

# Newsletter

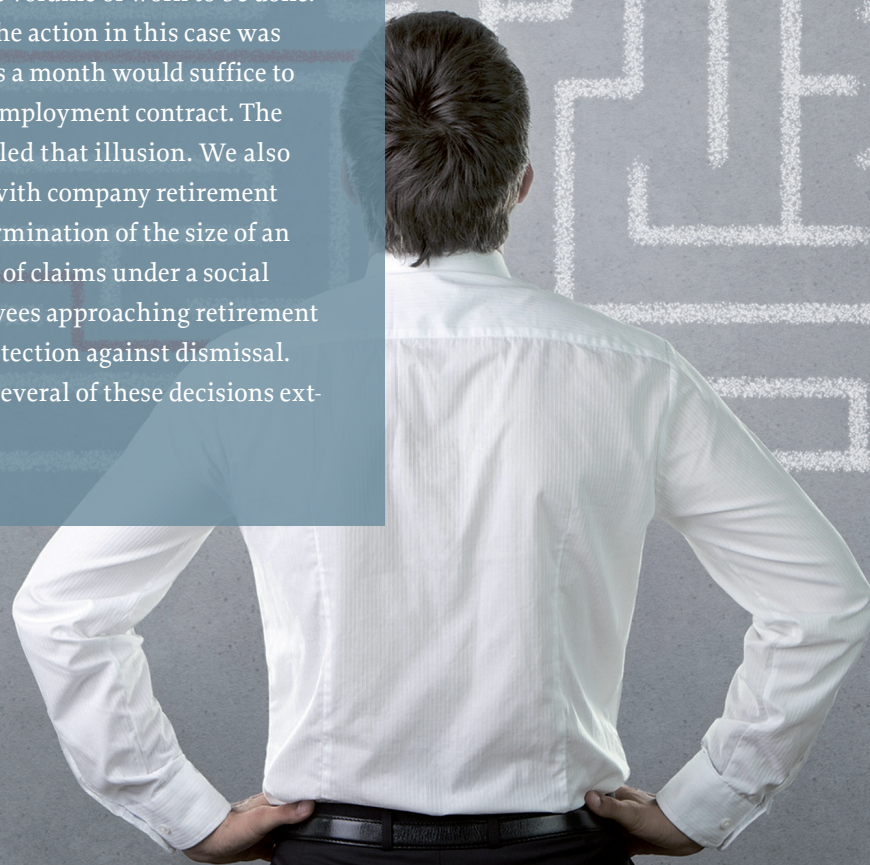
## Labour and employment

ISSUE 02 | 2013

### FOREWORD

Our second Newsletter for the year 2013 reviews various decisions by the Federal Labour Court as well as one from the Hessian Higher Labour Court. Practitioners will find these decisions that have ended up before the Federal Labour Court relevant, albeit at least in one case bizarre.

The most unusual of the cases examined here is no doubt the one in which the Federal Labour Court addresses the question as to whether employees can choose their working hours on the basis of the volume of work to be done. The employee who brought the action in this case was of the opinion that 5 1/2 hours a month would suffice to satisfy the provisions of her employment contract. The Federal Labour Court dispelled that illusion. We also examine decisions that deal with company retirement benefits, the criteria for determination of the size of an undertaking and calculation of claims under a social compensation plan of employees approaching retirement as well as cases involving protection against dismissal. Employers are likely to find several of these decisions extremely important.



## A recurring topic: Temporary personnel count for the purposes of determining the size of an undertaking

### Headnote

Temporary personnel must be counted as part of a company's workforce for the purposes of determining the size of a works council (§ 9 of the Works Constitution Act (Betriebsverfassungsgesetz – BetrVG) (Federal Labour Court, 13 March 2013 – 7 ABR 69/11).

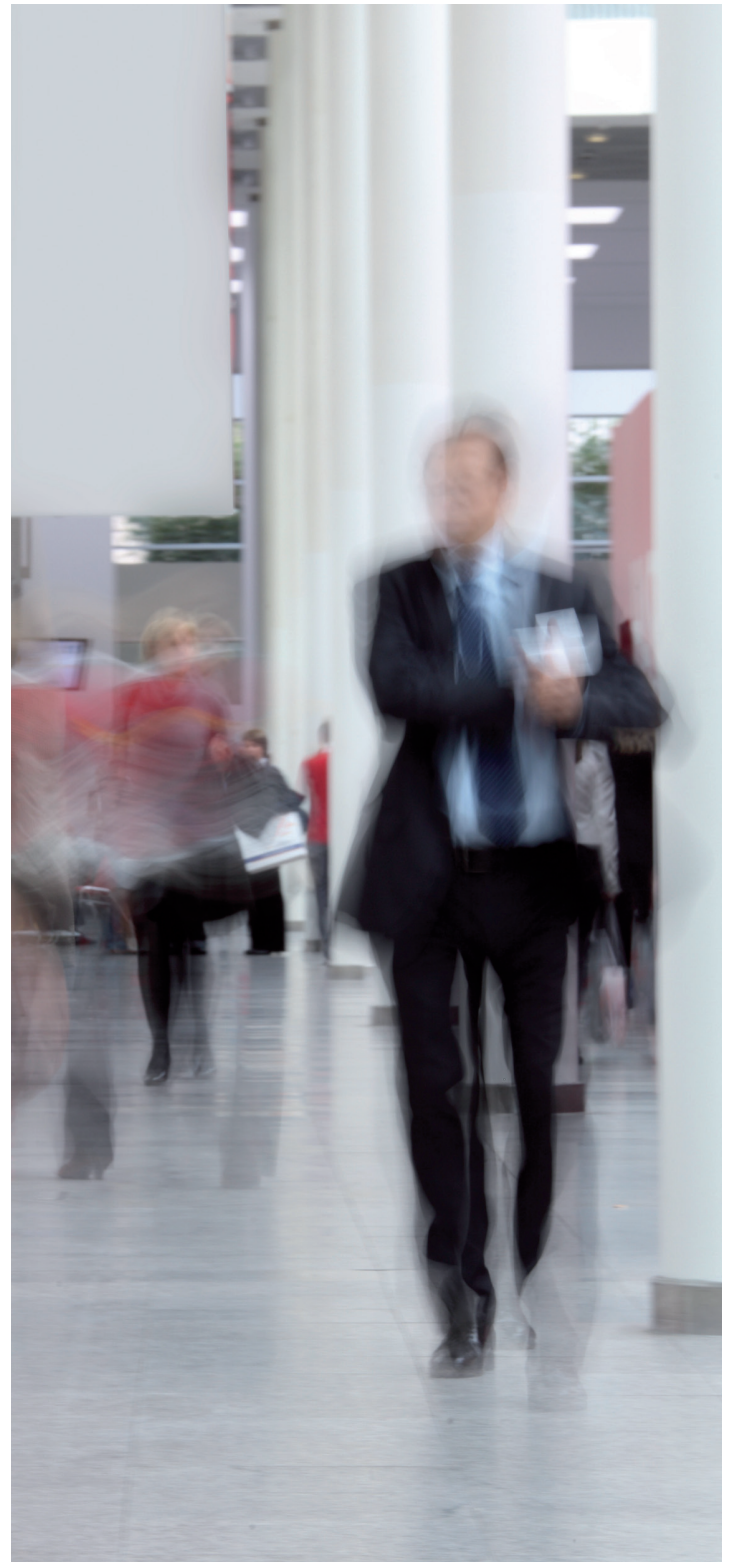
### Facts

The Federal Labour Court was called upon to assess the validity of the election of a works council in 2010. The company had a total of 879 regular employees and 292 temporary workers as of the record date for the election, and a 13-employee works council was elected.

The works council then contested the election, claiming that a 15-person works council should have been elected. The works council argued that the company's 292 temporary workers should have been counted for the purposes of determining the size of the works council since the first sentence of § 9 of the Works Constitution Act stipulates that the criterion of voting eligibility is irrelevant in the case of works council elections of larger companies.

### Decision

The Federal Labour Court accepted the reasoning of the works council and declared the works council election invalid. According to the first sentence of § 9 of the Works Constitution Act, the number of members of a works council is based on the size of the workforce employed by the company as a rule. In addition, employees must be eligible to vote in the case of companies with between 5



and 100 employees. According to the second sentence of § 7 of the Works Constitution Act, temporary personnel are also eligible to vote once they have been with a company longer than three months. In the case of undertakings with more than 100 employees, on the other hand, the law makes no distinction as regards eligibility to vote. In the case at issue here, the Federal Labour Court confirmed that the company had more than 1,001 employees. In so doing, the court introduced a change in the case law (see on the previous legal situation Federal Labour Court 10 March 2004 – 7 ABR 49/03). According to the court, a construction of the law based on the intent and purpose of the above thresholds would dictate that temporary personnel also be counted for the purposes of determination of the size of an undertaking. In any case, the question as to whether or not temporary employees are eligible to vote is no longer relevant when a company has more than a hundred employees.

## Comments

Although temporary employment has definitely played a positive role in Germany in the fight against unemployment, it is increasingly frowned upon as an instrument of labour market policy. This was reflected not only in the fact that the Temporary Employment Act (Arbeitnehmerüberlassungsgesetz – AÜG) was amended to make its provisions more stringent in December 2011, but also in changes in the case law made by the Federal Labour Court immediately thereafter. In the previous issue of our Newsletter, we referred to the decision of the Federal Labour Court of 24 January 2013, (2 AZR 140/12), which also dealt with determination of company size, but in connection with the question of protection against dismissal. Departing from previous case law, the Federal Labour Court ruled that temporary personnel employed “as a rule” must be taken into account. This change in the case law now also applies to the law governing codeter-

mination. Companies with a high percentage of temporary personnel will in the future have to expect to find themselves confronted with a works council with at least two more members. This will of course increase the costs incurred by the necessity of releasing works council members from their usual duties and providing appropriate training.

Changes in legislation and the case law are making the use of temporary employees less attractive in practice, for temporary employees must in many ways be treated like regular employees. The new legal situation can be summed up in a few words: temporary personnel vote and count!

Jens Völksen

The new legal situation  
can be summed up  
in a few words:  
temporary personnel  
vote and count!

## Federal Labour Court: Significant curtailment of benefits under social compensation plan permissible in the case of older employees

### Headnote

A company and its works council may take into account the time remaining until retirement for the purposes of determining settlements under a social compensation plan. Due to their approaching retirement, employees who have already reached the age of 58 may therefore receive settlements that are significantly lower than those granted their younger colleagues. This does not violate the principle of equal treatment anchored in the law governing codetermination or the ban on agebased discrimination under European Union law (Federal Labour Court, judgment of 26 March 2013 - 1 AZR 813/11, press release).

### Facts

The Federal Labour Court was called upon to rule on a social compensation plan agreed to by an employer and a works council in 2011 due to the imminent closure of an establishment. The plan initially called for a settlement for employees to be dismissed based on a standard formula that took into account gross remuneration, length of service and the age of the employees. This standard formula was not, however, applied in the case of employees who had already reached the age of 58. These employees received a settlement based on only 85 % of gross remuneration less unemployment compensation up to the earliest possible time of eligibility for governmental retirement benefits. The plaintiff had reached the age of 62 as of the record date for the purposes of determination of his settlement, and the settlement was in his case not based on the standard formula, which would have given him a settlement in the amount of approximately EUR 240,000.00. Instead, he received only compensation for partial loss of remuneration up to retirement

age in the amount of a total of EUR 4,974.62. He argued that his settlement was approximately EUR 235,000.00 lower than it should have been solely because of his age. He considered this to be agebased discrimination, which is prohibited by the relevant provisions of the General Equal Treatment Act (Allgemeines Gleichbehandlungsgesetz – AGG).

### Decision

The Federal Labour Court ruled against the plaintiff. The court held that the use of different formulas under a social compensation plan was legitimate and did not criticize the fact that the standard formula was not applied to determine the benefits of employees who had reached the age of 58. The Federal Labour Court emphasized that the calculation of settlements under social compensation plans on the basis of age is allowed pursuant to the second option described under item no. 6 of the third sentence of § 10 of the General Equal Treatment Act. The court reasoned that management and the works council of a company could apply a formula that would compensate only for the economic loss incurred up to early retirement in the case of employees approaching retirement age due to the fact that the purpose of such settlements under a social compensation plan is to facilitate transition. The action of the employee approaching retirement age was unsuccessful, and the employee had to accept the settlement in the amount of EUR 4,974.62.

### Comment

The judgment of the Federal Labour Court ultimately cannot be faulted since it proceeds from the correct assumption, namely, that the purpose of settlements is

to alleviate future financial burdens due to the loss of employment. The situation of employees nearing retirement when they lose their jobs cannot be compared with that of younger employees, whose retirement lies in the farremoved future and who possibly even have to use the settlement to finance part of their retirement. As a result, it is logical to rely on the second option described under item no. 3 of the third sentence of § 10 of the General Equal Treatment Act, according to which older employees who are eligible for retirement – possibly after receiving unemployment compensation – are subject to no or hardly any financial disadvantage if they become unemployed when they have almost reached retirement age.

Nevertheless, this decision does leave a “bitter taste” since the normal settlement based on the standard formula would have come to approximately EUR 240,000.00 under the social compensation plan whereas the employee bringing the action received only just under EUR 5,000.00 on the basis of calculations for employees nearing retirement. Since any age limit – 58 in the present case – will by nature inevitably be arbitrary – the

age of 59 or 60 could also have been chosen in the case at issue here, settlements can differ significantly, which means that whether a generous settlement is received or a – relatively – insignificant amount is virtually a matter of chance.

However, the Labour Court was correct in not taking this into account since there is no way to avoid choosing a certain age for the purposes of applying a different formula for the calculation of settlements for employees nearing retirement in order to be able to take this aspect into account at all. In practice, this means that it is always advisable to formulate social compensation plans so that the settlements of employee approaching retirement age are calculated separately, which – depending upon a company’s age structure – can result in considerable savings for the employer.

Dr. Christoph Müller



## Employers are under no obligation to inform unsuccessful candidates as to the outcome of selection processes

### Headnote

Unsuccessful candidates for employment have no right to information as to whether an employer has hired another candidate and what criteria were used as the basis for the new hire (Federal Labour Court, judgment of 25 April 2013 - 8 AZR 287/08).

### Facts

The plaintiff had applied for a position as a software developer but was not invited to a job interview. She was convinced that she was ideally qualified for the position and concluded that her gender, age and Eastern European origins were the real reasons why she was not invited for an interview. Neither the job description nor the rejection letter contained any objective indication of discrimination on the basis of any of these grounds. Against this background, the plaintiff asked the employer to provide information as to whether the vacant position was filled and, if so, on the basis of what criteria. The plaintiff anticipated that such information would provide evidence of discrimination in the recruitment process in violation of the General Equal Treatment Act (Allgemeines Gleichbehandlungsgesetz – AGG) and as a result entitle her to appropriate financial compensation.

### Decision

The action was dismissed by the lower courts and then ultimately in the final instance by the Federal Labour Court. According to § 15(2) of the General Equal Treatment Act, a rejected candidate is entitled to compensation only if discriminated against by an employer on the basis of race or due to his ethnic origin, gender, religion or

creed, disability, age or sexual identity. If an unsuccessful candidate can provide evidence of such discrimination, for example, because the formulation of the job description is not genderneutral or explicitly addresses “young” candidates, it is according to § 22 of the General Equal Treatment Act incumbent upon the employer to prove that the successful candidate was in fact selected on the basis of objective – non-discriminatory – criteria.

Since no circumstantial evidence was immediately obvious, the plaintiff tried to obtain evidence of discrimination by demanding information from the company.

In the year 2010, the Federal Labour Court had already ruled in this matter that no such right to information can be inferred from national German law, reasoning that the legislature had indeed eased the burden of evidence and proof for unsuccessful candidates but did not make provision for a right to information that went any further.

Against that background, the Federal Labour Court submitted the question as to whether such a right to information could be inferred from Community law to the European Court of Justice. In its judgment of 19 April 2012, the European Court of Justice ruled that this was not the case, but did point out that an employer’s refusal to provide any information could be cited as possible evidence of discrimination, adding that the evidentiary weight of such refusal would, however, have to be assessed on the basis of the actual circumstances involved in the specific case.

Following the decision of the European Court of Justice, the Federal Labour Court then dismissed the action of the unsuccessful candidate, concluding that she simply alleged discrimination arbitrarily without having an

objective reason to do so. The court found that once it was established that no right to information exists the employer was also no longer under any obligation to provide any further explanation as regards the selection process and that refusal to provide information could not alone be of any decisive importance in the absence of any other circumstantial evidence of discrimination against the plaintiff.

## Comments

Both the judgment of the Federal Labour Court and the underlying decision of the European Court of Justice are welcome and their legal argumentation convincing. In its implementation of the European Directive in the form of the General Equal Treatment Act, the legislature not only defined the substantive conditions for compensation, but also provided conclusive rules for the assignment of the burden of evidence and proof. The General Equal Treatment Act deviates from the basic rule to the effect that each party bears the burden of presenting the most favourable evidence and proof in support of its case and eases the burden of unsuccessful candidates for employment. The ostensible victim of discrimination must not provide evidence of and demonstrate the existence of discrimination as such; indication of such discrimination is sufficient. Any circumstantial evidence can usually be inferred from the recruitment process, as a rule on the basis of the use of revealing language in the formulation of job descriptions or rejection letters. In order to preclude claims under the General Equal Treatment Act, it is still advisable to pay especially careful attention to the formulation of job descriptions and rejection letters to avoid any semblance of discriminatory selection. When recruitment processes provide no indication of any discrimination, inquiries from unsuccessful applicants for employment concerning the selection process can be ignored.

However, if the recruitment process does give the unsuccessful applicant objective reason to suspect discrimination under the General Equal Treatment Act and provide supportive “ammunition”, it would be advisable to respond to the inquiry. Failure to do so would expose an employer to the danger that refusal could ultimately be construed as a clear indication of discrimination.

Dr. Frank Wilke

The ostensible victim of discrimination must not provide evidence of and demonstrate the existence of discrimination as such...

## Employees who line their own pockets risk dismissal

### Headnote

Employees who compete with their employers without permission are subject to summary dismissal (Hessian Higher Labour Court, judgment of 28 January 2013, – 16 Sa 593/12).

### Facts

The plumber who brought the action was employed by a company that repairs drainpipes. After inspecting the drainpipes in the kitchen and basement of a customer with a special-purpose camera for his employer, the employee told the customer that it would be necessary to install new drainpipes. He then carried out the necessary work himself a few days later and charged the customer EUR 900.00, which he asked for in cash. No invoice was issued. The plumber kept the money without informing his employer.

When the employer happened to find out about the incident during a service call to the same customer four years later, he dismissed the plumber with immediate effect for cause.

### Decision

The action brought for protection against dismissal before the Wiesbaden Labour Court was successful in the first instance, but the Hessian Higher Labour Court dismissed the action on appeal. The Higher Labour Court considered the plaintiff's activity to constitute competition with his employer, which was not very surprising. The court ruled that employees are not allowed to offer services that compete with those of their employers and that employers must retain unrestricted access to their markets without being exposed to the risk of any disadvantages due to the activities of their own employees. According to the court,

the employee committed an egregious breach of his duties as an employee by performing services in competition with his employer for his own benefit, which meant that the employer could not be expected to maintain the employment relationship and that the summary dismissal was an appropriate reaction.

### Comments

The decision of the Hessian Higher Labour Court, which has up to now been made public only in the form of a press release, is to be welcomed. It came as no surprise that the Higher Labour Court considered the conduct of the plaintiff to constitute cause for summary dismissal. After all, the plaintiff did deprive his employer of a concrete business opportunity, which he took advantage of for his own benefit and – to make matters worse – did so without declaring the income. What is surprising, however, is that the Wiesbaden Labour Court granted the action for protection against dismissal in its judgment in the first instance, which was unfortunately not published.

Apart from the diverging opinions of the two instances, this case is also unusual in that the employer did not acquire knowledge of the incident until four years after it occurred. Summary dismissal must take place within 2 weeks of discovery of the breach warranting dismissal by the employer. If such a breach remains unknown to an employer for a longer period of time, summary dismissal is still possible – as in the present case – even years later. However, when the interests of the parties are weighed against one another for the purposes of determining whether the employer can be reasonably expected to maintain the employment relationship in the individual case, the elapsed time is likely to work in favour of the employee.

Dr. Frank Wilke

## Federal Labour Court revises its case law on the treatment of the “jump” in the contribution ceiling for company pension plans

### Headnote

The one-time EUR 500.00 increase in the contribution ceiling in the year 2013 cannot be ignored in the case of pension commitments involving a “split pension formula”. Correction is possible only if the pension shortfall is so significant that recipients of company pension plans cannot be reasonably expected to accept the agreement in place (Federal Labour Court, judgment of 23 April 2013 - 3 AZR 475/11).

### Facts

The plaintiff was a retiree who had been promised benefits under a company pension plan by his employer. The amount of the company pension was to be calculated on the basis of what is referred to as a “split pension formula”, which means that the benefits to be provided by the company for that part of the employee’s income lying above the contribution ceiling for the governmental retirement insurance would be higher than the retirement benefits for the part lying below the ceiling. It is not unusual for benefits under company pension plans to be determined in this fashion. On the one hand, the “split” makes it possible to make up for the shortfall that results from the fact that employees receive no benefits from the governmental retirement insurance scheme for that part of their income lying above the contribution ceiling; on the other hand, employers also remit no social security contributions for that part of their employees’ income lying above the contribution ceiling, which is why they are willing to invest this “saving” in higher benefits under company pension plans.

The contribution ceiling is normally adjusted each year to take into account the country-wide increase in gross

monthly wages and salaries. With effect as of 1 January 2003, however, the legislature raised the ceiling by a one-time “jump” in the amount of EUR 500.00 to help close the financial deficit in the governmental retirement insurance scheme. From the point of view of recipients of company pensions, this jump had a negative effect as regards calculation of retirement benefits on the basis of a “split pension formula” since it also entailed a reduction in the amount of income lying above the contribution ceiling.

In two judgments dated 21 April 2009, the Federal Labour Court issued landmark decisions, ruling that recipients of company pension benefits must not absorb the entire effect of the jump in the contribution ceiling. The prevailing opinion at the time was that company pensions should therefore be calculated as though the one-time increase in the contribution ceiling had not taken place.

### Decision

This case law met with virtually unanimous criticism in the scholarly literature as well as by a series of lower courts, and the Federal Labour Court has now revised its opinion. Consistent with prevailing opinion, the Senate has now adopted the position that the jump in the contribution ceiling must also be taken into account for the purposes of calculation of company pension benefits using the “split pension formula”. Recipients of company pension benefits must accept the negative impact.

Adjustment is required only if the jump in the contribution ceiling results in such a significant decrease in benefits that the employees affected cannot be reasonably expected to accept the agreement. The Federal Labour Court gave no indication – at least not in the

press release it issued – as to where the threshold of significance might lie. Although the benefit shortfalls in the cases decided here were of an order of magnitude of between 5 % and 10 %, the Federal Labour Court saw no need for any adjustment.

## Comments

The Federal Labour Court implemented the desired change in its previous case law by making a complete about face with its new decision, evidently adopting the convincing arguments advanced in the scholarly literature and the findings of various lower courts.

The previous case law, according to which the sudden increase in the contribution ceiling revealed an omission in the guidelines for retirement benefits that had to be filled through supplementary interpretation of underlying agreements, was justifiably criticized on the grounds that the only change involved the abrupt increase in the contribution ceiling used as a reference. There was therefore never any omission in the guidelines for retirement benefits, but only an unexpected change in external circumstances. The law recognizes the notion of interference with the underlying basis of a transaction for the purposes of rectification in such cases. However, the corresponding mechanisms are not triggered by just any disturbance of parity, but can be resorted to only if unexpected occurrences make it unreasonable to expect one of the two parties to an agreement to continue to honour that agreement. The Federal Labour Court was correct in changing its position to reject modification of the guidelines for retirement benefits in cases in which the benefits shortfall does not exceed reasonable limits.

This decision will come as welcome relief for employers whose guidelines for retirement benefits make provision for what is referred to as a “split pension formula”

since they can now continue to apply their formulas as planned. It is likely to be necessary to adjust the pension formula to mitigate the one-time effect of the jump in the contribution ceiling only in the case of significant reductions in benefits, i.e., in excess of 10 %.

Dr. Frank Wilke

There was therefore never any omission in the guidelines for retirement benefits, but only an unexpected change in external circumstances.

## “Money for Nothing?”

### Headnote

Even if an employment contract omits express mention of working hours, an employer can regularly expect employees to work during an undertaking’s usual working hours [Federal Labour Court judgment of 15 May 2013, 10 AZR 325/12].

### Facts

The plaintiff was employed by the defendant as a “salaried employee” (i.e. not covered by a pay award) with an annual salary of EUR 95,000.00. The written employment contract contained no express understanding as regards working hours. The only stipulation in this regard was one to the effect that the employee also had to work “outside normal working hours” if necessary. Flexitime accounts based on a normal work week of 38 hours were kept for the defendant’s employees. After the plaintiff had accrued a negative balance of approximately 700 hours, the employer requested that she at least adhere to the normal 38-hour work week.

The plaintiff was, however, of the opinion that – in the absence of any understanding to the contrary – she was not bound to any specific working time. She argued that she only had to complete the work assigned to her, regardless of how much time it took. After the plaintiff worked 19.8 and 5.5 hours respectively in two consecutive months, the defendant reduced the plaintiff’s monthly salary payments accordingly.

The plaintiff brought an action for payment of the difference and at the same time petitioned the court to rule that she was under no obligation to work 38 hours per week in the future.



## Decision

Like the lower courts, the Federal Labour Court dismissed the action and instructed the plaintiff that her employment contract could be reasonably construed to require her to be at work during the company's normal working hours. The court opined that working time need not necessarily be expressly defined in the form of a concrete agreement if the contract otherwise contains nothing to indicate any exception to normal working hours.

The lower courts had found that "company working hours are in principle considered to have been agreed" in the absence of any express understanding to the contrary. Finally, the courts stated that any employee would be sufficiently aware of the fact that an employment contract entails an obligation to perform work and not an obligation to produce results regardless of the time invested. Since the plaintiff had failed to fulfil her obligations as an employee, her employer was justified in reducing her compensation accordingly.

## Comments

Careless contract drafting came together with a good portion of chutzpa here, and these ingredients combined to create a curious situation, but one that was ultimately properly assessed by all instances. With welcome clarity, the court of first instance, the Düsseldorf Higher Labour Court, had already found that employees cannot reasonably assume that they will be paid for doing nothing in the absence of a concrete agreement governing working time.

Although the employer did in this case ultimately not suffer any serious repercussions, employment contracts should be formulated to avoid such pitfalls due to care-

lessness. In any case, the Notification Act (Nachweisgesetz – NachwG) requires that employers define working time in the form of a written employment contract or – if no agreement is made in writing – notify the employee of the working time in writing.

Dr. Frank Wilke

## Contents

- 2 A recurring topic: Temporary personnel count for the purposes of determining the size of an undertaking
- 4 Federal Labour Court: Significant curtailment of benefits under social compensation plan permissible in the case of older employees
- 6 Employers are under no obligation to inform unsuccessful candidates as to the outcome of selection processes
- 8 Employees who line their own pockets risk dismissal
- 9 Federal Labour Court revises its case law on the treatment of the “jump” in the contribution ceiling for company pension plans
- 11 “Money for Nothing?”

This Newsletter was prepared according to our best knowledge and belief. It is meant to be a general outline of the law and cannot be a substitute for personal advice in an individual case. We therefore do not accept any liability whatsoever for damage. If you no longer wish to receive a copy of this Newsletter, please let us know by forwarding an e-mail to [jlang@goerg.de](mailto:jlang@goerg.de).

## Our office

**GÖRG** Partnerschaft von Rechtsanwälten

### BERLIN

Klingelhöferstraße 5, 10785 Berlin  
Tel +49 30 884503-0, Fax +49 30 882715-0

### COLOGNE

Kennedyplatz 2, 50679 Köln  
Tel +49 221 33660-0, Fax +49 221 33660-80

### ESSEN

Alfredstraße 220, 45131 Essen  
Tel +49 201 38444-0, Fax +49 201 38444-20

### FRANKFURT AM MAIN

Neue Mainzer Straße 69 – 75, 60311 Frankfurt am Main  
Tel +49 69 170000-17, Fax +49 69 170000-27

### HAMBURG

Dammtorstraße 12, 20354 Hamburg  
Tel +49 40 500360-0, Fax +49 40 500360-99

### MUNICH

Prinzregentenstraße 22, 80538 München  
Tel +49 89 3090667-0, Fax +49 89 3090667-90