Newsletter Labour and Employment

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PREFACE

Our first Newsletter for 2012 starts off with a close look at the term „part of an undertaking“, which has come to play an increasingly important role in transfers of businesses. If a company outsources parts of its production or administration to another company, this raises the question of whether the employment relationships transfer to the other company by operation of law (section 613a of the German Civil Code). The smaller the outsourced division, the more significant this question. However, not every form of outsourcing constitutes the transfer of a part of an undertaking, so employees will not always be transferred.

Thereafter, we turn our attention to a case in which an employee was summarily dismissed for „stealing“ data from his employer after he had been released from his duty to work under the terms of a mutual release. The Hessian Higher Labor Court upheld the legality of the summary dismissal.

In addition, we take another look at the issue of the time limit for the carryover of annual leave entitlements in the future. This topic has again become relevant due to the judgment handed down by the European Court of Justice on 22 November 2011. Finally, we consider the questions of whether an employee who resigns from his job, without notice, is bound by such resignation, and the question of whether an employer may dismiss an employee for „lying“.

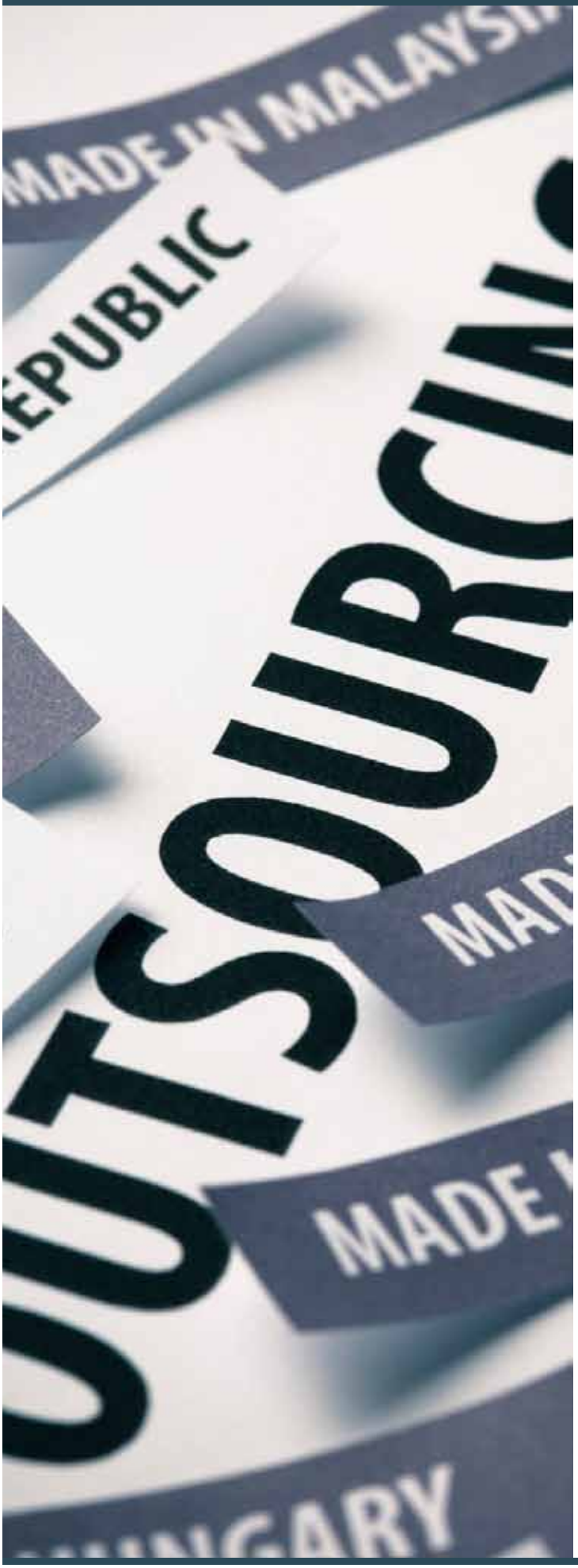
Decisions concerning the development of the term „Part of an Undertaking“ in Section 613a of the German Civil Code (Bürgerliches Gesetzbuch – BGB)

Section 613a of the German Civil Code is one of the most decisive provisions of German and European employment law because it has numerous, far-reaching legal implications for the transferee of a business. The possibility that a transfer will be considered a transfer of an undertaking pursuant to section 613a of the German Civil Code when the means of production and/or labor force are transferred is always one of the main factors that must be considered when assessing the risks of such a transaction. The general consensus in this connection is that section 613a of the German Civil Code covers both the transfer of undertakings as well as the transfer of independent parts of undertakings (autonomous business units). This is particularly problematic both in respect of outsourcing and insourcing because simply the fact that individual activities are (re)allocated to or taken over by a third party may under certain circumstances amount to the transfer of an undertaking. As a result, all of the employees involved are then deemed by law to have been transferred to the potential transferee, and their previous employment contracts, including all agreed working conditions, retain their validity. In light of this, the conditions under which the transfer of an autonomous business unit will be treated as the transfer of an undertaking within the meaning of section 613a of the German Civil Code has become a hotly debated question in legal journals and the relevant national and European case law.

The “Klarenberg Decision” of the European Court of Justice (ECJ)

The ECJ‘s decision in the „Klarenberg“ case (ECJ, Judgment of 12 February 2009 – C-466/07) created quite a furor. Prior to this decision, the position according to the case law of the Federal Labor Court was that the courts would only assume that there was a transfer of a part of an undertaking if the transferee continued to operate it as an autonomous business unit post-transfer. If, on the other hand, the „cards were reshuffled“ or the part of the undertaking transferred was so fully integrated into the transferee‘s organizational structure that it could no longer be described as an autonomous business unit after the putative transfer, the courts would not consider it a transfer of an undertaking within the meaning of section 613a of the German Civil Code. The ECJ rejected this view in its „Klarenberg“ decision and held that a transfer of a part of an undertaking can also take place, even if the transferee does not preserve the organizational autonomy of the unit transferred. In the case decided by the ECJ, the re-engaged employees had been integrated into the transferee‘s existing organizational structure. They also performed activities for it in relation to products that were not connected with the putative transfer. An employee who had not been re-engaged brought an action claiming there had been a transfer of a part of an undertaking.

There were strong objections to the ECJ‘s „Klarenberg“ decision in the German legal community because the principles which the Federal Labor Court had previously applied were considered in largest part sound and preferable. They had been aimed at protecting employees against transfers of organizational entities in a manner that would result in the transferee‘s business organization and structure absorbing them for its production processes, without assuming some or all of the employees‘ contracts. However, according to those principles, such absorption would only occur where the transferee continued the business activities or continued to operate the parts of the business taken over as an autonomous business unit. The European Court of Justice understands the protective purpose of Directive 2001/23/EC, which section 613a of the German Civil Code transposes into German law, differently to the Federal Labor Court as only requiring



„the retention by the transferee of a functional link of interdependence, and complementarity" between the various elements of production transferred. Thus, even according to the ECJ's most recent case law, the complete dissolution of the unit transferred within the transferee's organization such that its previous structure is no longer recognizable would still not be regarded as a transfer of an undertaking pursuant to section 613a of the German Civil Code. Nevertheless, the retention of the „specific organization of the various elements of production which are transferred" is not a precondition for the assumption of a transfer of an undertaking. The ECJ's case law basically results in a great deal of legal uncertainty, which will make it difficult to eliminate the risk of a deemed transfer of an undertaking through changes to the organization of the operating resources or workforce by the potential transferee.

The Federal Labor Court's response

Following the ECJ's ruling, the Düsseldorf Higher Labor Court held that there had been a transfer of an undertaking, even though the business unit transferred in fact no longer constituted a transferable business unit for the purposes of the transferee. The Federal Labor Court decided on appeal from the Düsseldorf Higher Labor Court, however, that, even taking into account the ECJ's case law, there had been no transfer of an undertaking because what had been transferred to the transferee had not even constituted a transferable business unit for the purposes of the transferor (Judgment of 13 October 2011 – 8 AZR 455/10). According to the decision of 13 October 2011, a transferable business unit only exists „where there is an organized grouping of persons and/or assets facilitating the exercise of an economic activity which pursues a specific objective and such grouping is sufficiently organized and autonomous" (Press Release No. 78/11 of the Federal Labor Court). Thus the Federal Labor Court

does not directly contradict the ECJ's opinion as far as the necessity for the transferee to retain the business unit's organizational structure post-transfer is concerned. Instead it shifts the focus to the issue of whether the transferor in fact had a sufficiently autonomous and thus transferable business unit within the meaning of section 613a of the German Civil Code. In this context, close attention must be paid to the necessary organizational autonomy of the transferred business unit when operated by the transferor.

Evaluation and consequences in practice

The ECJ's 2009 decision in the „Klarenberg" case introduced a high degree of uncertainty for businesspeople with respect to takeovers of parts of an undertaking. According to that decision, if the transferee changed the organizational structure, this would not preclude the occurrence of a transfer of an undertaking as long as it nevertheless continued or could continue to use the functional link between the various elements of production transferred. It thus became extremely difficult for a potential transferee to estimate to what extent it would have to „break up" a business unit post-transfer in order to effectively avoid the risk of a transfer of an undertaking pursuant to section 613a of the German Civil Code. The ECJ has in any case established that the transferee will not be able to destroy the previous organizational autonomy simply by allocating additional tasks to the employees that were not performed by the business unit transferred. Instead the ECJ ruling requires the functional link between the elements transferred to be severed or destroyed in such a way that the transferee cannot use them to pursue an identical or analogous economic activity. In practice this means that the reorganization or integration of a purchased business unit will not be enough to prevent its being treated as the transfer of part of an undertaking pursuant to section 613a of the German Civil Code.

However, the subsequent decision of the Federal Labor Court in this matter, the final text of which is not yet available, is informative. According to the press release issued on 13 October 2011, it is necessary in this context to examine „whether the assets transferred by the transferor constitute for its purposes an operational grouping sufficient in itself to provide services characterizing the business's economic activity, without recourse to other significant assets or other parts of the business". This would at least seem to indicate that the Federal Labor Court intends to counter the extremely relaxed requirements which the ECJ imposes on transferees in respect of the retention of the organizational structure acquired by placing more stringent controls on the existence of a transferable business unit.

Felix Pott

Summary dismissal for data theft still possible after employee‘s release from work

Headnote

Where an employer has already irrevocably released an employee from his duty to work up until the time when his employment contract terminates, it may still dismiss him without notice if it subsequently discovers that the employee committed a serious breach of duty (in this case stealing data) while still working (Hessian Higher Labor Court, Judgment of 29 August 2011 – 7 Sa 248/11).

Facts

The plaintiff had been employed by the defendant-bank since October 2008. He last held the post of departmental head with general signing powers. In June 2010 the parties entered into a deed of release, which provided that the plaintiff‘s employment contract would terminate on 31 December 2010 and that he would be irrevocably released from the duty to work from 1 July 2010. Shortly before leaving the bank, namely on 29 and 30 June 2010, the plaintiff forwarded a total of 94 e-mails to his private e-mail account. Neither party disputes that data subject to bank secrecy rules was attached to most of the e-mails. The defendant-bank became aware of this on 7 July 2010 and thereupon terminated its employment relationship with the plaintiff on 20 July 2010 for cause without notice. The plaintiff subsequently offered to immediately delete the transferred data in the presence of a bank representative and in addition brought an action for unfair dismissal in respect of the termination without notice.

Decision

The Local Labor Court allowed the action for unfair dismissal, but its decision was subsequently overturned on appeal to the Hessian Higher Labor Court. The Higher Labor Court found first of all that the plaintiff‘s conduct constituted a serious breach of duty since he had removed sensitive data from the employer‘s sphere of control and sent it to his private e-mail account. Furthermore, the Higher Labor Court referred to the Federal Labor Court‘s case law and correctly pointed out that the fact that the plaintiff had already been irrevocably released from work at the time of his dismissal did not prevent such dismissal. It is true that his release from work precluded any repetition of his breach of duty. However, the court rightfully held that no danger of a repeated breach is necessary in cases in which the breach of duty is so serious as to destroy all of the employer‘s trust in the honesty and loyalty of the employee. An employer can normally not be expected in such cases to retain an employee and pay him for the remaining term of his employment contract even if he has been released from work. If the relationship of trust has been irreparably destroyed, the employer cannot be expected to make further salary payments (or a lump-sum settlement agreed in a deed of release), particularly where the employee‘s length of service has been so short. Therefore, whether or not there was a risk that the employee would repeat his breach of duty was not significant.

Comment

The Hessian Higher Labor Court's decision is to be welcomed since it clearly shows that dismissal is still possible even where the employee has already been released from work and thus there is no risk of a repeated breach of duty. In the end, the court simply confirms the prior case law of the Federal Labor Court (Federal Labor Court, Judgment of 5 April 2001, NZA 2001, 954). Nevertheless, labor courts are often mistakenly influenced when weighing the interests of the parties by the assumption that a summary dismissal for breach of duty is only justified where there is risk that the employee will repeat his breach of duty. This approach fails to take into account that a certain „basic trust" in the honesty and loyalty of an employee is necessary at all times, even when he no longer has a duty to render his services. In particular, an employer cannot be expected to continue to pay an employee (in some cases a considerable amount of money) during a declared or agreed release from work in the knowledge that such employee has previously committed a serious breach of duty against it. Neither here nor in the case where an employee is terminated for misconduct is the issue of whether his breach of duty constitutes a criminal offense relevant.

Felix Pott

A „Use By“ date for Annual Leave Entitlements

We reported in our previous Newsletter (Newsletter 3/2011) on the Opinion of the Advocate-General of the European Court of Justice in the „Schulte“ case. Meanwhile, on 22 November 2011, the ECJ handed down its decision in which it corrected its previous case law on the accumulation of annual leave entitlements in the case of long-term incapacity for work in the manner desired by employers. The ECJ made clear that leave entitlements might also extinguish in the case of long-term incapacity for work if these could previously have been carried over during a reasonable period of 15 months.

It is thus now possible under European law to restrict the unlimited accumulation of leave entitlements such that they lapse 15 months after the expiry of the leave year. If no collective agreement to this effect exists, then this should be agreed with employees in their employment contracts.

However, the Baden-Württemberg Higher Labor Court recently decided in a first reaction from the German courts that the lapsing of leave entitlements in the case of illness-related absence from work over a longer period should apply directly under German leave entitlement law (Judgment of 21 December 2011 (10 Sa 19/11)). In the Higher Labor Court‘s opinion, leave entitlements should lapse even without express agreement, i.e. automatically, at the latest 15 months after the leave year expires.

The decision of the Baden-Württemberg Higher Labor Court is certainly to be welcomed, but nonetheless from a legal point of view surprising. Up to this point, German leave entitlement law, which is regulated by statute, has not provided for a 15-month carryover period of such kind. Nor does the wording of the legislation support this interpretation. It is thus doubtful whether the desirable result achieved by the Higher Labor Court will ultimately be upheld by the court of highest instance, the Federal Labor Court. Thus in order to make sure that leave entitlements cannot be accumulated without limitation, it would thus be advisable for employers to provide for a carryover period in their standard employment contracts and to make the necessary amendments to existing employment contracts. In the event that the Federal Labor Court does not share the Baden-Württemberg Higher Labor Court‘s opinion, employees who are ill over a longer period of time could potentially continue to be able to accumulate leave entitlements without limitation.

Dr. Frank Wilke

Employee‘s resignation without notice: „What do I care about my silly talk from yesterday!“

Headnote

If an employee resigns from his job, without notice, but does not have a good cause for resignation, he may later claim that his resignation was invalid and that his employment relationship continues to exist.

Facts

The plaintiff who was employed by an airline was suspected of having stolen various items from an aircraft. She had been informed of the airline-employer‘s suspicions during an interview and given an opportunity to make a statement. Since she was unable to dispel the suspicion against her, the employer indicated that it would dismiss her without notice. To preempt this, the employee duly resigned without notice during the interview. However, a short while later she went back to her employer and claimed that her employment contract was still in force. In the same vein as Konrad Adenauer‘s remark – „What do I care about my silly talk from yesterday!” – she informed her employer that she no longer felt bound by her own resignation. She claimed that her resignation was invalid because no „good cause“ had existed.

Decision

The Hessian Higher Labor Court allowed the claim and found that her employment contract was still in force (Judgment of 25 May 2011 – 17 Sa 222/11). It made it clear that a resignation by an employee without notice will only be valid if the employee also has good cause for the resignation. However, according to the Higher Labor Court, the plaintiff in the case before it did not have good cause for resignation. Quite the contrary was the case since the employer had not been guilty of any breaches of contract and had not done anything during the interview (which had been properly conducted) that could be grounds for terminating the employment contract. In particular, it had been entitled to indicate to the employee that it would dismiss her without notice.

In addition, the Higher Labor Court was of the opinion that the employee was entitled to rely on the invalidity of her own resignation. It stated that an employee is only prevented from relying on the invalidity of his own resignation if his employer is entitled to assume that the resignation was meant seriously and intended to be final. Where – as was the case here – there was no such intention on the part of the employee, and if the employee resigns without notice so as to preempt termination without notice by the employer, then the employee is not acting in breach of the principles of good faith by asserting that his own resignation was invalid.

The Higher Labor Court noted as an aside that the invalid resignation should be requalified as an offer to enter into a mutual release and that the employer had actually accepted this offer. However, a valid release must be in writing and for this reason both parties must personally sign the one and the same document. In the present case, however, the letter of resignation had only been signed by the plaintiff. Consequently, no document, duly signed by both of the parties, had come into being terminating the employment contract.

As a result, the Higher Labor Court found that the employment contract was still in force.

Comment

The decision is surprising, but it nonetheless shows how an employer should act in such a situation. It is not uncommon for the parties to an employment contract to agree on a mutual release or for the employee to resign during a hearing for suspected misconduct. At first sight it would appear absurd that an employee should of all things be able to dispute his own resignation at a later date and thus – from the employer's perspective – terminate the contract in the least certain of ways. Unlike in cases where an employer terminates the contract, resignation by an employee is not subject to a three-week time limit in relation to a claim that the resignation was invalid. Under the circumstances described by the Higher Labor Court, an employee may thus assert that his resignation was invalid even after the three-week time limit has expired.

Accordingly, employers must aim to conclude deeds of release whose validity is not dependent on the existence of a ground for termination. It is thus advisable for employers in comparable situations to accept an employee's resignation and to add a written note with the word „agreed" to it, and then sign it. This way the employer can upgrade a – possibly – invalid resignation to a deed of release, which will still be valid without the existence of good cause for termination. The employee will then no longer be able to claim that his employment contract is still in force.

In this event his only chance of successfully alleging before a labor court that his employment contract still exists is if he can challenge the validity of his resignation. This presupposes, however, that the employer made an illegal threat or fraudulently deceived him during the hearing so that he would resign. If instead the hearing was properly conducted, i.e. the employer gave a full account of its suspicions as well as any exonerating circumstances and did not exert undue pressure on the employee, the employee's challenge will as a rule fail. If the employer wishes to safeguard itself against the risk of a challenge to the deed of release, it would be advisable for it to issue in addition, by way of precaution, its own notice of termination. Since an employee has three weeks from receipt of such a notice of termination to institute proceedings for unfair dismissal, the employer can at least trigger a time limit upon expiry of which the legal certainty of one element of contractual termination (namely the employer's notice of termination) will exist.

As can be seen from the above, the path to a legally certain termination of an employment relationship can thus be a stony one even if the employee (supposedly) agrees to a deed of termination.

Dr. Frank Wilke

Lying as a reason for dismissing an employee

Headnote

If an employee pretends that he has performed work tasks that he has not in fact performed, his employer will normally be justified in dismissing him with notice. However, where the unperformed task only constitutes a part of the total work that has to be performed, and if such work only has to be performed occasionally, a dismissal without notice will as a rule be invalid (Federal Labor Court, Judgment of 9 June 2011 – 2 AZR 284/10).

Facts

The plaintiff was a clerk employed by the county authority. His duties included annually checking the roadworthiness of the emergency vehicles used by the German Red Cross. He was required to personally inspect the vehicles and prepare a report. However, in 2004 he did not inspect a single vehicle and in 2005 he only inspected a few vehicles. Instead he left the inspections to the respective Red Cross branch. For these purposes, he sent the branches reports which he had already filled out and stamped in advance. The reports confirmed that the vehicles were adequately equipped and that they were roadworthy and in good condition. The forms had already been signed in blank by him. The employees at the Red Cross branches simply had to complete the forms and return them to the plaintiff. Once the county authority became aware of this practice, it issued a notice of termination for cause and, as a precaution, a notice of termination without cause.

Decision

The Federal Labor Court held that the termination for cause was invalid but that the termination without cause was valid (Judgment of 9 June 2011 – 2 AZR 284/10). The court made it clear that a „lie at work“ was not in and of itself a reason for dismissal. It conceded that pretending to perform a task and the associated lie to the employer could in specific circumstances constitute good cause justifying a termination for cause. However, in its view, it would be necessary to draw a distinction on the basis of whether the plaintiff had deceived his employer in respect of essential tasks or in respect of ancillary tasks that „only“ had to be performed occasionally. Since the plaintiff had properly performed his other work tasks, his employer could be expected to employ him for the duration of the notice period and entrust him with his main tasks. Thus the plaintiff‘s conduct did not justify a termination for cause.

On the other hand, his systematic deception of his employer in respect of the work not actually performed justified its termination of his employment, without cause, with notice.

Comment

The Federal Labor Court‘s decision shows clearly that an employee may not be dismissed for one transgression, but that what has to be considered is whether the employer can be reasonably expected to continue to employ him – at least for the duration of his notice period – in spite of his breach of duty. The Federal Labor Court‘s judgment does indeed state unambiguously that the plaintiff‘s conduct did not on any account have to be tolerated by the employer. However, since the plaintiff had misled his employer only in respect of one part of his work, the employer could reasonably be expected to continue to employ him

until the expiry of the notice period. In the court's view the employer should simply have him perform his other work up to such date.

This result may be justified in terms of legal methodology, but it is nonetheless extremely disconcerting in view of the considerable loss of trust resulting from a systematic deception. According to this decision, employees who systematically deceive their employers – even in an area involving safety as was the case here – cannot be terminated for cause as long as they have fulfilled their other tasks properly. In light of this employers should under no circumstances neglect to issue, as a matter of precaution, a notice of termination without cause at the same time as they issue a notice of termination for cause. At least the Federal Labor Court did not question the validity of a notice of termination without cause in the present case.

Dr. Frank Wilke

Thus the plaintiff's conduct did not justify a termination for cause.

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