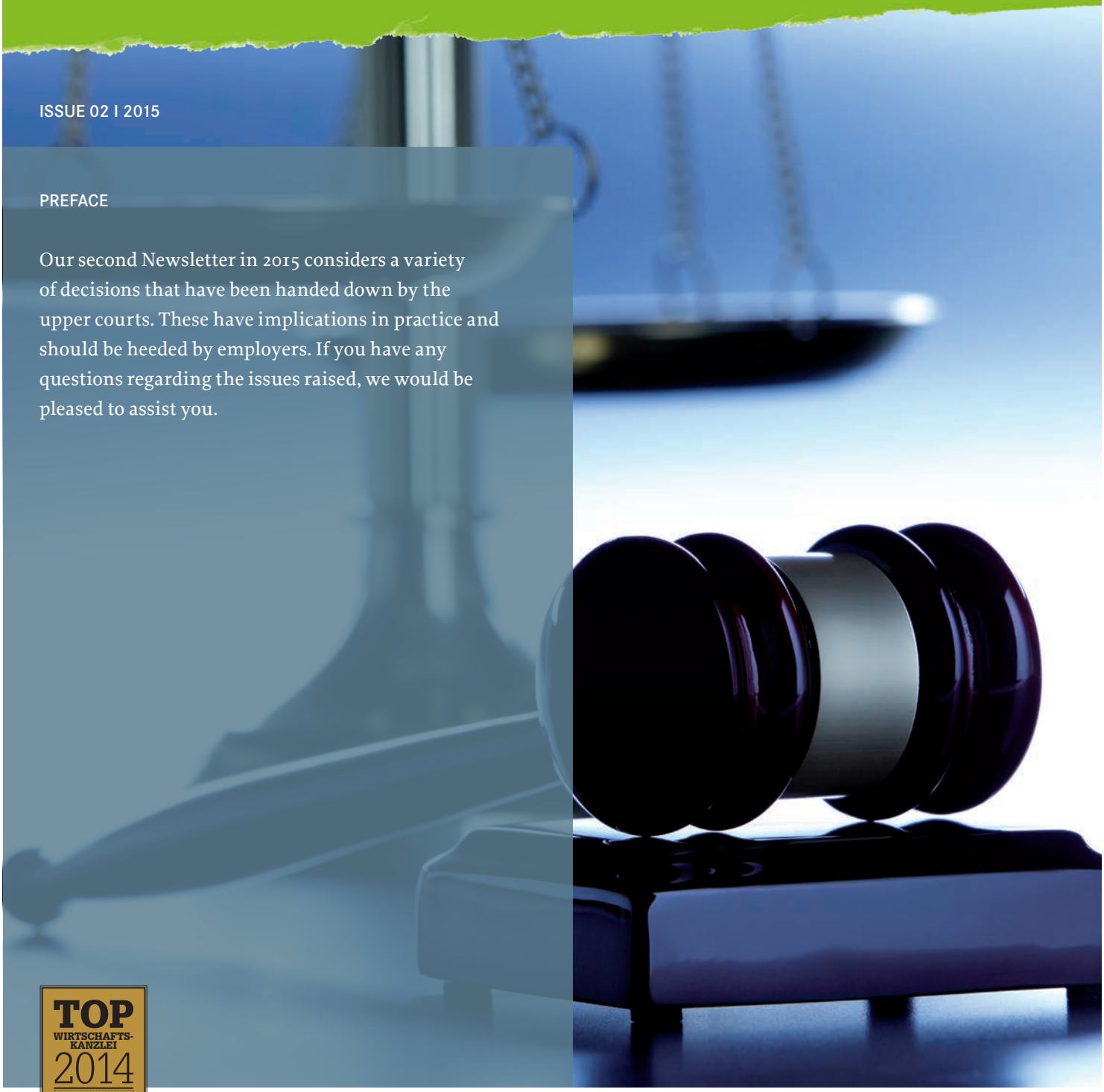
# Newsletter
# Labour Law



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## PREFACE

Our second Newsletter in 2015 considers a variety of decisions that have been handed down by the upper courts. These have implications in practice and should be heeded by employers. If you have any questions regarding the issues raised, we would be pleased to assist you.

TOP WIRTSCHAFTS-KANZLEI 2014 ARBEITSRECHT
FOCUS DEUTSCHLANDS GROSSE KANZLEIENLISTE

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# Dismissal – easier said than done ...

## Decision

The Düsseldorf Higher Labor Court ruled on the legality of the dismissal of an employee on 28 August 2014, whose employment was terminated with effect as of "the next possible date" (5 Sa 1251/13). The notice of dismissal contained neither mention of the effective date of termination of employment nor any reference to the period of notice required.

The court upheld the action for protection against dismissal brought by the employee, pointing out that a dismissal must be sufficiently specific. For example, the court ruled that a notice of dismissal must clearly indicate the date on which the employment relationship is to end. In the case at issue, the court found that this condition had not been met since the notice of dismissal mentioned neither a date for termination of employment nor was any reference made to the applicable period of notice. The present case also involved conditions for termination under a collective agreement. Due to the vagueness of the notice of dismissal, the court ruled that the dismissal was as such invalid.

## Implications for Practice

The decision of the Düsseldorf Higher Labor Court shows what pitfalls can lie in store even in the case of a relatively simple notice of dismissal. In order to ensure the validity of a notice of dismissal, it is regularly necessary either to make express mention of the date of termination of employment or refer to the applicable legal or other basis for the definition of the length of the period of notice (e. g., statutory minimum or employment contract).

The decision of the Düsseldorf Higher Labor Court conflicts with a judgment of the Federal Labour Court of 10 April 2014, and an appeal is as a result now pending before the Federal Labour Court. Regardless of its outcome, however, it is strongly recommended that the applicable period of notice or the date of termination of employment be referred to in any notice of dismissal. The following sample formulation may be used:

"This is to advise you that your employment will be terminated effective as of the expiration of the applicable period of notice prescribed by [statute/contract/collective-bargaining agreement]. According to our calculations, termination will therefore take place with effect as of [date of termination of employment]."

In the event that the date of termination of employment indicated by the employer should prove to be incorrect, such a formulation would still make it possible to calculate the intended date.

Jens Völksen

**The employment was terminated with effect as of "the next possible date".**

# Private Use of Company Car during Leave Phase of Part-Time Pre-Retirement Employment

## Decision

The Rhineland-Palatinate Higher Labor Court decided in its judgment of 12 March 2015 (Ref. 5 Sa 565/14) that an agreement covering the private use of a company car also applies during the leave phase of part-time pre-retirement employment unless the parties to the respective employment contract have agreed to a cancellation proviso or some other possibility for retraction of the benefit.

The plaintiff and the defendant had entered into a part-time pre-retirement employment agreement that called for application of what is referred to as the block model, which is based on two equally long periods. A work phase, during which the employee works full-time, is followed by a leave phase, during which the employee is released from his or her daily duties. The corresponding reduction in the employee's compensation is then spread over the entire term of the part-time pre-retirement employment agreement.

The plaintiff had been entitled to a company car for private use prior to entering into the part-time pre-retirement employment agreement. Nevertheless, the plaintiff was required to return the company car to the defendant at the end of the work phase.

The Higher Labor Court decided that the defendant had no right to deprive the plaintiff of the use of a company car after termination of the work phase. The court was of the opinion that the use of a company car constituted payment in kind and was therefore part of the compensation due the employee as long as the employee was entitled to receive such compensation.

The court reasoned that the return of the vehicle could also not be justified by arguing that the compensation due the employee was halved during the term of the part-time pre-retirement phase and that the vehicle was fully available during the work phase. According to the court, it was to be sure normal to reduce the compensation of an employee working part-time in proportion to the reduced work schedule, but the use of a company car for private purposes is a payment in kind that cannot be divided and must for that reason also be provided during the period of part-time employment. The court then concluded that since the parties had failed to agree to a cancellation proviso or some other possibility for retraction, the provision governing the use of the vehicle remained in effect until the end of the entire period covered by the part-time pre-retirement agreement.

## Implications for Practice:

A few years ago, the Eleventh Chamber of the Rhineland-Palatinate Higher Labor Court (14 April 2005, Ref. 11 Sa 745/04) issued an opinion that differed in one significant point from that of the Fifth Chamber discussed here. The Eleventh Chamber argued that the employer could satisfy the employee's right to the use of a company car by making the car fully available during the work phase and that the employee would therefore not be entitled to the use of a company car during the leave phase. The Frankfurt a. M. Labor Court also shared this view in one of the few relevant decisions on the issue of company cars during part-time pre-retirement employment (2 June 2003, Ref. 15 Ca 1957/03).

Due to the stand of the Frankfurt a. M. Labor Court, the current decision of the Rhineland-Palatinate Higher Labor Court makes it even more important to include cancellation provisos in agreements covering the use of company cars by employees. In the event no such provision is made for termination of the use of company vehicles in the original contract, the omission should be rectified in the agreement governing part-time pre-retirement employment.

Hagen Strippelmann

The current decision makes it even more important to include cancellation provisos in agreements covering the use of company cars by employees.

# Which period of notice is more advantageous?

## Decision

In a judgment dated 29 January 2015, the Federal Labor Court addressed the question as to whether the period of notice for dismissal specified in employment contracts can take precedence over the statutory minimum. In the case at issue, an employment contract called for a period of notice of six months with effect as of mid-year or the end of the year, but the statutory period of notice based on the length of service was seven months effective as of the end of any month since the employee involved had been with the company for well over 20 years. The Federal Labor Court ruled that a contractual period of notice can take precedence over the statutory minimum only if it is longer than the minimum prescribed by law (Federal Labour Court, judgment of 19 Jan. 2015, Ref. 2 AZR 280/14).

## Implications for Practice

Stipulation of a shorter period of notice than that prescribed by law in an employment contract will regularly be found invalid, but not a longer period. Whether the longer period of notice agreed in an employment contract is actually longer must be determined by comparison. However, such comparison should not be based on the time of notification of dismissal in a given case; instead, the abstract concept behind the general requirement must be examined to determine whether it is compatible with the statutory provisions. In the case of the present decision, it is possible to imagine a great number of different constellations that would involve contractual periods of notice that are longer than the statutory period of notice. However, the contractual period of notice was shorter than the period prescribed by law in the concrete instance. The possibility of this constellation alone suffices to make the contractual period of notice invalid. The entire contractual provision becomes invalid; "cherry-picking" to retain the most favorable period of notice (therefore in the present case "seven months with effect as of mid-year or the end of the year") is not possible.

The Federal Labor Court has left the question open as to whether the period of notice stipulated in an individual employment contract can take precedence until such time as it conflicts with statutory periods of notice based on the length of service.

The decision shows once again that examination of concrete circumstances does not suffice for the purposes of assessing the validity of provisions of employment agreements. Instead, the abstract configuration is what counts. For example, a period of notice that at first glance seems longer than those provided by law can lead to the unintended application of the statutory periods of notice even if only one constellation is conceivable in which the statutory period would be longer and more advantageous for the employee.

Pia Pracht

# Federal Constitutional Court Rules Collective-Bargaining Agreements Invalid

## Decision

In December 2010, the Federal Labor Court ruled that the Collective Bargaining Association of Christian Trade Unions for Temporary Work and Personnel Service Agencies (Tarifgemeinschaft Christlicher Gewerkschaften für Zeitarbeit und Personalserviceagenturen – hereinafter referred to as "CGZP") had no collective-bargaining authority (Decision of 14 Dec. 2010, 1 ABR 19/10). In May of 2012, Federal Labor Court then found that such authority had already been lacking in the year 2003 and ruled retroactively that the collective agreements negotiated by the CGZP were invalid (Decision of 22 May 2012, 1 ABN 27/12).

Some 18 temporary employment agencies filed a constitutional complaint against this decision as well as other decisions. In their opinion, retroactive rescission of the organization's collective-bargaining authority was in violation of the principles of legitimate expectations and legal certainty anchored in Art. 20(3) of the Basic Law (Grundgesetz – GG). The constitutional complaint proved unsuccessful. In its decision of 25 April 2015 (1 BvR 2314/12), the Federal Constitutional Court dismissed the alleged violation of Art. 20(3) of the Basic Law, arguing that the principles of legal certainty and legitimate expectations were indeed anchored in the rule of law, and that for that reason genuine ex post facto laws were not permissible. However, the question as to whether the authority to represent employees is valid in this case only involves construction of the law by the courts. The court added that this could only entail the necessity of respect for legitimate expectations in exceptional cases, for example, in the case of an unforeseeable change in the case law of the highest federal courts. In the opinion of the Federal Constitutional Court, the complainants could not rely on such case law since none existed as of the time of the challenged decisions. The Federal Labor Court initially addressed the issue of the collective-bargaining authority of the CGZP in December of 2010. The Federal Constitutional Court also pointed out the complainants could not have had any legitimate expectations since there had already been considerable doubt as to whether the CGZP had the authority to represent employees in the year 2003.

Despite that fact, the court reasoned, the plaintiff companies had proceeded to apply the collective agreements with the CGZP, which called for lower rates of compensation for employees, and the decisions they challenged simply represented the occurrence of a previously identified risk.

## Implications for Practice

The decision of the Federal Constitutional Court confirms the case law of the Federal Labor Court. As a result of that decision, temporary personnel whose compensation was fixed in collective agreements with the CGZP were able to sue for retroactive payment of higher compensation on the basis of the 'principle of equality'. Under § 10(4) of the Temporary Employment Act (Arbeitnehmerüberlassungsgesetz – AÜG), temporary personnel working for a temporary agency are entitled to essentially the same conditions, including compensation, as those enjoyed by comparable employees of the agency. The claims were, however, limited by applicable limitation periods or time bars (see Federal Labor Court, judgments of 13 March 2013, 5 AZR 954/11, 5 AZR 146/12, 5 AZR 242/12, 5 AZR 294/12 and 5 AZR 424/12).

The financial repercussions of retroactive derecognition of the CGZP's collective-bargaining authority went beyond the issue of the claims of temporary workers to receive retroactive payment. In addition to the difference between compensation paid and that actually due on the basis of the principle of equality, it was also necessary to pay the social-security contributions, including the contributions to accident insurance (§ 23(1) of the Social Code (Sozialgesetzbuch) IV and § 150(1) of the Social Code VII; see § 42d(3) of the Income Tax Act (Einkommensteuergesetz) in conjunction with § 44(2) sent. 2 of the Fiscal Code on the back payment of payroll taxes).

These financial repercussions can also affect the companies that obtain manpower through temporary agencies since clients of temporary agencies incur secondary liability – even in the case of insolvency on the part of the corresponding agencies – for social-security contributions, including contributions to accident insurance, under § 28e(2) sent. 1 of Social Code IV and § 150(3) sent. 1 of Social Code VII in conjunction with § 28e(2) sent. 1 of Social Code IV (see § 42d(6) of the Income Tax Act for possible liability for payroll taxes).

Dr. Piero Sansone

# Has the Federal Labour Court Put a Stop to Meritless Discrimination Lawsuits?

## Decision

An insurance company that solicited applications for its trainee program indicated that it was looking for candidates who had recently received or would soon receive a very good university degree and had also had some professional experience acquired through formal training, internships or student employment. Candidates with law degrees were also expected to have concentrated on labor law or have a medical background. The plaintiff in this case, who had passed the second exam required for admission to the German bar in 2001, applied for the position. In his application letter, he mentioned, among other things, that he had managerial experience due to his previous executive position with a legal expenses insurer. He also said that he was attending a course to qualify as a specialist in labor law and had had background experience in medical law since he was handling an extensive case involving medical law due to the death of his father. After the plaintiff's application was rejected, he demanded payment of 14,000 Euro from the defendant as compensation for damages due to age-based discrimination. The defendant then invited him to a meeting with the company's personnel manager to discuss the issue, but the plaintiff declined to accept the invitation.

The Federal Labour Court was, on the basis of the formulation of the plaintiff's application and conduct, of the opinion that it could be assumed that the plaintiff did not submit his application for the purposes of obtaining employment. According to the court, the application was formulated to ensure that the defendant would not hire the plaintiff as a trainee and that it was in fact to be assumed that the plaintiff had provoked a rejection, which would mean that he did not therefore qualify as an "applicant" within the meaning of § 6(1) sent. 2 of the General Equal Treatment Act (Allgemeines Gleichbehandlungsgesetz – AGG).

The Federal Labour Court also pointed out that the General Equal Treatment Act was based on the implementation of a European directive, according to which "access to employment" is protected. In that regard, the formulation goes further than the General Equal Treatment Act. The Federal Labour Court decided to request a ruling from the European Court of Justice as to whether the directive was to be understood to mean that an applicant must actually seek employment, i.e., actually want to be employed, or whether mere formal application sufficed to enjoy the protection prescribed by the directive.

## Implications for Practice

The Federal Labour Court would obviously like to put an end to the practice of submitting frivolous employment applications for the express purpose of provoking rejection in order to be able to claim damages for discrimination under the General Equal Treatment Act. According to current case law, claims for damages by applicants are already being denied under exceptional circumstances on the grounds that they are abusive of the law. However, employers still bear the burden of evidence and proof in such cases. Employers must provide evidence to the effect that the applications were never meant seriously, and the level of proof is very high.

Even if the anticipated ruling of the European Court of Justice on the preliminary question turns out to be in favor of employers – meaning that applicants enjoy protection

under the General Equal Treatment Act only if their applications for employment are seriously meant – this will not change the fact that employers will still bear the burden of evidence and proof in the future if they suspect that an application is not meant seriously. Rejection of a claim for damages would, however, then have to be justified on other grounds.

In the past, claims for damages have been dismissed on the grounds that they were abusive of the law. If the response of the European Court of Justice to the question presented by the Federal Labour Court is positive, this would on the other hand not open the way to application of § 15 of the General Equal Treatment Act. Whether the requirements as regards the level of proof required to conclude that an application is not meant seriously would in the future be lower remains to be seen. The order for reference does not seem to indicate any such tendency. As a result, regardless of the outcome of the proceedings, caution is still recommended when it comes to the formulation of employment ads and the entire recruitment process in terms of possible discrimination.

Lena Jordan

## Content



## Note

This Newsletter was prepared according to our best knowledge and belief. It is meant to be a general outline of the law and cannot be a substitute for personal advice in an individual case. We therefore do not accept any liability whatsoever for damage. If you no longer wish to receive a copy of this Newsletter, please let us know by forwarding an e-mail to jmoeltgen@goerg.de.

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## Our office

GÖRG Partnerschaft von Rechtsanwälten mbB

BERLIN
Klingelhöferstraße 5, 10785 Berlin
Phone +49 30 884503-0, Fax +49 30 882715-0

COLOGNE
Kennedyplatz 2, 50679 Köln
Phone +49 221 33660-0, Fax +49 221 33660-80

ESSEN
Alfredstraße 220, 45131 Essen
Phone +49 201 38444-0, Fax +49 201 38444-20

FRANKFURT AM MAIN
Neue Mainzer Straße 69 – 75, 60311 Frankfurt am Main
Phone +49 69 170000-17, Fax +49 69 170000-27

HAMBURG
Dammtorstraße 12, 20354 Hamburg
Phone +49 40 500360-0, Fax +49 40 500360-99

MUNICH
Prinzregentenstraße 22, 80538 München
Phone +49 89 3090667-0, Fax +49 89 3090667-90