Newsletter Labour and employment

ISSUE 03 I 2013

FOREWORD

Our third Newsletter for the year 2013 reviews new rulings by the Federal Labour Court on the waiver of compensation for annual leave that fits seamlessly into the most recent case law on the rights to annual leave. Another decision of the Federal Labour Court concerns the formal requirements that must be met by the content of notices of dismissal, especially as regards the period of notice.

Practitioners will also be interested in a very recent judgment of the Federal Labour Court that addresses the issue of discrimination in the formulation of employment advertisements; the Federal Labour Court criticised in particular the use of "Young Professionals", a term the court considers indicative of age-based discrimination. Finally, one of the cases we review addresses the question as to whether, and to what extent, the Employment Protection Act (Kündigungsschutzgesetz – KSchG) transcends national borders.

Waiver of compensation for annual leave now possible as part of a court settlement

Headnote

According to a recent decision by the Federal Labour Court, employees may waive compensation for the statutory minimum annual leave as part of a court settlement (Federal Labour Court, judgment of 14 May 2013 - 9 AZR 844/11).

Facts

The defendant had dismissed the plaintiff, an employee who had been unable to work due to illness since January 2006, with effect as of 30 June 2009. A legal dispute concerning the dismissal ended with a settlement that called for, among other things, termination of employment with effect as of 30 June 2009, payment of compensation in cash in the amount of euro 11,500 and extinguishment of all pecuniary claims of the parties against each other arising from the employment relationship, whether known or unknown or for whatever legal reason. The plaintiff then brought a claim for euro 10,656.72 against his former employer for annual leave from the years 2006 to 2008.

Decision

The Chemnitz Labour Court dismissed the action, but the plaintiff filed an appeal with the Saxony Higher Labour Court, which partially revised the judgment of the lower court and ordered the former employer to pay compensation for annual leave in the amount of euro 6,543.60 (Saxony Higher Labour Court, judgment of 26 May 2011 - 9 Sa 86/11). The employer's appeal before the Federal Labour Court was then successful and the judgment of the court of first instance reinstated.

Comments

Under the previous case law of the Federal Labour Court, rights to annual leave and compensation for such leave were inseparable. The right to compensation involved, according to the Federal Labour Court, not merely a pecuniary claim, but represented a „surrogate" for the underlying right to annual leave, which meant that the accrual and extinguishment of the right to compensation were subject to the same legal requirements as the entitlement to free time. Since the first sentence of § 13(1) of the Federal Holiday Act (Bundesurlaubsgesetz – BUrIG) stipulates that the right to minimum annual leave under §§ 1 and 3(1) of the Federal Holiday Act is an absolute right, the same would also apply to any claim for compensation based on the statutory minimum leave according to the "surrogate" theory. The Federal Labour Court has since completely abandoned this theory since it was incompatible with EU law (see ECJ, judgment of 20 January 2009, - C-350/06 and C-520/06, "Schultz-Hoff") (Federal Labour Court, judgment of 19 June 2012 – 9 AZR 652/10).

According to the Saxony Higher Labour Court, express abandonment of the surrogate theory by the Federal Labour Court did not, however, mean that the absolute right to compensation for the statutory minimum annual leave pursuant to the third sentence of § 13(1) sentence and § 7(4) of the Federal Holiday Act can be ignored since the right to compensation for annual leave is not simply a pecuniary right that the parties are at liberty to dispose of at will.

The decision of the Federal Labour Court, which has up to now appeared only in the form of a press release, marks a departure from this opinion and is in that regard consistent with the court's more recent case law on annual leave and claims for compensation for annual leave. According to this decision, the third sentence of § 13(1) of the Federal Holiday Act permits deviation from the provision con-

tained in § 7(4) of the Federal Holiday Act, which calls for compensation for annual leave if it cannot be taken, either in its entirety or in part, due to termination of employment, but not at the expense of the respective employee. However, the court argued, this provision forbids only individual contracts that exclude the possibility of claims for pecuniary compensation for accrued annual leave; if an employee has a claim to compensation for statutory leave for the purposes of rest and relaxation pursuant to § 7(4) of the Federal Holiday Act when employment is terminated, nothing prevents that employee from waiving that claim.

The logical consequence of this would be that it is now possible for an employee to waive claims to compensation for the minimum annual leave required by law not only through a settlement reached through the courts, but also by signing a release to that effect upon termination of employment. Under previous case law, this possibility existed as regards annual leave in excess of the legal minimum granted in employment contracts. In the case of claims to compensation under collective agreements, it is important to keep in mind that the first sentence of § 4(4) of the Collective Agreement Act (Tarifvertragsgesetz –TVG) stipulates that such claims may be waived only under a settlement approved by the bargaining partners.

However, it remains to be seen whether the European Court of Justice will approve this welcome addition to the case law of the Federal Labour Court. To be on the safe side, in the case of disagreement as to the number of days of annual leave that have not been taken, it is for the time being necessary to keep in mind the possibility of settling the question of compensation for annual leave through the use of an agreement on the underlying facts that confirms that all annual leave has been taken "in kind".

Christine Vesper

Notice to terminate – Specific mention of date of termination

Headnote

Notice to terminate is effective if specific and unambiguous. This will regularly be the case if an employee can tell when the employment will come to an end.

Facts

In the case of an employee who had joined a company as an industrial clerk in 1987, the required period of notice reflected the corresponding time of service. Insolvency proceedings were initiated on 1 May 2010 and an insolvency administrator appointed after the employer-company became unable to pay its debts. The insolvency administrator decided to completely shut down the company and dismiss all employees. The plaintiff bringing the action received notice of dismissal on 3 May 2010. The notice stated that her employment would come to an end "as of the next possible date". The letter did not, however, contain mention of a specific date, but it did refer to the legal periods of notice under § 622 of the Civil Code (Bürgerliches Gesetzbuch – BGB) and § 113 of the Insolvency Code (Insolvenzordnung – InsO). In particular, it was mentioned that § 113 of the Insolvency Code limits the period of notice to three months in cases in which a longer period of notice would otherwise – in the absence of insolvency – have applied by operation of law, a collective agreement or an employment contract. The employee then brought an action against the insolvency administrator before the Labour Court.

Decision

Both the first instance labour court and the Higher Labour Court granted the employee's motion, ruling the dismissal invalid due to the fact that it was insufficiently specific. The insolvency administrator then appealed this decision to the Federal Labour Court, which ruled in his favour in the final instance (Federal Labour Court, judgment of 20 June 2013 – 6 AZR 805/11, press release). The court found that the dismissal of 3 May 2010 – with three months' notice – was effective as of 31 August 2010. The Federal Labour Court did to be sure refer to the requirement that the notice of dismissal contain specific information, but did not – despite the omission of a specific date for termination of the employment relationship – have any misgivings in the present case, for the notice of dismissal did mention the legal periods of notice and, in particular, the relevant three months' notice pursuant to § 113 of the Insolvency Code. According to the court, that meant the employee could easily have determined the date of termination of her employment on the basis of her length of service.

Comment

The decision of the Federal Labour Court is to be welcomed since if creates legal certainty and does away with the possibility of exaggerated claims arising from ostensibly insufficient precision in the formulation of notices of dismissal. In the case decided by the Federal Labour Court, it was in any case obvious that the intention of the insolvency administrator was to serve notice to terminate as soon as possible, i.e., with three month's notice as allowed by § 113 of the Insolvency Code. The notice of dismissal was sufficiently specific since the employee could without any great effort determine the date of termination.

It is, however, important that it be at least possible to determine the date of termination of employment. As a result, mention should in any case be made of the applicable provisions of law. In order to comply with requirements concerning the necessary degree of precision of information contained in notices of termination on the one hand and to express the intention to terminate without any ambiguity on the other hand, the use of the following formulation is recommended:

„This is to inform you of the termination of your employment with us as of the next possible date, which we determine to be [date of termination] on the basis of [law/the collective agreement, employment contract].“

Jens Völksen

Fixed-term employment of works council members without an objective reason under the Act on Part-Time Employment and Fixed-Term Contracts

Headnote

According to § 14(2) of the Act on Part-Time Employment and Fixed-Term Contracts (Teilzeit- und Befristungsgesetz – TzBfG), fixed-term employment contracts of works council members which are not based on objective reasons expire as of the agreed term as in the case of such contracts with other temporary employees. The scope of application of § 14(2) of the Act on Part-Time Employment and Fixed-Term Contracts may not be purposively reduced, for example, for reasons of EU law. The provision governing deviations from collective agreements contained in the third sentence of § 14(2) of the Act on Part-Time Employment and Fixed-Term Contracts, which also permits deviations that are disadvantageous for employees, is compatible with EU law.

Facts

The Federal Labour Court was called upon to decide whether it was legally permissible to terminate the fixed-term employment of a member of a works council which was not based on objective reasons as of the end of the fixed term.

The employment relationship between the plaintiff and the defendant, a security provider, fell under collective agreements between the Bundesverband Deutscher Wach- und Sicherheitsunternehmen e.V., an association of security providers, and the trade union ver.di. According to § 2 of the respective industry-wide collective bargaining agreement, fixed-term employment contracts may without an objective reason be extended up to a maximum of four times limited to a total duration of 42 months. In 2006, the parties entered into an employment relationship for a term extending up to 31 July 2007 under this collective agreement. The initial term was extended at first time up to 31 July 2008 and then up to 11 January 2010 under an agreement dated 8 April 2008. In September 2009, the plaintiff was elected to the company's works council as a deputy member.

The plaintiff sought, among other things, a declaration to the effect that the provision calling for a limited term was void.

Decision

The action was dismissed by the lower courts and then ultimately by the Federal Labour Court in the final instance. The Federal Labour Court ruled that the fixed-term provision was permissible under the provisions of the collective agreement, finding that § 14(2) of the Act on Part–Time Employment and Fixed-Term Contracts allows collective agreements that call for extensions and a maxi-

mum duration of such extensions that differ from what is otherwise permitted by law – even if to the disadvantage of individual employees – and that the provision governing deviations from collective agreements provides no occasion for reservations as regards compatibility with EU law.

According to the court, limitation of fixed-term employment to a maximum of 42 months without an objective reason as called for in the collective agreement and a maximum of four extensions represent moderate expansion of the possibilities as regards fixed-term employment without an objective reason allowed under § 14(2) of the Act on Part-Time Employment and Fixed-Term Contracts in the present case.

The court also ruled that the plaintiff's position as a member of a works council did not stand in the way of limitation of an employment relationship, arguing that EU law requires no purposive interpretation of § 14(2) of the Act on Part-Time Employment and Fixed-Term Contracts in the case of fixed-term employment relationships with members of works councils which are not based on objective reasons and the European directive does not require that employees' representatives be accorded greater protection against dismissal.

Comments

The decision of the Federal Labour Court is to be welcomed and confirms previous case law on the contractual autonomy of parties to collective agreements. According to the Munich Labour Court's decision of 8 October 2010, fixed-term employment of members of works councils without an objective reason was illegal under European law. However, the Federal Labour Court has now made it clear that § 14(2) of the Act on Part-Time Employment and Fixed-Term Contracts does indeed allow fixed-term employment of elected members of works councils without an objective reason since the application of § 14(2) of the Act on Part-Time Employment and Fixed-Term Contracts is not restricted by EU law.

The Federal Labour Court does, however, make a strict distinction between fixed-term employment and discrimination due to works council membership on the one hand and fixed-term employment agreed – as in the present case – without any regard to works council membership on the other hand. As a result, the court therefore once again confirmed the priority of agreements limiting the duration of employment over rights to special protection, for mothers, works council representatives, etc. The Federal Labour Court held in that regard that fixed-term employment of a (deputy) works council representative without an objective reason would not offer adequate protection or security if termination of that employee's employment could be justified on the basis of works council membership or activities. If, however, that is not the case, even a smaller chance of regular employment or continuation of the employment relationship upon election to a works council would not justify any increase in protection.

Dr. Jessica Blattner

Typical traps – A search for "Recent Graduates/Young Professionals" may constitute age discrimination

Headnote

Mention of "Recent Graduates/Young Professionals" in an employment advertisement run to recruit candidates for a trainee program may be construed as indicative of age discrimination. In such cases, an employer will regularly have to prove that no such discrimination took place.

Facts

The Federal Labour Court was called upon to decide whether an employment advertisement directed at "Recent Graduates/Young Professionals" represented prohibited discrimination against older candidates.

The defendant – the operator of a public hospital – had set up a special program for "Recent Graduates/Young Professionals" and started to recruit junior managerial personnel for the program in April of 2009. The employment advertisements included the passage: "C will require junior management personnel in the years to come. We now have a special program for "Recent Graduates/Young Professionals" to meet that need.

The then 36-year-old lawyer and subsequent plaintiff applied for such a position. His candidacy was unsuccessful and he brought an action for relief in the form of damages and a cease-and-desist order under the General Equal Treatment Act (Allgemeines Gleichbehandlungsgesetz – AGG). The plaintiff was of the opinion that the employment advertisement constituted prohibited discrimination on the basis of age.

Decision

Both the lower Labour Court and the Higher Labour Court dismissed the action. The plaintiff's appeal to the Federal Labour Court as regards entitlement to damages was successful. Finding that evidence of improper discrimination on the basis of the plaintiff's age did exist in the present case, the superior court remanded the case to the Higher Labour Court for reconsideration.

The text of the job advertisement was what provided the grounds for assuming the existence of age discrimination since the qualifications contained therein included the terms "college graduates" and "young professionals". According to the court, the choice of vocabulary showed that the defendant was using age as a specific criterion for qualification and was seeking "young" applicants of about 30 years of age, which meant that the search was in violation of § 7 of the General Equal Treatment Act according to § 11 of the Act.

Since – in the opinion of the Federal Labour Court – concrete evidence of a discriminatory hiring practice did exist, the employer was responsible, as required by § 22 of the General Equal Treatment Act, for showing that the plaintiff was not a victim of illegal discrimination. According to § 10 of the General Equal Treatment Act, distinctions may be made on the basis of age, for example, to achieve a balanced age structure. Nonetheless, the Federal Labour Court was of the opinion that the argument advanced by the employer in the case at hand was without merit. The same applied as regards the argument to the effect that college graduates were recruited because they could be more easily "moulded". The defendant had, however, also submitted that it had selected the best candidates as required by Article 33(2) of the Basic Law. Since the plaintiff's academic performance was not as good as those of the other candidates interviewed, there was reason to think that considerations other than age had indeed led to the less favourable outcome. Since the candidate contested the employer's selection practice, the matter was remanded to the Higher Labour Court for further action and reconsideration.

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. Jessica Blattner

Federal Labour Court – Further employment limited to positions available at an employer's domestic establishments

Headnote

The obligation of employers to offer employees further employment – possibly under significantly less attractive working conditions – as required by § 1(2) of the Employment Protection Act (Kündigungsschutzgesetz – KSchG) to avoid dismissal for redundancy does not apply as regards available positions with an establishment of the employer located in another country.

Facts

The Federal Labour Court was tasked with ruling on the validity of a dismissal due to redundancy involving an employer in the textile industry that had for some time maintained an establishment in the Czech Republic for the production of certain bandage materials. Final production took place in Germany, where the employer was based. In June 2011, the employer decided to transfer all production to its Czech establishment. Plans called for only the administration and commercial activities to remain in Germany. Due to the move, the employer gave all employees notice of dismissal for redundancy. One of the employees contested this dismissal, arguing that the dismissal was not justified since the employer should have offered employees the possibility of further employment in positions at the foreign establishment.

Decision

The Federal Labour Court ruled against the plaintiff, as did the lower courts. The action for protection against dismissal was unsuccessful. Due to the transfer of production to the Czech establishment, no other possibility existed for further employment of the production worker at a domestic establishment.

Comments

For many employers, the transfer of operations to another European country represents an attractive restructuring possibility, especially because of lower payroll and production costs. However, it is necessary to take into account a few "pitfalls" that go beyond settlement obligations that may exist under collective agreements. A dismissal due to redundancy must be considered a solution of last resort, which means that employers must first investigate less radical measures, and this applies in general despite the provision contained in the second sentence of no. 1 b) of § 1(2) of the Employment Protection Act (Kündigungsschutzgesetz – KSchG) and regardless of whether a works council exists. Employers must therefore determine whether further employment is possible at another establishment of the same company, possibly under different employment conditions. However, this obligation to investigate the possibility of further employment applies only as regards positions available at establishments of the employer's company. The Employment Protection Act is not operative at the level of group companies. Employers are under no obligation to consider the possibility of options for further employment by other group companies (except in the case of employment contracts that make provision for transfers within a group of companies). The established case law of the Federal Labour Court is also based on the assumption that the scope of application of the Employment Protection Act is limited to establishments in Germany. For the purposes of § 1 of the Employment Protection Act, such establishments

include only organisational entities or parts of a company located in the Federal Republic of Germany. In the case of the present decision, the Federal Labour Court was consistent in its application of these principles and has now made it clear that investigation of possibilities for further employment is limited to operations located in Germany. Only under special circumstances must an employer consider offering employment at a foreign establishment. In that regard, this decision conflicts with a judgment to the contrary handed down by the Hamburg Higher Labour Court (Ref.: 1 Sa 2/11). Investigation of possibilities for further employment therefore ends at the German border.

It is, however, necessary to keep in mind that the protection against termination in the case of a transfer of operations does not always stop at the German border. If, for example, operations are transferred to another company in another country through a sale of a business pursuant to § 613a of the Civil Code (Bürgerliches Gesetzbuch – BGB), dismissals cannot be justified on the basis of a shutdown of operations in Germany since termination would ultimately have been based on a sale of the company – albeit to a company in another country – and as a result be in violation of § 613a(4) of the Civil Code.

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