedure described above, i.e., to put the notice in an envelope in the presence of a witness. It is not advisable to send a notice of dismissal by mail if the letter deliverer will only leave a note in the mailbox of the employee to be dismissed to the effect that the letter can be collected at a certain location if the employee should happen not to be at home. Constructive delivery will not take place until the letter is collected. On the other hand, it is advisable to use a service that includes preparation of a record of delivery by the letter deliverer that can be obtained by the employer.

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