Newsletter
Labour Law

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PREFACE

This second issue of the 2016 Newsletter starts off by considering a new statutory provision, which will take effect on 1 October 2016 and has attracted little attention to date. It will influence the drafting of time-bar clauses in agreements.

In addition, since the requirements laid down by the case law continue to increase, we revisit the question of the significance of Occupational Integration Management in the case of dismissal due to illness. Finally, we consider whether employees who are on vacation can be recalled, how a notice of dismissal should be formulated, and whether parental leave may be requested by sending a facsimile or e-mail.

New Legal Situation: Formulation of Notices – Written Form vs. Text Form

Introduction

Time-bar clauses are quite common in labour law and can be found in employment contracts as well as in collective labour agreements or works council agreements. One-step notices will regularly stipulate that claims become barred if not brought within a specific period of time; what may be referred to as two-step notices, on the other hand, call for legal action to be taken after a certain period of notice elapses if the recipient fails to discharge the obligation at issue within such period. These clauses are therefore significantly more important than normal time-bar clauses; they must be officially taken into account by the labour courts and serve as the basis for finality and legal clarity.

Current situation

Contracts will often stipulate that notices called for in time-bar clauses must be made in writing to be considered valid. This will regularly mean that a party must bring its claims in the form of a personally signed document addressed to the respective counterparty. According to the established case law of the Federal Labour Court, the written-form requirement contained in time-bar clauses may, however, be satisfied by facsimile or e-mail transmission of the corresponding notices without a personal signature unless a clause specifically provides otherwise. This is justified on the basis of the fact that the intent and purpose of these notices do not necessitate a personal signature and the circumstance that the provisions of law governing declaratory acts are not directly applicable to claims brought by virtue of quasi-legal acts.

Legal situation as of 1 October 2016

Up to now, written-form requirements pertaining to notices called for in time-bar clauses did not present a problem. However, the situation will change on 1 October 2016 when the revision of § 309 no. 13 of the German Civil Code (Bürgerliches Gesetzbuch – BGB) goes into effect. According to the current version of § 309 no. 13 of the German Civil Code, clauses in business conditions are invalid if they require a form that is more stringent than the written form for notices or statements to be made to the user or a third party.

According to § 309 no. 13 b) of the revised version of the German Civil Code, clauses are invalid if they require a form that is more stringent than the text form for notices or statements. Unlike the written form, the text form requires no personal signature; instead a legible statement on a permanent medium, i. e., on paper or an electronic recording medium, suffices. However, the author must be identified and it must be obvious where the content ends.

According to Art. 229 § 37 of the Introductory Act to the Civil Code (Einführungsgesetz zum Bürgerlichen Gesetzbuch – EGBGB), § 309 no. 13 b) of the new version of the German Civil Code will apply to contractual relationships entered into after 30 September 2016. Since the content of provisions of standard employment contracts governing notices is subject to §§ 307 et seq. of the German Civil Code, such contracts may therefore no longer include standard formulations that call for notices to be made in writing as of 1 October 2016. Any such clauses governing notices would be in violation of § 309 no. 13 b) of the new version of the German Civil Code and therefore

invalid. Clauses of standard employment contracts stipulating that claims must be brought within a certain period of time may require only that notification of such claims be made in text form to be valid.

Unlike the content of standard clauses governing notices in employment contracts, the content of clauses of collective agreements governing notices is not subject to compliance with §§ 307 et seq. of the German Civil Code. According to § 310(4) sent. 1 of the German Civil Code, the content of collective agreements, and therefore any clauses governing notices as well, is not subject to compliance with §§ 307 et seq. of the German Civil Code.

The content of clauses governing notices in collective agreements referred to in employment contracts is also not subject to compliance insofar as the clause containing the reference as a whole makes reference to a relevant collective agreement. As a result, clauses of collective agreements governing notices and clauses of employment contracts that as a whole make reference to a relevant collective agreement will not be affected by the revision of § 309 no. 13 of the German Civil Code.

In the case of clauses of employment contracts that make reference to a collective agreement that is not relevant or only to specific parts of a collective agreement, the content of the clauses referred to that govern notices is subject to compliance and must therefore also satisfy § 309 no. 13 b) of the new version of the German Civil Code. As a result, clauses governing notices that are referred to may not require a form that is more stringent than the text form. Otherwise the clause referred to must be modified accordingly or the clause of the employment contract that governs notices must be formulated individually.

Like comparable clauses in collective agreements, clauses governing notices in works council agreements do not fall under § 310(4) sent. 1 of the German Civil Code and will therefore also not be affected by the revision of § 309 no. 13 of the German Civil Code.

Conclusions

In summary, it can be concluded that standard clauses of employment contracts governing notices may in the future require only that notices be given in text form and not, as previously, in writing.

Clauses of employment contracts containing references to collective agreements that are not relevant or only to specific parts of a collective agreement should be modified accordingly.

Clauses of collective agreements governing notices, clauses of employment contracts that as a whole make reference to such clauses of a relevant collective agreement, clauses of works council agreements governing notices and standard employment contracts entered into prior to 1 October 2016 will not be affected by the revision of § 309 no. 13 of the German Civil Code.

Dr Christoph J. Müller

Dismissal Due to Illness: Sense and Senselessness of Occupational Integration Management

Problem

The standards that must be met in order to dismiss an employee on grounds of illness are high. In order to make a good case for the dismissal of an employee due to illness in the case of a dispute over protection against dismissal, Occupational Integration Management must precede the dismissal. If an employee is incapacitated and absent from work for more than six weeks at a time or for more than a total of six weeks in the course of a year, the employer must – on condition that the respective employee is willing – meet with the employee to discuss the possibilities for overcoming the incapacity and services or help that would be required to prevent reoccurrence and maintain the employment relationship. Since this essentially sums up everything the law has to say on Occupational Integration Management, the remaining requirements as regards implementation must be inferred from the extensive case law on Occupational Integration Management. To some extent, the requirements found in the case law are so exaggerated as to de facto preclude the possibility of dismissal on the grounds of illness.

Implications for practice

Due to the fact that the requirements reflected in the case law are to some extent exaggerated, an employer cannot afford to commit any errors in the context of implementing Occupational Integration Management.

Procedure
The initial interview to which the employee must be invited in writing provides the basis for Occupational Integration Management. The invitation should be carefully prepared. Among other things, the employee must be informed of his or her rights as regards data protection. Employers will find that they have to pay dearly for even the most minor of errors.

Occupational Integration Management must be carried out as an "open-ended search process". This procedure is more than a mere formality to be settled in order to make it possible to dismiss an employee on the grounds of illness; it is in fact necessary to make a serious effort to find possible solutions. A detailed record should be made of the content of the Occupational Integration Management interviews and, ideally, also signed by the employee. Depending on the circumstances of the individual case – for example, whether or not a rehabilitation measure is carried out following the interview or whether considerable time has elapsed between the initial interview and the decision to dismiss the employee – the labour courts may even require that the Occupational Integration Management process be repeated several times.

Parties involved
In addition to the employee (and perhaps legal counsel), representatives of the works council must also be involved in Occupational Integration Management. It is also advisable to involve the company physician. In the case of an employee with a severe disability, the severely handicapped employee representative and the responsible Integration Office must also be consulted. Providers of integration-related services (*Integrationsfachdienste*), medical services of health insurers, local common service points (*örtliche Gemeinsame Servicestellen*) and the employers' liability insurers may also be involved in the Occupational Integration Management process.

Implications of improper Occupational Integration Management

A dismissal due to illness will not automatically be considered invalid in the case of the absence of Occupational Integration Management or failure to carry out the procedure properly. The labour courts will, however, regularly impose a higher burden of evidence and proof upon the employer in such cases, for example, as regards possibilities for modifying the employee's previous employment environment or alternative employment in a different position. An employer will rarely be able to satisfy this higher standard of evidence and proof. In the absence of Occupational Integration Management, it will normally not be possible to rely on general statements by claiming, for example, that no alternative employment possibilities exist.

Conclusions

Even if an employer has already exhaustively examined all conceivable feasible solutions and comes to the conclusion that Occupational Integration Management is likely to prove superfluous, the procedure should be carried out anyway prior to issuance of a notice of dismissal due to illness. In view of the partly exaggerated requirements found in the case law, more is better than less.

Pia Pracht

Summertime, vacation time – Do employers have the right to call employees back to work during vacation?

Problem

Personnel shortages regularly occur during the summer vacation period due to the increase in the number of employees who take their paid annual leave during the summer months. Employers are often faced with the problem of finding ways to handle work in order to avoid production shutdowns or claims for damages by customers due to failure to keep deadlines. This problem can obviously be minimised through careful planning in advance on the part of the employer, but even the best of plans will quickly prove futile in the case of unforeseen events such as, for example, unusually high health-related absenteeism or an unexpectedly high volume of incoming orders. In such situations, many employers consider it only natural to call employees who are on vacation back to work. This is, however, not always consistent with what is actually allowed by law.

Implications for practice

No right to call employees back to work
Once an employee's vacation has been approved, it cannot be unilaterally cancelled. Neither the Federal Holidays Act (*Bundesurlaubsgesetz* – BUrlG) nor the duty of loyalty implicit in employment contracts in any way obligates an employee to interrupt his or her vacation. The law also does not allow any agreement that enables an employer to cancel vacation already approved.

Emergencies
According to the Federal Labour Court, employers do have the right to cancel the vacation of employees that has already been approved in emergencies under exceptional circumstances. However, this is possible only in the case of urgent necessity if no other alternative is possible. The Federal Labour Court has, however, not up to now provided a precise definition of what would constitute such an "emergency". Neither an unexpectedly strong increase in business nor unusually high health-related absenteeism will normally suffice to constitute an emergency within the meaning of the case law in the absence of other extenuating circumstances.

Right to cancel vacation in the case of contractually agreed extra vacation
In the case of additional vacation in excess of the legally prescribed minimum, the case law would on the other hand seem to allow employment agreements that give employers the right to cancel such additional vacation. According to the Federal Labour Court, employers are free to make additional vacation contingent on any conditions they prefer.

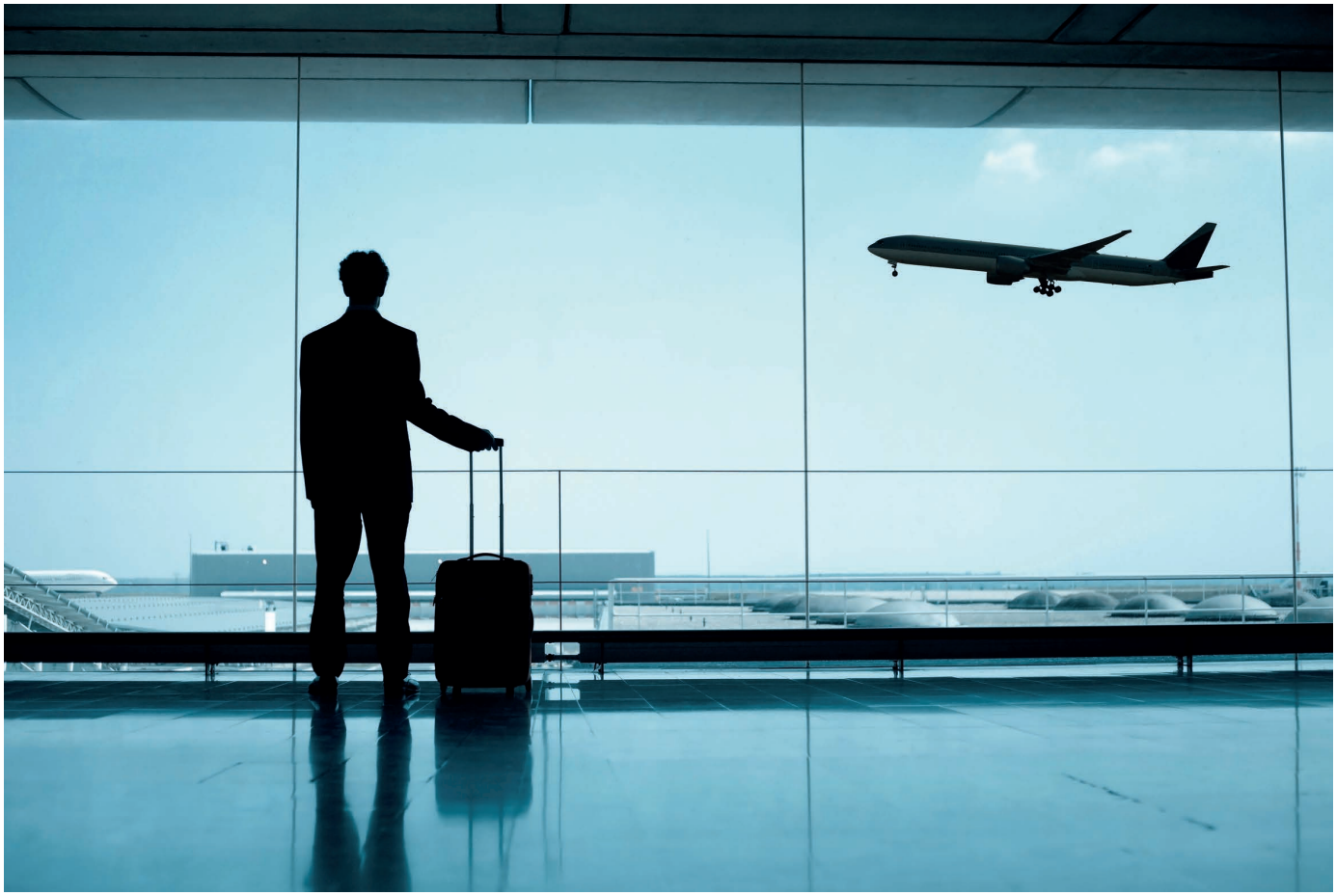
The concrete formulation of the corresponding clause in the employment agreement must, however, make a clear-cut distinction between the legally prescribed minimum vacation and any additional vacation granted voluntarily by the employer in order to ensure the validity of the clause permitting cancellation in respect of the additional vacation.

It is also recommended that it be made clear in each case whether vacation taken is to be counted toward the legally stipulated minimum vacation or the additional vacation granted under the employment contract.

Conclusions

Employee vacations should be planned very carefully and if possible provision made for sufficient reserve personnel since it will regularly not be possible to cancel vacation and call personnel back to work. It is, however, possible to enter into voluntary agreements with employees that provide incentives to agree to curtail vacation time and return to work if necessary (e. g., covering cancellation costs, additional compensation). In such cases, it is only necessary to keep in mind that approved vacation that is interrupted and not used as planned may not be allowed to lapse altogether. Vacation that is voluntarily interrupted must be granted at a later date.

Pia Pracht



Requests for parental leave submitted by facsimile or e-mail are invalid

Parental leave must be applied for in writing. A facsimile or an e-mail will not suffice.

Decision

In its judgment of 10 May 2016 (Ref. 9 AZR 145/15), the Federal Labour Court was called upon to rule on whether a facsimile transmission suffices to comply with the written-form requirement contained in § 16(1) sent. 1 of the Federal Parental Allowance and Parental Leave Act (*Bundeselterngeld- und Elternzeitgesetz* – BEEG) and whether it triggers the protection against dismissal under § 18(1) sent. 1 of the Federal Parental Allowance and Parental Leave Act.

In the case at issue, an employee notified her employer per facsimile transmission that she would take parental leave after the birth of her child. Following the period of maternity leave, the employer terminated the employment relationship without first obtaining the approval of the occupational health and safety authorities as required by § 18(1) sent. 4 of the Federal Parental Allowance and Parental Leave Act.

The employer defended its action by arguing that the facsimile did not constitute a valid request for parental leave and that the employee did not therefore qualify for the special protection against dismissal pursuant to § 18(1) sent. 1 of the Federal Parental Allowance and Parental Leave Act.

The lower courts decided against the employer and found that the facsimile represented an effective formal request for parental leave pursuant to § 16(1) sent. 1 of the Federal Parental Allowance and Parental Leave Act. It was assumed that the employee was eligible for special protection against dismissal pursuant to § 18(1) sent. 1 of the Federal Parental Allowance and Parental Leave Act and the dismissal was ruled invalid (Frankfurt/Main Labour Court , judgment of 27 May 2014, Ref. 10 Ca 8834/13 and Hesse Higher Labour Court, judgment of 8 Jan. 2015, Ref. 9 Sa 1079/14).

The Federal Labour Court ruled in favour of the employer, stating that neither a facsimile nor an e-mail satisfied the written-form requirement of § 16(1) sent. 1 of the Federal Parental Allowance and Parental Leave Act. According to the Federal Labour Court, a request for parental leave sent by facsimile or e-mail is void. As a result, the employee had not effectively applied for parental leave, which meant that she was not entitled to special protection against dismissal and that dismissal by the employer was valid.

The Federal Labour Court's only qualification was to the effect that an employer could under certain circumstances be considered to be acting in bad faith by relying on the written-form requirement contained in § 16(1) sent. 1 of the Federal Parental Allowance and Parental Leave Act, but the court saw no indication of such bad faith on the part of the employer in the present case.

Implications for practice

The decision of the Federal Labour Court is welcome. It clarifies the meaning of § 16(1) sent. 1 of the Federal Parental Allowance and Parental Leave Act for employers: in order to be valid, a request for parental leave must be

made in writing, i. e., the employee must submit a personally signed notice. Any request for parental leave made by facsimile or e-mail will be considered invalid on formal grounds and will not suffice to trigger special protection against dismissal.

The decision of the Federal Labour Court is also consistent and makes it clear that an employer is not acting in bad faith by initially failing to react to a request that is invalid on formal grounds and than taking measures – e. g., dismissal – if the employee fails to appear at work during the alleged parental leave.

Dr Josef Toma

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

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.

Despite this encouraging decision, we continue to recommend – as previously in the Newsletter article of 31 August 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]."

Dr Christoph J. Müller

"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]."

Content

Note

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