

SPECIAL PROTECTION AGAINST TERMINATION FOR SPECIFIC CLASSES OF PERSONS

COMMENT German labor law occasionally also contains pitfalls where one would not expect them. Who, for example, would ever think that the Recycling and Waste Management Act (Kreislaufwirtschafts- und Abfallgesetz – KrW-/AbfG) or the Federal Emissions Control Act (Bundesimmissionsschutzgesetz – BImSchG) would entail fundamental rights that protect certain employees? One employer recently found that this is in fact the case in an action before the Federal Labor Court (Judgment of 26 March 2009, Case Ref.: 2 AZR 633/07). In brief, the decision was based on the following facts:

The plaintiff had been employed as plant supervisor and waste officer since May 2006. The existence of this position was documented not only in the company’s organization chart, but also in the employee’s written employ-

ment contract. In October 2006, the employer terminated the plaintiff’s employment without cause and offered the plaintiff further employment under different conditions (termination due to operational change).

The claim brought for wrongful dismissal was upheld by the Court. The Federal Labor Court found that termination without cause was invalid pursuant to section 55(3) of the Recycling and Waste Management Act. This provision prohibits termination without cause in such cases.



This decision provides an appropriate occasion for reviewing the legal provisions governing the protection of special employees against dismissal.

- The *waste officers* mentioned above are not the only employees who enjoy protection against termination without cause under the law. *Emissions officers* (section 58 of the Federal Emissions Control Act), *hazardous incidents officers* (section 58d of the Federal Emissions Control Act) and *water pollution control officers* (sections 21-22 of the Federal Water Act (Wasserhaushaltsgesetz – WHG)) also enjoy special protection against termination. The possibility of termination without cause is excluded. This also applies for a period of one year after the employee has given up the protected function. Section 626 of the German Civil Code does, however, still permit dismissal for cause.
- Section 15 of the Dismissal Protection Act (Kündigungsschutzgesetz – KSchG), which protects members of works councils, is one of the more well known provisions of law that prohibit termination. In this case, protection against termination even remains in effect for the year following the employee's term of office. Exceptions apply only in the case of termination as a result of a closure and for cause (subject to the approval of the works council or the Labor Court).

Even members of *election committees* (among others) enjoy such protection, albeit to a lesser degree.

- Section 85 of Book Nine of the Social Code (Sozialgesetzbuch IX – SGB IX) also represents a “classic” case. However, unlike the provisions cited above, this provision contains no general prohibition of termination. Instead, it stipulates that the termination of *severely handicapped employees* is subject to the approval of the Integration Office (Integrationsamt). This Office is in particular responsible for determining whether terminations are related to a disability.
- *Mothers-to-be* enjoy extensive protection against termination. Termination of employment is generally not allowed during pregnancy and up to the end of the fourth month following delivery (section 9 of the Maternity Protection Act (Mutterschutzgesetz – MuSchG). Termination of employment is possible only under certain circumstances if the responsible authority makes an exception and authorizes the measure. In this case, protection against termination is therefore more extensive than in the case of members of works councils or employees with special functions.
- Similar special protection against termination also applies in the case of employees on *parental leave* (section 18 of the Federal Parental Allowance and Parental Leave Act (Bundeselterngeld- und Elternzeit-

gesetz – BEEG). Termination is not possible once parental leave is requested (at the earliest eight weeks prior to commencement of parental leave) and for the duration of such leave. The responsible authority may authorize the termination only in exceptional cases.

- Special conditions also apply in the case of *apprentices*. During the contractual probationary period, termination is possible at any time without prior notice. Thereafter, dismissal is possible only for cause. The reasons for dismissal must be specified in the letter of dismissal (section 22 of the Vocational Training Act (Berufsbildungsgesetz – BBiG).
- Finally, *employees performing military service* or *civilian service* enjoy special protection under section 2 of the Employment Protection Act (Arbeitsplatzschutzgesetz – ArbPlSchG) and section 78 of the Civilian Service Act (Zivildienstgesetz – ZDG) respectively.
- Finally, Article 48 of the Basic Law (Grundgesetz – GG) may prove important in 2009, which is a “super election year.” This Article stipulates that no one may be prevented from accepting and exercising the office of Member of Parliament. Dismissal or termination for this reason is not permissible.

In conclusion, before terminating an employee, it is always advisable to determine whether any restrictions exist on the basis of an employment contract or collective agreement or works agreement.

! UPDATE ! On 3 July 2009, the Bundestag voted to increase the protection against termination enjoyed by data protection officers. Sections 4 and 5 of the Federal Data Protection Act (Bundesdatenschutzgesetz – BDSG) is to be amended so that dismissal – even after the position is no longer held – is only possible for cause. This law is scheduled to take effect as of 1 September 2009.