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PREFACE

We begin our Newsletter by considering current issues related to collective redundancy. Planning a large reduction in the size of the workforce can, in and of itself, trigger the co-determination rights of the works council. Such rights have to be observed at all cost. Careful preparation of such redundancies is also essential due to the numerous formalities involved.

Another contribution deals with the conduct of gate checks and the question of whether they are permissible, particularly from the data protection perspective. The Federal Labour Court has recently adopted a new approach in relation hereto.

Finally, we turn our attention to two judgments handed down by the European Court of Justice which affect German employment law. One judgment considers issues related to how commissions should be taken into consideration when calculating holiday pay, while the other treats issues related to the assignment of temporary agency workers.

Pioneering. GÖRG

Peculiarities and Pitfalls of Collective Redundancies

It is not uncommon for employers to be confronted with rather large problems when issuing a legally effective redundancy notice pursuant to the Employment Protection Act (Kündigungsschutzgesetz – KSchG). The requirements for acting in the legally prescribed manner are even more complex where a collective redundancy is planned, i.e. where a certain percentage of the employees of an establishment are to be dismissed at the same time or within a short space of time. Special duties to provide information and hold consultations as well as to notify can make preparations for and the implementation of such dismissals more difficult and, at times, prolong the process considerably.

Reconciliation of Interests

If the establishment where a collective redundancy is to occur has a works council, there may be a duty to conclude a reconciliation of interests with the works council before issuing dismissal notices to the employees. The existence of an operational change is a prerequisite [§ 111 of the Works Constitution Act (Betriebsverfassungsgesetz – BetrVG)] for this. A reduction in the size of the workforce alone may constitute an operational change if a certain percentage of the establishment's total workforce is made redundant. The relevant thresholds are specified in § 17 (1) of the Employment Protection Act (Kündigungsschutzgesetz – KSchG), which provides that a collective redundancy (and thus an operational change within the meaning of § 111 of the Works Constitution Act) occurs where one of the following thresholds is reached:

- more than 5 redundancies in establishments that normally employ more than 20 and less than 60 employees,
- 10% of the employees or more than 25 redundancies in establishments that normally employ at least 60 but less than 500 employees, or
- at least 30 redundancies in establishments that normally employ at least 500 employees.

Moreover, the Federal Labor Court (Bundesarbeitsgericht – BAG) has imposed an additional restriction, namely where at least 5% of the entire workforce is made redundant in establishments with at least 500 employees (cf. Federal Labor Court, Order of 28 March 2006 – 1 ABR 5/05, NZA 2006, 932). If the thresholds are reached, the employer must at the very least seriously attempt to conclude a reconciliation of interests with the works council so as not to expose itself to claims by its employees for compensation for the detrimental effects of redundancy pursuant to § 113 of the Works Constitution Act. An employer will only be considered to have made a serious attempt at concluding a reconciliation of interests if it appeals, should negotiations with the works council

prove unsuccessful, to the conciliation committee referred to in § 76 of the Works Constitution Act, and if such committee confirms – should negotiations continue to prove unsuccessful – that negotiations have failed.

Social Compensation Plan

In addition to the reconciliation of interests process which is necessary from the employer's perspective, the works council will always seek to conclude in particular a social compensation plan to compensate employees for the economic disadvantages that they suffer. However, in the case of staff reductions, the works council can only legally compel the employer to conclude such a social compensation plan (through recourse to the conciliation committee) if the thresholds specified in § 112a (1) of the Works Constitution Act, which are significantly higher than those in § 17 of the Employment Protection Act (see above), are reached. According to § 112a (1), the works council is only permitted to compel the conclusion of a social compensation plan if

- 20% of the staff or at least 6 employees are to be made redundant in establishments that normally employ less than 60 employees,
- at least 20% of the staff or 37 employees are to be made redundant in establishments that normally employ at least 60 but less than 250 employees,
- at least 15% of the staff or 60 employees are to be made redundant in establishments that normally employ at least 250 but less than 500 employees, or
- at least 10% of the staff or 60 employees are to be made redundant in establishments that normally employ at least 500 employees.

According to § 112a (2) sentence 1 of the Works Constitution Act, an employer cannot be compelled to agree to a social compensation plan where it reduces its staff during the first four years after the company is founded. In addition to the works council's legal possibilities for compelling the employer to agree to a social compensation plan, it also has practical bargaining power. The works council often links its consent to the conclusion of a reconciliation of interests, which is important from the employer's perspective (see above), to the employer's agreement to a social compensation plan, even if same cannot be compelled by law.

Notification of Collective Redundancy

Where certain thresholds are reached (see point 1 above), it should be noted that an employer is required by § 17 of the Employment Protection Act to notify the responsible job center (Agentur für Arbeit) of a proposed collective redundancy before issuing dismissal notices. If it fails to do so or if its notification is incomplete, the dismissal notices will be formally invalid. It must be noted that, if the establishment has a works council, additional procedural steps need to be initiated before the notification of the collective redundancy is sent to the job center. In particular, pursuant to § 17 (2) of the Employment Protection Act the employer must provide the works council with details of the planned collective redundancy during the consultation process. The consultation process is thus particularly important since its proper conduct is an essential prerequisite for a valid collective redundancy notification and thus of each of the respective dismissals. If the works council is not willing to conclude a reconciliation of interests or give its opinion

pursuant to § 17 (2) of the Employment Protection Act, there must be an interval of at least two weeks between consultation of the works council and the actual issuance of the notification [§ 17 (3) sentence 3 of the Employment Protection Act]. Thus, at the same time as negotiations for a reconciliation of interests are underway, it would be advisable to prepare a draft notification of collective redundancies for the job center, and to send it to the works council for consultation purposes since it contains the necessary information.

Dismissal

If an establishment does not have a works council, the issuance of a dismissal notice does not usually require any additional procedural steps. Pursuant to § 623 of the German Civil Code (Bürgerliches Gesetzbuch – BGB), the dismissal must be in writing, must be served in good time (preferably with a proof of service) and, where appropriate, include an accurate calculation of the notice period. The latter, however, is not a prerequisite for a valid dismissal. If the employee commences court proceedings, the employer must show that it has fulfilled all of the prerequisites for a valid dismissal, and in the event that the employee disputes this, the employer must prove same. In particular, the employer must provide evidence of compelling operational reasons for the dismissal [§ 1 (2) sentence 1 of the Employment Protection Act], and that it has properly selected the employees to be made redundant on the basis of the social criteria prescribed by law [§ 1 (3) of the Employment Protection Act]. If a works council exists, it must be consulted pursuant to § 102 (1) of the Works Constitution Act prior to each dismissal. The dismissal cannot be effectively issued until after the works council has given its opinion on the proposed dismissal (its consent is not necessary), or until a week has elapsed since it was consulted. As regards the grounds for dismissal, the employer may, during consultations with the works council, in part make reference to the reconciliation of interests if it includes sufficiently detailed information about the elimination of the employee's job. If the reconciliation of interests contains a list of names (i.e. a list of the names of the employees to be dismissed), the court will assume

If a works council exists, it must be consulted pursuant to § 102 (1) of the Works Constitution Act prior to each dismissal.

pursuant to § 1 (5) of the Employment Protection Act that an operational reason for the dismissal exists. Similarly, the selection of the employees to be made redundant on the basis of social criteria may only be examined by the court for the existence of any blatant errors. However, works councils only rarely agree to such a list of names.

Regardless of the existence of a works council, the employer must in certain cases observe the special protection against dismissal that applies to severely disabled employees or employees on parental or maternity leave. The

prior consent of the public authorities is required for the dismissal of these employees. If the prerequisites for consent by the public authorities are met, the consent procedure may take place parallel to consultations with the works council. In addition, it should be noted that works council members also enjoy special protection against dismissal pursuant to § 15 (1) of the Employment Protection Act.

Summary /Checklist

The requirements described create logistical challenges for employers in the case of collective redundancies, particularly where works council are involved, since it is necessary to perform the individual procedural steps and hold consultations in an effective manner and in the correct order. The checklist below assumes that the number of dismissals in connection with a reduction in the size of the workforce meet the requirements of an operational change within the meaning of § 111 of the Works Constitution Act as well as those of a collective redundancy within the meaning of § 17 of the Employment Protection Act. In this case, the employer should proceed by taking the following steps:

1. Inform the works council of the planned reduction in the size of the workforce, and request it to engage in negotiations regarding the conclusion of a reconciliation of interests and, possibly, a social compensation plan.
2. Prepare a draft collective redundancy notification, and send it to the works council with a reference to the consultation procedure called for by § 17 (2) of the Employment Protection Act.
3. Forward the letter of notification in point 2 (“at the same time”) to the relevant job center.
4. Conclude negotiations on a reconciliation of interests and seek the works council’s opinion on the consultations pursuant to § 17 (2) of the Employment Protection Act.
5. Consult with the works council pursuant to § 102 of the Works Constitution Act on the dismissals contemplated in the reconciliation of interests.
6. Notify the responsible job center of the collective redundancy.
7. Issue the dismissal notices.

The above provides a reliable and effective approach for employers who plan large scale cutback of their personnel. If there is no works council involved, only points 6 and 7 need be followed.

Felix R. W. Pott

Gate checks: Special proportionality in the case of works agreements concerning the personality rights of employees [Federal Labor Court 1 ABR 2/13 (A)]

Headnote

A works agreement which affects the personality rights of employees must be proportionate. This is the case where a works agreement provides for bag checks (including checks of coat and jacket pockets) at the factory gates to prevent the theft of small items of production, and where, in the year prior to the entry into force of the works agreement, loss from stolen items amounted to approximately EUR 250,000.00 in relation to 86 employees selected by a random number generator who were checked on 30 days of the year.

Facts

In 2009, a joint venture comprised of several employers (hereinafter referred to as the "employer") entered into a works agreement with the works council regarding the conduct of gate checks. This works agreement included, inter alia, a provision which, having regard to § 32 of the Federal Data Protection Act (Bundesdatenschutzgesetz – BDSG), allowed the conduct of gate checks. The gate checks included checks of containers carried by employees as well as of their clothing and, in particular, coat and jacket pockets. A random generator was used to select the employees who would be checked. According to information from the works council, additional checks could be ordered if an employee was suspected of theft. The results of the checks were stored electronically.

Between October 2009 and September 2010, goods worth a total of EUR 250,000.00 were pilfered from the employer. On the basis of the works agreement mentioned, gate checks were carried out on a total of 86 people on 30 days during one year. In several cases, stolen goods were discovered, which led to the filing of criminal complaints. Subsequently, the works council (due to changes in its composition) terminated the works agreement for cause.

Decision

The Federal Labour Court held that the described works agreement could not be terminated for cause because it was in compliance with the provisions of § 75 (2) sentence 1 of the Works Constitution Act (Betriebsverfassungsgesetz – BetrVG). At the time in question, the works agreement could not be duly terminated because of the notice period that had been agreed.

To start with, the Federal Labour Court upheld its prior case law in which it had ruled that the parties to a works agreement must respect the general right of personality derived from Article 2 (1) in conjunction with Article 1 (1) of the Basic Law (Grundgesetz – GG) when concluding a works agreement. The Federal Labour Court deduced from this that any works agreement that encroaches on the general right of personality must be especially proportionate. This requires that a provision be suitable, necessary and reasonable in view of the employee's rights and the desired objective. In particular, the parties to the works agreement should not have another means available to them of achieving the desired objective which is just as effective but less restrictive in relation to the employee's right of personality. A works agreement is proportionate in the strict sense if on balance the severity of the encroachment is not disproportionate to the reasons justifying such encroachment. After carefully and closely weighing the severity of the

encroachment against the reasons for it, the Federal Labour Court then arrived at the conclusion that the provisions on the clothing and bag checks were proportionate.

Since the works agreement also prescribed that the results of the checks should be recorded, the Federal Labour Court considered in addition whether the works agreement was compatible with § 32 of the Federal Data Protection Act. If § 32 of the Federal Data Protection Act had been the only standard of review, the Federal Labour Court would have had to resolve a good number of controversial questions (for example, the permissibility of preventative or repressive measures). However the Federal Labour Court held that the works agreement was a legal provision within the meaning of § 4 (1) of the Data Protection Act. As a proportionate provision on the protection of personality rights, this therefore took precedence over a review of § 32 of the Data Protection Act.

Comments

In this decision, the Federal Labour Court once again reaffirmed its view that a works agreement is a legal provision within the meaning of § 4 (1) of the Federal Data Protection Act. This means that the data processing provided for in the works agreement does not require either the consent of the employee or recourse to the statutory provisions in the Federal Data Protection Act, or in particular to § 32 of the Data Protection Act. This is particularly important because this is a topic which is frequently the subject of disagreement among legal commentators (cf. Gola/Schomerus, BDSG, 11th ed. 2012, § 4 para. 10 with further references). The draft of a data protection law for employees even provided that it was not permissible for a works agreement to deviate from the data protection requirements which apply to employees. Given that efforts to regulate unanswered questions regarding the data protection of employees are not likely to be “resumed” at the current time, it would seem that works agreements are one way that the parties to works agreement can autonomously regulate data protection.

In view of the decision of the Federal Labour Court presented here as well as another one of its recent decisions (Federal Labour Court, 2 AZR 546/12 of 20 June 2013), it should be noted that particularly high standards must be applied to the application of the proportionality principle in the case of works agreements affecting data pro-

tection. As is shown by the detailed examinations undertaken in both cases by the Federal Labour Court, it is not just necessary to weigh different encroachment measures against each other in terms of their severity. Instead it can be assumed that individual provisions achieve a balance between the reason for encroachment on data protection and the degree of its severity. A disproportionate works agreement cannot form the basis for an encroachment by an employer on the personality rights and data protection rights of an employee. As a result, any evidence gathered in such manner cannot be used in court. In light of this new and very strict case law handed down by the Federal Labour Court on the proportionality of works agreements, it will no longer be possible to simply rely on the validity of existing works agreements.

Dr. Jochen Lehmann

A disproportionate works agreement cannot form the basis for an encroachment by an employer on the personality rights and data protection rights of an employee.

ECJ: Inclusion of commission in holiday pay?

Headnote

Where a sales consultant receives remuneration composed of a basic salary and commission whose amount is linked to the number of sales contracts that are concluded as a result of tasks he performs personally, this commission must be taken into account for the purposes of calculating the holiday pay to which he is entitled during his annual leave. In such cases, the holiday pay may not be restricted to his basic salary, even if the experienced reduction in remuneration actually occurs after the period of annual leave.
(ECJ, judgment of 22 May 2014 – C-539/12)

Facts

The British plaintiff in the original proceedings has been employed by British Gas as an Internal Energy Sales Consultant since 2010, and still is. His task is to persuade business clients to buy his employer's energy products. His remuneration consists of two main components: In addition to a monthly basic salary, which currently totals GBP 1,222.50, the plaintiff receives a monthly variable commission which is calculated by reference to the sales actually achieved and therefore depends not on the amount of time worked but on the outcome of his consultancy work in the form of newly concluded agreements. The commission is always paid in arrears several weeks or months following the conclusion of the respective sales contract between British Gas and the customer. In 2011, the plaintiff earned on average monthly commission of GBP 1,912.67.

In the period from 19 December 2011 to 03 January 2012, the plaintiff was on paid annual leave. Given that he did not carry out any work during this period of approximately 2 weeks, he was not able to make any new sales or follow up on potential sales. Accordingly, he was also not able to generate commission in that period. This had adverse effects on the plaintiff‘s salaries in the following months during which he essentially only received remuneration reduced to his basic salary. As the plaintiff was not prepared to accept this situation, he brought an action before a British employment tribunal for the outstanding holiday pay which he believed to be owing to him for the period from 19 December 2011 to 03 January 2012. Thereafter, the court seized of the matter ordered a stay of proceedings and referred the matter to the ECJ for a preliminary ruling on the question of whether, in the circumstances of the present case, the commission which the worker would have earned during his annual leave had to be taken into account in calculating his holiday pay.

Decision

The ECJ answered yes to this question. In its view, it has to be ensured that if a worker takes paid annual leave that he continues to receive for the duration of the annual leave his normal remuneration for that period of rest. The purpose of providing paid annual leave is to put the worker, during such leave, in a position which is, as regards his salary, comparable to periods of work. Otherwise there is a risk that the worker may be deterred from actually exercising his right to paid annual leave, given the financial disadvantage which he would suffer as a result of the annual leave.

The ECJ stated in its reasoning that it would be contrary to these principles if – as in the present case – a worker whose remuneration consists of a basic salary and performance-based commissions were only entitled in respect of his annual paid leave to a salary consisting of his basic salary. The court acknowledged that the total amount received by the plaintiff during his annual leave period was comparable to that earned during periods of work because of previously achieved sales. However, it recognised that the actual financial loss was suffered in the period following the plaintiff's annual leave. This delayed reduction in remuneration was just as much an unreasonable disadvantage as reductions which occurred directly during the annual leave period. The court thus held that holiday pay in this situation could not be limited to a worker's basic salary.

Whether or not an employer has properly taken commission into account in calculating holiday pay in an individual case is a matter for the national courts to decide in compliance with the case law of the ECJ.

Comments

In its judgment, the ECJ strengthened the rights of workers for whom commissions from the successful arrangement of sales make up a significant part of their monthly salary. This is based on the correct assumption that such workers would possibly forego their leave entitlement if they had to endure a significant financial loss during the leave period. Accordingly, workers must also be entitled to commission payments during this period. The amount of such payment is a matter for the employer or, in the event of dispute, the national courts.

According to § 11 (1) sentence 1 of the Federal Leave Entitlement Act (Bundesurlaubsgesetz – BurlG), the amount of the holiday pay is calculated on the basis of the average remuneration during the 13 weeks preceding the commencement of leave. "Remuneration" in this context means all components of remuneration which the worker has received during the reference period as consideration for his work in the relevant assessment period (Federal Labour Court, judgment of 17 January 1991 – 8 AZR 644/89, NZA 1991, 778). According to the case law of the Federal Labour Court, there can be no doubt that commission paid for sales achieved by the worker are a component of the remuneration that must continue to be paid during leave according to § 11 (1) sentence 1 of the Federal Leave Entitlement Act (Federal Labour Court, judgment of 19 September 1985 – 6 AZR 460/83, NZA 1986, 471). Thus, unlike one-off bonuses, these should be taken into account in calculating holiday pay. Thus the judgment of the ECJ reinforced what Germany's highest labour court had already decided in its case law.

When calculating holiday pay, it is necessary in these cases to ask what commissionable transactions the worker could have concluded during the period in which he was absent on holiday or what delays in the conclusion of such transactions were caused by his holiday. Using the commissions achieved in the past as a basis, the employer will have to estimate the amount of regularly recurring commissions in addition to fixed payments. For these purposes, it will have to determine average earnings during a longer reference period, which may possibly be longer than 13 weeks.

Patrick Klinkhammer, LL.M.

Finnish referral to the ECJ: Is the prohibition against the permanent assignment of temporary agency workers pursuant to § 1 (1) sentence 2 of the Temporary Agency Workers Act (Arbeitnehmerüberlassungsgesetz – AÜG; hereinafter the "Act") beginning to totter?

Overview of the legal position and the current case law

Until the adoption of Directive 2008/104/EC on temporary agency work (hereinafter the "Directive"), it was permissible in Germany to assign and hire temporary agency workers on a permanent basis, and thus to do this without any maximum hiring period (*cf. Federal Labour Court, judgment of 25 January 2005 – 1 ABR 61/03*). The prevailing view among employment law commentators is, however, that the permanent assignment of temporary agency workers contravenes the Directive, which had to be implemented by 05 December 2011.

For the purposes of implementing the Directive, the German legislature thus introduced § 1 (1) sentence 2 of the Act in December 2011, which provides that the assignment of agency workers to a user undertaking is "temporary". In the opinion of the Federal Labour Court, § 1 (1) sentence 2 of the Act is not simply clarificatory in its nature, but instead contains an express prohibition on the assignment of workers on anything more than a temporary basis (*Federal Labour Court, judgment of 10 July 2013 – 7 ABR 91/11; confirmed by Federal Labour Court, judgment of 10 December 2013 – 9 AZR 51/13*). However, the Federal Labour Court left open the question of whether the introduction of this prohibition was actually necessary as a result of the Directive in its judgment of 10 July 2013. Nor did it define the term "assignment of temporary agency workers". As was made clear in a further judgment of the Federal Labour Court of 10 December 2013 (*9 AZR 51/13*), the fact that an assignment was not only temporary does not mean that it gives rise to an employment relationship between the temporary agency worker and the hirer (*cf. on this our Newsletter 1/2014, pp. 4-5*).

On the other hand, critics of the majority view and this case law assume that the Directive does not contain a prohibition on the permanent assignment of temporary agency workers. In their view the prohibition in § 1 (1) sentence 2 of the Act is instead a violation of Article 4 (1) of the Directive, which only permits prohibitions or restrictions on the use of temporary agency workers where this can be justified on grounds of general interest. This point was not addressed by the Federal Labour Court.

The Finnish referral to the European Court of Justice of 09 October 2013 (C-533/13)

The pending request for a preliminary ruling from the Finnish Työtuomioistuin to the European Court of Justice lodged on 09 October 2013 (C-533/13) relates precisely to this conflict. The request was prompted by a Finnish provision according to which temporary agency workers may only be used to cope with peak periods of work or

for work which, due to time constraints or qualitative requirements (arising from urgency, necessary equipment or similar reasons) cannot be carried out by the hirer's own employees.

The referring labour court construed this provision to mean that Finnish law does not permit temporary agency workers to be used in addition to company employees to perform ordinary business activities over a longer period of time.

The Finnish labour court therefore referred, inter alia, the following questions to the European Court of Justice for a ruling:

"*Must Article 4 (1) of the Directive be interpreted as precluding a national provision under which the use of temporary agency labour is permitted only in the cases specially listed, such as to cope with peak periods of work or for work which cannot be given to an undertaking's own employees to do? May the use of agency workers for a lengthy period in the ordinary work of an undertaking alongside the undertaking's own employees be defined as a prohibited use of agency labour?*"

Comments

It remains to be seen whether the European Court of Justice will regard the questions referred for a preliminary ruling as an opportunity for expressing a general opinion on the admissibility of the permanent assignment of temporary agency workers – which would be desirable. In any case, it is likely that it will be possible to gain valuable insights on the interpretation of the Directive and, in particular, the admissibility of a prohibition on the assignment of temporary agency workers on anything more than a temporary basis pursuant to § 1 (1) sentence 2 of the Act from the decision to be expected from the European Court of Justice. This is also likely to have implications for the legal assessment of the grand coalition's current plans to introduce a maximum 18-month period for the assignment of temporary agency workers in accordance with the coalition agreement for the 18th legislative term. It would also be necessary to measure such a maximum term of assignment against Article 4 (1) of the Directive. Furthermore, the European Court of Justice's decision should allow inferences to be drawn as to how the disputed question of what is meant by a "temporary" assignment of agency workers should be answered. Opinions on this are currently divided, and suggestions for restricting the use of temporary agency workers on a situation-related basis have been made as occurred in the subject of the Finnish referral for a preliminary ruling. Consequently, the law in connection with the assignment of temporary agency workers will continue to remain exciting. Until the European Court of Justice has handed down a decision, employers should continue, however, to pay attention to § 1 (1) sentence 2 of the Act due to the possible legal consequences of a breach (cf. on this our Newsletter 1/2014, pp. 4-5).

Dr. Piero Sansone

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Note

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