

Validity of termination with due notice and without cause “as of the next possible date”?

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In its judgment of 20 Jan. 2016 (6 AZR 782/14), the Federal Labour Court had ruled on the validity of dismissal with due notice and without cause “as of the next permissible date” in the alternative to dismissal for cause with immediate effect. The plaintiff was employed as a ventilation installer’s helper by the defendant, who operated a small enterprise involved in plant construction. The employment contract entered into by the two parties required 4 weeks/1 month’s notice for dismissal. The employment contract also stipulated that the period of notice would be increased if the mandatory period of notice to be given by the employer was extended under a collective bargaining agreement or by law. The employment contract did not make reference to any collective-bargaining conditions. The defendant had dismissed the employee due to alleged breaches of contract with immediate effect or, in the alternative, “as of the next possible date”. Although the Labour Court granted the plaintiff’s motion for protection against dismissal in respect of the notice of dismissal for cause and found that the employment relationship had been terminated by virtue of the notice of dismissal issued in the alternative with the legal period of notice and without cause, the Higher Labour Court also considered the notice of dismissal issued in the alternative invalid (see the Newsletter article of 31 August 2015 by Mr. Jens Völksen).

The Federal Labour Court then ruled that the employment relationship had been terminated by the notice of dismissal with the legal period of notice and without cause issued in the alternative, which was then the only notice at issue. The court ruled that the dismissal was not invalid because of a lack of certainty, a dismissal being a statement given to a recipient that must make clear to the recipient the intent of the individual making the statement. The court went on to explain that the recipient of a notice of dismissal must be able to tell when the employer expects the employment relationship

to come to an end and that it will as a rule suffice to mention either the date of termination or the length of the period of notice in the case of a dismissal with due notice and without cause. According to the court, dismissal “as of the next possible date” is only possible if the recipient of the notice of termination is aware of or can determine the duration of the period of notice and that such notice is in any case sufficient if the recipient can easily ascertain the legally applicable date without any extensive investigatory effort or clarification of difficult legal issues. In the case in dispute, the court argued that the question as to whether or not the plaintiff could easily determine the legally applicable date was moot since the dismissal with due notice and without cause had been issued in the alternative for the eventuality that the dismissal with immediate effect for cause turned out to be invalid, concluding that the party serving notice obviously expected the employment relationship to cease upon receipt of the notice of dismissal with immediate effect in this case, which meant that there was no lack of clarity as to the intended time of termination of the employment relationship for the recipient of the notice of dismissal.

Implications for practice

The decision of the Federal Labour Court as regards the possibility of reclassification of a dismissal for cause with immediate effect as a dismissal without cause with effect as of the next permissible date is only logical. Indeed, the Federal Labour Court explained that proceeding from the dismissal with immediate effect avoids any conflict with the possibility of reclassification mentioned above since a dismissal with due notice and without cause would not be invalid due to failure to specify the period of notice or the date of termination in the case of reclassification.

Legal Update

Despite this encouraging decision, we continue to recommend – as previously in the Newsletter article of 31 Aug. 2015 – the following formulation:
“In the alternative, we are terminating your employment relationship with us effective as of the expiration of the

applicable period of notice prescribed by [statute, contract, collective-bargaining agreement]. According to our calculations, termination will therefore take place with effect as of [time of termination of employment].”

Note

This overview is solely intended for general information purposes and may not replace legal advice on individual cases. Please contact the respective person in charge with GÖRG or respectively the author Dr. Christoph Müller on +49 221 33660-524 or by email to jmueller@goerg.de. For further information about the author visit our website www.goerg.com.

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