GÖRG

Legal Update Labour and Employment

Federal Labour Court – Further employment limited to positions available at an employer's domestic establishments

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Headnote

The obligation of employers to offer employees further employment – possibly under significantly less attractive working conditions – as required by § 1(2) of the Employment Protection Act (*Kündigungs-schutzgesetz* – KSchG) to avoid dismissal for redundancy does not apply as regards available positions with an establishment of the employer located in another country.

Facts

The Federal Labour Court was tasked with ruling on the validity of a dismissal due to redundancy involving an employer in the textile industry that had for some time maintained an establishment in the Czech Republic for the production of certain bandage materials. Final production took place in Germany, where the employer was based. In June 2011, the employer decided to transfer all production to its Czech establishment. Plans called for only the administration and commercial activities to remain in Germany. Due to the move, the employer gave all employees notice of dismissal for redundancy. One of the employees contested this dismissal, arguing that the dismissal was not justified since the employer should have offered employees the possibility of further employment in positions at the foreign establishment.

Decision

The Federal Labour Court ruled against the plaintiff, as did the lower courts. The action for protection against dismissal was unsuccessful. Due to the transfer of production to the Czech establishment, no other possibility existed for further employment of the production worker at a domestic establishment.

Comments

For many employers, the transfer of operations to another European country represents an attractive re-

structuring possibility, especially because of lower payroll and production costs. However, it is necessary to take into account a few “pitfalls” that go beyond settlement obligations that may exist under collective agreements. A dismissal due to redundancy must be considered a solution of last resort, which means that employers must first investigate less radical measures, and this applies in general despite the provision contained in the second sentence of no. 1 b) of § 1(2) of the Employment Protection Act (*Kündigungs-schutzgesetz* – KSchG) and regardless of whether a works council exists. Employers must therefore determine whether further employment is possible at another establishment of the same company, possibly under different employment conditions. However, this obligation to investigate the possibility of further employment applies only as regards positions available at establishments of the employer’s company. The Employment Protection Act is not operative at the level of group companies. Employers are under no obligation to consider the possibility of options for further employment by other group companies (except in the case of employment contracts that make provision for transfers within a group of companies). The established case law of the Federal Labour Court is also based on the assumption that the scope of application of the Employment Protection Act is limited to establishments in Germany. For the purposes of § 1 of the Employment Protection Act, such establishments include only organisational entities or parts of a company located in the Federal Republic of Germany. In the case of the present decision, the Federal Labour Court was consistent in its application of these principles and has now made it clear that investigation of possibilities for further employment is limited to operations located in Germany. Only under special circumstances must an employer consider offering employment at a foreign establishment. In that regard, this decision conflicts with a judgment to the contrary handed down by the Hamburg Higher Labour Court (Ref.: 1 Sa 2/11). Investigation of possibilities for further employment therefore ends at the German border.

It is, however, necessary to keep in mind that the protection against termination in the case of a transfer of operations does not always stop at the German border. If, for example, operations are transferred to another company in another country through a sale of a business pursuant to § 613a of the Civil Code (*Bürger-liches Gesetzbuch* – BGB), dismissals cannot be justified on the basis of a shutdown of operations in Germany since termination would ultimately have been based on a sale of the company – albeit to a company in another country – and as a result be in violation of § 613a(4) of the Civil Code.

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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