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Employment Tracker

MARCH 2023

Stay up to date with us

With our Employment Tracker, we regularly look into the "future of labour law" for you!

At the beginning of each month, we present the most important decisions expected for the month from the Federal Labour Court (BAG) and the European Court of Justice (ECJ) as well as other courts. We report on the results in the issue of the following month. In addition, we point out upcoming milestones in legislative initiatives by politicians, so that you know today what you can expect tomorrow.

Recent decisions

With the following overview of current decisions of the past month, you are informed which legal issues have been decided recently and what impact this may have on legal practice!

Subject	Date/ AZ	Remark/ note for practice
Federal Labour Court		
Effectiveness of a cap in a social compensation plan in the event of the inclusion of an additional amount for severely disabled employees	11.10.2022 - 1 AZR 129/21 -	**It is a violation of the principle of equal treatment under works council constitution law if the parties to a social compensation plan generally provide for the granting of an additional severance payment to compensate for the economic disadvantages caused by a severe disability as a result of the loss of the job, but do not pay it to older severely disabled employees because of a maximum amount provision in the social compensation plan**. *The 1st Senate of the Federal Labour Court decided this.* Facts The Federal Labour Court had to decide whether the cap provided for in a social compensation plan could also cover an additional amount for severely disabled employees. The defendant employer concluded a social plan with the works council to mitigate the disadvantages suffered by employees because of a plant closure. Among other things, the social compensation plan provides for an entitlement to severance pay for all employees who are dismissed for operational reasons, limited to a maximum amount of €75,000 (so-called cap). Severely disabled employees or those with equal rights shall receive additional severance pay under the social plan.

In addition to the reconciliation of interests and the social plan, the parties to the company concluded a company agreement on the same day regarding a lawsuit waiver bonus. This provides that employees who are entitled to a redundancy payment under the social plan receive a higher severance payment if they do not bring an action against unfair dismissal.

The plaintiff's employment was terminated for operational reasons. He did not bring an action for unfair dismissal.

In calculating the plaintiff's severance pay, the defendant also applied the cap of the social plan to the lawsuit waiver premium, so that according to the severance pay calculation the plaintiff was only entitled to severance pay in the maximum amount of €75,000. No additional severance payment was made because of the plaintiff's severe disability.

The plaintiff is of the opinion that the maximum limit contained in the social compensation plan discriminates against severely disabled employees. The additional contribution intended to compensate for the special - disability-related - disadvantages could not thereby bring the desired compensation for older severely disabled employees.

The decision of the Federal Labour Court

The Federal Labour Court ruled in favour of the plaintiff and awarded him the claimed additional amount for severely disabled employees.

The plaintiff met the requirements for the granting of the additional severance payment. The maximum amount provision contained in the social compensation plan does not prevent payment. The maximum amount provision is invalid due to a violation of the principle of equal treatment under works constitution law pursuant to Sec. 75 (1) BetrVG insofar as it extends to this additional severance payment amount.

By limiting the total severance payment to 75,000 euros per employee, some of the severely disabled employees are treated differently from the rest of this group. The maximum severance payment amount leads to the fact that only those severely disabled employees receive the additional severance payment whose severance payment does not exceed the amount

of 75,000 euros. This grouping is also not justified in view of the purpose pursued by the maximum amount regulation.

Cancellation of a transfer **Effects of a transfer, which may be in violation of co-determination, on the assignment of an employee to a part of the business that is being transferred**	15.11.2022 - 1 ABR 15/21 -	**The application pursuant to Sec. 101 Sentence 1 Works Constitution Act (*Betriebsverfassungsgesetz – BetrVG*) shall be unfounded if the individual personnel measure which is the subject of the application has ended. A spin-off has the consequence that the original personnel measure ends.** *The 1st Senate of the Federal Labour Court decided this.* Facts Before the Federal Labour Court it was disputed whether the defectiveness of a transfer of an employee under works constitution law affects his assignment within the meaning of Sec. 613a of the German Civil Code (*Bürgerliches Gesetzbuch – BGB*) and whether the works council is accordingly entitled to a claim for cancellation of the transfer pursuant to Sec. 101 sentence 1 BetrVG. The employer carried out an organizational change in one of its plants and installed a new department. The assets and tasks associated with the new division were transferred from the previous organizational units. The employer assigned the employees entrusted with the tasks – including the employee whose transfer is at issue in these proceedings – to the new unit. The works council, which had been informed of this, considered the measure to be a transfer and asserted a right of co-determination against the employer pursuant to Sec. 99 BetrVG, which the employer rejected. With its application, the works council asserted the cancellation of the transfer pursuant to Sec. 101 Sentence 1 BetrVG. During the ongoing proceedings, the new division was transferred to another company by way of a transfer of operations. Based on this, the employer is of the opinion that the proceedings have been settled due to the transfer of the business. With the transfer of the division, the employment relationship concerned here was also transferred to the acquiring

company. The works council, on the other hand, argues that it is precisely the allocation of the employment relationship to the new area that is in dispute. If the assignment was a transfer subject to co-determination, it was also invalid under individual law due to the lack of the works council's involvement and the employment relationship of the employee concerned was not transferred with the business unit.

The decision of the Federal Labour Court

The works council's appeal on points of law was unsuccessful before the 1st Senate of the Federal Labour Court.

The Federal Labour Court ruled that the works council could not demand the cancellation of the personnel measure. It could be assumed that the assignment of the job was a transfer. However, this personnel measure ended with the spin-off of the division.

An application pursuant to Sec. 101 sentence 1 BetrVG is always unfounded if the individual personnel measure which is the subject of the application ends. Because of the spin-off of the division to another company as the acquiring legal entity, this division, in which the employee had since been permanently employed, no longer belonged to the employer's company. The personnel measure as it originally appeared thus ended.

The spin-off of the division did not merely have the consequence that the original personnel measure as such continued to exist and only its former structure changed. Rather, the assignment of another job within the company represents a fundamentally different measure than if it had been aimed at an activity outside the company.

Entitlement to equal pay for work of equal value

(Art. 157 TFEU, Sec. 3 (1), Sec. 7 German Remuneration Transparency Act (EntgTranspG))

16.02.2023

- 8 AZR 450/21 -

A woman is entitled to equal pay for equal work or work of equal value if the employer pays male colleagues higher wages based on gender. This does not change if the male colleague demands higher pay and the employer gives in to this demand.

The 8th Senate of the Federal Labour Court decided this.

Facts

The Federal Labour Court had to decide on claims based on pay discrimination on the grounds of gender.

The defendant employer hired the plaintiff alongside another employee in sales at the beginning of 2017. During the contract negotiations, both were offered a monthly basic salary of 3,500 euros and, after the end of the training period, additional, performance-related remuneration. The plaintiff accepted the offer, whereas the other applicant negotiated a higher basic salary. Another sales employee who had been with the defendant since 1985 also received a higher salary than the plaintiff did. The plaintiff and the other two employees have the same responsibilities and authority.

In 2018, an in-house collective bargaining agreement went into effect at the defendant, which provided for the transfer of employees' individual salaries to pay grades. In the event that the new collectively agreed basic pay was higher than the previous pay of the respective employee, a capped adjustment of no more than 120.00 euros was provided for. Because of the cap, the plaintiff's pay was only increased to 3,620 euros and was thus still lower than that of the other two employees.

In her action, the plaintiff is claiming payment of further compensation. She is of the opinion that she performs an equivalent job and is discriminated against on the grounds of her gender due to the lower pay. She claims that the cap rule in the collective agreement perpetuates the unlawful pay discrimination. Therefore, the provision is invalid.

The defendant claims that the higher remuneration is based on the contractual negotiations conducted with him and is permissible within the framework of contractual freedom. The other employee received a higher salary due to his long service with the company. The collective agreement is gender-neutral and does not discriminate against the plaintiff.

The decision of the Federal Labour Court

The Federal Labour Court found in favour of the plaintiff for the most part. By paying the plaintiff a lower basic wage than her male colleagues despite the performance of work of equal value, the defendant had discriminated against the plaintiff because of her gender.

		The plaintiff was therefore entitled to the same basic pay as that of her male colleague pursuant to Article 157 TFEU, Section 3 (1), Section 7 EntgTranspG. The fact that the plaintiff received a lower basic salary than her male colleague for the same work gives rise to the presumption that the discrimination was based on gender. The defendant did not succeed in rebutting this presumption. In particular, the defendant could not rely on the fact that the higher remuneration of the male colleague was based on his negotiating skills in the job interview. The capping provision contained in the collective bargaining agreement did not apply to the plaintiff because she had not previously received a collectively agreed salary but a salary agreed in an individual contract.
Night work bonuses under collective bargaining agreements	22.02.2023 - 10 AZR 332/20 -	**A provision in a collective agreement, which provides for a higher premium for irregular night work than for regular night work does not violate the general principle of equality under Article 3 (1) of the German Constitution if there is an objective reason for the unequal treatment, which must be apparent from the collective agreement. Such a reason may be that the higher supplement is intended to compensate not only for the specific burdens caused by night work but also for the burdens caused by the reduced ability to plan an assignment to irregular night work.** *The 10th Senate of the Federal Labour Court decided this.* Facts The parties disputed the amount of collectively agreed bonuses for overtime. The plaintiff works shifts at the defendant, a company in the beverage industry. Section 7 of the collective bargaining agreement (MTV) applicable to the employment relationship provides that a bonus of 50% per hour is to be paid for irregular night work and a bonus of 20% per hour for regular night work. Accordingly, the plaintiff received a 20% bonus for the regular night work she performed.

In her action, the plaintiff is seeking the difference between the higher surcharges for irregular night work and the surcharges paid. She is of the opinion that the distinction between irregular and regular night work violates the principle of equality under Article 3 (1) of the German Constitution and the principle of equal treatment under Union law. Regular night work is considerably more stressful than irregular night work performed outside of shift systems and therefore less frequently.

The defendant, on the other hand, argues that the parties to the collective bargaining agreement have complied with the leeway granted to them by the provision in Sec. 7.1 MTV. The supplement for irregular night work was not only intended to compensate for the difficulty of night work, but also to prevent the employer from interfering with the employees' protected free time.

The decision of the Federal Labour Court

The Federal Labour Court ruled in favour of the defendant employer.

In its reasoning, the 10th Senate essentially stated that the regulation in the MTV on different surcharges for regular and irregular night work does not violate the principle of equality of Article 3 (1) of the German Constitution.

It is true that employees who perform regular or irregular night work are comparable with each other. There is also unequal treatment in that a higher supplement is paid for irregular night work than for regular night work.

However, there is an objective reason for this unequal treatment, which is recognizable from the collective agreement. The purpose of paying higher bonuses for irregular night work is to compensate for the burdens on employees who perform irregular night work because it is more difficult to plan this type of work. Within the framework of the autonomy of collective bargaining guaranteed by Article 9 (3) of the German Constitution, the parties to the collective bargaining agreement are not precluded from pursuing further purposes with a night work bonus in addition to the protection of health. This further purpose results from the content of the provisions of the MTV. There is no reasonableness test with regard to the amount of the difference between the supplements. It is at the discretion of the parties to

		the collective bargaining agreement how they evaluate and compensate financially for the aspect of poorer plannability for employees who perform irregular night work.
Entitlement to a pay increase under an in-house collective bargaining agreement **Wage increase as contractual penalty for breach of collective agreement**	22.02.2023 - 4 AZR 68/22 -	**In an in-house collective agreement, a pay increase can be agreed in the event that the employer does not carry out concretely specified reorganization measures by a certain date. The collectively agreed pay increase is subject to a condition precedent within the meaning of Section 158 (1) of the German Civil Code (Bürgerliches Gesetzbuch – BGB) without at the same time being a contractual penalty agreement within the meaning of Sections 339 ff. BGB.** *The 4th Senate of the Federal Labour Court decided this.* Facts The Federal Labour Court had to decide whether the plaintiff had a claim for payment of a higher remuneration against the defendant. In this context, it was in dispute in particular whether a wage increase in the event of a breach of the collective bargaining agreement is to be interpreted as a contractual penalty. The in-house collective agreement applicable to the employment relationship, which the defendant concluded with IG Metall, provides for pay increases in two stages. In addition, the collective agreement stipulates that the company's sanitary facilities are to be renovated within a certain period of time. In the event that the remediation does not take place or does not take place on time, a further 0.5% pay increase is to be implemented. The planned reorganization by the employer was only partial, which is why the plaintiff is claiming payment of the 0.5% increase in remuneration. He is of the opinion that the condition agreed in the collective bargaining agreement occurred because the defendant did not completely renovate the sanitary facilities and did not do so on time. The defendant, on the other hand, has argued that the pay increase agreed in the collective agreement for the case of failure to refurbish on time is a contractual penalty. This provision is invalid. The obligation to refurbish the sanitary facilities was a company standard, the fulfilment of which was to be asserted by the works council. This does not establish an

enforceable individual right of the individual employees to the sanitation work. Accordingly, a contractual penalty in favour of the individual employees in the event of non-fulfilment of the obligation was also ruled out. The 0.5% pay increase was also disproportionate in view of the fact that the deadline was only slightly exceeded. Moreover, the unforeseen and manageable schedule overruns were not the responsibility of the company. The subsections that were not reorganized were not in need of reorganization and were therefore not covered by the obligation to reorganize agreed in the collective agreement.

The decision of the Federal Labour Court

The Federal Labour Court awarded the plaintiff the payment claim asserted.

In its reasoning, the Federal Labour Court essentially stated that the condition for the pay increase within the meaning of Sec. 158 (1) BGB had occurred due to the incomplete implementation of the agreed remediation measures.

Contrary to the defendant's argument, the provision of the collective bargaining agreement is not a contractual penalty. The increase in remuneration concerned the main performance obligations of the employment relationships subject to the collective agreement and therefore served different purposes than a contractual penalty.

In the absence of applicability of the statutory provisions on contractual penalties, a reduction of the remuneration increase pursuant to Sec. 343 BGB cannot be considered. Likewise, such a reduction on the basis of Sec. 242 BGB is ruled out.

Upcoming decisions

With the following overview of upcoming decisions in the following month, you will be informed in advance about which legal issues will be decided shortly and what consequences this may have for legal practice!

Subject	Date/ AZ	Remark/ note for practice
Federal Labour Court		
Claim for compensation under the General Equal Treatment Act (AGG) **Discrimination on the grounds of religion in the process of filling a position** **Wearing of an Islamic headscarf by a kindergarten teacher in a municipal day-care centre**	30.03.2023 - 8 AZR 126/22 -	The Federal Labour Court decides on a claim for compensation due to possible discrimination on the grounds of religion in the job recruitment procedure. The plaintiff applied to the defendant city for an advertised position as a kindergarten teacher. During the interview, she was asked whether she would be willing to take off her headscarf during working hours. At first, the plaintiff did not want to confirm this. In the further course of the application procedure, she informed the defendant that she was now ready to take off her headscarf after all. Ultimately, the plaintiff was not hired. The background to the question during the job interview is that the defendant city has a duty of neutrality according to a service directive. According to this, there is an obligation to behave in a politically, ideologically and religiously neutral manner while on duty. The wearing of clothing that is objectively capable of impairing confidence in neutrality or endangering political, religious or ideological peace is prohibited. The plaintiff is of the opinion that she was discriminated against because of her religion and is therefore claiming compensation under the General Equal Treatment Act. She has argued that the mere wearing of a headscarf by a kindergarten teacher is not such as to call into question the neutrality of the day-care centre. In contrast, the defendant is of the opinion that there is no prohibited discrimination against the plaintiff. Its own duty of religious neutrality, the conception of its day care centres, as

		well as the negative religious freedom of the children cared for there and the trust of their parents in a religiously and ideologically neutral care and upbringing, require the ideological and religious neutrality of the educators employed there without exception. The wearing of an Islamic headscarf is contrary to this. The lower courts partially upheld the plaintiff's claim. In its appeal to the Federal Labour Court, the defendant is seeking to have the action dismissed.
Effectiveness of a waiting period termination due to lack of corona vaccination	30.03.2023 - 2 AZR 309/22 -	In dispute is whether the termination of a medical assistant during her probationary period, who did not want to be vaccinated against the Corona virus, is effective. The plaintiff worked for the defendant - a hospital - in patient care. The defendant made the plaintiff several offers of vaccination, which she did not accept. As a reason, the plaintiff stated that she did not want to be vaccinated against Corona. As a result, the defendant terminated the employment relationship with due notice. The plaintiff is defending herself against this termination with her lawsuit. She is of the opinion that the termination violates in particular the prohibition of measures pursuant to Sec. 612a of the German Civil Code. While the Labour Court held the termination to be invalid due to a violation of Sec. 612a of the German Civil Code, the Regional Labour Court denied a violation. In her appeal to the Federal Labour Court, the plaintiff seeks a declaration that the termination is invalid.
European Court of Justice		
Meaning of the concept of weekly rest period within the meaning of the Working Time Directive	02.03.2023 - C-477/21 -	The European Court of Justice decides on several questions concerning the interpretation of the concept of daily and weekly rest periods within the meaning of Art. 3 and Art. 5 of the Working Time Directive.

Reference for a preliminary ruling from the Miskolci Törvényszék (Hungary)

The background to the reference for a preliminary ruling is a case in Hungary. The plaintiff in the main proceedings works as a train driver for the defendant employer. The employee works based on a monthly work schedule, which does not specify any specific weekly rest days, but instead establishes a weekly rest period for all train drivers in accordance with a weekly reference period. According to the collective agreement applicable to the employment relationship, the employer granted the employee a daily rest period of twelve hours between two shifts, which he could spend at his home address, plus the so-called standard travel time or the time required to get to work or from work to his home address. With regard to the weekly rest period, if the employer could not guarantee the employee an uninterrupted weekly rest period of 48 hours in a given week, the employer nevertheless guaranteed an uninterrupted rest period of at least 42 hours in such a way that the employee was granted an average weekly rest period of at least 48 hours when scheduling his working time. The employee could not take a daily rest period or standard travel time before or after the weekly rest period or vacation. Indeed, the employer did not grant the employee a daily rest period when granting him the weekly rest period or vacation.

The plaintiff in the main proceedings is of the opinion that the daily rest period and the weekly rest period as well as the daily rest period and the vacation should be granted consecutively and independently of each other. Granting them at the same time or combining them is unlawful.

The court in Hungary suspended the proceedings and submitted a reference for a preliminary ruling to the European Court of Justice. The latter must now decide in particular how the term "weekly rest period" is to be interpreted in accordance with Art. 5 of the Working Time Directive.

Legislative initiatives, important notifications & applications

This section provides a concise summary of major initiatives, press releases and publications for the month, so that you are always informed about new developments and planned projects.

Subject	Timeline	Remark/ note for the practice
Whistleblower protection law stopped by Bundesrat for the time being	10.02.2023	In December 2022, the Bundestag passed the Whistleblower Protection Act. Based on the European Whistleblower Protection Directive, the law is intended to regulate the protection of whistleblowers who uncover violations of the law in companies or public authorities. However, the Bundesrat (upper house of the German parliament) refused to give its approval on February 10, 2023. It is therefore unlikely that the Whistleblower Protection Act will come into force in the first half of 2023.

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