

# Legal Update

## Labour and Employment

### Federal Labour Court: Cut-Off Date Clauses for Special Payments of a Mixed Nature

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#### Headnote

Special payments at the end of the year which are intended to reward employees for their loyalty to their employer as well as the work they have performed during the year (“special payments of a mixed nature”) cannot be made contingent in general terms and conditions of business on the existence of an employment relationship on the 31st of December of the respective year (Federal Labour Court, judgment of 13 November 2013 – 10 AZR 848/12, which is currently only available in the form of a press release).

#### Facts

The plaintiff had been employed by the defendant, a publishing house, as a controller since 2006. Each year he received together with his November salary what was

initially described as a “bonus”, and from 2007 on as a “Christmas bonus”, as a special payment in the amount of his November salary. Every autumn the defendant sent all of the employees a letter with “rules” governing such payments. The 2010 letter contained, among other things, a statement that payment “would be made to publishing house employees whose employment contracts had not been terminated as of 31 December 2010”. The letter provided that publishing house employees would receive an amount equal to 1/12 of their gross monthly salary for every calendar month of paid work for the company. Furthermore, the letter advised that employees who joined the company in the course of the year should receive the special payment under the rules on a pro rata basis. Following the end of his employment relationship on 30 September as a result of his termination, the plaintiff brought an action to obtain pro rata payment (9/12) of the special bonus.

## Decision

Although the lower courts rejected his claim, the plaintiff succeeded on his appeal to the Federal Labour Court, which ordered the defendant to pay him the amount sought. The court held that since the bonus served simultaneously as remuneration for work performed during the year, the cut-off date rule in the guidelines discriminated unreasonably against the defendant and was therefore invalid under sentence 1 of § 307(1) of the German Civil Code. In addition, the court was of the opinion that the rule conflicted with the underlying idea in § 611(1) of the German Civil Code because it deprived employees who leave the company before the end of the year of salary they have already earned. This is because the right to remuneration was acquired monthly on a pro rata basis according to the guidelines. Furthermore, the court found that there was nothing to indicate that the special payment was intended primarily for the period after the plaintiff left the company or was supposed to be for special work which the plaintiff failed to perform.

## Comments

This decision of the Federal Labour Court, which is currently only available as a press release, would seem to indicate that the court is maintaining its most recent case law on cut-off date rules in respect of special payments of a mixed nature.

According to the Federal Labour Court's previous case law, it was basically permissible to subject the making of special payments – including those of a mixed nature – to cut-off date clauses provided that the payments did not only constitute consideration for work already performed. In its decision of 18 January 2012, the Federal

Labour Court diverged from this case law in a case where the special payment of a mixed nature was made dependent on the employment contract not having been terminated on a date outside of the reference period of the special payment, namely the 15th of April of the following year (Federal Labour Court, judgment of 18 January 2012 - 10 AZR 612/10). In this case, the Federal Labour Court based its decision on the fact that the cut-off date rule at issue conflicted with the underlying idea in § 611(1) of the German Civil Code because it deprived employees of salary which they had already earned. While the lower court had assumed that the principles outlined in the decision of 18 January 2012 could not be applied to a situation where – as in the case at issue – the cut-off date fell on the 31st of December and thus was within the reference period for the bonus, the Federal Labour Court expressly applied this reasoning to such a case for the first time. The written grounds for the judgment are not yet available. However, according to the press release, the Federal Labour Court appears to have again based its decision largely on the fact that employees who leave the company before the end of the year cannot be deprived of salary already earned through the application of a cut-off date rule. Since this reasoning in the case of special payments of a mixed nature can be applied to every cut-off date rule, it can generally be assumed that cut-off date clauses in the case of special payments of a mixed nature will be invalid in the future.

As a result, cut-off date clauses are likely to only be permissible where the purpose of the special payment is solely to reward past and/or future employee loyalty. In this connection, the Federal Labour Court held in a recent decision that the fact that a special payment requires solely that the employment relationship not have been terminated on the day of payment does not constitute unreasonable discrimination even if responsibility for termination (for example, in the case of dismissal

due to redundancy) does not necessarily have to lie with the employee (Federal Labour Court, judgment of 18 January 2012 – 10 AZR 667/10).

## Note

This overview is solely intended for general information purposes and may not replace legal advice on individual cases. Please contact the respective person in charge with GÖRG or respectively the author himself: Dr. Piero Sansone on +49 221 33660-536 or [psansone@goerg.de](mailto:psansone@goerg.de). For further information about the author visit our website [www.goerg.com](http://www.goerg.com).

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