

Legal Update

Labour and Employment

Significant curtailment of benefits under social compensation plan permissible in the case of older employees

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Headnote

A company and its works council may take into account the time remaining until retirement for the purposes of determining settlements under a social compensation plan. Due to their approaching retirement, employees who have already reached the age of 58 may therefore receive settlements that are significantly lower than those granted their younger colleagues. This does not violate the principle of equal treatment anchored in the law governing co-determination or the ban on age-based discrimination under European Union law (*Federal Labour Court, judgment of 26 March 2013 - 1 AZR 813/11, press release*).

Facts

The Federal Labour Court was called upon to rule on a social compensation plan agreed to by an employer and a works council in 2011 due to the imminent closure of

an establishment. The plan initially called for a settlement for employees to be dismissed based on a standard formula that took into account gross remuneration, length of service and the age of the employees. This standard formula was not, however, applied in the case of employees who had already reached the age of 58. These employees received a settlement based on only 85% of gross remuneration less unemployment compensation up to the earliest possible time of eligibility for governmental retirement benefits. The plaintiff had reached the age of 62 as of the record date for the purposes of determination of his settlement, and the settlement was in his case not based on the standard formula, which would have given him a settlement in the amount of approximately € 240,000.00. Instead, he received only compensation for partial loss of remuneration up to retirement age in the amount of a total of €4,974.62. He argued that his settlement was approximately €235,000.00 lower than it should have been solely because of his age. He considered this to be age-based discrimination, which is prohibited by the rele-

vant provisions of the General Equal Treatment Act (*Allgemeines Gleichbehandlungsgesetz – AGG*).

Decision

The Federal Labour Court ruled against the plaintiff. The court held that the use of different formulas under a social compensation plan was legitimate and did not criticize the fact that the standard formula was not applied to determine the benefits of employees who had reached the age of 58. The Federal Labour Court emphasized that the calculation of settlements under social compensation plans on the basis of age is allowed pursuant to the second option described under item no. 6 of the third sentence of § 10 of the General Equal Treatment Act. The court reasoned that management and the works council of a company could apply a formula that would compensate only for the economic loss incurred up to early retirement in the case of employees approaching retirement age due to the fact that the purpose of such settlements under a social compensation plan is to facilitate transition. The action of the employee approaching retirement age was unsuccessful, and the employee had to accept the settlement in the amount of € 4,974.62.

Comments

The judgment of the Federal Labour Court ultimately cannot be faulted since it proceeds from the correct assumption, namely, that the purpose of settlements is to alleviate future financial burdens due to the loss of employment. The situation of employees nearing retirement when they lose their jobs cannot be compared with

that of younger employees, whose retirement lies in the far-removed future and who possibly even have to use the settlement to finance part of their retirement. As a result, it is logical to rely on the second option described under item no. 3 of the third sentence of § 10 of the General Equal Treatment Act, according to which older employees who are eligible for retirement – possibly after receiving unemployment compensation – are subject to no or hardly any financial disadvantage if they become unemployed when they have almost reached retirement age. Nevertheless, this decision does leave a “bitter taste” since the normal settlement based on the standard formula would have come to approximately € 240,000.00 under the social compensation plan whereas the employee bringing the action received only just under € 5,000.00 on the basis of calculations for employees nearing retirement. Since any age limit – 58 in the present case – will by nature inevitably be arbitrary – the age of 59 or 60 could also have been chosen in the case at issue here, settlements can differ significantly, which means that whether a generous settlement is received or a – relatively – insignificant amount is virtually a matter of chance. However, the Labour Court was correct in not taking this into account since there is no way to avoid choosing a certain age for the purposes of applying a different formula for the calculation of settlements for employees nearing retirement in order to be able to take this aspect into account at all. In practice, this means that it is always advisable to formulate social compensation plans so that the settlements of employees approaching retirement age are calculated separately, which – depending upon a company’s age structure – can result in considerable savings for the employer.

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 himself: Dr. Christoph Müller on +49 221 33660-524 or by email to cmueller@goerg.de. For further information about the author visit our website www.goerg.com.

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