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NEWSLETTER

GÖRG
YOUR BUSINESS LAWYERS

LABOUR AND EMPLOYMENT LAW

INTRODUCTION

Our third Newsletter for 2018 begins by focusing on the provisions of the new Act on Part-Time Employment and Fixed-Term Contracts and a decision of the Federal Constitutional Court on limited-term employment for no objective reason, which has also attracted attention in the press. In addition, we analyse a situation of particular practical relevance: namely, how much time an employee who has not been properly notified of a transfer of employment is granted in order to issue an objection against the transition of the employment contract to a "new" employer and to return to the "old" employer. The Federal Labour Court has set new standards and quite astonishingly allowed a period of seven years for submitting objections. The remaining articles cover issues regarding employee surveys, refusal of consent pursuant to § 99 of the Works Constitution Act, employment conditions at church-affiliated institutions and post-employment non-compete agreements.

Contents

Bill to Amend Legislation Governing Fixed-Term Part-Time Employment – Federal Constitutional Court Rules on Effect of Prior Employment on Fixed-Term Part-Time Employment

In the last issue of our Legal Update, we provided an overview of new developments in labour law resulting from the Agreement of the ruling coalition government (made up of CDU/CSU and FDP) for the 19th legislative term. In the meantime, the cabinet has approved a bill to update the legislation governing part-time employment. The German Bundestag is now deliberating the issue, and the new legislation is expected to go into effect in 2019. The changes called for in this government bill are presented below.

'Bridge' Part-Time Employment

The Right to Part-Time Employment for a Specific Period

In addition to the current right to work part-time for an unlimited period, the the new § 9a proposed for the Act on Part-Time Employment and Fixed-Term Contracts (Teilzeit und Befristungsgesetz – TzBfG) would change the law to grant employees the general right to work part-time for a specific duration. The aim of this change is to enable employees to reduce their working hours for a specific period ranging from one to five years. However, this option will only be available to employees working for businesses with more than 45 employees and then only after six months of service. Employees who opt for a part-time 'bridge' period would then return to their original normal working hours at the end of that period.

When working part-time, employees are not allowed to reduce or increase their hours, nor are they allowed to return to their original working hours prior to the end of the agreed 'bridge' period.

The new law would also enable employees to opt for part-time employment for a different period than the legally prescribed timeframe of one to five years if this is permitted by a collective agreement. It remains to be seen whether parties to collective agreements will take advantage of this option.

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Upper Limit in Part-Time 'Bridge' Period Employment for Employers with Fewer than 200 Employees

An upper limit has been put in place for employers with between 46 and 200 employees. For example, an employer with between 46 and 60 employees may refuse to accept an employee's application to work part-time if four other employees have already had their working hours reduced for a limited 'bridge' period. The upper limit to part-time employment for a 'bridge' period increases incrementally by one employee for every 15 employees.

Further Reasons for Refusing to Accept Part-Time 'Bridge' Employment

Apart from the option of refusing to allow employees to switch to part-time employment for a 'bridge' period once the 'reasonable' limit described above has been exceeded, employers can also refuse to accept this type of employment for operational reasons. The draft contains the same wording found in § 8 of the Act on Part-Time Employment and Fixed-Term Contracts (general right to work part-time), which means that the prior case law of the labor courts can be relied on in that regard.

Applications in 'Text Form'

Applications for part-time have so far been possible without any formal requirement, i. e. also verbally. In the future, applications for bridge part-time work (for a 'bridge' period) must be submitted in 'text form' (without a formal signature). An application by e-mail or fax is sufficient.

Preferential Treatment of Part-Time Employees in the Case of Vacancies

More Stringent Burden of Evidence and Proof for Employers

§ 9 of the Act on Part-Time Employment and Fixed-Term Contracts already requires that part-time employees who have expressed a desire to extend their contractually agreed working hours should receive preferential treatment when filling relevant vacancies, as long as they are as qualified as other candidates. As a rule, this will only not be the case if urgent operational considerations or other employee applications for part-time work would oppose such preferential treatment.

§ 9 of the Act on Part-Time Employment and Fixed-Term Contracts would be amended so that an employer who does not want to accommodate an employee's request would bear the burden of demonstrating that no suitable position is available and/or that the employee is less qualified than other candidates for the open position. In the past, employees bore the burden of evidence and proof.

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Apart from providing evidence of part-time employment, employees will only have to demonstrate that they submitted a request to change their working hours. In the future, it will be easier to provide such proof since the bill stipulates that the request may be submitted in 'text form'.

On-Call Work

Limit for On-Call Duty

According to the current § 12 of the Act on Part-Time Employment and Fixed-Term Contracts, employees and employers may agree to on-call arrangements, but a minimum work week of ten hours will be deemed as agreed if no specific understanding has been reached otherwise. According to the new bill, this will be increased to 20 hours.

In addition, a new clause is to be inserted that would limit the amount of additional on-call work that can be required. Employers could have employees work up to 25 percent of the minimum work week on an on-call basis. Where there are agreements calling for a maximum work week employers would have the right to reduce the number of working hours by up to 20 percent of the maximum amount. Introducing this provision should give employees greater planning certainty and more regular income.

In the future, the average time worked over the preceding three months would be taken as the mandatory basis when determining sick pay and holiday pay.

Fixed Term for no Objective Reason

Federal Constitutional Court Clarifies Effect of Prior Employment in the Case of Fixed-Term Employment for no Objective Reason

§ 14(2) sent. 2 of the Act on Part-Time Employment and Fixed-Term Contracts prohibits fixed-term employment in cases where an employee was previously employed by the same employer on a part-time basis or otherwise.

In its ruling on 6 June 2018 (1 BvL 714 and 1 BvR 1375/14) concerning legislation prohibiting employment for multiple limited terms where no objective reason was given, the Federal Constitutional Court found such legislation to be constitutional. At the same time, the Senate declared that ithe Federal Labour Court's interpretation of § 14(2) sent. 2 of the Act on Part-Time Employment and Fixed-Term Contracts, under which employment contracts between the same two parties involving limited terms without giving an objective reason would be permissible if an interval of more than three years lay between the respective contracts, was inconsistent with the Constitution (Grundgesetz – GG).

In the future, employment for a limited term will not be allowed if a potential employee has already worked for the same employer at any time in the past.

LENA KLEVER

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Forfeiture of Right to Object to Transition of Employment Relationship after Transfer of Undertaking

In its decision on 24 August 2017 (Case ref.: 8 AZR 265/16), the Federal Labour Court specified the conditions under which an employee forfeits the right to object to the transition of an employment relationship because of a transfer of undertaking pursuant to § 613a of the German Civil Code (Bürgerliches Gesetzbuch – BGB). Before presenting the decision, a brief overview will be given regarding the question of employees forfeiting their rights to object to the transition of an employment relationship.

Forfeiture of Right to Object to transition of an Employment Contract

Under a transfer of undertaking pursuant to § 613a of the German Civil Code, the purchaser assumes the rights and obligations arising from employment agreements existing on the date of transfer. Employees affected by a transfer of undertaking therefore find themselves working for a new employer who they did not choose themselves. Accordingly, they have a right to object to the transition of their employment relationship within a period of one month. This one-month period commences upon receipt of letter of notification regarding the disposition of the business and the implications for employees. The seller and the purchaser of the business are jointly responsible for such letter of notification.

If such letter of notification does not completely fulfill all legal requirements, the one-month period does not commence, meaning that employees will regularly retain the right to object to the transition of their relationship for an unlimited period and theoretically also be able to demand employment from their former employer even after many years have elapsed. Since the courts have imposed very stringent requirements regarding the content of such letter of notification, this has actually occurred quite often in the past.

Although there is generally no time limit for the right to object to the transition of an employment contract, this right can lapse under the general legal principles of civil law and no longer be exercised. For example, a right is forfeited if not exercised for a lengthier period of time ('element of time') and if the individual to whom the right is granted has given the impression that he or she will no longer exercise this right ('element of circumstance'). This means that the employee's conduct must give the impression that the employee has accepted the purchaser as his or her new employer.

According to the established case law of the Federal Labour Court, merely continuing to work for the purchaser of the business 'as usual' will not regularly be deemed to convey such an impression; special circumstances must also be present. The presence of such circumstances has been frequently recognized by the courts when an employee has acknowledged the existence of an employment relationship with the purchaser of the undertaking, for example, by entering into a severance agreement or accepting dismissal by the employer.

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Decision of the Federal Labour Court

In its decision on 24 August 2017, the Federal Labour Court developed a specific concept for forfeiting the right to object to the transition of employment contracts in cases similar to those under discussion here. The court ruled that such rights expire if two conditions are met. Firstly, the employee must have been informed in text form (in writing, without formal signature) regarding the transition of his or her employment contract and the date, or anticipated date, and nature of the transfer of undertaking and the purchaser's name ('basic information') and must also have been informed of his or her right to object to the transition of the employment contract pursuant to § 613a(6) of the German Civil Code. Secondly, the employee must have been employed by the new owner for a period of seven years as a rule.

The judgment of 24 August 2017 was based on a case in which the plaintiff exercised her right to object to the transition of her employment contract six years and eleven months (!) after the disposition of the business. The Federal Labour Court ruled that the employee had not been properly notified of the transfer of operations and that the one-month period for exercising the right to object to the transition of her employment agreement had therefore never commenced. The court argued that the plaintiff had received 'basic information' on the transfer of operations, but that her right to object to the transition of her employment contract was still intact since a period of seven years had not yet elapsed between the transfer of operations and the objection to the transition. No other circumstances were evident that would have warranted the forfeiture of the employee's right.

Implications for Practice

The judgment discussed here marks the first instance where the Federal Labor Court has set a specific upper limit to the time allowed for exercising the right to object to the transition of employment contracts in connection with the disposition of a business. The choice of seven years may seem somewhat arbitrary, but the Federal Labour Court found this period appropriate, essentially because it lay roughly between the usual three-year period of limitation and the maximum notice period of ten years for reporting withdrawal from declarations of intent and these two periods were deemed too short and too long, respectively.

The decision is likely to provide a certain degree of additional planning security at the managerial level even though the period of seven years is not exactly short. It is also necessary to keep in mind that seven years is intended as a general limit. Therefore, if there is reason to believe that an employee's right to object to the transition of his or her employment contract has not been forfeited, it is possible that the employee will also be able to exercise that right even after more than seven years have passed.

DR. HAGEN STRIPPELMANN

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No Co-determination Right of Local Works Council to be Consulted on Group-Wide Employee Survey

Decision

By decision of 21 November 2017 (1 ABR 47/16), the Federal Labour Court ruled on and under which conditions a group-wide employee survey conducted by the group parent company is subject to co-determination of the works council and which employee representative body is competent in so far.

In the case in question, the group parent company decided to conduct an employee survey using a standardized questionnaire of more than a hundred questions covering a range of different subjects, almost all of which were multiple-choice. The questionnaires were to be sent directly to all employees of the group companies by the group parent company. Neither the group council nor the local workers councils became involved by the group parent company reseptively the subsidary companies. Participation was voluntary and an external service provider was brought in to evaluate the results, guaranteeing anonymity.

The local works council of one of the subsidiary companies initiated proceedings before the labour court, arguing essentially that the employer's survey fell into the category of health protection and personnel questionnaires. Their reasoning was that the survey had an impact at the operational level, and that since the local works council was the competent employee representative body it was mandatory to consult them.

Unlike the lower courts, the Federal Labour Court did not concur with this legal assessment. Given the fact that the questionnaire involved the group rather than any individual affiliate, any co-determination right during such surveys would fall to the group works council and not to any local works council. Moreover, the court did not acknowledge the existence of any co-determination rights that could have been violated.

Implications for Practice

Group companies are occasionally confronted with an operational need, or compelling necessity, to implement uniform measures group-wide. Such measures are regularly adopted at the level of the group parent company for uniform implementation by all affiliated companies and their employees. Apart from introducing and implementing uniform group-wide IT systems or ethics policies, for example, this may also occasionally involve introducing uniform criteria for assessing employees or – as in the present case – a group-wide employee survey. The common factor in all measures described is an inherent potential for conflict at the operational level. In part, this is because local works councils often assert a right to be consulted on the general subject matter or at least on specific aspects even if group-wide implementation is urgently needed. This is also because the case law of the Federal Labour Court is not always clear as to which party has the – exclusive (!) – co-determination right.

Acting on the assumption that such rights fall to the local works councils as decided by the lower courts, it may ultimately be impossible to implement such measures in practice. The Federal Labour Court evidently recognized this important aspect and has ruled accordingly. This was a welcome decision.

The Federal Labour Court refused any co-determination rights regarding the employee survey because of the specific implementation and the content of the questionnaire.

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This limits the possibility of generalization. The court did, however, find particular relevance in the fact that participation was voluntary and completely anonymous in this case.

Similar proceedings have frequently resulted from the fact that local works councils – whether justifiably or not – feel circumvented by employers. As a result, it is not unusual for works councils to attempt – as in the present case – to seek a temporary injunction to suspend implementation while the principal proceedings are pending. Such escalation can often be avoided by timely communication in advance and a certain amount of tact, though this is obviously not always successful.

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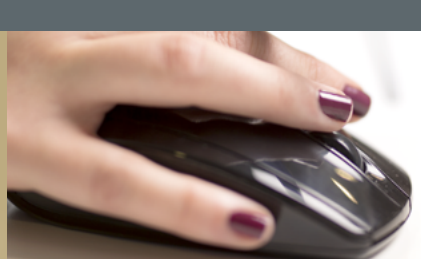

Timely Receipt of Refusal of Consent (§ 99 of the Works Constitution Act) – Chairperson of Works Council as the Employer's "Receiving Agent"?

Decision

§ 99(1) of the Works Constitution Act (Betriebsverfassungsgesetz – BetrVG) requires in part for a company to notify its works council of any changes to employee status and to obtain the consent of the works council prior to implementing the measure in question. Consent will be deemed as granted pursuant to § 99(3) sent. 2 of the Works Constitution Act (notional consent) if the works council does not refuse consent in writing within a period of one week.

On 3 November 2017 (Case ref.: 6 TaBV 5/17), the Hamburg Higher Labour Court ruled on a case involving an employer and a works council that could not agree whether 'notional consent' had been effectively given pursuant to § 99(3) sent. 2 of the Works Constitution Act.

The decision revolved around an understanding, evidently reached under exceptional circumstances, between a personnel manager and the chairperson of the works council regarding letter of notification of objections to a planned measure.

The decision was based on the following factual situation. The employer is a service provider for the aviation industry with business premises in Hamburg and other locations. Since a new collective wage agreement was to go into effect, it became necessary to classify employees and assign them to levels under the new agreement. The employer and the works council at the employer's Hamburg location agreed to extend the period for accepting or refusing the planned measure to three weeks pursuant to § 99 of the Works Constitution Act.

On 3 July 2012, the employer's personnel manager, who was not based in Hamburg, gave the chairperson of the Hamburg works council a folder containing the documents pertaining to the planned changes.

In an e-mail on 23 July 2012, the chairperson of the works council wrote to the personnel manager: "The works council has completed the classification hearings. How do we want to proceed with delivery?"

The personnel manager initially failed to respond; subsequently, the chairperson of the works council phoned the personnel manager on 24 July 2012. In response to the chairperson's question of how to handle delivery of the folder concerning the planned reclassifications, the personnel manager, who was on vacation at the time, responded as follows: "Keep it. I will be in Hamburg next week anyway and will pick it up then."

The chairperson of the works council then kept the folder with the works council's findings, which included several refusals of the reclassification, in one of the works council's filing cabinets. On 31 July 2012, the chairperson of the works council then handed the folder over to the personnel manager during his next visit to Hamburg.

The employer was of the opinion that the works council had failed to take a position regarding employee reclassification in a timely fashion within the agreed three-week period and that notional consent could therefore be assumed by law. The employer therefore asked the labour court to rule that the works council had given its consent to the various reclassifications. As an alternative, the employer requested that the court provide the required consent.

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The Hamburg Labour Court denied the employer's motions for declaratory judgment in a partial order. The Hamburg Higher Labour Court confirmed the decision of the lower labour court.

The Hamburg Higher Labour Court was of the opinion that the works council's refusal to consent to the reclassifications was given in a timely fashion, reasoning that the personnel manager had authorized the chairperson of the works council to accept letters of notification of refusal of consent as the personnel manager's authorised recipient in their telephone conversation on 24 July 2012, and that the employer's claim that the works council's response had been delivered too late was unfaithful due to the employer's inconsistent behaviour and therefore not admissible.

Implications for Practice

The decision discussed here, issued by the Sixth Chamber of the Hamburg Higher Labour Court, contrasts another decision by the Second Chamber of the same court. In a virtually identical case, the Second Chamber ruled that a works council was late in delivering its findings because the extension given by the phone conversation on 24 July 2012 was insufficiently precise, and therefore invalid ("next week"). Unlike the Sixth Chamber, the Second Chamber did not consider invocation of failure to respect the time limit as unfaithful.

Both decisions show that the parties to collective agreements can enter into agreements – including oral understandings – that deviate from the wording of the law in order to permit more flexible operational cooperation, especially concerning the extent of deadlines and rules for their compliance prescribed by the law governing co-determination. However, the parties run the risk that a labour court may find such agreements invalid in a given case. It is not always possible for either party to such agreements to assume that the other party will honor an understanding that may ultimately prove invalid, as was shown by the decision of the Second Chamber of the Hamburg Higher Labour Court. It is not necessarily considered bad faith to claim that an agreement is invalid.

Because its decision differed from that of the Second Chamber of the Hamburg Higher Labour Court, the Sixth Chamber admitted the appeal to the Federal Labour Court.

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‘Third Way’ ... Are Church Employment Contract Guidelines Binding for Church-Affiliated Institutions?

Issue / Decision

The constitution guarantees a strong legal position for church-affiliated institutions – primarily those affiliated with the Protestant and Catholic Churches. They are granted a broad right to self-administration and self-regulation, which is particularly evident in the area of labour law. Whereas ‘normal’ employers can only choose between individual employment contracts or collective agreements, church-affiliated businesses can adopt their own conditions for employment agreements, e.g., the Caritas or Diakonie Employment Contract Guidelines (Arbeitsvertragsrichtlinien – AVR), which are referred to as a ‘third way’. In its judgment on 24 May 2018 (6 AZR 308/17, Press Release no. 26/18), the Federal Labour Court published a major decision regarding the ‘third way’. The action was brought by a senior caregiver employed by a member of Diakonisches Werk e.V. This organization’s statutes require that all members (i.e., employers) establish contracts with their staff based on the Employment Contract Guidelines (AVR). In the case in question, the caregiver’s employment agreement was not actually based on the Employment Contract Guidelines and the remuneration in question was lower than the amount called for under the Guidelines. The employee filed an action to recover the difference.

The action was strongly denied by the appellate courts. According the Federal Labour Court, regular courts cannot enforce the application of Employment Contract Guidelines, because ‘third way‘ provisions do not constitute a collective agreement. Civil courts cannot compel church-affiliated employers to actually apply their ‘third way’ labour law in practice. The Employment Contract Guidelines apply only if expressly referenced and incorporated into an employment contract.

Implications for Practice

This judgment is extremely important for the employment practices of religious organizations, since it clarifies the relationship between civil law and the rights of denominational institutions. A distinction must be made between the two levels of law. The present case makes that very evident. According to church law, church-affiliated businesses must apply ‘third way’ labour law in their employment contracts. However, according to the Federal Labor Court, this only applies within the “sphere of church law”. Consequently, the Employment Contract Guidelines do not ‘automatically’ apply to employment contracts. Since the Employment Contract Guidelines are not considered collective agreements, employment agreements must make specific reference to the Guidelines. Otherwise they do not apply.

In other words, according to church law, church-affiliated institutions should actually apply the Employment Contract Guidelines, but their employees cannot force their employers to do so under civil law. However, Catholic institutions for example are regularly subject to the oversight of the archbishop, who is empowered to take appropriate remedial action under church law. It is therefore advisable for church-operated institutions to actually implement the provisions of ‘third way’ labour law in order to avoid sanctions under church law or risk not receiving the approval of works councils.

If it is not desirable to apply the Employment Contract Guidelines depending on the circumstances (e.g., an organisation‘s ability to compete in the market), it may be advisable to depart from church lawin some cases, for example, by leaving the association and changing the institution’s statutes. Exclusive application of civil law in the future can also be an expression of religious self-determination.

JENS VÖLKSEN

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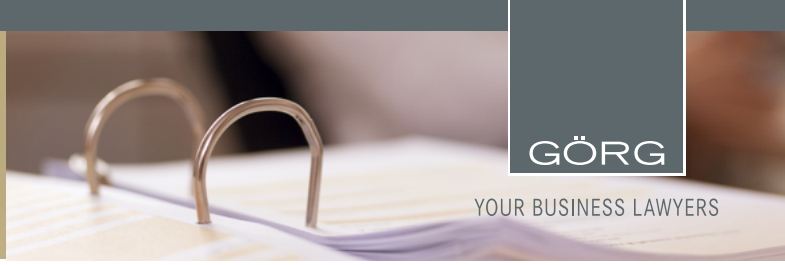

Withdrawal from the Post-contractual Non-Compete obligation

Post-Employment Non-Compete Agreement

An employer can use a post-contractual non-compete obligation to prevent employees from providing expertise or know-how to a direct competitor after the termination of employment. However, failure to fulfill the obligations arising from such an agreement may have undesirable implications. Employees bound by such non-compete obligation will be significantly inhibited in their careers by the limitation of their options on the labour market. As a result, companies must compensate employees financially for the time they remain unavailable to company competitors. This 'compensation' must be equal to at least 50% of the employee's most recent contractual remuneration. The employee's duty to refrain from employment with competitors (for a period of up to two years at most) and the employer's obligation to pay such compensation form a single contractual agreement. The obligations of the parties are reciprocal. If either the employer or the employee, or both, should fail to fulfill its obligations, this can affect the obligations of the other party.

Withdrawal

In a decision dating from January of this year, the Federal Labour Court (Federal Labour Court, judgment on 31 January 2018 – 10 AZR 392/17) reaffirmed that an employee can withdraw from the non-compete if the employer fails to fulfil its post-contractual obligation to pay the compensation described above.

The plaintiff in the case in question was employed by the defendant as "Head Officer of Technology". The employment agreement stipulated a post-contractual non-compete obligation for a period of three months after the employment agreement had ended. In exchange, the plaintiff would receive compensation amounting to 50% of his most recent monthly remuneration. The employment relationship was terminated by the employee, who then honoured the agreement to refrain from seeking employment with a competitor, but the defendant failed to pay the compensation. After the employee's initial request for payment proved unsuccessful, including a grace period for payment specified by the employee, the employee then informed his former employer by e-mail that he no longer felt bound to the non-compete agreement "with immediate effect". Nevertheless, the employee refrained from any competitive activity until the end of the three-month period and then filed an action for payment of the full compensation amount.

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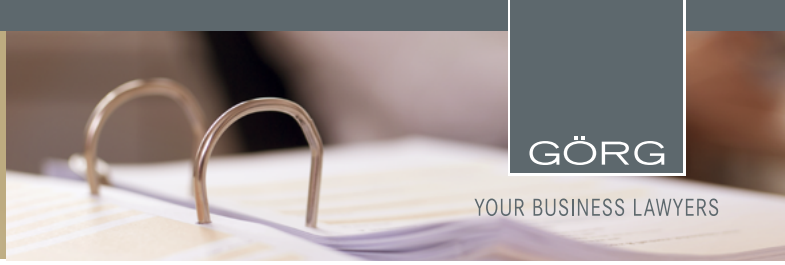

The Federal Labour Court ruled that the employee was only entitled to compensation for the period of time preceding the above-mentioned e-mail in which he announced that he was withdrawing fromt the existing post-contractual non-compete agreement, reasoning that the employee was no longer required to forego employment with any competitor afterwards, nor was his former employer under any further obligation to pay the compensation.

Since a grace period had been set, and the employer unmistakably refused to pay indemnification in the specific case, the employer was in breach of contract and withdrawal was justified.

Implications for Practice

In the above decision, the Federal Labour Court adhered to its previous line of decisions. It is therefore advisable for employers to fulfill their contractual obligations to avoid withdrawing from an existing post-contractual non-compete obligation by the employee.

The right of withdrawal can also be applied by reverse analogy if an employee fails to comply with a post-contractual non-compete obligation. If an employee acts in breach of a contract, it could prove advantageous for an employer to withdraw from the clause under certain circumstances. In particular, this could be the case for long non-compete periods that may not be of substantial interest to the employer anymore.

Any decision regarding the right of withdrawal should, however, be considered carefully. Once announced, withdrawal cannot be reversed.

DR. HEIKO REITER

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