# Extended periods of notice in employment contracts

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## Introduction

It is often difficult to find suitable employees in today's labor market. That is therefore also one reason to ask what employers can do to retain skilled employees (longer). For example, the design of employment contracts offers certain possibilities, e.g., longer periods of notice. However, the judgment of the Federal Labor Court of 26 October 2017 (File Ref.: 6 AZR 158/16) underscores the fact that it is not legally possible to retain employees indefinitely through the use of contractual constraints.

## Decision

A company employed a forwarding agent at a gross salary of € 1,400 per month. An addendum to the employment contract called for the possibility of termination by either of the parties with effect as of the end of any month upon three years' notice as well as an increase in the employee's monthly salary to a gross € 2,400.00. The possibility of any further pay increase in the course of the next three years was expressly excluded. On 27 December 2014, the employee served notice of termination with effect as of 31 January 2015, which was in compliance with the legal period of notice. In its judgment of 26 October 2017, the Federal Labor Court ruled that the employee was under no obligation to honor the contractual extension of the legal period of notice to three years and that the corresponding provision was invalid.

The court argued that the period of notice formulated by the employer did to be sure lie within the limits prescribed by § 622(6) of the German Civil Code (*Bürgerliches Gesetzbuch* – BGB) and § 15(4) of the Act on Part-Time Employment and Fixed-Term Contracts (*Teilzeit- und Befristungsgesetz* – TzBfG), but was significantly longer than the regular period of notice contained in § 622(1) of the German Civil Code, which meant that the clause was invalid pursuant to the first sentence of § 307(1) of the German Civil Code since it placed an unreasonable burden on the employee. After weighing all of the circumstances involved in the specific case, the court found that the extended period of notice represented an unreasonable limitation of the employee's occupational flexibility, one reason being that this disadvantage was not outweighed by the increase in salary, which was explicitly capped for three years.

## Comments

As far as can be told, the highest courts have up to now not ruled on contractual arrangements that extend the period of notice to be observed by employees when terminating their employment. The judgment of the Federal Labor Court therefore provides an elucidating look at the options available for designing contracts, albeit against the background of a rather atypical situation.

According to the statutory model, either of the parties can terminate an employment contract with effect as of the fifteenth or the end of any calendar month upon four weeks' notice. In the case of termination by an employer, the period of notice increases with time up to a maximum of seven months to the end of a calendar month for an employee with 20 years of service pursuant to § 622(2) of the German Civil Code. On the other hand, the statutory period of notice to be observed by the employee remains unchanged. These statutory periods of notice may, however – provided that § 622(6) of the German Civil Code is respected – be extended on the basis of agreements with individual employees. This will also regularly hold if the contract is formulated by the employer. According to § 622(6) of the German Civil Code, however, the contractual period of notice required of an employee may not be longer than the period of notice called for in the case of dismissal by the employer. In addition, § 15(4) of the Act on Part-Time Employment and Fixed-Term Contracts limits the duration of contractual commitments; in the rare case of a long-term employment contract that is, for example, entered into "for life" or for a term in excess of five years, the employee has the right to terminate the employment

contract with six months' notice after five years. Otherwise, however, contractual arrangements that make provision for termination by either of the parties, for example, as of the end of a quarter after giving six months' notice, will regularly be permissible and also binding upon the employee.

However, the present judgment of the Federal Labor Court underscores the fact that periods of notice that remain within the limits imposed by § 15(4) of the Act on Part-Time Employment and Fixed-Term Contracts and comply with the provisions contained in § 622(6) of the German Civil Code can also be invalid under exceptional circumstances. When reviewing preformulated extensions of periods of notice of termination, it is especially important to make sure that the occupational flexibility of the employee is not unduly restricted. The lower court, the Saxony Higher Labor Court, indicated that the possibility of a period of notice longer than one year can therefore practically be excluded in the case of "normal" positions. The situation may be different when unusual positions in the areas of science or business are involved.

## Conclusions

Parties to an employment contract may agree to an arrangement that calls for the same period of notice for the employee as for the employer. In any case, periods of notice longer than a year will regularly not be acceptable if they unreasonably restrict the occupational flexibility of employees, at least as regards positions that are not particularly unusual. Given this background, it is advisable to review contracts calling for extended periods of notice. In the event an agreement is found to be invalid, the statutory arrangement for termination by employees will apply, i.e., four weeks' notice with effect as of the fifteenth or the end of a calendar month. On the other hand, as the party benefiting from the invalid clause, the employer must comply with the extended period of notice.

## Note



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