Newsletter
Labour Law

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PREFACE

Our first Newsletter in 2015 examines a row of Federal Labor Court decisions on questions that are relevant in legal practice. We will, in the future, continue to primarily tackle judgments handed down by the Federal Labor Court as well as the higher labor courts and to focus on their relevance in legal practice.

Therefore, we will mostly provide short summaries and then elaborate on the implications for employers.

Is covert observation of employees always illegal?

Decision

On 19 February 2015, the Federal Labor Court addressed the question as to whether video recordings made of an employee on sick leave by a private detective hired by the employee's employer were illegal. The same employee had previously already won an action before the labor court against dismissal for reasons lying in her conduct; At issue in the present case was only the question as to whether the employer was liable for damages for pain and suffering as a result of the video recordings. Following publication of the press release of the Federal Labor Court, various sources reported that covert observation of employees would no longer be permissible. It was rumored that employers could no longer use private detectives to investigate "suspicions" of misconduct on the part of employees.

Relevance in legal practice

The use of private detectives to observe employees is still permissible after the Federal Labor Court's judgment. The Eighth Senate of the Federal Labor Court had simply criticized the fact that the employer had no reason to involve a private detective in the present case. The employee had submitted a total of six medical certificates from two different physicians. Nothing other than that had occurred. There was, as a result, nothing to indicate that the employee was feigning illness. In such cases, employers may, according to the Federal Labor Court, neither have employees observed by private detectives nor may they have film and video recordings made. That means that circumstances must therefore be present that undermine the credibility of a medical certificate, for example, if an employee is not allowed to take paid annual leave when planned and then claims illness at precisely the time the employee originally wanted to take time off.

It will still be possible to use the services of private detectives in any such cases, but it will be necessary to ensure that no video recordings are made; it is possible to determine whether an employee is actually ill or not through simple observation. There is no necessity for video recordings. The decisive factor will therefore consistently be the existence of suspicion that illness is only feigned. The same principles will also apply in other cases involving the use of private detectives, for example, to determine whether an employee is stealing from an employer. Suspicions must be grounded in objective fact.

Dr. Christoph J. Müller

Advertising with ex-employees is permissible!

Decision

The Federal Labor Court decided on 19 February 2015 that employers are entitled to use advertisements showing former employees even after their employment has terminated. Where the employee has consented to appearing in a promotional film for the employer during the term of his employment, this consent will, as a rule, remain in force even after the employment relationship has terminated. The employer is thus entitled to continue using the promotional film. The employee is only entitled to revoke his consent where he has a justified interest in doing so *(Federal Labor Court, judgment of 19 February 2015, file reference 8 AZR 1011/13).*

Relevance in legal practice

Good news for employers! The production of marketing and promotional films can be a costly business if the services of a professional advertising agency are used. As a result, it would be most unfortunate for an employer if, just after completion of a brand-new promotional film, the employer could no longer use it because the employee had left the company. This is particularly true nowadays when employee fluctuation is higher. In principle, employees can rely on the right to the protection of their own image guaranteed under the Basic Law. The requirement of consent to the publication of images derives basically from § 22 of the Art Copyright Act (Kunsturhebergesetz – KUG). Nonetheless, in the opinion of the Federal Labor Court, once consent has been granted, it may only be revoked if the employee has a justified interest in this. In the court's view, the employee has no right to not be associated with his former employer after the termination of the employment relationship. In addition, no distinction should be made as to whether the employee consented in his capacity as an employee or as a private individual. Thus employees cannot assume, when they grant their consent, that the publication will terminate after their employment relationship terminates.

The Federal Labor Court's decision shows how important it is to obtain the employee's consent to publication when making a promotional film or otherwise publishing pictures of employees. Failure to do so can result in the employee blocking publication or possibly even claiming damages from the employer for unauthorized publication.

Pia Pracht

Expulsion of a member of the works council

Headnote

A member of the works council may be expelled from the works council pursuant to § 23 (1) of the Works Constitution Act (Betriebsverfassungsgesetz – BetrVG) if he violates his duties on a continuing basis. It can be assumed that this is the case where he does not perform his work over a period of months because he is supposedly occupied with works council activities.

Facts

The employer had a workforce of over 200 until the end of 2013. The works council member X was completely released from his duty to work (§ 38 (1) of the Works Constitution Act). Following the company's restructuring, the number of its employees was less than 200 so that new elections for the works council had to be held in 2014. X was re-elected to the works council. Although he was no longer entitled to a release from work pursuant to § 38 of the Works Constitution Act, he did not return to his performance of any work for the employer. He informed the employer day in, day out that he was occupied with works council activities, relying on § 37 (2) of the Works Constitution Act, which provides for a temporary release from the performance of work duties. In the subsequent period, it was decided several times to release X for several weeks "due to works council activities". The letters only contained brief mention of a few tasks.

Decision

The employer submitted an application pursuant to § 23 (1) of the Works Constitution Act for X's expulsion from the works council. The Bonn Labor Court ruled in the employer's favor (order of 17 March 2015, 1 BV 59/15; the order is not yet final). The court indicated during the hearing that brief references to works council activities were not a sufficient basis for month-long releases from work pursuant to § 37 (2) of the Works Constitution Act. In its opinion, the works council should have provided concrete proof of the necessity for the release from work. The grounds for the decision are not yet available.

Comments

An application to expel a member of the works council may be lodged pursuant to § 23 (1) of the Works Constitution Act where the member commits a gross violation of his statutory duties. It can be assumed from this that an abuse of the authority to grant a release under § 37 (2) of the Works Constitution Act can lead to expulsion from the works council. The section provides for a release from work where this is necessary for the proper performance of works council activities.

The member of the works council has in this connection a discretion. Essentially, he is only required to inform his employer that he will be performing works council activities. He is not obliged to inform his employer in advance as to which activities require his release. However, the provision is susceptible to abuse due to its discretionary scope. As part of the relationship of trust between them, the employer has to rely on the member of the works council making efficient use of his time for works council activities.

In the present case, there was an obvious abuse of the authority to grant a release from work. The works council member had not performed any work after his re-election and had for all intents and purposes continued to be released full-time from the duty to work. He had exploited § 37 (2) of the Works Constitution Act. As a result, the decision is to be welcomed. It remains to be seen whether it obtains legal force.

Jens Völksen

A member of the works council may be expelled from the works council pursuant to § 23 (1) of the Works Constitution Act, if he violates his duties on a continuing basis.

No right on the part of a works council to a training course with a “feel-good factor”

Decision

The Trier Labor Court (*3 BV 11/14*) held on 20 November 2014 that an employer may reject a request from its works council to be permitted to attend an external training course if an in-house seminar with the same content would be more economical. The works council had decided to send four of its members at the employer’s expense to an external training event lasting several days that would involve overnight accommodation and meals. Instead of acceding to this wish, the employer obtained an offer for an in-house event with the same content from the same organizer. Since this was about 40% cheaper, the employer offered the works council members the in-house seminar and refused to allow them to attend the external event.

Relevance in legal practice

It is not unusual for organizers of seminars for works councils to advertise events at attractive tourist locations (“Conference hotel with a high feel-good factor”, “Right in the middle of the beautiful Lüneburg Heath, you will find peace and comfort”, “The ideal starting point for discovering the cultural highlights of the town”). Finally, since “hotel invoices can be billed directly to the employer”, these kinds of offers are understandably very popular.

The Trier Labor Court’s decision provides a very simple method of putting a stop to “seminar tourism”. Where the quality of the training course is the same, the employer may direct the works council to a less expensive – albeit not as attractive from a tourist’s perspective – alternative. Since almost all seminar organizers also offer in-house seminars, employers should obtain an alternative bid for holding an in-house seminar with the same content where the external seminar offered is too expensive and too touristy.

Dr. Frank Wilke

ECJ "AKT": No statement on permanent employment of temporary agency workers

Decision

The decision of the European Court of Justice in the matter of "AKT" was awaited with great anticipation (please see our discussion on this and the reference to the court for a preliminary ruling in our Newsletter 2/2014, pp. 11-12.). This is because the Court could have used the preliminary ruling as, among other things, an opportunity for making its views known for the first time on the permissibility of supplying temporary agency workers permanently.

§ 1 (1) sentence 2 of the Temporary Agency Workers Act (Arbeitnehmerüberlassungsgesetz – AÜG, hereinafter the "Act"), which provides that the assignment of agency workers must be "temporary", prohibits this kind of permanent supply of temporary agency workers in Germany. Critics of this provision regard this limitation a violation of Article 4 (1) of Directive 2008/104/EC on temporary agency work (hereinafter the "Directive"), which only permits prohibitions or restrictions on the use of temporary agency workers where this can be justified on grounds of general interest. Since the question referred for a preliminary ruling also concerned the admissibility of prohibitions and restrictions pursuant to Article 4 (1) of the Directive, it was expected that the decision would also make it possible to draw inferences about the permissibility of § 1 (1) sentence 2 of the Temporary Agency Workers Act under EU law.

These expectations were only satisfied in part. In its judgment of 17 March 2015 (C-533/13), the European Court of Justice decided that only national authorities are bound by Article 4 (1) of the Directive, not however national courts. Accordingly, national courts are therefore not obliged to disapply legal provisions which violate Article 4 (1) of the

Directive. The other questions referred for a preliminary ruling: "Can the use of temporary agency workers for a lengthy period to perform an undertaking's normal work alongside the undertaking's own employees amount to an improper use of temporary agency workers" was left unanswered by the ECJ.

Relevance in legal practice

Following the decision of the European Court of Justice, the question of whether temporary agency workers can be employed permanently – as provided for under German law – remains unresolved. Moreover, it remains unclear as to whether, and if so, which guidelines the Directive provides as to the meaning of "temporary" supply of temporary agency workers, which may be the only legal form of supplying workers.

Nonetheless, valuable insights can be gained from the decision on the interpretation of the Directive and, in particular, on the admissibility of prohibitions and restrictions, such as those contained, for example, in § 1 (1) sentence 2 or § 1b of the Act. The ECJ made it clear that courts are not required to assess the validity of such provisions on the basis of Article 4 (1) of the Directive. Accordingly, a review of such provisions under EU law will rely in particular on primary law and it is likely that restrictions and prohibitions on temporary work will be assessed first and foremost on the basis of the freedom to provide services laid down in Article 56 TFEU.

The ECJ's decision is likely to also be of significance for the legal assessment of the Grand Coalition's proposed legislation. The Coalition Agreement for the 18th legislative period provides, among other things, for the introduction of a maximum period of 18 months for the supply of temporary agency workers. Following the judgment handed down by the European Court of Justice, it will not be possible to base objections to this on Article 4 (1) of the Directive.

Dr. Piero Sansone

No duty on the part of the employer to point out tax advantages to a marginally employed person

Decision

The Federal Labor Court was called upon on 13 November 2014 *(8 AZR 817/13)* to decide whether an employer has any obligation to inform a marginally employed person ("mini-jobber") as to the various taxation options available. Mini-jobbers may opt for flat rate taxation. This is generally financially more attractive for employees. However, the employee may also be taxed individually on the basis of his tax card. In the present case, the employer did not pay the flat-rate tax for the employee. Instead, the employee had to pay the appropriate rate of tax based on his tax card. In the particular case, this was disadvantageous for him. After he discovered through another source that the flat-rate tax option would have been more advantageous for him, the employee sought to recover damages for overpaid taxes. He was unsuccessful in all instances. The court emphasized that no statutory duty to inform exists. In addition, it should have been obvious to the employee after he submitted his tax card that he would be taxed individually.

Relevance in practice

One has to agree with the Federal Labor Court's decision. It is consistent and in keeping with previous decisions on an employer's duty to inform. We provided detailed information in our Legal Update of October 2014 on the cases in which an employer is required to notify an employee of certain legal consequences in respect of the employment relationship. The basic rule is that an employee can only expect to be given information if the law makes express provision for this (e.g. § 613 a (5) of the German Civil Code (Bürgerliches Gesetzbuch – BGB) or § 4 a of the Occupational Pension Schemes Improvement Act (Gesetz zur Verbesserung der betrieblichen Altersversorgung – BetrAVG)). Accordingly, except in the cases provided by statute, employers will seldom have a duty to inform.

Jens Völksen

An employee can only expect to be given information if the law makes express provision for this.

The end of the "parachute solution" in the case of false contracts for work and services?

Decision

The Baden-Württemberg Higher Labor Court is divided on the question of whether the penalty for a "false contract for work and services" is an employment relationship with "the client of the temporary employment agency (hirer)" or whether a hiring-out permit held by the "temporary work agency" offers effective protection against this. The background to both proceedings was § 10 of the Temporary Agency Workers Act (Arbeitnehmerüberlassungsgesetz), which, where the hiring out of the worker was illegal, employs a legal fiction to deem an employment relationship to exist between the temporary agency worker and the hirer.

In its decision of 03 December 2014, the 4th Chamber adopted the employer-friendly view that has prevailed up to now (*4 Sa 41/13*). According to this view, the only way the application of the legal fiction can be avoided in the case of pro forma "false contracts for work and services", which are however in practice de facto hiring-out contracts, is if the contractor has a hiring-out permit "in reserve". A mere two weeks later on 18 December 2014, the 3rd Chamber then held, however, that a hiring-out permit could only help to avoid the application of the fiction if the parties have expressly agreed on the hiring out of the employee. In the Chamber's opinion, disguising the situation as a "false contract for work and services" made the "client of the temporary employment agency" move into the employer position with all the related consequences (*3 Sa 33/14*).

Relevance in legal practice

The problem of a "contract for work and services" and its inherent risks arise in almost every case where outside personnel are brought in. Often the criteria which are essential for classifying a contract for work and services as a contract for work and services exist at best on paper, while the outside personnel are actually deployed in daily business operations as temporary agency workers. In order to guard against the consequences of what would then be a de facto hiring out of workers, it has until now been normal practice to only engage those contractors who "to be on the safe side" had their own hiring-out permit and who could thus legally hire out temporary workers. It will now be for the Federal Labor Court to resolve the disagreement at the Higher Labor Court of Baden-Württemberg as to whether this protection is actually effective.

Moreover, it is to be expected that the legislature will in the future cut the parachute strings. In any case, the Grand Coalition has already targeted the "parachute solution" in the coalition agreement and intends to put "false contracts for work and services" – even where a hiring-out permit exists – on the same footing as illegal hiring out of temporary workers. In the future, the motto will be: Hiring out of temporary workers will only be recognized as such where it genuinely occurs. Consequently, where outside personnel are used, it will be more important than ever to ensure that they are really treated in a way that corresponds to the type of contract entered into with them.

Dr. Frank Wilke

Presence of a lawyer during company discussions on the reintegration of employees after long-term or repeated absence from work due to illness

Decision

On 18 December 2014, the Higher Labor Court of Rhineland-Palatinate (*5 Sa 518/14*) held that an employee does not as a rule have a right to be accompanied by a lawyer to internal company discussions on reintegration after illness. The court indicated that reintegration after illness is aimed primarily at developing opportunities for continuing the employment relationship. The focus is not on terminating the employment relationship. Consequently, it is not necessary to involve a lawyer in order to guard against suffering possible legal disadvantages. Even the fact that the employee may be experiencing health problems – which can usually be assumed – does not mean that the assistance of a legal representative is required.

Relevance in practice

The decision provides legal clarity. If they are not permitted to have their own lawyer present, employees often refuse to hold discussions with their employer. At any rate, a right to have one's own lawyer present does not generally exist in the case of talks on reintegration at work after illness. Nonetheless, distinctions have to be drawn in individual cases. If the employer itself is represented by a lawyer at talks on reintegration after illness, the employee should also be allowed to be accompanied by his legal adviser so that the parties are on an equal footing.

In addition, the courts are sometimes in favor of an employee having his lawyer accompany him to a meeting if a dismissal for suspected serious misconduct is involved. The reason for this is that the purpose of meetings of this kind is to prepare a dismissal notice. This applies, in any case, where the employer is also represented by a lawyer. Accordingly, the employer should at least let the employee know in advance of a meeting that it intends to bring its own legal adviser. This would allow the employee to decide himself whether he also wishes to be accompanied by an adviser. However, if the meeting involves a "normal" staff appraisal, the employee will, as a rule, not be entitled to be accompanied by a lawyer. As long as discussions do not concern termination of the employment contract or significant changes to it, it is an internal company matter for the parties to discuss without an external adviser being present.

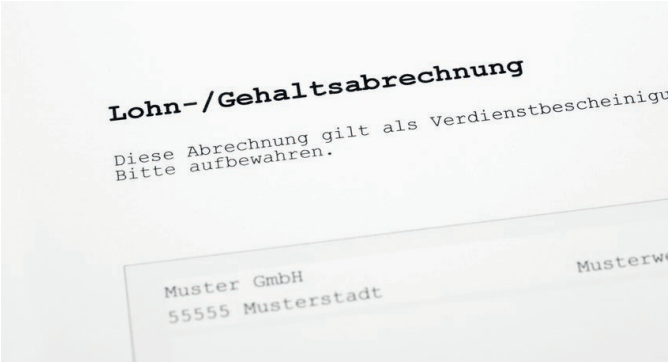
Jens Völksen

The courts are sometimes in favor of an employee having his lawyer accompany him to a meeting if a dismissal for suspected serious misconduct is involved.

Clever circumvention of the minimum wage?

Decision

On 04 March, the Berlin Labor Court handed down one of the first decisions on the minimum statutory wage which has been in force since 01 January 2015. According to the decision, employers are not permitted to deduct additional holiday pay or a special annual bonus from the minimum statutory wage. Termination of employment with an offer of re-employment on new terms, which is aimed at achieving such a deduction, is invalid. The employee was employed for a base salary of EUR 6.44 per hour and received a performance bonus and extra payment for working shifts; in addition, she received holiday pay and, after a certain period of service, a staggered annual bonus. The employer terminated the employment relationship and offered at the same time to re-employ the employee at an hourly rate of EUR 8.50 without any performance bonus, additional holiday pay, or a special annual bonus (*Berlin Labor Court judgment of 04 March 2015, file reference 54 Ca 14420/14*).



Relevance in legal practice

The minimum statutory wage has been in force nationwide since 01 January 2015. Both employers as well as labor courts are now gathering their initial experience with this new legal institution. So far a variety of unresolved issues have been identified in connection with the minimum statutory wage, which require clarification from the courts. The Berlin Labor Court's decision does, however, appear to clamp down on what initially appears to be quite a clever attempt to circumvent the statutory minimum wage. Even if the method used by the employer in the case decided by the court, i.e. a termination of employment with an offer of re-employment on new terms, accompanied by the disappearance/deduction of previously granted special payments appears attractive, this supposedly clever way of circumventing the minimum statutory wage is impermissible.

The purpose of the minimum wage is to directly remunerate the employee for the work that he performs. However, special payments, such as holiday pay or Christmas bonuses do not serve this purpose. Accordingly, the deduction of those kinds of special benefits – even indirectly through termination of employment with an offer of re-employment on new terms – is impermissible. Consequently, the purpose of a special payment will determine whether it can be permissibly deducted from the minimum wage.

Pia Pracht

Content

Note

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