GÖRG

# Newsletter
# Labor and Employment

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## PREFACE

Our second Newsletter in the year 2011 starts off with a review of new judgments of the labor courts concerning employee dress. Many companies have rules that govern what employees are allowed to wear while at work, and such dress codes are not always without their problems and not infrequently meet with resistance, especially from works councils.

This issue also covers a long-awaited decision of the Federal Labor Court on employment contracts that are limited to a definite term for no objective reason. In the past, a new employee could be hired on a fixed-term basis for a maximum of up to two years if that employee had never worked for the same employer "previously." This blanket provision has been a nuisance for both employers and employees since candidates have in the past been denied fixed-term employment because they had "previously" – for example, 10 years earlier – already worked for the same employer as students. The Federal Labor Court has now ruled that the word "previously" is to be taken to mean within the preceding "three years."

Yet a further judgment of the Federal Labor Court addresses the issue of service of notices of dismissal, which we take as an occasion to review the various problems involved in the service of such notices in general. Finally, we discuss a judgment of the Federal Labor Court concerning the dismissal of an employee who has received a long prison sentence.

# Update on Employee Dress Policy

Company dress codes are very important in many industries and, frequently, equally problematic. What initially sounds like an issue involving minor rules governing everyday activity can lead to disputes before the labor courts between employers and employees. Employers may generally adopt guidelines governing employee dress and appearance during working hours by virtue of their right to issue instructions. However, the latitude enjoyed by employers in such cases is frequently limited by the rights of employees. The relevant issues involved here include the right of works councils to be consulted under legislation governing co-determination as well as legislation intended to protect employees against discrimination and safeguard their right of personality.

This is illustrated once again by a case recently decided by the Cologne Higher Labor Court (Cologne Higher Labor Court, Order of 18 August 2010 – 3 TaBV 15/10). This case involved an employer who is responsible for passenger security checks at an airport. In order to ensure that employees present a uniform appearance to the public, the company issued, without consulting its works council, “instructions” that stipulated, among other things, that employees had to appear for work in their uniforms and wear official identification at chest height. The court found that section 87(1) no. 1 of the Works Constitution Act (Betriebsverfassungsgesetz – BetrVG) generally gave the works council the right to be consulted in connection with company regulations governing employee dress. The court ruled that such instructions are invalid if an employer fails to obtain the approval of the works council in advance.

The parties also disagreed as to the validity of a dress code contained in a company-wide works agreement that regulated, among other things, underwear worn under the company uniform, fingernail color and length in the case of female employees and the grooming, facial hair and make-up of male employees. The Higher Labor Court ruled that the parties to a workplace agreement had a duty to respect the right of personality of employees at all times. For that reason, only such workplace rules are permissible as do not unreasonably infringe this right. Applying these principles, the court found that parts of the dress code at issue were unreasonable and therefore invalid. This was the case, for example, of a rule governing the color of the fingernails of female employees. On the other hand, the court did find a rule appropriate that limited the length of fingernails to protect passengers during security checks. This clearly shows the necessity for ensuring that any rules governing the appearance of employees can also be objectively justified.

In addition to the various aspects of the right of personality involved, it is also important to address the possibility of violation of anti-discrimination legislation when drafting a dress code. Rules that are not applied consistently, for example, because they concern only men or women, are permissible only if sufficient reason exists on the basis of objective operational considerations (see section 8(1) of the General Equal Treatment Act (Allgemeines Gleichbehandlungsgesetz – AGG)). In the case mentioned above, for example, the court found that rules that govern the hair color of men or prohibit men from wearing artificial hair were invalid. The court reasoned that this would constitute (in addition to unreasonable interference with the right of personality) gender discrimination against male employees. As a result, the court found this rule to be in violation of section 7(1) of the General Equal Treatment Act. On the very same grounds, the Cologne Labor Court (judgment of 5 April 2001 - 12 Ca 8659/10) also found invalid a company rule that required only male cockpit personnel to wear their pilot’s hats in the public airport areas. The court found that this also constitutes gender discrimination since there is no obvious reason why this rule should apply only to men.

The cases addressed above show that employers would be well advised to take into account various important issues when considering the introduction of rules governing the appearance of employees. These aspects can be ignored only at the risk of judicial disputes with a company's employees or works council. It is therefore recommended that such aspects be closely examined before introducing such rules.

Jens Völksen

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# Fixed-Term Employment in the Absence of an Objective Reason and Previous Employment Pursuant to Section 14(2) of the Act on Part-Time Employment and Fixed-Term Contracts

## Headnote

In the absence of an objective reason for a definite term, fixed-term contracts for a total period of up to two years are now legal unless the employee in question has worked for the employer in the preceding three years.

## Facts

The claimant started to study to become a teacher in the '90s. While she was a student, she worked for the Free State of Saxony – the employer in this case – for a total of 50 hours between 1 November 1999 and 31 January 2000, and she then applied to the Free State of Saxony for a teaching position after she completed her studies. Her application was accepted, and she was employed as a teacher from 1 August 2006 to 31 July 2008. She was expressly employed for a fixed term, and no reason was provided for this qualification (section 14(2) of the Act on Part-Time Employment and Fixed-Term Contracts). She then contested termination of her employment, relying on the fact that the third sentence of section 14(2) of the Act on Part-Time Employment and Fixed-Term Contracts prohibits employment for a definite term under such circumstances. According to the wording of this legislation, a fixed-term contract is invalid in the absence of an objective reason in the case of candidates who have already worked for the same employer previously.

## Decision

The Federal Labor Court dismissed the action in the final instance (Federal Labor Court, judgment of 6 April 2011, 7 AZR 716/09). The court rendered a decision that runs counter to the unambiguous wording of the second sentence of section 14(2) of the Act on Part-Time Employment and Fixed-Term Contracts. According to this decision, the term "previously" is not to be constructed to mean "in the entire past," but rather as meaning within the past three years. The court argued that to construct the provision prohibiting employment of previous employees for a fixed term differently would defeat the intent and purpose of this law. The reason for this is that the purpose of the Act on Part-Time Employment and Fixed-Term Contracts enacted in 2001 was to prevent abusive use of successive fixed-term employment contracts. In addition, the court reasoned that the idea behind employment for a fixed term was to enable certain groups of individuals to transition to the workforce. Excessively restrictive construction of the provision prohibiting fixed-term employment of former employees would thus, according to the court, defeat the purpose of the legislation. The court elaborated that there was no longer any danger of abuse of the use of fixed-term employment contracts after a period of three years. Furthermore, literal construction would unreasonably restrict the freedom of contract of the parties to employment contracts and, as a result, the freedom to choose freely one's vocation. After all employees entering the labor market would be at a disadvantage if they were to be excluded from consideration for a position – due to fears that a fixed term might prove illegal – simply because they had once worked for the same employer in the past. The court concluded that there was some question as to whether prohibition of employment of former employees for a fixed term would be constitutional if it were to turn out to be a barrier to employment.

## Comment

The decision is likely to be very much welcomed by both employees and employers, all the more so since it came as a surprise. The prohibition of employment of employees for a definite term seemed to be carved in stone. When the legislation was enacted, a few scholarly authors did plead the necessity of allowing the possibility of employment for a definite term. However, due to the clear wording of the law, this opinion did not prevail. More recently, strict construction of the prohibition of employment of previous employees for a fixed term has been found to constitute an unreasonable barrier to employment, and instances have also been reported in

the media. For example, unemployed persons have been denied employment for a fixed term in the public sector. This was grounded in concern that fixed-term employment was not possible since the applicants had already worked for the same employer in the past. Applicants who find themselves in this situation will not be confronted with this problem in the future. In addition, employers will no longer have to fear that fixed-term employment contracts may be illegal because they may have "overlooked" a candidate's previous employment.

Jens Völksen

# When does service of notice of dismissal occur?

## Headnote

When spouses live together in a joint household and each of them is for that reason generally considered authorized to receive notices on behalf of the other, service will regularly be considered valid if made to the addressee's spouse outside the shared domicile (Federal Labor Court 9 June 2011 – 6 AZR 687/09).

## Facts

On 31 January 2008, the employer in the case at hand, whose business involves the sale of pallets, served proper notice of dismissal on a managerial assistant with effect as of 29 February 2008. The dismissal resulted from a disagreement between the parties that ended with the employee leaving her workplace on 31 January 2008. Her employer, who operates a small enterprise and is therefore not subject to the Employment Protection Act (Kündigungsschutzgesetz – KSchG), then decided to dismiss her the same day. Since it no longer seemed possible to reach his employee that day, he had the notice of dismissal hand delivered to the employee's husband by another employee. The other employee knew where the husband worked, namely, for a DIY retail store. The employee then went to this DIY outlet and gave the husband the notice of dismissal in an envelope at his place of work. The employee subsequently claimed that her husband did not give her the notice of dismissal on 31 January 2008 and that she did not receive it until 1 February 2008, which in her opinion meant her employment contract could not be terminated prior to 31 March 2008.

The employer, on the other hand, rebutted that service of the employee's husband was valid so that the employee did in effect constructively receive notice at the end of January 2008. The employee petitioned the responsible labor court to rule that her employment relationship was not terminated until 31 March 2008. Although the Lower Labor Court granted her motion, the Cologne Higher Labor Court reversed that decision.

## Decision

The Federal Labor Court denied the appeal of the plaintiff and upheld the judgment of the Higher Labor Court. The Federal Labor Court first of all established that the husband of the employee to be dismissed did receive the notice of dismissal on the afternoon of 31 January 2008 and that that constituted "normal" delivery since the notice of dismissal was hand delivered to the employee's husband by another employee of the employer. The court also stated that it was important that the employer be able to use a messenger if this is the only way to comply with a period of notice or if the employer wants to be able to provide proof of service of notice and the time of service. The Federal Labor Court also rejected the employee's argument to the effect that her husband was not authorized, either explicitly or tacitly, to receive notices intended for her and that receipt by her husband did not constitute receipt by her. The Federal Labor Court refuted this argument first of all by making reference to existing case law according to which each of the spouses living in a joint household is considered authorized to receive notices on behalf of the respective other spouse. This is considered to be the case since common experience shows that it can be regularly assumed that a notice intended for one spouse will be received if delivered to the addressee's spouse such that the intended recipient will be able to take cognizance of the notice. The Federal Labor Court also extended the scope of this legal doctrine to include cases in which a notice of dismissal is served on a spouse outside their shared dwelling. According to the court, the employee did to be sure not constructively receive the notice of dismissal as soon as it was served on her husband, but only when it could be assumed, under normal circumstances and taking into account prevailing opinion, that her husband would give her the notice of dismissal.

In the present case, the Federal Labor Court ruled that one would assume, under normal circumstances, that the employee's spouse would give his wife the notice of

dismissal after work on the same day. Since the notice of dismissal was therefore delivered to her on 31 January 2008, the employment relationship was also properly terminated as of 29 February 2008.

## Comment

Although the financial ramifications of an adverse ruling would not have been particularly onerous for the employer in the present case since the employment relationship would have been terminated a month later, namely, as of 31 March 2008, timely delivery of a notice of dismissal can be of significant financial importance. If, for example, an employer wants to give an employee notice on the final day of the sixth month of employment, and as a result immediately prior to the day on which the provisions of the Employment Protection Act would apply, the notice of dismissal absolutely must be received by the employee by this day; if it is received only one day later, the provisions of the Employment Protection Act will apply and the dismissal may be invalid due to the absence of a reason for dismissal. In the case of a dismissal with a notice of six months effective as of the end of the first six months of the year or the end of the year, receipt of delivery of the notice of dismissal is also very important. The implications can be even more dramatic in the case of employment contracts with managing directors and executive officers that, for example, call for an extension of three or five years unless terminated by one of the parties with six months' notice effective as of the end of the initial term of the agreement. If notice of termination is not received by the employer or the employee on a timely basis in such cases, employment may be inadvertently extended by a period of three or five years and costs incurred in the six- or even seven-figure region.

Especially when the day of receipt of notice of dismissal or termination is important – which means in particular in the case of dismissal or termination with effect as of the end of a given month, all precautions must be taken to ensure proper service of notice. In the ideal case, a notice of dismissal will be prepared by the responsible individuals on the employer side and the original put into an envelope in the presence of a messenger who will then hand deliver the notice to the employee to be dismissed or put the notice in the latter's mailbox. The messenger should then make a note of the delivery of the notice of dismissal ("mental note") and possibly even take a photograph of the place of delivery (for example, door or mailbox) in order to eliminate all doubt as to whether the messenger delivered the notice to the right address. Notice of dismissal should definitely not be sent by mail since it is not possible to obtain proof of delivery. In such cases, an employee can simply claim to have never received a notice of dismissal. Employees have even been known to claim that they did to be sure receive an envelope, but that it was empty. In order to preclude this possibility, it is advisable to adopt the procedure described above, i.e., to put the notice in an envelope in the presence of a witness. It is not advisable to send a notice of dismissal by mail if the letter deliverer will only leave a note in the mailbox of the employee to be dismissed to the effect that the letter can be collected at a certain location if the employee should happen not to be at home. Constructive delivery will not take place until the letter is collected. On the other hand, it is advisable to use a service that includes preparation of a record of delivery by the letter deliverer that can be obtained by the employer.

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# Dismissal due to Lengthy Prison Sentences

## Headnote

A prison sentence of several years is a sufficient reason for giving notice of dismissal even if the underlying conviction has nothing to do with the employment relationship.

## Facts

The complainant had already been working for his employer as an industrial mechanic for 14 years when he was arrested in November 2006 and held for trial. The employee was not released on bail and was finally sentenced to 4 years and 7 months in prison in May 2007. In addition, a previously suspended sentence of confinement for one year and 10 months was activated. The complainant was not able to serve his sentence in an open prison. A decision in this regard was not expected until December 2008. Given this situation, the claimant's position within the company was permanently filled. The employer then terminated the employment relationship in February 2008. The Higher Labor Court upheld the action filed to seek protection against dismissal. The employer then appealed this decision.

## Decision

The Federal Labor Court (Federal Labor Court, judgment of 24 March 2001, 2 AZR 790/09) overruled the original decision, finding that dismissal for reasons lying in the person of the claimant was legally valid. The court found that it would be unreasonable to expect the employer to keep the position unfilled or to simply make do with a temporary substitute, for it was necessary to take into account the fact that the convicted employee was himself responsible for the circumstances causing his absence, which is not true in cases involving dismissal due to illness. In view of this situation, the employer could not be expected to go to any greater trouble for the claimant or accept greater inconvenience. In any case, the court was of the opinion that an employment relationship may be terminated for reasons lying in the person of the claimant in the case of incarceration of more than two years.

## Comment

This judgment can only be welcomed in every respect. Nevertheless, this outcome is more surprising than it might initially appear. After all, the court of appeal did previously grant the complainant's motion. The Higher Labor Court most likely based its decision on different grounds, namely prospects for employment in the future and the reasonableness of the burden imposed upon the employer. As a result, dismissal is not necessarily an option in the case of shorter sentences, in any case not unless the conviction is related to the employment. It is also necessary to take into account that an individual serving a prison sentence cannot claim payment of wages because the employer refuses to accept his services. At best, expenses are incurred by the employer due to reorganization. The decision of the Federal Labor Court has shown that the interest of an employer in dismissal will regularly prevail over the interest of an employee in continuation of employment. This will be all the more so the case if the criminal offence is related to employment (e.g., driving while intoxicated on the part of a truck driver or fraud by a bookkeeping clerk).

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