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PREFACE

Our second Newsletter for 2012 starts off by taking up a decision of the Federal Court of Justice (Bundesgerichtshof) on the application of the General Equal Treatment Act (Allgemeines Gleichbehandlungsgesetz – AGG) to the managing directors of private limited companies. The Federal Court of Justice affirmed the applicability of the Act and granted damages and compensation for pain and suffering to a managing director whose contract was not renewed due to his age. In addition, we discuss the prerequisites for a dismissal for suspected misconduct which, unlike a dismissal for misconduct, always require the prior hearing of the employee.

Thereafter, we concern ourselves with a judgment of the European Court of Justice on successive fixed-term employment contracts – which remain basically permissible – and a judgment of the Federal Labor Court (Bundesarbeitsgericht) on the special protection of severely disabled persons against dismissal. Finally, we examine a decision of the Federal Labor Court on the issue of whether a Christmas bonus has to be paid to an employee whose employment has already been terminated, which was decided in a manner pleasing to employees.

Discrimination against the managing director of a private limited company on account of his age

Headnote

The scope of protection of the General Equal Treatment Act covers a managing director of a private limited company whose employment is not continued after his service contract expires. If a service contract for a fixed-term is not extended due to the managing director's age, he may claim damages and appropriate pecuniary compensation (Federal Court of Justice, judgment of 23 April 2012 – II ZR 163/10).

Facts

Until 31 August 2009, the 62-year-old plaintiff was the managing director of a private limited company which operated various clinics. The private limited company had a supervisory board which was, among other things, responsible for the conclusion of contracts of service for managing directors. The managing director's service contract was for a fixed term of 5 years. It contained a provision requiring the parties to give notice at least 12 months prior to its expiry as to whether they wished to extend its term. The private limited company's supervisory board decided in October 2008 that it would not extend the plaintiff's contract after 31 August 2009. Instead it appointed a 41-year-old competitor as managing director with effect from 1 September 2009.

Prior to that time the chairman of the supervisory board had made a statement to the press that the board would not be continuing the plaintiff's employment due to his age. He even justified his approach by declaring that the board had chosen a candidate who could "keep the company on track over the long term" due to the "upheavals in the health sector". The plaintiff thereupon alleged that this amounted to a violation of the General Equal Treatment Act and demanded damages and appropriate compensation. The Cologne Regional Court (Landgericht) dismissed the action, while the Cologne Higher Regional Court (Oberlandesgericht) upheld it.

Decision

The Federal Court of Justice affirmed the decision of the Cologne Higher Regional Court, but nevertheless referred the matter back to it so that it could resolve the issue of damages which it had previously calculated erroneously. The Second Civil Senate, which had jurisdiction to hear the case, found initially that section 6(3) of the General Equal Treatment Act applied to the managing director of a private limited company so that directors and officers were also protected against discrimination. In accordance with the evidentiary rule in section 22 of the General Equal Treatment Act, the managing director only needed to submit circumstantial evidence showing discrimination due to age. Furthermore, the court held that where such circumstantial evidence had been submitted, it was up to the private limited company to refute the allegation of discrimination due to age or to present evidence of and prove that the unequal treatment due to age was permissible (section 10 of the General Equal Treatment Act). Since the private limited company was unable to do either of the above in the case before the court, the action was allowed on the merits.

Comment

This case is the first decision handed down by the Federal Court of Justice on the application of the General Equal Treatment Act to managing directors. In the end, the judgment is not surprising: after all section 6(3) of the General Equal Treatment Act clearly provides that the protection of the Act extends to every director and officer (thus including members of the management board of a public limited company). It can be assumed that this

includes directors who are shareholders. The defendant-company also made things easy for the Federal Court of Justice in the present case. The chairman of the private limited company's supervisory board had served the press the grounds for discrimination on a silver tray and had stated that the managing director's age was the reason why his service contract had not being extended. This was all that the managing director needed to submit in order to force the company to present and prove its case. It was unable to rebut the accusation that the failure to extend the managing director's contract was based on reasons connected with his age. We can assume that the case would have had a completely different outcome had the chairman of the supervisory board not made the remark. Even after this judgment of the Federal Court of Justice, it will still be possible not to extend the service contracts of older directors and officers. The body responsible for the decision whether to extend a service contract (the shareholders' meeting or the supervisory board) should simply ensure that it does not give as its reason for not extending the service contract one of the forms of discrimination listed in the General Equal Treatment Act (e.g. age, gender, origin etc.). The Federal Court of Justice's decision is also certain to be of significance since directors and officers (particularly female ones) are more likely to be aware of the General Equal Treatment Act in the future.

Dr. Christoph Müller

Formal requirements of an effective dismissal for suspected misconduct

Headnote

A valid dismissal for suspected misconduct presupposes that an employee has been given an opportunity to respond to all of the suspicions raised against him. If an employer relies on grounds of suspicion in litigation in respect of which the employee was not heard, this will in and of itself be reason for viewing the dismissal for suspected misconduct as invalid (Cologne Higher Labor Court, judgment of 09 November 2011, - 9 Sa 680/11 -).

Facts

The employee was employed as a bank teller. In December 2010, during a break she visited some colleagues in the area where the counters were located for a "chat". Both tills were difficult to see. When the amounts in the till were counted at the time of the shift change, it became apparent that a large sum of money was missing. During bank internal investigations, the plaintiff came under suspicion. She was accused of having taken money from her colleague's till while things were quiet. In addition, it transpired during the investigations that larger sums of money had inexplicably disappeared from the tills at the branch during the previous months. In any case, in addition to other bank tellers the plaintiff had always been present on such occasions.

During the course of investigations stretching over numerous weeks, the plaintiff was questioned in connection with the suspected theft. However, she was only questioned about the occurrence in December 2010, not, however, in respect of the other unexplained shortfalls during the previous months. After interviewing other witnesses, the employer finally dismissed her for suspected misconduct.

Decision

The Cologne High Labor Court allowed the action for unfair dismissal. On the one hand, the employer had exceeded the two-week time limit for summary dismissal due to its delayed investigations (see section 626(2) of the German Civil Code (Bürgerliches Gesetzbuch - BGB) and, on the other hand, the dismissal was invalid for procedural reasons since the employee had not been properly heard. She should also have been given an opportunity to comment on the other incidents involving the disappearance of money.

Comment

This decision shows once again what kind of procedural pitfalls exist in relation to the issue of a dismissal notice. A prior hearing of the employee is an integral part of every dismissal for suspected misconduct. Strict standards apply to dismissal of such kind. The accused employee must be given an opportunity to rebut the grounds of suspicion and to bring evidence to exonerate himself. The hearing must relate to a specific set of facts. The employer may not simply confront the employee with an assessment of the situation which is unsubstantiated. Information which has already been obtained may not be kept from him. The employee must be given an opportunity to contest facts that occurred within a limited time and geographic framework or to shed light on events that are unclear for the employer.

However, what is pleasing from the perspective of employers is that the Cologne Higher Court found on the basis of the Federal Labor Court's case law (judgment of 12 May 2010, – 2 AZR 587/08 –) that a dismissal for suspected misconduct was in principle admissible in spite of the high procedural requirements. There must be objective evidence giving rise to a strong suspicion that there has

been a serious breach of duty (e.g. commission of a criminal offense such as accepting bribes in the course of business or breach of a fiduciary duty or theft).

Checklist

In order to ensure that a dismissal for suspected misconduct is valid, it is essential to plan the hearing procedure carefully. It is necessary to comply with a tight timetable due to the two-week time limit set by section 626(2) of the German Civil Code. The checklist below is intended to provide an overview of the main steps:

Step 1
Investigation of the facts – First of all, it is necessary for the employer to ensure that the facts are clarified as completely as possible. It is important to consider all of the evidence and to evaluate both incriminating as well as exonerating circumstances. At the end of investigations, the employer has to decide whether there are still strong reasons to suspect the employee of misconduct (dismissal for suspected misconduct).

Step 2
Preparation of the meeting for a hearing – The meeting for a hearing should be prepared with the utmost of care; it should be held within a week of the conclusion of the internal investigations (except if holidays or illness prevent this). The list of persons who will be attending the meeting for a hearing should be finalized as early as possible. If the employer has a works council, a member of the works council should be present.

Step 3
Letter inviting the employee to the meeting for a hearing – The employee must be given timely notice of the meeting at which he will be heard. It is advisable to have the invitation letter delivered to the employee personally (and to obtain confirmation of receipt from him). It would be a fatal error to lure him to a meeting on a pretext. Accordingly, the invitation letter should explain the purpose of the meeting. It must be clear to the employee that its aim is to clarify a certain set of facts and that it is in his own interests to attend. At the same time, he should be made aware that he could be dismissed. There should be at least half a working day or a night between the invitation and the meeting (except where there is a serious risk of collusion).

Step 4
Meeting for a hearing – We have already discussed the details of the content and the purpose of a meeting for a hearing above. It is important that the meeting is conducted in an objective fashion. It should be open-ended as to its outcome and not show a tendency to apportion blame. The employee must be given adequate opportunity to respond to the accusations, while the employer must consider any statements that would exonerate the employee. The employer must reveal all of its information. The individual questions and answers should be recorded and the minutes of the meeting should be prepared quickly. The employee should be sent a copy of the minutes (e.g. by e-mail).

Step 5
Conclusion of the meeting for a hearing – If it was not possible to dispel the suspicion against the employee, the employer should inform him that it intends to dismiss him. In this context, he should be given a final opportunity to set out his case (in writing) and be set a time limit of 1 to 2 days for doing so. Depending on the course that the meeting has taken, it may be advantageous to discuss the possibility of terminating the employment relationship by mutual agreement (severance agreement). However, the employer may not pressure the employee into signing

a severance agreement since this could result in the agreement being later challenged on the grounds that the employee was coerced into signing it. The employee should be able to "sleep on it".

Step 6
Final Evaluation – After the meeting for a hearing or after any supplemental information is received, the facts should be reappraised and evaluated as quickly as possible. Depending on the complexity of the case, this should not take more than one to two days. Thereafter, the works council must be consulted within a two-week time limit (assuming there is a works council). In addition, if there are any exonerating circumstances, these must not be kept from the works council during consultations (in respect of a termination with or without cause for misconduct or for suspected misconduct). The works council must be informed about the employee's statement. It is advisable to provide the works council with a copy of the minutes. Once again we need to warn against presenting the situation one-sidedly in a "favorable" light for the employer.

It is not uncommon for the parties to negotiate a severance agreement during the two-week deadline. These kinds of negotiations do not release the employer from its duty to adhere to the time limit. If negotiations break down, steps should be taken to ensure that the prerequisites for a summary dismissal have been satisfied.

There is certainly no standard solution. Undoubtedly, a procedure that deviates from the checklist (i.e. from the ideal solution) will be justified in individual cases due to the potential complexity of the factual circumstances. The hearing procedure should be planned carefully since it will in any event be of considerable importance for subsequent unfair dismissal proceedings. It would be advisable to seek legal advice, at the latest, when embarking on step 2.

Jens Völksen

Successive fixed-term employment contracts still permissible

Headnote

Fixed-term employment contracts may also be renewed to permit the replacement of employees on leave even if that need proves to be recurrent or even permanent. Whether or not such a renewal is acceptable or constitutes an abusive practice must be determined on the basis of an assessment of all of the circumstances involved in the individual case

Facts

The plaintiff had been employed in the public sector for 11 years under a total of 13 separate fixed-term employment contracts. Her employer consistently justified each of these employment contracts on the basis of a need to replace an employee on temporary leave (for example, due to parental leave) pursuant to no. 3 of the second sentence of section 14(1) of the Act on Part-Time Employment and Fixed-Term Contracts (Teilzeit und Befristungsgesetz – TzBfG). The plaintiff ultimately contested the validity of the (fixed-term) employment relationship through three courts. The Federal Labor Court, which ultimately heard the case, declined to render a conclusive decision in view of the existence of the relevant provisions of European law and referred the matter to the European Court of Justice (ECJ).

Decision

The ECJ did not address the underlying factual background in detail; in its judgment of 26 January 2012 (C-586/10-"Kücük"), the court did, however, rule that "fixed-term employment contracts" are generally permissible. The decision, which is available in the form of a press release, states that a permanent need for temporary replacements may constitute a legitimate reason for a series of fixed-term employment contracts and that a temporary need for replacement personnel constitutes an objective reason within the meaning of section 5(1)(a) of Council Directive 1999/70/EC. The court found that the provisions of German law suffice to prevent abusive use of fixed-term employment contracts and that a series of fixed-term contracts based on a recurrent need for replacement personnel was not in itself illegal. The ECJ emphasized that an employer is under no obligation to create a permanent position of indefinite duration even in the case of a foreseeable need for replacement personnel over the long term, reasoning that such an obligation would exceed the scope of what Directive 1999/70/EC was intended to accomplish.

The ECJ did, however, also emphasize that the use of successive fixed-term employment contracts is subject to scrutiny to prevent abuse by employers and that the national courts must in each case consider all of the circumstances involved, including the number and total duration of fixed-term employment contracts concluded with the same employer in the past.

Comment

The decision of the ECJ adds nothing new to the underlying issue. Viewed from the perspective of employers, the legal certainty that now exists is, however, certainly welcome since employers can now rely on the fact that successive fixed-term employment contracts are still permissible if justified by objective reasons, in particular when replacement personnel are needed. As far as the standard for abusive use of successive fixed-term employment agreements is concerned, it is necessary to consider all temporary contracts concluded with an employee in the past. Previously, German law consistently called for a review of only the most recent contract. However, the German courts have up to now also refused to recognize

the existence of an objective reason if the reason advanced for fixed-term employment was obviously only a pretext. In the case at issue, the Federal Labor Court will now have to determine whether the need for replacement personnel can qualify as an objective reason for twelve successive renewals of a temporary employment contract within a period of eleven years or whether this constitutes abusive practice.

Jens Völksen

Fixed-term employment contracts may also be renewed to permit the replacement of employees on leave even if that need proves to be recurrent or even permanent.

Loss of special protection against dismissal due to failure to respond truthfully to questions pertaining to disability

Headnote

Once an employee has been with a company for at least six months, the employer may require that the employee disclose information regarding the existence of any severe disability or application for recognition of such disability. Employers may in particular require such information pertaining to the existence of a severe disability in cases in which dismissal is contemplated. An employee who untruthfully denies the existence of such a severe disability may not then invoke a right to special protection against dismissal by virtue of such disability in an ensuing unfair dismissal action (Federal Labor Court, judgment of 16 February 2012 – 6 AZR 553/10).

Facts

An employer who was contemplating implementation of measures to downscale his workforce had all of his employees complete questionnaires that included questions as to whether they were severely disabled, qualified as such or had applied for such status. The plaintiff, who was in fact severely disabled, answered the relevant questions with "no". After selecting the redundant employees on the basis of the social criteria prescribed by law, the employer then served notice of dismissal upon the employee despite the latter's disability, the existence of which was not obvious to the employer, without consulting the Integration Office. The plaintiff based his claim for protection against dismissal essentially on the fact that he qualified for special protection against dismissal because of a severe disability, which meant that the dismissal was not valid without the prior approval of the Integration Office.

Decision

The Federal Labor Court dismissed the action for protection against dismissal. According to the court, the plaintiff could not rely upon special protection against dismissal by virtue of severe disability since he had failed to respond truthfully to the employer's question as to the existence of any disability, thereby reinforcing the employer's erroneous assumption to the effect that it was not necessary to consult the Integration Office prior to serving notice of dismissal. The court also found that the employer had a right to enquire about the existence of a severe disability and was therefore entitled to a truthful response. In view of the contemplated dismissal, the employer had a legitimate interest in a truthful response to his question. The employer required the information requested to comply with his legal obligations to take into consideration the existence of any

relevant disabilities in connection with the application of social criteria to choose candidates for dismissal and to initiate the requisite approval process with the Integration Office.

The Federal Labor Court rightly pointed out at the same time that a severe disability or equivalent status will regularly entail an extensive series of obligations on the part of an employer once a trial period of six months has expired. Once that period elapses, an employer will therefore regularly have a legitimate interest in knowing whether any of his employees is severely disabled or has equivalent status. An employer may therefore in any case ask employees whether they are severely disabled or have equivalent status if such information is required to comply with the law, which means that questions as to the existence of a severe disability or equivalent status are therefore permissible not only when dismissal is contemplated. Further examples of situations cited by the Federal Labor Court that justify such questions arise in connection with an employer's duties to provide employment suitable for the disabled, to pay a compensatory tax for failure to employ disabled individuals or to grant such employees additional leave. An employer will also regularly have the right to ask employees whether they qualify for treatment as disabled employees in order to fulfill these duties.

Comment

Employees with severe disabilities or equivalent status enjoy special protection against dismissal regardless of whether they have informed their employers accordingly or not. If an employee invokes the right to special protection against dismissal within three weeks after receipt of notification of dismissal from his employer, usually in connection with an action to claim protection against dismissal, the dismissal will be invalid unless approved by the Integration Office. Approval by the Integration Office after the fact is not possible, which means defective termination is not amenable to remedy. The employer's only recourse is to initiate proceedings to obtain approval after receipt of notification from the employee in order to serve the employee with a notice of dismissal a second time after completion of such proceedings. An employee who has failed to disclose the existence of a severe disability to his employer can thus prolong employment by first letting his employer serve an initial notice of termination in vain.

The Federal Labor Court's decision is encouraging since it now makes it clear that an employer may enquire about the potential existence of special protection against dismissal due to severe disability or equivalent status prior to issuance of notices of dismissal. Employers will therefore be well advised to ask personnel about the existence of any severe disabilities or equivalent status once they have been employed for six months in order to obtain sufficiently reliable information. In the event downsizing should then become necessary, such data should, however, be "updated" beforehand. This will ensure that an employee cannot conceal the existence of a recognized disability or equivalent status in order to be able to use the possibility of special protection against dismissal as an "ace up his sleeve" in the context of an action to seek protection against dismissal.

Dr. Frank Wilke

Federal Labor Court confirms validity of cut-off dates for Christmas bonuses in employment contracts

Headnote

Employers may make payment of Christmas bonuses contingent upon the existence of a valid employment contract that has not been terminated as of the time of disbursement if such bonuses do not constitute consideration for work performed (Federal Labor Court judgment of 18 January 2012, 10 AZR 667/10).

Facts

The plaintiff received notice of dismissal with effect as of 31 December 2009 from her employer on 23 November 2009. The underlying standard employment contract called for payment of a Christmas bonus, but only "if notice of termination of the employment relationship has not been served as of the time of disbursement". In this case, disbursement would normally have taken place with payment of the plaintiff's wages for the month of November. The employment contract also stipulated that the bonus was at the same time intended as a loyalty bonus. The employee argued that the provision calling for exclusion of payment of the Christmas bonus due to the preceding notice of dismissal was invalid and claimed payment of the bonus for the year 2009.

Decision

Although the lower courts did admit the action and upheld the plaintiff's right to receive payment of the Christmas bonus, the Federal Labor Court set aside the decision of the Hamm Higher Labor Court and remanded the matter for further clarification. The Federal Labor Court has for the first time stipulated that a clause calling for payment of a Christmas bonus only in the case of the continued existence of an employment relationship that neither of the parties has terminated by serving notice does not unduly disadvantage an employee and is therefore consistent with the standard contained in section 307(1) of the German Civil Code. This issue had previously been the subject of considerable controversy since the highest court had not ruled on the matter.

According to the Federal Labor Court, a clause that makes entitlement to special consideration contingent upon the existence of a non-terminated employment relationship as of a specific date is now permissible as long as such payment does not constitute consideration for services or work performed, but instead takes the form of a loyalty bonus, for such a clause would neither lack transparency, nor be disadvantageous to employees. The court ruled that this would also apply in the case of a clause calling for such a cut-off date regardless of which of the parties serves notice of termination. Payment of a bonus may therefore also be excluded if an employer serves notice of termination (for reasons not attributable to the employee). According to the court, the possibility of having the validity of a notice of dismissal reviewed provides employees with adequate protection in those cases not involving the performance of work and consideration for same. (Alternatively: provided there is no interference with the relationship between performance and consideration.) As a result, payment of a Christmas bonus that does not constitute wages or salary may be made contingent upon the existence of an employment relationship that has not been terminated as of the time of payment.

Comment

The decision of the Federal Labor Court takes into account employers' legitimate interest in limiting the payment of Christmas bonuses that are unrelated to the performance of any work or services to those employees whose employment has not been terminated as of the time of

payment. It will regularly be important in such cases to ensure that the contractual provision clearly stipulates that the respective payment is of the nature of a "loyalty bonus". It is also interesting to note that the decision of the Federal Labor Court arising from its assessment of contractual conditions calling for cut-off dates or repayment applies regardless of the reason for termination of the employment relationship or whether the reason can be attributed to the employee or the employer. The situation is different when repayment of subsidies for personal advancement is required in the case of termination of employment within a certain period following completion of the personal advancement measures since it is necessary to distinguish between different reasons for termination in order to be able to ensure that the obligation to make repayment is valid. As regards clauses calling for cut-off dates in respect of payment of special bonuses, however, the decision at issue here creates legal certainty for employers as long as the payments in question are of the nature of loyalty bonuses.

Felix Pott

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