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Newsletter Labor and Employment

PREFACE

In our first Newsletter for 2011, we again review a number of judgments handed down by the Federal Labor Court, some of which have also received extensive press coverage. These include the Federal Labor Court's decision regarding a Muslim employee who justified his refusal to perform certain work on religious grounds and was, as a result, summarily dismissed by his employer. The Federal Labor Court found that the dismissal was invalid and referred the matter back to the Regional Labor Court for further clarification of the facts.

This decision has wide implications in practice. In addition, the Federal Labor Court considered the issue of whether a Christian union had authority to negotiate collective bargaining agreements on temporary employment; this decision could be of far-reaching significance for temporary work agencies as well as their customers, which can expect to have to make back payments. Finally, we turn our attention to judgments of the Federal Labor Court which deal with discrimination against a pregnant woman in connection with the filling of a job vacancy and repayment of continuing education costs. These are issues that arise frequently in practice.

FEDERAL LABOR COURT DECISION ON THE REPAYMENT OF CONTINUING EDUCATION COSTS

HEADNOTE

When courts, in compliance with section 307(1) of the German Civil Code, review the content of a clause that provides that an employee must repay continuing education expenses paid for by an employer, if the employee voluntarily leaves his employment before completing the continuing education, they will normally uphold such clause (Federal Labor Court decision of 19 January 2011, 3 AZR 621/08).

FACTS

The defendant had been a bank employee working for a savings bank association since 2002. In 2006 he commenced a course offered by the Bavarian Savings Bank Association (Bayerischer Sparkassen- und Giroverband), leading to the qualification of savings bank business graduate. In order to do this he had arranged with his employer that it would bear the costs of the course and the costs of his taking the exam. In addition, they had agreed that the defendant would be released from work so that he could attend the course, but would continue to receive his salary. The party's agreement also contained a clause stating that the defendant would be obliged to reimburse his employer for the course and exam fees as well as the salary received during his leave of absence from work, if he left the employer of his own free will before concluding the continuing education course. The agreement reached between the parties amounted to a standard provision and thus was to be treated in the same way as standard terms and conditions of business.

The defendant completed two of a total of three approximately five-week training blocks during an eight-month period. Before beginning the last remaining training block, the defendant gave notice and accordingly did not take part in the last training block. The employer then demanded repayment of the continuing education costs.

DECISION

The Federal Labor Court, as the court of last resort, allowed the employer's claim. It held that it was necessary to review the content of the repayment clause pursuant to section 307(1) of the German Civil Code, but that the clause should be upheld because it did not unreasonably disadvantage the employee. The Court explained that its finding would be the same even if the further continuing education was not ongoing, but instead completed in separate blocks, spread over a period of time, so that the employee would be „committed" for a longer period. Furthermore, the Court found that there was no reason to assume a disadvantage within the meaning of section 307(1) of the German Civil Code, where the timetable for the individual training blocks follows the rules of the continuing education body.

In this case, the employer has no room to influence when training blocks will be held in a way which suits its own interests and thus has no influence over how long an employee „commits" himself. The court intentionally left open the question of whether the reasonableness of the length of the breaks between the training blocks – insofar as they were known at the time when the repayment agreement was concluded – would themselves be subject to review under section 307 of the German Civil Code.

COMMENT

The Federal Labor Court's decision is in keeping with the previous case law on the topic of repayment of continuing education costs. The main criterion for a court's decision will normally be whether the agreed repayment duty represents an unreasonable disadvantage to the employee because it makes giving notice difficult.

Where the parties have agreed that the employee only has to repay the costs if he leaves voluntarily before finishing the continuing education, the only time this can be seen as an unreasonable disadvantage is when the breaks between individual training blocks are unusually long or the employer was able to influence their scheduling. Since the courts are prohibited from reading down a clause in order to give it validity, it is always important to make sure that the prerequisites for a repayment obligation are formulated precisely. Otherwise there is a risk that the clause as a whole will be invalid, and that the employer will be saddled with the continuing education costs of an employee who quits soon after he starts a course.

FEDERAL LABOR COURT DECISION ON DISCRIMINATION AGAINST A PREGNANT WOMAN WHEN FILLING A JOB VACANCY

HEADNOTE

There is no reason to place strict requirements on the presumption of gender-based discrimination relating to pregnancy (Federal Labor Court decision of 27 January 2011, 8 AZR 483/09).

FACTS

The plaintiff was one of three managers employed in the defendant's international marketing department. The department was headed by a vice-president, whose position became vacant in September 2005. The plaintiff applied for the job, but was unsuccessful. The defendant filled the vacancy with a man instead of the plaintiff. She was pregnant at the time the position was filled, and this fact was also known to the defendant. The plaintiff sought compensation claiming that she had been discriminated against on the grounds of her sex; i.e. that she had not been given the job because she was pregnant. In support of her claim, she alleged that her pregnancy had been mentioned when she was told of the decision about the job. The employer-defendant alleges that there were objective reasons for its decision.

DECISION

The Federal Labor Court had already reversed the decision of the Berlin-Brandenburg Regional Labor Court against the plaintiff once and referred the decision back to it because the plaintiff had presented facts that would indicate gender-based discrimination pursuant to section 611a (1) of the German Civil Code (old version which was valid until 17 August 2006). After taking evidence, the Regional Labor Court in its second decision again rejected the presumption that there had been gender-based discrimination. When the Federal Labor Court heard the plaintiff's appeal for a second time, it once again reversed the Regional Labor Court's decision and referred the matter back to the Regional Labor Court for another hearing. The Federal Labor Court stated in its reasoning that the Regional Labor Court had made errors of law when ascertaining the facts and in rejecting the presumption. This is because it will be enough to establish a presumption that a pregnant employee has been discriminated against on the gender-based grounds, if she is merely able to show, in addition to objective criteria such as that the job was given to someone else and that the employer knew she was pregnant, that there are other facts giving rise to a presumption of gender-based discrimination. There is no reason to place strict requirements on these additional submissions in particular.

COMMENT

Although the decision concerned the old version of section 611a of the German Civil Code, it is to be expected that it can also be applied to the current legal situation under the General Equal Treatment Act (Allgemeine Gleichbehandlungsgesetz - AGG). This seems likely since it is sufficient for the purposes of establishing gender-based discrimination under sections 7 and 22 of the General Equal Treatment Act if the aggrieved presents what are known as „presumptions of fact" which indicate unlawful discrimination has occurred (Records of the Upper House of the German Federal Parliament (Bundesratsdrucksache) 329/06, p. 51).

In this case, the Court found that it was sufficient that the employer had brought up the plaintiff's pregnancy at the time of issuing its decision. Simply mentioning surrounding circumstances which imply discrimination on the grounds of gender results in a reversal of the burden of proof to the detriment of the employer. Accordingly, any mention – even oral – of pregnancy in connection with a decision about a promotion carries with it a considerable risk that it will be construed as gender-based discrimination. Even where the employer's conduct has been above reproach, there is a risk that the employee will abuse this evidentiary rule.

DECISION OF THE FEDERAL LABOR COURT ON WHETHER A CHRISTIAN UNION HAS COLLECTIVE BARGAINING AUTHORITY INCREASES LEGAL UNCERTAINTY IN THE AREA OF TEMPORARY EMPLOYMENT

HEADNOTE

The collective bargaining authority of an umbrella organization made up of various unions within the meaning of section 2(3) of the Collective Agreements Act (Tarifvertragsgesetz - TVG) presupposes that its organizational area coincides with that of its member unions (Federal Labor Court decision of 14 December 2010, 1 ABR 19/10).

FACTS

The decision concerned an application from the trade union ver.di for a determination as to whether or not the Tarifgemeinschaft Christlicher Gewerkschaften für Zeitarbeit und Personal-Service-Agenturen (CGZP), a Christian union, had authority to engage in collective bargaining. The CGZP was established in December 2002. According to its bylaws, its sole task is to conclude collective agreements on behalf of the members of the unions that belong to it in the area of the commercial supply of personnel services. The areas of activity of its current member unions, Christliche Gewerkschaft Metall (CGM), Berufsgewerkschaft (GHV) and Gewerkschaft öffentlicher Dienst und Dienstleistungen (GÖD), are not, however, limited to the supply of personnel services but extend further.

Since the CGZP's bylaws were amended in 2009, its member unions have been permitted to conclude collective bargaining agreements with employers or employer associations in the temporary workers sector. The Berlin Labor Court held in its first instance decision that the CGZP had no authority to engage in collective bargaining because it did not have sufficient social might. The Berlin-Brandenburg Regional Labor Court agreed with this essentially, but attributed the CGZP's lack of collective bargaining authority to the 2009 amendment to its bylaws and the fact that, according to its bylaws, the CGZP's area of authority extended beyond those in the bylaws of its member unions.

DECISION

The Federal Labor Court essentially confirmed the decision of the Berlin-Brandenburg Regional Labor Court and thus answered the question of whether or not the CGZP had authority to enter into collective bargaining agreements in the negative. The Federal Labor Court's reasoning was also based on the idea that, according to its bylaws, the CGZP's collective bargaining authority differed from that of the respective member unions belonging to it. On the one hand, the member unions had not completely conveyed their collective bargaining authority to the CGZP since their authority, according to their bylaws, extended beyond the area of temporary work in all cases.

On the other hand, the CGZP's authority extended beyond that of its member unions because they were not responsible for the entire area of the commercial supply of personnel services. Due to these circumstances the Federal Labor Court decided first of all that the CGZP, as an umbrella organization, could not derive collective bargaining authority for the area of authority set out in the bylaws from its member unions. The Federal Labor Court deliberately left open whether the individual member unions themselves had collective bargaining authority. The Court also declined to comment on the issue of the necessary social might of the CGZP.

COMMENT

The final rejection of the CGZP's collective bargaining authority by the Court has serious implications for the entire temporary workers sector. The associated invalidity of the collective bargaining agreements concluded by the CGZP will make it possible for many temporary workers to demand back pay equivalent to that received by comparable employees in the respective companies where they worked (cf. section 9 no. 2 of the Temporary Employment Act (Arbeitnehmerüberlassungsgesetz – AÜG)). This means that many temporary work agencies may find themselves exposed to massive demands for salary back payments.

The same applies to the resulting necessity for back payments of social security contributions. What is also problematic is the fact that the issue of social might and thus also the collective bargaining authority of the individual unions has been left open. Accordingly, there will continue to be enormous uncertainty as far as compliance with the equal pay principle contained in section 9 no. 2 of the Temporary Employment Act is concerned. The incorporation of collective bargaining agreements of CGZP or one of its member unions is currently inadvisable. In addition, the government and opposition have agreed, before the Hartz IV mediation committee, on a minimum wage for temporary workers, which will also apply in non-working periods, of probably at least € 7.60/per hour (in western Germany) and € 6.65/per hour (in eastern Germany).

ON THE EFFECTIVENESS OF A DISMISSAL BASED ON AN EMPLOYEE'S REFUSAL TO WORK FOR RELIGIOUS REASONS

HEADNOTE

If an employee refuses to perform a task to which he has agreed contractually, this may justify his dismissal by his employer (Federal Labor Court decision of 24 February 2011, 2 AZR 636/09).

FACTS

The plaintiff was employed by the defendant as a shop assistant in a large department store. In February 2008 he refused the defendant's instructions to work in the drinks section of the store. The plaintiff is a Muslim and claimed that his religious beliefs prevented him from involvement of any kind in the distribution of alcoholic drinks. As a result, the defendant dismissed him. The plaintiff then instituted proceedings for unfair dismissal. The court of second instance, the Schleswig-Holstein Regional Labor Court, upheld the validity of the dismissal.

DECISION

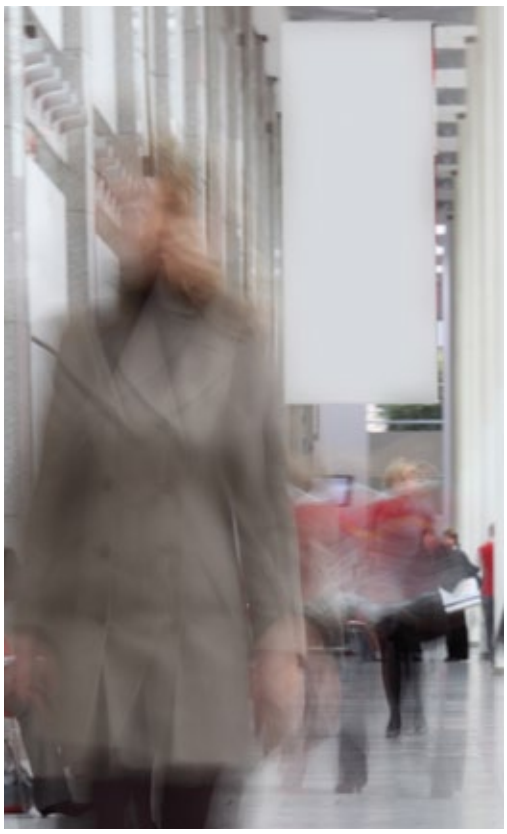
The Federal Labor Court overturned the decision of the Schleswig-Holstein Regional Labor Court and referred the matter back to it for a new hearing and decision. The Senate stated in its reasoning that it was not possible to decide definitively on the basis of the facts ascertained by the Regional Labor Court whether the plaintiff's refusal to work in the drinks department justified his dismissal by the defendant. The Court held that an employee's refusal on religious grounds to perform a task, which he has contractually agreed to perform, may in principle be justified. The plaintiff must, however, if he believes there are religious grounds preventing him from performing the work, inform the employer exactly what those religious grounds are and state exactly which activities they prevent him from performing.

However, it was a precondition for the validity of the dismissal that the defendant was not able to assign the plaintiff any other closely related activity that would have taken into account the restrictions imposed on him by his religion. In the present case, the plaintiff did not make clear enough submissions on which activities his religious beliefs prevented him from performing. Accordingly, it was not possible to reach a definitive decision on whether any other employment opportunities existed.

COMMENT

The Federal Labor Court's decision raises serious practical concerns. It is true that the legal arguments in relation to the significance of religious freedom as a legal interest to be protected under Article 4(1) of the Basic Law are perfectly understandable.

However, as far as the drafting of employment contracts and the exercise by an employer of his right to give instructions are concerned, this case law is not without its difficulties. Employers could try to avoid potential refusals to work on religious grounds by agreeing with an employee on such a narrow scope of duties that any refusal to work would necessarily lead to a (valid) dismissal because there were no alternative activities which the employee could be given. This would, however, result in a severe restriction on the employer's authority to give instructions during the employment relationship. This is neither in the interests of employers, nor of employees, who would then have to accept – irrespective of religiously motivated refusals to work – a significantly higher risk of being dismissed for operational reasons Whether or not the facts ascertained in this case ultimately justify the dismissal will depend on the Schleswig-Holstein Regional Labor Court's decision and the fresh appeal to the Federal Labor Court that will presumably follow.



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