Newsletter
Labour Law

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PREFACE

Our third Newsletter for 2015 begins by focusing on an interesting decision handed down by the Mainz Labor Court regarding the validity of fixed-term employment contracts for professional football players – something which has also attracted plenty of attention in the press. In a surprising move, the Mainz Labor Court concluded that long-term limitations in contracts with football professionals were invalid, which in theory could result in Bundesliga clubs having to field professional players until retirement age unless some reason for termination occurs beforehand. In addition, we also address questions of occupational integration management, which are becoming ever more important in the lead up to dismissal due to illness. Finally, we cover issues related to limits on the length of employment contracts with retirees (which normally require the existence of an objective reason that is frequently absent), a claim for special payment based on the employer's conclusive behavior and the indemnification of the works council for legal costs after the appointment of a lawyer.

Fixed-Term Contracts for Professional Football Players Illegal – No Right to Premiums after Relegation to Second Division

Decision

In its decision of 19 March 2015 (3 Ca 1197/14), the Mainz Labor Court ruled on the legality of a fixed-term employment contract with a professional football player – former Mainz 05 goalkeeper Heinz Müller – and the question as to whether players who no longer train and play with a club's first-division Bundesliga team are still entitled to receive payment for point bonuses.

The Mainz Labor Court granted the player's motion in part.

The question as to whether the contract of a professional football player may be limited to a fixed term is governed by § 14 of the Act on Part-Time Employment and Fixed-Term Contracts (Teilzeit- und Befristungsgesetz – TzBfG), which stipulates in its § 14(1) that an objective reason must exist for limitation of an employment contract to a fixed term in excess of two years. The court was not able to see any such objective reason in the nature of the work, in common industry practice, in the public's need for a change of personnel or in the exceptionally high compensation of professional football players, reasoning as follows:

– The nature of the work involved did not make it possible to draw parallels with the case law pertaining to the creative employees of radio and television stations, employees of the press or performing artists or actors. In all of these cases, the personal interests of the employees must be weighed against the protection of the specific fundamental rights of broadcasting, the press and art in the individual case. However, no equivalent right exists in the case of the football club in the present case, which means that it is also not possible to assume the existence of a specific characteristic in the case of professional sports that would justify a fixed-term contract.

– Common industry practice cannot constitute an objective reason for a fixed-term contract. According to the case law of the Federal Labor Court, common industry practice can only serve as guidance. A prohibited violation of a rule cannot be accepted on the grounds that it is common practice.

– A general need on the part of the public for a change in personnel is equally ill-suited as justification for a fixed-term contract. The need for change would exist only in the absence of successful performance on the part of a player, which makes it impossible to talk in terms of an objectifiable need for change that is independent of successful performance. Even if such a need did exist, it would not outweigh the interests of the employee.

– High remuneration also cannot justify a fixed-term contract. Previous case law to that effect predates § 14 of the Act on Part-Time Employment and Fixed-Term Contracts. Since the European legislation on which the provision contained in § 14 of the Act on Part-Time Employment and Fixed-Term Contracts is based was intended to avoid precarization of employment, a danger that is particularly acute in the case of professional football players in view of the fact that the opportunity to learn a trade or acquire professional qualifications outside the realm of professional sports is very limited or non-existent for professional athletes in the years in which such training is usually acquired, it is not possible to justify fixed-term contracts in this case.

On the other hand, the Mainz Labor Court denied the employee's request for payment of point bonuses for the times during which he was not a member of the club's first-division team. Ultimately, the Labor Court assumed that the plaintiff could not demonstrate the existence of any breach of good faith as required by § 162(1) of the German Civil Code (Bürgerliches Gesetzbuch – BGB) although he bore the burden of evidence and proof. In view of the complexity of the decision-making criteria, the employer in this case would have broad discretionary latitude when it comes to deciding whether a player qualifies for a first-division team. In particular, important factors to be taken into account here would include interaction between players, tactical considerations, possibly also based specifically on the opposing teams, comparison with other players on the team that could be chosen, possibly also future prospects, potential improvement, synergies, etc.

Implications for Practice

The judgment of the Mainz Labor Court is one of very few that address the permissibility of fixed-term employment contracts in the area of professional sports. No case law has been forthcoming from the Federal Labor Court on this issue up to now, and the permissibility of fixed-term contracts that exceed the permissible term of two years is the subject of dispute in the legal literature. If the judgment stands, this will have enormous implications as regards contracts in practice, not only in the area of professional football but also for all other professional team sports. Fixed-term employment contracts with professional athletes – as well as with their managers and coaches – are today common in that area. Contrary to the opinion of the Mainz Labor Court, we believe that the practice of using fixed-term contracts can be justified by § 14(1) no. 4 of the Act on Part-Time Employment and Fixed-Term Contracts in the case of professional athletes. In particular, the fact that professional football players cannot be employed as such until they reach retirement age must be taken into account since the change in their physical constitution with age precludes this possibility. Moreover, every athlete is also subject to the "wear and tear" manifested in the form of slower reactions, a loss of speed, etc., which occur at different points in time, and their employers also have to be able to react to such changes. In addition, it is compellingly necessary to be able to change rosters for each new season in order to introduce tactical changes and deal with the necessity of working with different types of players and personalities.

In particular, the fact that professional football players cannot be employed as such until they reach retirement age must be taken into account since the change in their physical constitution with age precludes this possibility.

An employer will want to be able to field a team that offers an ideal combination of skills and personalities at all times.

Pending a decision by the Federal Labor Court, employers in the area of professional sports will, however, be well advised to include the express wish of players for fixed-term employment in their contracts with professional athletes, for fixed-term contracts are permissible according to the case law of the Federal Labor Court if it can be shown in the individual case that a professional athlete would have accepted only temporary employment even if offered an unlimited contract.

As regards payment of point bonuses to players who are not members of the club's first-division team, the Mainz Labor Court made it encouragingly clear that employers enjoy broad discretionary latitude when making decisions as to whether a player qualifies for a place on the first-division team or not and that the respective player bears the burden of providing evidence and proof in the case of a claim to the effect that the employer acted in breach of good faith when making such a decision (§ 162(1) of the German Civil Code). In the present case, the plaintiff was not able to provide proof to the effect that his transfer from the first-division team was not based on objective reasons. The employer was as a result also under no obligation to pay bonuses.

Dr. Heiko Reiter

Occupational Integration Management (Betriebliches Eingliederungsmanagement – BEM) – Notification of Employees

Decision

Occupational integration management pursuant to § 84(2) of Social Code IX (Sozialgesetzbuch IX) becomes very important in the case of employees who are ill over a lengthy period or time. In our Legal Update of May 2015, we have already drawn attention to a new decision concerning consultation of legal counsel. In the meantime, a further decision of the Federal Labor Court has appeared that concerns occupational integration management. This decision is of enormous importance for practitioners since it addresses the requirements to be met when inviting an employee to participate in an occupational integration management program.

Headnote

It is up to the respective employer to take the initiative when occupational integration management seems to be advisable. The employer must comply with formal requirements when providing an employee with information on occupational integration management. That entails providing information on the goals of occupational integration management and the nature and the scope of the data collected and used for such purposes *(judgment of 20 November 2014, 2 AZR 755/13).*

Implications for Practice

Whenever dismissal of an employee is contemplated because of illness, formulation of the reasons for dismissal can represent a daunting challenge. The courts will consistently want to determine whether the dismissal is reasonable, and this will regularly presuppose completion of occupational integration management. Otherwise, dismissal is possible only under exceptional circumstances (for example, if it is obvious that occupational disability will be permanent). In actual practice, it will seldom be possible to demonstrate that this is indeed the case. That makes it all the more important to be able to show that adequate occupational integration measures have been carried out or – if the employee refuses to participate – at least a serious attempt was made to do so. The first step here is to inform the employee of the goals of the program. However, it is not sufficient to simply repeat the content of the law. It is also necessary to point out that sensitive personally identifiable information will be used, in particular medical data (§ 3(9) of the Federal Data Protection Act (Bundesdatenschutzgesetz – BDSG)). As a result, it is by no means sufficient to casually tell an employee that he or she must appear for the purposes of occupational integration

management. It is advisable to provide such information in writing and obtain acknowledgment of receipt. The following formulation is likely to suffice:

"[...] Working together with you, the Works Council, the Disabled Staff Representative, the Integration Office and the company physician, we would like to take advantage of occupational integration management to determine how your occupational disability can be overcome and what services or assistance would make it possible to avoid a recurrence and, among other things, enable you to continue employment with us. Our priority goal is your continued employment with us. Occupational integration management is open-ended, which means you can actively contribute your input and suggestions. In the course of the program, we would like to discuss the health-related issues that resulted in your absence in the past. In addition, we would like to partner with you to ascertain what possibilities exist to alleviate your health problems.

Please take note of the fact that personally identifiable information within the meaning of § 3(9) of the Federal Data Protection will be recorded and stored. In the context of occupational integration management, this will involve your health history. This information shows the periods during which you were unable to work.

Finally, we would like to point out that participation in occupational integration management is voluntary. [...]"

Jens Völksen

The employer must comply with formal requirements when providing an employee with information on occupational integration management.

Is it Permissible to Fix the Term of Employment after a Person has reached Retirement Age?

Decision

The Federal Labor Court was called upon in a case on 11 February 2015 to decide on the legality of fixed-term employment following the attainment of retirement age (Ref. 7 AZR 17/13). The original employment contract did not provide for employment to automatically terminate upon the employee reaching retirement age. It was not until after the employee had reached retirement age that the parties to the employment contract agreed on a number of time limits on his employment.

The Federal Labor Court referred the matter to the lower court, which was the Berlin-Brandenburg Higher Labor Court. The Federal Labor Court did, it is true, determine that fixed-term employment can be justified on the facts for personal reasons residing with an employee under § 14(1) sent. 2 no. 6 of the Act on Part-Time Employment and Fixed-Term Contracts (Teilzeit- und Befristungsgesetz – TzBfG). However, in the case at hand, there were insufficient findings of fact to enable a conclusive decision to be made. Furthermore, it held that the fact that the employee had reached retirement age was justification for the imposition of a fixed term. In addition, it found that the agreement on the fixed term must relate, at the time it is made, specifically to the employer's personnel planning arrangements.

Implications for Practice

In order to be valid, agreements on fixed term employment that are made with employees who have reached retirement age must be based on an objective reason. According to § 14(1) sent. 2 no. 6 of the Act on Part-Time Employment and Fixed-Term Contracts, a time limitation can be justified on the basis of reasons residing with the employee.

The decision handed down by the Federal Labor Court shows that, where retirement age has been reached, the requirements for validity may in part vary according to the time that an agreement to fix the term of employment is concluded. In any event, the employee's eligibility to receive a pension from the statutory pension insurance scheme is a prerequisite for validity. Furthermore, it is necessary, in those cases where the agreement for a fixed term is made after the employee reaches retirement age, that such agreement is, at the time it is made, specifically connected with the employer's personnel planning arrangements, e.g. training of a replacement for the employee or for filling his position until a replacement can be found for him.

It is in principle necessary to take § 41 sent. 3 of Social Code VI (Sozialgesetzbuch – SGB VI) into account in those cases where the limit on the length of employment is based on the employee's reaching the statutory pension age. This legal provision allows parties who have incorporated a clause on retirement into their employment contract to postpone termination of the contract (if need be, multiple times) in order, for example, to make

transitional arrangements until a successor for the employee can be found. However, the provision only applies to agreements limiting the length of employment which are concluded after 1 July 2014.

Although limitations on the term of employment that are based on the attainment of retirement age are in principle a form of age discrimination, this kind of unequal treatment is, however, permissible pursuant to § 10 sent. 3 no. 5 of the General Equal Treatment Act (AGG – Allgemeines Gleichbehandlungsgesetz). In any case, it is advisable to include a clause in the original employment contract which provides for its termination upon attainment of the statutory retirement age in order to be certain that the employment relationship will actually end when the employee starts to draw a pension. If the employer thereafter wishes to enter into a fixed-term contract with the employee, the principles mentioned above should be taken into account in order to ensure that the contract entered into is not one for an unlimited term that could remain in force for years.

Pia Pracht

Indemnification for Legal Costs is Only Available Where the Works Council has Duly Passed a Corresponding Resolution

Decision

On 18 March 2015, the Federal Labor Court held that an employer will only be liable for the costs of counsel for the works council if the works council has duly passed the relevant resolution prior to counsel's appointment (7 ABR 4/13). According to the court's decision, this not only applies to the initial appointment of counsel, but also and especially where counsel lodges an appeal on behalf of the works council. The absence of such a resolution will not invalidate any appeal lodged. It will, however, mean that the employer is not liable to pay the costs of the appeal. The Senate based its reasoning on an implied duty on the part of the works council to consider the employer's interest in controlling costs. In its view, the works council was required to examine the chances of an appeal being successful prior to the appeal being lodged. As a rule, this was not something which the works council could assess at the time of the commencement of proceedings. In the court's opinion, the only permissible exception to this principle is where the matter is of such importance as to justify the works council believing from the outset that the case should be pursued through all instances.

Implications for Practice

The Federal Labor Court has reaffirmed once again that the works council has an obligation to have due regard to the employer's interest in controlling costs in cases involving § 40 of the Works Constitution Act (Betriebsverfassungsgesetz – BetrVG). The works council is obliged to pass a resolution duly appointing a lawyer not just at the time of commencement of proceedings relating to collective bargaining before a labor court, but also, as a rule, before lodgment of an appeal. Where an employer is not inclined to assume the costs of the work council's legal counsel, it should, for a start, request that the works council submit a copy of the resolution in which the decision was taken to appoint a lawyer. If no such resolution exists, then the question of whether it was necessary to conduct court proceedings is no longer decisive. The employer is then not obliged to bear the costs of the lawyer. In individual cases, the works council will not be obliged to duly pass a resolution if the works council was, due to the special significance of the matter, entitled to assume that an appeal would be necessary already at the time court proceedings were commenced.

Lena Jordan

Can Apprentices be Dismissed on the Grounds of Suspected Wrongdoing?

Decision

In its decision of 12 February 2015 (Ref. 6 AZR 845/13), the Federal Labor Court ruled on the question as to whether an apprentice can be dismissed on the grounds of suspicion of wrongdoing. In the case at issue, the plaintiff was employed by the defendant, a bank, as a banking apprentice. The plaintiff counted the money from the night deposit box of a branch of the bank on 20 June 2011, and a shortage of Đ 500.00 was ascertained later. When the shortage was put to the plaintiff, he mentioned the amount of the shortage although he had never been informed of the amount by anyone from the bank. The defendant concluded that only the perpetrator could have had such information and that the plaintiff must have been responsible for the shortage. After hearing the plaintiff, the employer terminated the apprenticeship contract with immediate effect for good cause. The Federal Labour Court dismissed the action, as had both lower courts, ruling that dismissal on the grounds of suspected wrongdoing was also possible in the case of employment of apprentices and that the bank was under no obligation to inform the plaintiff of the subject of the hearing in advance, which the plaintiff argued was necessary. The Federal Labour Court found no fault with the assessment of the case by the Higher Labour Court and denied the appeal.

Implications for Practice

The Federal Labor Court made it clear first of all that it is also possible to terminate contracts with apprentices on the basis of suspected wrongdoing. Anything else would also have been surprising since the possibility of dismissal of employees on suspicion has already been firmly anchored in employment law for many years. This is a reflection of the fact that an employment relationship cannot be maintained on a basis of mutual trust in the case of a strong suspicion of a serious breach of conduct. The situation cannot be considered any different in the case of contracts with apprentices since they are also based on mutual trust and cannot be upheld if this trust is irretrievably destroyed. What is interesting then is that the Federal Labour Court found that interrogation of the employee, which – unlike in the case of dismissal for cause – is a prerequisite for dismissal on suspicion, may take place without informing the employee in advance of the reason for the talk. An employer is therefore under no obligation to specify the various reasons for such a meeting when inviting an employee to a personal meeting. He may in fact confront the employee with his concrete suspicion at the beginning of the meeting and ask him to explain himself and dispel the suspicion. This leaves the employee – and that includes apprentices – with no time to prepare a response. As a result, the employee would not be able to plan a strategy for refuting the employer's allegations. This obviously reinforces the legal position of the employer considerably since it gives him the advantage of the element of surprise; the employer is not faced with a well prepared employee, possibly even able to present documentation to bolster his case, who can forcefully argue his case. Since various practitioners have in the past asserted that notification of employees of the reasons for such meetings in advance should be mandatory, this issue has now been legally clarified.

Dr. Christoph Müller

Speech is Silver, Silence is Gold

Decision

The Federal Labor Court found in its decision of 23 July 2015 that the dismissal of a 63-year-old employee was discriminatory and thus invalid because the employer had mentioned the employee's "pension entitlement" as grounds for termination in its letter of dismissal (Ref. 6 AZR 457/15). Such mention was reason to assume that the employee had been directly discriminated against on the grounds of age. According to the court, the employer was unable to rebut this presumption by arguing that the volume of work had decreased significantly and that other employees who remained in employment were better qualified. The employer defended its reference to the employee's "pension entitlement" by arguing that it wished to formulate its termination letter in a "friendly" and "obliging" manner.

Implications for Practice

Once again we have confirmation that employers are best advised to avoid giving reasons when issuing a notice of dismissal. Except in those cases where express reasons for termination are mandatory, such as in the case of the dismissal of trainees or pregnant women, or where a collective agreement necessitates the provision of a reason, it is always best to follow this advice. Since the employer's business was a small establishment, it did not fall within the scope of the Employment Protection Act (Kündigungsschutzgesetz – KSchG). Thus if it had not been for the unfortunate provision of a reason for termination, the termination would have survived judicial scrutiny without any difficulty. Since, except where the provisions of the Employment Protection Act provide otherwise, it is not necessary to specify reasons for termination, and, in principle, all that is required is that the termination be neither in bad faith nor unconscionable, the reasons advanced by the employer (decline in the volume of work and lack of qualifications on the part of the employee) would probably have helped to ensure the validity of the termination.

Dr. Frank Wilke

Once again we have confirmation that employers are best advised to avoid giving reasons when issuing a notice of dismissal.

Establishment of a Right to a Special Payment through Conclusive Behavior of the Employer

Decision

The Federal Labor Court was called upon to decide on the establishment of a right to receive a special payment through the conclusive behavior of an employer in its judgment of 13 May 2015 (Ref.10 AZR 266/14).

The plaintiff had been employed by the defendant as a site manager from May 1992 to November 2010 without a written employment contract. In each of the years from 2007 to 2009, he received an additional payment described in his salary statement as a "special payment" together with his normal December salary. These payments amounted to Đ10,000 in 2007 and Đ12,500 in both 2008 and 2009. The plaintiff then claimed that he was entitled to a special payment in the amount of Đ12,500 for 2010 as well. The Federal Labor Court – unlike the lower courts – allowed the plaintiff's claim for a special payment for 2010 on the merits. The case had to be remitted to the Higher Labor Court of Saxony-Anhalt for a decision on the amount of this special payment.

In the court's opinion, the plaintiff was entitled to assume that he could expect a special payment in subsequent calendar years due to the fact that the payment made each January had been described as a "special payment" in his respective salary statements and because it had been paid, without any reservations, in varying amounts at the end of each year over a period of three consecutive years. Since the defendant did not make the special payment conditional upon compliance with other requirements, the court thought that it could be assumed that the payment also constituted remuneration for work performed by the plaintiff. Accordingly, the fact that the plaintiff had left the defendant's employment during the year was not a reason that would preclude the grant of the special payment.

Moreover, in the court's eyes, the difference in the amounts of the payments made from 2007 to 2009 did not preclude the establishment of a a claim to a special payment. In this regard the Senate diverged from the view that it had adopted in previous rulings. In its judgment of 28 February 1996 (Ref. 10 AZR 516/95), it had taken the view that the annual grant of payments in different amounts was an indication that the employer wished to decide each year "at its discretion" as to the amount of any special payment made.

Implications for Practice

This decision emphasizes just how easily an employer can become unintentionally bound to making special payments. Simply by repeating a payment, an employer can be deemed to be making an implied binding offer. Through conclusive behavior – usually in passively accepting the payment – the employee can accept such offer.

This is something that employers should bear in mind whenever they make special payments. However, the rulings of the Federal Labor Court make it difficult to formulate watertight clauses. Furthermore, the decision of the Federal Labor Court discussed here is a reminder that a clause providing for a special payment on a

voluntary basis, which can be revoked at any time, will be considered lacking in transparency and thus of no legal effect. According to the court's reasoning, if a person has no right to a benefit, the benefit cannot be revocable, i.e. only that which one is entitled to can be revoked. On the basis of this kind of hairsplitting by the highest labor court, employers would be well advised to take legal advice before agreeing on special payment provisions or making special payments.

Hagen Strippelmann

Content

Note

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