Which period of notice is more advantageous?

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Decision

In a judgment dated 29 January 2015, the Federal Labor Court addressed the question as to whether the period of notice for dismissal specified in employment contracts can take precedence over the statutory minimum. In the case at issue, an employment contract called for a period of notice of six months with effect as of mid-year or the end of the year, but the statutory period of notice based on the length of service was seven months effective as of the end of any month since the employee involved had been with the company for well over 20 years. The Federal Labor Court ruled that a contractual period of notice can take precedence over the statutory minimum only if it is longer than the minimum prescribed by law
(Federal Labour Court, judgment of 19 Jan. 2015, Ref. 2 AZR 280/14).

Implications for Practice

Stipulation of a shorter period of notice than that prescribed by law in an employment contract will regularly be found invalid, but not a longer period. Whether the longer period of notice agreed in an employment contract is actually longer must be determined by comparison. However, such comparison should not be based on the time of notification of dismissal in a given case; instead, the abstract concept behind the general requirement must be examined to determine whether it is compatible with the statutory provisions. In the case of the present decision, it is possible to imagine a great number of different constellations that would involve contractual periods of notice that are longer than the statutory period of notice. However, the contractual period of notice was shorter than the period prescribed by law in the concrete instance. The possibility of this constellation alone suffices to make the contractual period of notice invalid. The entire contractual provision becomes invalid; “cherry-picking” to retain the most favorable period of notice (therefore in the present case “seven months with effect as of mid-year or the end of the year”) is not possible.

The Federal Labor Court has left the question open as to whether the period of notice stipulated in an individual employment contract can take precedence until such time as it conflicts with statutory periods of notice based on the length of service.

The decision shows once again that examination of concrete circumstances does not suffice for the purposes of assessing the validity of provisions of employment agreements. Instead, the abstract configuration is what counts. For example, a period of notice that at first glance seems longer than those provided by law can lead to the unintended application of the statutory periods of notice even if only one constellation is conceivable in which the statutory period would be longer and more advantageous for the employee.

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 Pia Pracht on +49 221 33660-524 or by email to ppracht@goerg.de. For further information about the author visit our website www.goerg.com.

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