Employment Law Newsletter

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unyer GLOBAL ADVISORS

Contents

■ EDITORIAL

Dear readers,

The political events and developments of the last few weeks and months have provided plenty of topics to talk about. Our times are characterised by uncertainty. Many people are looking to the future with concern. We in Germany are also facing major economic and political challenges. The upcoming government's plans for the world of work remain to be seen. At least our newsletter is consistent in these times and in this issue once again addresses the topics relevant to the labour law practice.

AI is a hot topic in employment as well, but the framework for the use of AI tools is often not yet sufficiently defined by the employer. In particular, the use of such instruments by employees harbours the risk of internal company information being passed on. Daniel Greger from our Hamburg office addresses this issue and shows how employers can regulate the use of external AI applications by employees based on their right to issue instructions.

A completely different subject that regularly occupies employers and consultants is target agreements – a key instrument for performance management and motivation. Robert von Steinau-Steinrück and Louisa Huske from Berlin highlight the legal challenges of such agreements and provide practical advice. In our section on pensions, Jan Hansen and Benedikt Strohdeicher report in detail on a recent judgement by the Federal Labour Court (Bundesarbeitsgericht, BAG). The subject matter is the conditions under which an established company pension scheme (specifically at group level) can be amended to the detriment of the beneficiaries.

In our news from the Unyer network, Raphaël Schindler of Luther Luxembourg provides insights into current developments in the recruitment of skilled labour in Luxembourg. Since the beginning of 2025, new tax breaks have been in place there to attract highly qualified people from abroad. Finally, this issue also provides you with the usual overview of current labour court decisions that we believe are particularly relevant for HR work.

Our authors look forward to your feedback. Please do not hesitate to contact us if you have any questions or suggestions. We hope you enjoy reading this report.

Yours

Achim Braner

■ CURRENT TOPICS

Safeguarding internal company information in the event of unauthorised use of AI tools by employees

The use of AI applications by employees harbours the risk of internal company information being passed on, as there is no control over the group of recipients and the further use of the content entered. However, employers can use their right to issue instructions to regulate the way in which employees use external AI tools, thereby increasing productivity and protecting confidential information.

I. The protection of internal information in the employment relationship

1. Business secrets and confidential information

Due to the general duty of consideration, the employee is obliged to maintain confidentiality regarding business secrets and confidential information even without a separate agreement. The term “trade secret” is legally defined in Sec. 2 No. 1 of the Act on the Protection of Trade Secrets (Geheimnisschutzgesetz / GeschGehG) and requires that appropriate confidentiality measures be taken. Only recently, the BAG rejected confidentiality protection because the employer merely claimed in general terms that it had taken confidentiality measures (BAG, decision of 17 October 2024 – 8 AZR 172/23). An obligation to maintain the confidentiality of trade secrets therefore only exists if the employer has taken and documented appropriate confidentiality measures. It should therefore take technical and organisational measures to maintain confidentiality, for example by setting

up technical usage blocks and issuing specific guidelines on what information may be used for what purpose when using which AI tools. It should also take control measures, e.g. through regular spot checks, and organise training courses.

The general duty of confidentiality also extends to confidential information, meaning all other processes and facts that become known to the employee in connection with their position in the company and which the employer has a special interest in keeping confidential. When using AI applications, employees are therefore prohibited from using company documents or data containing confidential information (such as calculation bases, offers and customer data) when prompting or uploading. However, confidential information requires a recognisable legitimate interest in confidentiality on the part of the employer.

2. Extension of the duty of confidentiality

The general duty of confidentiality can be contractually extended if and insofar as this is justified by legitimate interests. So-called catch-all clauses, which cover all company matters across the board, are nevertheless invalid. An overriding interest must relate to individual, specifically defined information. With regard to the use of AI applications, such an interest may exist in contractually extending confidentiality to information that is neither business secrets nor confidential information, as there is no control over the group of recipients and the further use of the content entered when using AI tools, e.g. with regard to operational processes and business relationships.

II. Options to regulate

The employer can make specifications by exercising the right to issue instructions in accordance with Sec. 106 sentence 1 German Trade, Commerce and Industry Regulation Act (Gewerbeordnung / GewO), as unilaterally issued specifications can be adjusted or cancelled at any time. Such flexibility is advantageous due to the rapid development of AI applications.

1. Scope and limits of the right to issue instructions

The employer's right to issue instructions includes the right to authorise and prohibit the use of the (technical) work equipment used in the performance of the contractually agreed obligations of the employee. For this reason alone, the employer can determine whether and under which conditions AI applications may be used in the performance of the work. Limits exist above all in statutory and collective and individual contractual regulations as well as within the scope of equitable discretion. As a result, the employer is generally prohibited from extending the duty of confidentiality to information that goes beyond business secrets and confidential information as part of its guidelines on the use of AI applications.

With regard to unauthorised use, the right to issue instructions is not restricted on the basis of mandatory co-determination rights of the works council. This also applies if the employer allows employees to use external AI applications via their own account and they have to bear any costs incurred themselves (Labour Court of Hamburg, decision of 16 January 2024 – 24 BVGa 1/24). This is unlikely to apply to browser-based applications, as any right of co-determination in this respect is likely to have already been exercised on a regular basis. However, pursuant to Sec. 90 (1) No. 3, (2) Works Councils Act (Betriebsverfassungsgesetz / BetrVG), the works council has a right to instruction and consultation when artificial intelligence is used.

2. Prohibition, authorisation and ordering of use

Nevertheless, the employer's right to issue instructions does not include instructing the employee to create and/or use a private user account, as it is generally the employer's responsibility to provide the work equipment required to perform the work. If the employer allows its employees to use AI applications without authorisation, it should restrict the type and manner of use as follows:

a) Applications, users and purposes

The employer should set specific guidelines on the type and manner of use by specifying which applications may be used by which employees for which purpose and which information may be used. When authorising individual AI applications, the requirements of the AI Regulation by the EU (Regulation (EU) 2024/1689) must also be taken into account. In particular, AI tools used in HR departments may be so-called high-risk systems, the use of which places various obligations on the operator (Art. 26 AI Regulation).

b) Confidentiality, data protection, anonymisation

Furthermore, the employer should urgently prohibit the introduction of business secrets and confidential information when using AI applications. Employees should be instructed to anonymise all information. Employers should also prohibit employees from using personal data and uploading (unverified or uncensored) documents to an application.

c) Duty of review, disclosure and documentation

It is also advisable to prohibit employees from accepting and instructing a work result generated using AI without checking it and correcting any errors – this serves to safeguard quality standards in the first place. In addition, employees should be instructed to always report the extent to which AI tools have been used and to document this.

d) Participation in training courses

Finally, it makes sense to make the use of AI applications dependent on prior participation in a training course. Adequate AI competence is in the legitimate interest of the employer. According to Art. 4 AI Regulation, operators of AI systems across all risk classes have also been obliged since 2 February 2025 to take measures to ensure that staff and other actors involved in the operation and use of AI systems on their behalf have a sufficient level of AI competence.

III. Summary

In the employment relationship, employees are obliged to maintain confidentiality regarding business secrets and confidential information, even without a separate agreement. The employer should make its employees aware of the content of the confidentiality obligations, particularly with regard to the use of AI applications, and set guidelines in this regard. The employer's right to issue instructions serves this purpose, whereby the employer should carefully weigh up the work facilitation expected from authorising the use of AI applications against the associated risks.

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How to conclude target agreements effectively

Target agreements are a key instrument for managing and motivating performance. They offer the parties to the employment contract the opportunity to define measurable results – but also harbour a number of legal challenges.

I. Introduction

Target agreements are extremely relevant in practice and are regularly the subject of court decisions. In 2024, for example, the BAG ruled that employees are entitled to compensation if the employer does not set targets for a target period that influence a bonus payment to be guaranteed under the employment contract (decision of 3 July 2024 – 10 AZR 171/23). According to the judges, the employer is in breach of its contractual obligation if it does not enter into negotiations to determine the targets by mutual agreement and does not give the employees the opportunity to exert influence to protect their interests. A clause that allows the employer to undermine the contractually agreed order of precedence of target agreement and target setting also unreasonably disadvantages the employee in accordance with Sec. 307 (1) Sentence 1, (2) German Civil Code (Bürgerliches Gesetzbuch / BGB) – and is therefore invalid. According to the BAG, a unilateral change from a target agreement that is freely negotiated between the parties to a target that is unilaterally determined by the employer is not possible.

II. The difference between target agreements and targets

Target agreements are agreements concluded between the parties to the employment contract on the targets to be achieved for the reference period agreed in the framework agreement (often one year). They can be structured as individual or group target agreements as well as non-remunerated or remunerated. In practice, remuneration-related individual target agreements are regularly concluded for specialists and managers so that they receive agreed commissions or bonuses (“variable remuneration”) for the achievement of targets. Target agreements are exempt from control up to the limit of morality due to their joint structure. In the case of targets, on the other hand, the targets are set unilaterally by the employer. The content of the target must be covered solely by the employment contract and must stand up to fairness review in accordance with Sec. 315 (3) BGB and Sec. 106 GewO. The employer therefore bears the burden of initiative

The purpose of both instruments is to increase motivation to achieve targets, to promote professional and personal development and to create legal clarity with regard to the justification for entitlement to performance-related pay. The BAG has only recently transferred its case law on target agreements to targets, according to which a claim for damages exists if the employer violates its sole duty of initiative by setting targets for a past period of time and is therefore no longer able to fulfil the motivational function (decision of 19 February 2025 – 10 AZR 57/24). Whether a target agreement or a target specification is relevant in a specific individual case must be determined by interpreting the contractual agreement.

III. Layout and content of the target agreement

A target agreement can be contained entirely in an (individual or collective) contract or divided into two parts. In the latter case, the first step is to establish a framework that defines the procedure for determining the specific (annual) targets, how achievement is determined and which bonuses are paid. This should be done in writing for legal certainty. The second part, the actual annual target agreement, contains the individual targets that employees must achieve in the relevant period. There are hardly any limits to the content of these targets as they are set by mutual agreement. For example, a distinction can be made between “soft” and “hard” targets: “hard” targets are business indicators such as costs, sales achieved, project completion and acquisition successes, while “soft” targets require a subjective assessment due to the lack of direct measurability. These can be personnel management skills, customer satisfaction and the team spirit of employees.

IV. Co-determination rights of the works council

The works council has various co-determination rights with regard to target agreements: It has a say in the design of the bonus system in relation to the distribution principles (Sec. 87 (1) No. 10 BetrVG), in employee appraisals to determine targets (Sec. 87 (1) No. 1 BetrVG) and in electronic data processing to monitor target agreements (Sec. 87 (1) No. 6 BetrVG). It also has a right to information in the case of specific target agreements (Sec. 80 (2) Sentence 1 BetrVG) and the task of monitoring compliance with collective agreements and the principle of equal treatment (Sec. 80 (1) No. 1 BetrVG).

V. Legal consequences of failure to agree targets

It is often the case that the parties do not agree any specific targets, although they are obliged to bring about the mutually agreed conclusion of the agreement. If the targets are not agreed throughout the entire calendar year, the claim to fulfilment based on this lapses. If the employer is responsible for this, the employee can assert a claim for damages, as decided by the BAG. This can be done in two ways: As a rule, the employer bears the burden of initiative through the framework agreement, meaning that it breaches its obligations if it does not actively approach the employee to conclude the target agreements. According to the BAG, however, the burden of initiative can also be contractually transferred to both parties, so that they are obliged to approach the other party. In this case, the employer only breaches its contractual secondary obligation if it does not enter into negotiations contrary to the employee’s request to conclude a target agreement. In this case, the employer may not be at fault if he has proposed targets to the employee that could have been achieved with reasonable foresight. The amount of the claim is decided by the court on the basis of its own judgement, taking into account all circumstances. However, in the context of (contributory) negligence, it must be taken into account that employees also have a duty to co-operate.

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■ COURT DECISIONS

No refusal of consent by the works council for transfers due to violation of certain participation rights

The works council cannot refuse its consent to a transfer because the employer has used instruments such as personnel questionnaires, assessment principles or selection guidelines in the selection procedure in breach of co-determination.

BAG, decision of 24 September 2024 – 1 ABR 31/23

The case

Four internal applicants applied for the position of "Electrical Engineering Coordinator" advertised by the employer. They took part in a selection process in which two managers conducted interviews and assessed the candidates through digital interviews. These questionnaires contained questions on categories such as expertise, self-presentation and motivation and resulted in a points score. The content of the digitally recorded information corresponded to the handwritten notes of the managers. The employer then applied for the works council's approval to transfer an employee. The works council refused to give its consent and claimed it had not been presented with all the relevant documents (i.e. specifically the handwritten notes). In addition, the interview forms used were subject to its co-determination pursuant to Sec. 94 and 95 BetrVG and should therefore not have been used without its consent. The Labour Court replaced the refused consent, the Higher Labour Court rejected the complaint of the works council.

The decision

The BAG also rejected the works council's appeal on points of law due to the lack of grounds for refusal of consent pursuant to Sec. 99 (2) BetrVG. The employer had duly informed the works council about the transfer and provided it with the essential documents because the digital interview forms had contained all relevant information. As the handwritten notes of the managers did not form the basis of the selection decision, the employer did not have to submit them. The judges also clarified that even a breach of Sec. 94 and 95 BetrVG in the creation or application of personnel questionnaires, assessment principles or selection guidelines does not constitute grounds for refusing consent pursuant to Sec. 99 (2) No. 1 BetrVG. The provision only applies if the specific personnel measure itself violates a statutory provision. However, Sec. 94 and 95 BetrVG would only regulate the co-determination rights of the works council in the organisation of selection procedures and would not serve to protect individual personnel measures.

Our comment

The BAG confirms its case law on selection guidelines (see decision of 10 July 2013 – 7 ABR 91/11) and clarifies that the works council can only refuse its consent to a personnel measure if there is a breach of a standard that directly affects the measure itself. A breach of the co-determination rights under Sec. 94 and 95 BetrVG is not sufficient for this, as these provisions only regulate the involvement of the works council, but do not prevent the transfer as such. For employers, this means that a transfer can generally be enforced even if selection criteria not subject to co-determination were used in the selection process – provided there are no other legal obstacles. Nevertheless, it is advisable to involve the works council in the development of selection processes at an early stage in order to avoid conflicts later on. The decision also shows that late objections are not to be taken into account, even if they are justified in terms of content.

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Calculation of special payments for released works council members

When calculating the hypothetical amount of a variable remuneration component for a released works council member, the special features of the respective special payment must be taken into account. For a target achievement bonus, not only the average results of a peer group must be taken into account, but also, in relation to this, the last target achievements of the person concerned before her or his release.

BAG, decision of 12 June 2024 – 7 AZR 141/23

The case

The plaintiff is employed by the defendant employer as a car salesman and has been fully released from his duties as a member of the works council since November 2020. In addition to his basic salary, he previously received several variable salary components, such as commissions for leasing transactions concluded. He also received a target achievement bonus, the amount of which depended on the number of new cars invoiced and handed over.

The defendant stopped paying commissions after the exemption, although vehicles were still delivered in the months before and after the start of the plaintiff's exemption in which he was involved. With regard to the target achievement bonus, the defendant pointed out in April 2021 that this would henceforth be calculated on the basis of the average value of the units sold by the peer group, i.e. by all salespeople in the local branch. The plaintiff then demanded a different calculation method for his bonus, in which his sales made before the release were compared to those of the peer group, and a bonus payment in the corresponding amount. In addition, he demanded the commission payments which, in his opinion, had been unjustly omitted. The Labour Court dismissed the subsequent action, while the Higher Labour Court largely upheld it.

The decision

The BAG upheld the plaintiff's appeal. The claim for payment of the bonus was justified. According to Sec. 37 (2) BetrVG, members of the works council are to be released from their duties without a reduction in pay if and to the extent that this is necessary for the proper fulfilment of their duties. By virtue of the standard, a works council member must continue to receive the remuneration that he or she would have earned if he or she had worked instead of performing works council activities. This includes all remuneration components, which is why the plaintiff is entitled to the bonus even after his leave of absence. However, the special features of the respective remuneration component must be taken into account.

The determination of hypothetical facts in the case of a variable annual bonus can only be made on the basis of auxiliary facts which, in conjunction with rules of experience, allow an indicative conclusion to be drawn about a certain course of events and thus, if necessary, a judicial estimate. This should not only be based on the sales success of the peer group, but also on the plaintiff's last target achievements in relation to it. This would also take into account possible market-related fluctuations. The asserted financing commissions could also constitute remuneration within the meaning of Sec. 37 BetrVG. However, an estimate of the amount of the claim must be made on the basis of a considerably longer reference period.

Our comment

When determining the remuneration of a released works council member, all bonuses, allowances and special benefits that the person concerned received before the release must be taken into account in addition to the basic remuneration. According to the decision, performance-related remuneration components are to be determined on the basis of current target achievements of comparable employees and the previous average results of the works council member. The amount of a bonus is therefore also based on all factors for its award during periods of leave. In another new decision, the BAG added that bonuses and supplements must also continue to be granted if they were granted during an active employment relationship – even if the person concerned no longer performs any work due to their official duties and therefore no longer performs any activities during the bonus-relevant periods (decision of 28 August 2024 – 7 AZR 197/23).

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Co-determination rights of the works council for the use of headset systems

The works council has a right of co-determination pursuant to Sec. 87 (1) No. 6 BetrVG if headset systems are to be introduced and used. This applies in any case if managers can use them to listen in on employees' communication with each other.

BAG, decision of 16 July 2024 – 1 ABR 16/23

The case

The employer is part of a global clothing retail group with numerous sites in Germany. Instead of the walkie-talkies previously used, it wanted to use headsets in future for communication between employees. These are operated with the help of software. There is a usage obligation for managers, employees in the checkout and changing room areas as well as for the tidying and return team.

The portal through which the headsets are technically supported and maintained is operated by the Group's central IT department in Dublin. The individual headsets are not assigned to a specific employee. Instead, they are taken at random from the device pool on a daily basis. It is not documented which employee used which device and when. It is not technically possible to record the communication. The works council wanted to prohibit the employer from introducing and using the headset system in the branch as long as it did not have a say in the matter. The Labour Court and the Higher Labour Court rejected the works council's claim.

The decision

According to the BAG, there is generally no right of co-determination pursuant to Sec. 87 (1) No. 6 BetrVG if behavioural or performance data is collected by means of a technical device that cannot be assigned to individual employees. The usage data generated through the use of the devices could not be assigned to the employees because the devices are distributed purely randomly. The data would therefore not allow any conclusions to be drawn about the behaviour and performance of the individual employee.

As a result, however, the BAG still qualified the headsets as technical equipment suitable for monitoring because the managers working in the branch can use them to listen in on the communication of other employees using a headset at any time. This means that supervisors are also always in a position to take note of the behaviour of all employees using a headset and thus check it. As a result, these employees are subject to constant monitoring pressure. The fact that the employees' conversations are not recorded or stored is not decisive. In the end, the works council's legal complaint was unsuccessful because, in the opinion of the BAG, the right of co-determination did not belong to the local works council, but to the general works council, because the headset system was introduced throughout the company.

Our comment

According to the BAG's established case law on the co-determination of the works council in the introduction and use of technical equipment intended to monitor performance and behaviour, it is sufficient that the equipment is objectively and directly suitable for monitoring performance and behaviour. Whether the employer actually pursues this objective and actually evaluates the data obtained through the monitoring is not decisive. This extensive interpretation, which effectively means that every IT system is subject to co-determination, has been widely criticised. In the present decision, the BAG differentiated according to whether the emergence of monitoring pressure is likely. If this criterion prevails, this could lead to a welcome limitation of co-determination from the employer's perspective.

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Reduced evidential value of medical certificates of incapacity for work

The probative value of a certificate of incapacity for work may be undermined if the employee falls ill immediately after a dismissal and there are indications that cast doubt on the existence of the incapacity for work. One such indication is a coincidence in time between the duration of the certificate(s) of incapacity for work and the notice period.

BAG, decision of 18 September 2024 – 5 AZR 29/24

The case

The parties are in dispute about continued remuneration in the event of illness. The plaintiff employee worked for the defendant employer as a lecturer in 2020. On Friday 29 April 2022, the plaintiff handed in his notice of termination with effect from 31 May 2022 to the managing director of the defendant. On the following Monday, the plaintiff's doctor certified his incapacity to work from 2-13 May 2022. On 13 May 2022, the plaintiff received a follow-up certificate until on 31 May 2022, the last day of the employment relationship. He started a new job on 1 June 2022. As the defendant did not pay continued remuneration for May, the employee successfully brought an action before the Labour Court. The Higher Labour Court also ruled in his favour and dismissed the defendant's appeal.

The decision

However, the BAG upheld the defendant's appeal. The evidentiary value of the certificates of incapacity for work was undermined. In general, the employee bears the burden of presentation and proof for the conditions for entitlement to continued payment of remuneration under Sec. 3 (1) Sentence 1 Continued Remuneration Act (Entgeltfortzahlungsgesetz / EFZG), which are regularly proven by the submission of a medical certificate of incapacity for work within the meaning of Sec. 5 (1) Sentence 2 EFZG. However, despite its high evidential value, the certificate of incapacity for work does not establish a legal presumption with the consequence that only proof to the contrary would be admissible. As the employer is often not aware of the causes of illness and is therefore restricted in terms of evidence, sufficient circumstantial evidence is sufficient to shatter the probative value. This is always the case if the employee falls ill immediately after receiving notice of termination and there is a temporal coincidence between the notice period and the certified incapacity to work. This is also the case here, as the incapacity to work covers the exact period of notice, regardless of any public holidays or weekend days in between.

Our comment

As a rule, the employer can demand that the employee (also) prove his or her incapacity to work due to illness by other means of evidence. For the indication of the connection between the certified incapacity for work and the notice of termination, it is also irrelevant whether it is a case of the employee's own or the employer's termination. According to Sec. 278 (1a) German Social Code V (Sozialgesetzbuch V / SGB V), doubts also exist if, among other things, the employee is conspicuously often only unfit for work for a short period of time or the start of the incapacity for work often falls on a working day at the beginning or end of a week. Certificates from a doctor who has become conspicuous due to the frequency of the certificates issued by him also give rise to doubts. Nevertheless, the certificate of incapacity for work remains the most important evidence of incapacity for work due to illness. Even if the probative value can be shaken, the submission of a medical certificate deprives the employer of the right to refuse performance pursuant to Sec. 7 (1) No. 1 EFZG.

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Entitlement to holiday pay in lieu in the event of bans under maternity protection law

The provision of Sec. 24 Sentence 2 Maternity Protection Law (Mutterschutzgesetz / MuSchG), according to which leave not taken or not taken in full before the start of an employment ban can be taken in the current or next leave year, also applies in the case of several, directly consecutive employment bans under maternity protection law. The standard thus prevents both the forfeiture of holiday entitlements accrued before the employment ban and those accrued during these phases.

BAG, decision of 20 August 2024 – 9 AZR 226/23

The case

The plaintiff employee was employed by the defendant employer as a dentist from February 2017 to March 2020. Her holiday entitlement was 28 days per calendar year in accordance with her employment contract. Due to the defendant's pregnancy, the defendant issued a ban on employment with effect from 1 December 2017. The period of the aforementioned (first) employment ban was seamlessly followed by further employment bans due to maternity protection periods and breastfeeding periods until the legal termination of the employment relationship on 31 March 2020. The plaintiff then requested compensation for five remaining days of leave from 2017, 28 days each for 2018 and

2019 and a further seven days of leave for 2020 that had accrued up to the legal termination of the employment relationship. The defendant rejected this. The Labour Court upheld the subsequent action, the Higher Labour Court also dismissed the defendant's appeal.

The decision

The BAG ruled in the same way. The asserted claim for compensation for unfulfilled leave follows from Sec. 7 (4) Federal German Holiday Law (Bundesurlaubsgesetz / BUrlG). This was not precluded by the fact that the plaintiff had not been able to carry out her work during the phases in dispute due to several seamlessly following employment bans under maternity protection law. Periods during which a person concerned is absent due to employment prohibitions within the meaning of Sec. 3, 11, 12 and 13 (1) No. 3 MuSchG are to be treated as periods of employment in the sense of a fictitious employment when calculating the entitlement to paid holiday leave pursuant to Sec. 24 Sentence 1 MuSchG.

The holiday entitlements accrued in the individual periods of the employment bans in accordance with these principles also did not expire before the end of the employment relationship in accordance with Sec. 7 (3) BUrlG, according to which holiday must be granted and taken in the current calendar year. The provision of Sec. 24 Sentence 2 MuSchG is contrary to this. If an employee cannot take leave that has been accumulated in several consecutive employment bans before the start of the last employment ban, Sec. 24 Sentence 2 MuSchG only applies after the end of the last employment ban. In this case, any leave accrued up to that point can be claimed after the end of the last employment ban in the current or next leave year.

Our comment

With the above interpretation, the BAG, in view of its previous case law, creates a parallelism for the accrual and expiry of leave entitlements in the case of consecutive maternity protection periods and parental leave (see previously BAG, decision of 5 July 2022 – 9 AZR 341/21 and decision of 20 May 2008 – 9 AZR 219/07). Employers should note that Sec. 24 Sentence 2 MuSchG does not merely extend the carry-over period pursuant to Sec. 7 (3) Sentence 3 BUrlG, but extends the leave year itself by the duration of the protected periods. Employers should also bear in mind that the holiday entitlement extended in accordance with Sec. 24 Sentence 2 MuSchG can only expire or become time-barred if the employer has fulfilled its obligation to cooperate. This is the case if the employer first transparently informs the employees concerned about the volume of their remaining holiday entitlement for the current year, including the extended holiday entitlement. With regard to the extended leave, the employer must also point out (in contrast to the annual leave) that the portion of the extended leave pursuant to Sec. 24 Sentence 2 MuSchG does not expire until the end of the following year if it has not been requested. In order to avoid legal disputes and additional payment obligations on the part of the employer, reliable documentation and proper transfer of the leave entitlements of the employees concerned should be ensured within the company.

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No compensation for “AGG jumpers” in the event of abuse of rights

The claim of an unsuccessful applicant for compensation payment pursuant to Sec. 15 (2) General Anti-Discrimination Act (Allgemeines Gleichbehandlungsgesetz / AGG) may be an abuse of law if the applicant did not apply in order to obtain the advertised position, but with the sole aim of being able to assert claims for compensation.

BAG, decision of 19 September 2024 – 8 AZR 21/24

The case

The parties are in dispute regarding the claim for payment of compensation pursuant to Sec. 15 (2) AGG due to an alleged violation of the prohibition of discrimination on the grounds of gender. The plaintiff is a trained industrial clerk. He was most recently unemployed and, according to his own statements, completed a full-time distance learning programme to become a business lawyer (LL.M.). In the past, the plaintiff applied unsuccessfully to various companies in different federal states with almost identical cover letters for job advertisements in which the position of “secretary” was to be filled. After the plaintiff received rejections to the letters of application, he filed claims for compensation in each case. On 3 January 2023, the plaintiff applied to the defendant in response to a job advertisement published on the internet seeking an “office clerk/secretary”. In his CV, the plaintiff stated, among other things, that he had seven years’ experience as a secretary. The CV did not contain any specific dates or evidence of training or any previous employment.

The plaintiff received no response to his application, while the defendant filled the position with a woman. The plaintiff then filed a claim for discrimination against his gender, as the job advert was not worded in a gender-neutral way. He left the amount of compensation to the discretion of the court, but it should not be less than EUR 6,000 . The Labour Court and the Higher Labour Court rejected the claim and the plaintiff’s appeal.

The decision

This was also decided by the BAG. The claim for compensation was precluded by the far-reaching objection of abuse of rights pursuant to Sec. 242 BGB. The Higher Labour Court’s prior assessment that the plaintiff acted systematically and purposefully in order to “earn” a sufficient profit through compensation claims, while he had no interest in obtaining the position advertised by the defendant, was not objectionable. Objectively speaking, the plaintiff’s full-time distance learning programme, the large number of almost identical applications in different federal states, which were made specifically in response to job advertisements looking for a female secretary, and the large number of compensation claims all spoke in favour of this. On the basis of this evidence, it was argued that there was deliberate action to obtain an unjustified advantage and thus the necessary subjective element for an abuse of rights.

Our comment

The decision is worth reading for employers who find themselves exposed to claims for compensation under Sec. 15 (2) AGG due to so-called “AGG jumpers” (German: “AGG-Hopper”), as the BAG explains the requirements for the objection of abuse of rights in detail. The judges also deal in detail with the procedural burden of proof. It is true that in a compensation dispute pursuant to Sec. 15 (2) AGG, the employer bears the burden of presentation and proof for the existence of the requirements of abuse of rights. However, the employer is not obliged to substantiate and prove all allegations if it is not possible or unreasonable for it to present the necessary facts in more detail. The plaintiff then has the secondary burden of presentation and proof, so that a simple denial of the circumstances presented by the employer on the part of the plaintiff is no longer sufficient.

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■ CASE LAW IN BRIEF

Negative feelings – requirements for the presentation of non-material damage in the context of the claim under Art. 82 (1) GDPR

The mere fear of a loss of control of data is not sufficient to demonstrate non-material damage within the meaning of Art. 82 (1) GDPR. Rather, a plaintiff must present specific, objectively verifiable circumstances that justify their fears in the individual case.

BAG, decisions of 20 June 2024 – 8 AZR 91/22 and 8 AZR 124/23

The case

In two cases, the BAG had to decide on a claim for damages pursuant to Art. 82 (1) GDPR. In the first case, the plaintiff employee requested information from the defendant employer pursuant to Art. 15 (1) GDPR. Specifically, he requested information about a works council hearing in connection with a transfer of his person, which he considered inadmissible. In this context, he also demanded its cancellation and the removal of a warning from his personnel file. To this end, he requested information about all personal data relating to this incident. The defendant declared that it would uphold the transfer, sent copies of the works council hearing and rejected the plaintiff's account as inaccurate. He then applied for compensation of at least EUR 8,000 . The Labour Court dismissed the claim and the Higher Labour Court awarded the plaintiff EUR 2,000.

In the second proceeding, the plaintiff employee and his employer unsuccessfully negotiated the cancellation of the employment relationship. During these proceedings, the plaintiff requested information about the processing of his personal data pursuant to Art. 15 (1) GDPR and copies pursuant to Art. 15 (3) GDPR. The defendant refused to provide the information, whereupon the plaintiff sued for this and also demanded payment of damages for pain and suffering in the amount at least EUR 5,000. The denial of information had deprived him of the opportunity to check the processing of his personal data. This loss of control was significant and noticeable, and the refusal was also deliberate and malicious. The Labour Court awarded the plaintiff EUR 4,000, the Higher Labour Court dismissed the claim.

The decision

In both proceedings, the BAG ultimately denied a claim for non-material damages pursuant to Art. 82 (1) GDPR. In the first case, the judges left open whether a breach of Art. 15 (1) or (3) GDPR could lead to a claim for damages under Art. 82 (1) GDPR at all. In any case, a loss of control inevitably goes hand in hand with any violation of the right to information and therefore cannot justify any independent damage that goes beyond the mere violation of Art. 15 GDPR. Otherwise, the independent damage requirement would be meaningless. Negative feelings asserted by the plaintiff, such as the fear of possible misuse of his data, are not sufficient to justify immaterial damage. Such feelings must be objectively comprehensible in the specific individual case so that they can be recognised as damage, i.e. can be regarded as justified by applying an objective standard.

In the second case, the BAG confirmed that immaterial damage can also be caused by the loss of control over personal data or concerns about possible data misuse. However, whether this fear constitutes damage according to objective standards must be examined on a case-by-case basis. In the present case, the mere fear that unlawful processing of the plaintiff's data is possible due to the denial of data protection information naturally arises from the violation of the right to information itself - and therefore does not constitute independent damage. This is therefore not sufficient for the assumption of immaterial damage. If such a loss of control were already recognised as damage, any breach of Art. 15 GDPR would automatically be liable for damages.

Unjustified criminal charges against superiors as extraordinary grounds for dismissal

Criminal charges without a legal basis against the employer, superiors or colleagues constitute such a significant breach of secondary obligations under the employment contract that they can justify termination without notice in accordance with Sec. 626 (1) BGB

Higher Labour Court of Saxony, decision of 27 June 2024 – 4 Sa 245/23

The case

The plaintiff had been employed as a pool attendant by the defendant employer, a municipality that operates a public swimming pool, since 2006. Following a conflict with a colleague at the end of 2021, the plaintiff accused his superior of failing to fulfil his duties. Shortly afterwards, he fell ill for a longer period of time, but continuously harassed his supervisor on WhatsApp and also threatened her. Due to his continued inability to work, the supervisor refused to hand over duty rosters, whereupon the plaintiff filed criminal charges against her and two other employees. In January 2023, the defendant banned him from the premises, which he responded to with a criminal complaint for false suspicion.

A short time later, the plaintiff visited the defendant's city council and claimed that COVID-19-restrictions had been violated at the inauguration of his superiors in March 2021, which was also attended by the Mayor. At the same time, he sent emails for example to the supervisor's employer and to the Office for Education and Social Affairs, in which he announced that criminal charges were pending against several employees of the swimming pool hall, which he also attached to the email. He also called for children and young people to be protected. The defendant subsequently terminated her employment without notice. When it learnt shortly afterwards that he had been stalking a colleague for some time and that he had threatened to "find" her even after moving, the defendant dismissed the plaintiff again without notice. The Labour Court dismissed his action for unfair dismissal.

The decision

The Higher Labour Court of Saxony also rejected the plaintiff's appeal. The first extraordinary dismissal by the defendant was already justified for good cause because the plaintiff had claimed in his emails to third parties that criminal charges were pending against employees of the defendant, although he had filed these himself without any legal basis. The effectiveness of the second dismissal was therefore no longer relevant. A significant breach of secondary obligations under the employment contract could also be relevant to dismissal within the framework of Sec. 626 (1) BGB. Such a breach could be the filing of a report against the employer, superiors or colleagues, especially if false statements are made knowingly or recklessly. The reasons for the report deserve special consideration. However, if it is intended solely to damage or "finish off" the employer, this constitutes a disproportionate reaction. The same applies to the plaintiff's statements to the city council. It is true that employees are allowed to criticise their employer – even publicly and in an exaggerated manner. However, grossly unobjective attacks that could undermine the position of the employer or a superior do not have to be accepted.

No compensation for a subsequent volunteer programme with better conditions

If the parties to an employment contract conclude a termination agreement as part of a voluntary redundancy programme, the employee is not entitled to future differential payments or compensation if the employer later launches a new programme with better conditions.

Higher Labour Court Cologne, decision of 12 September 2024 – 6 Sa 630/23

The case

The defendant employer offered its employees termination agreements as part of a voluntary programme. Interested parties could leave their employment contracts from the age of 55. In return, they received 55 % of their last gross monthly salary as a bridging allowance until the age of 63. In an information flyer, the defendant stated that the conditions would not be adjusted at a later date and that they would not improve over time. At the end of 2021, the plaintiff employee concluded a corresponding termination agreement with effect from 31 December 2023. In March 2023, the defendant launched a new programme in which the bridging allowance was now 65 %. The claimant therefore demanded the monthly difference for the period up to the age of 63, or alternatively compensation or the amendment of his termination agreement. The Labour Court dismissed the claim.

The decision

The Higher Labour Court Cologne ruled in the same way. With regard to the claim for future payments of the difference, the appeal was already inadmissible. There was also no breach of duty on the part of the defendant for a claim for damages. The mere fact that it later concluded more favourable termination agreements with other employees did not constitute a breach of duty towards the plaintiff. Nor did it provide any false information. In particular, it was not obliged to inform the plaintiff that a better volunteer programme was planned for a later date. Furthermore, it had not made false

promises in breach of duty. The statements in its information flyer were clearly to be understood as meaning that there would be no upward or downward adjustments following the conclusion of a cancellation agreement. Finally, there was also no claim arising from a breach of the basis of the contract or a breach of the principle of equal treatment under labour law. The appeal was not authorised.

No co-determination of the works council for strike breaking bonuses

If an employer grants bonuses to employees who do not take part in an upcoming strike, the works council has no right of co-determination regarding the distribution principles of such payments.

Higher Labour Court Baden-Württemberg, decision of 30 October 2024 – 21 TaBV 8/24

The case

Strike actions were announced at the employer involved in April 2024, which then took place on 15 April 2024. Shortly beforehand, the employer posted a notice announcing that it would pay a bonus of EUR 250 per day for the period from 15-19 April 2024 to all employees who carry out their regular work during a strike and do not strike. The local works council then requested the establishment of a conciliation committee to negotiate a works agreement regarding the distribution principles of these payments. The Labour Court granted the request.

The decision

The employer's appeal before the Higher Labour Court Baden-Württemberg was again successful. If there is established supreme court case law on a legal issue that denies a right of co-determination, the conciliation committee is obviously not competent. The question of the scope of co-determination in industrial disputes had been sufficiently clarified by the case law of the BAG in this sense. The BetrVG also applies during industrial action, but individual co-determination rights can be restricted in order to protect the autonomy of collective bargaining protected by Art. 9 (3) of the German Constitution and the principle of parity of action arising from it if there is a serious risk that the works council will block an industrial action otherwise possible for the employer and thus inevitably intervene in the action to its disadvantage. According to the case law of the BAG, the employer's promise of an additional financial benefit with the aim of deterring the employees called to strike from participating in the strike is a permissible industrial action (see BAG, decision of 14 August 2018 – 1 AZR 287/17). Furthermore, the co-determination of remuneration pursuant to Sec. 87 (1) No. 10 BetrVG does not refer to the granting of a bonus per se, to the volume or the purpose from which the group of beneficiaries follows in the abstract. In the case of a strike-breaking bonus, the works council therefore has no scope for regulation.

Establishment of a conciliation committee in case of disputed competence of the general works council

If a staff reduction is planned in two joint operations as part of a restructuring programme and no agreement is reached between the employers involved and the central works council on a reconciliation of interests and a social compensation plan, the application for the establishment of a conciliation committee is not inadmissible, as the central works council is not obviously not competent.

Higher Labour Court Rhineland-Palatinate, decision of 10 October 2024 – 5 TaBV 15/24

The case

The applicant employers maintain two joint operations, each of which has elected a local works council. A general works council exists across all companies. At the end of April 2024, the management informed the central works council that a restructuring was planned, which was to be accompanied by a reduction in personnel in the two joint operations. This would have constituted an operational change within the meaning of Sec. 111 BetrVG. When the central works council demanded more and more documents during the negotiations on a reconciliation of interests and social compensation plan, cancelled one of the appointments at short notice and no agreement was reached even after the submission of draft agreements, the employers declared the negotiations to have failed and applied to the Labour Court for the establishment of a conciliation committee. This was granted.

The decision

The Higher Labour Court Rhineland-Palatinate also rejected the complaint of the central works council. There had been

extensive discussions between the parties involved. At the latest after the rejection of the proposed drafts, the employers could have assumed that the central works council did not seriously want to negotiate further. The conciliation committee should also be set up because the central works council is not obviously not competent within the meaning of Sec. 100 (1) Sentence 2 Labour Court Proceedings Act (Arbeitsgerichtsgersetz / ArbGG). The planned measures would indisputably constitute an operational change subject to co-determination. According to Sec. 50 (1) Sentence 1 BetrVG, the central works council is originally responsible if a matter affects the entire company or several companies and cannot be regulated by the individual works councils. An objectively compelling requirement for a cross-company regulation is sufficient. This is the case here both for the reconciliation of interests and for the social plan, as there is cross-site planning.

Validity of an expiration clause even without exclusion of claims under the GDPR

An exclusion clause in an employment contract is not invalid because it does not expressly exclude claims arising from the GDPR from its scope of application.

Higher Labour Court Hamburg, decision of 11 June 2024 – 3 SLa 2/24

The case

The plaintiff employee was on a three-year parental leave until 12 August 2022. Her employment contract with the defendant employer contained a two-stage expiration clause from which claims arising from liability for intent and the statutory minimum wage were excluded. Following a dismissal protection lawsuit, her employment relationship ended on 31 October 2022. With an extension of the lawsuit dated 26 April 2023, she requested holiday pay for 2020, 2021 and pro rata for 2022 for the first time, which the defendant rejected with reference to the exclusion clause. The Labour Court also rejected the related application for payment. In her appeal, the plaintiff asserted that the clause was invalid because it did not exclude claims for damages under Sec. 309 No. 7 BGB, industry-specific minimum wage claims, mandatory claims under collective agreements and works agreements and claims under the GDPR from its scope of application.

The decision

The Higher Labour Court Hamburg nevertheless also rejected the appeal. The holiday pay compensation claim could indeed be recognised. The exclusion clause was effective. The fact that it violated Sec. 309 No. 7 BGB was not so important, taking into account the special features applicable in labour law (Sec. 310 (4) Sentence 2 BGB). Furthermore, the fact that the clause also covers claims arising from collective agreements, works agreements and industry-specific minimum wages does not lead to a lack of transparency in accordance with Sec. 307 (1) Sentence 2 BGB, as no collective standards had an effect on the employment relationship when the contract was concluded. Nor was it apparent that industry-specific minimum wages could apply. The same applies with regard to the fact that the regulation does not expressly exclude claims under the GDPR from forfeiture. The GDPR makes no statement on the dispositive nature of the rights of data subjects regulated therein. Furthermore, preclusive period provisions would not affect the content of a claim, but merely the continued existence of a right that has already arisen. Even if claims arising from the GDPR could not be subject to a contractual limitation period, this would not render the clause invalid, as the legal situation at the time the contract was concluded should be taken into account and the GDPR only came into force in May 2018. The appeal was authorised and lodged (case reference at the BAG: 9 AZR 152/24).

■ CURRENT DEVELOPMENTS IN PENSIONS

Zombies, steel and crises – The BAG on the deterioration of company pension schemes within the Group

The question of whether and, if so, under what conditions a company pension scheme, once established, can be amended to the detriment of the beneficiaries has been a long-running issue in case law and literature for some time. The BAG has now issued a new decision on this topic.

I. Background

At the heart of this issue is always the question of how the conflicting interests of employers and beneficiaries can be reconciled if an employer wishes to adjust a company pension commitment for economic reasons. Whilst a pension scheme – usually set up in times of financial hardship - can awaken the employer's desire to contain costs in times of economic downturn, many beneficiaries fear a drop in the level of provision and therefore often lose a significant portion of their income in old age. In order to balance this dilemma, the BAG developed the so-called three-stage scheme back in the mid-1980s. According to this scheme, there are different levels of justification for the deterioration of an existing company pension scheme, depending on the severity of the intervention. Deteriorating replacements not only affect individual companies, but increasingly also entire groups of companies. A case that took place there recently came before the BAG and provided an opportunity to scrutinise the "rules of the game" of deteriorating replacements of company pension schemes within a group.

II. The decision of the BAG of 2.7.2024 – 3 AZR 247/23

In the underlying case, the plaintiff had been employed by the defendant, a group-affiliated employer in the coal and steel industry, since 1986. The defendant provides the plaintiff with company pension benefits. His former employment contract provided that the associated claims to pension benefits were

to be calculated in accordance with a pension scheme of the parent company. When the plaintiff entered into his employment relationship, a pension scheme in the form of a group works agreement dated 1 October 1977 (PO 77) applied. This was replaced in 1987 by a new pension scheme (PO 87) at group level. The plaintiff retired with effect from 31 August 2020. Since then, he has received a company pension – calculated on the basis of PO 87 – in the amount of EUR 180.76 per month. Based on PO 77, he would have received EUR 698.44 per month. When he demanded pension benefits in this amount, the defendant invoked the existential economic difficulties of the steel industry and thus also of the Group at the end of the 1980s. The Labour Court dismissed the subsequent action, as did the Higher Labour Court on the plaintiff's appeal.

However, the BAG upheld the plaintiff's appeal, but referred the matter back to the Higher Labour Court for further discussion. The BAG also assumed that PO 77 could be replaced by PO 87 in accordance with the so-called time collision rule. The admissibility of the associated deteriorations was to be measured against the principles of the three-stage scheme. The fact that a longer period of time has passed since then does not escape this – on the contrary, this is typical for matters relating to company pension schemes and does not lead to a change in the burden of presentation and proof or to a reduction in the burden of proof. The defendant was therefore required to submit in detail which economic difficulties affecting the entire group meant that financial relief for the group was in its interests and why the reduction in future increases was not disproportionate to the reason. The previous submission was insufficient in this respect, in particular a generalised reference to the effects of the steel crisis. Furthermore, it was unclear to what the sharp increase in pension provisions once forecast with the continuation of PO 77 was attributable. Finally, it was not sufficiently explained to what extent the savings made by PO 87 were part of a coherent overall concept for the economic consolidation of the group as a whole.

III. Effects

The BAG once again confirms that deteriorating replacements are to be measured against the principles of the three-stage scheme. In the case of standardised group regulations, it is not the individual contract employee but the group as a whole that must be taken into account. In this case, the judges expect the employer to provide a clear explanation of the reasons behind the decision to replace the employee, despite the fact that the replacement took place around 30 years ago. For (group) employers, this initially means that replacement processes can still be subject to a review many years or decades after they were carried out. If the employer fails to provide sufficient justification, which is likely to be the rule rather than the exception given the depth of justification required by the BAG, the supposedly superseded regulation will be revived vis-à-vis those pension beneficiaries who invoke it. In addition to the financial consequences, this threatens to create a group-wide "pension patchwork" of current regulations and their long-dead predecessors. Apart from the fact that deteriorating interventions in pension schemes should always be the last resort, employers are therefore strongly advised to carefully document and cautiously communicate such processes.

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■ INTERNATIONAL NEWS FROM UNYER

Luxembourg: New tax relief for highly qualified professionals in Luxembourg since 1 January 2025

Based on a law of 20 December 2024, new tax breaks have been in force in Luxembourg since the beginning of 2025 to attract highly qualified professionals from abroad. These measures offer tax advantages for both employees and employers and help to strengthen the Luxembourg labour market.

The core of the measures is a 50 % tax exemption on the gross annual salary (up to EUR 400,000). In addition, tax exemptions can be claimed for certain costs such as relocation costs, housing subsidies and children's school fees. These tax exemptions apply for up to eight years.

In order to benefit from these tax incentives, professionals must have specific qualifications and expertise, be recruited from abroad by a Luxembourg-based company (and perform 75 % of the work in Luxembourg) and earn a minimum annual salary (EUR 75,000). Companies must also fulfil certain conditions in order to benefit from this tax relief – among other things, the total number of employees benefiting from the tax relief must not exceed 30 % of the company's total workforce in Luxembourg.

These new tax incentives make Luxembourg an even more attractive location for international professionals, particularly in the areas of finance, technology and research. This makes it easier for companies to attract highly qualified employees and reduce their tax burden at the same time.

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■ GENERAL INFORMATION

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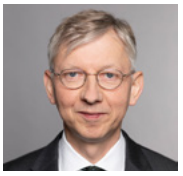

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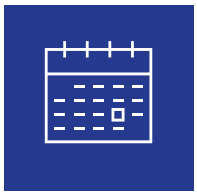
Events, publications and blog



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