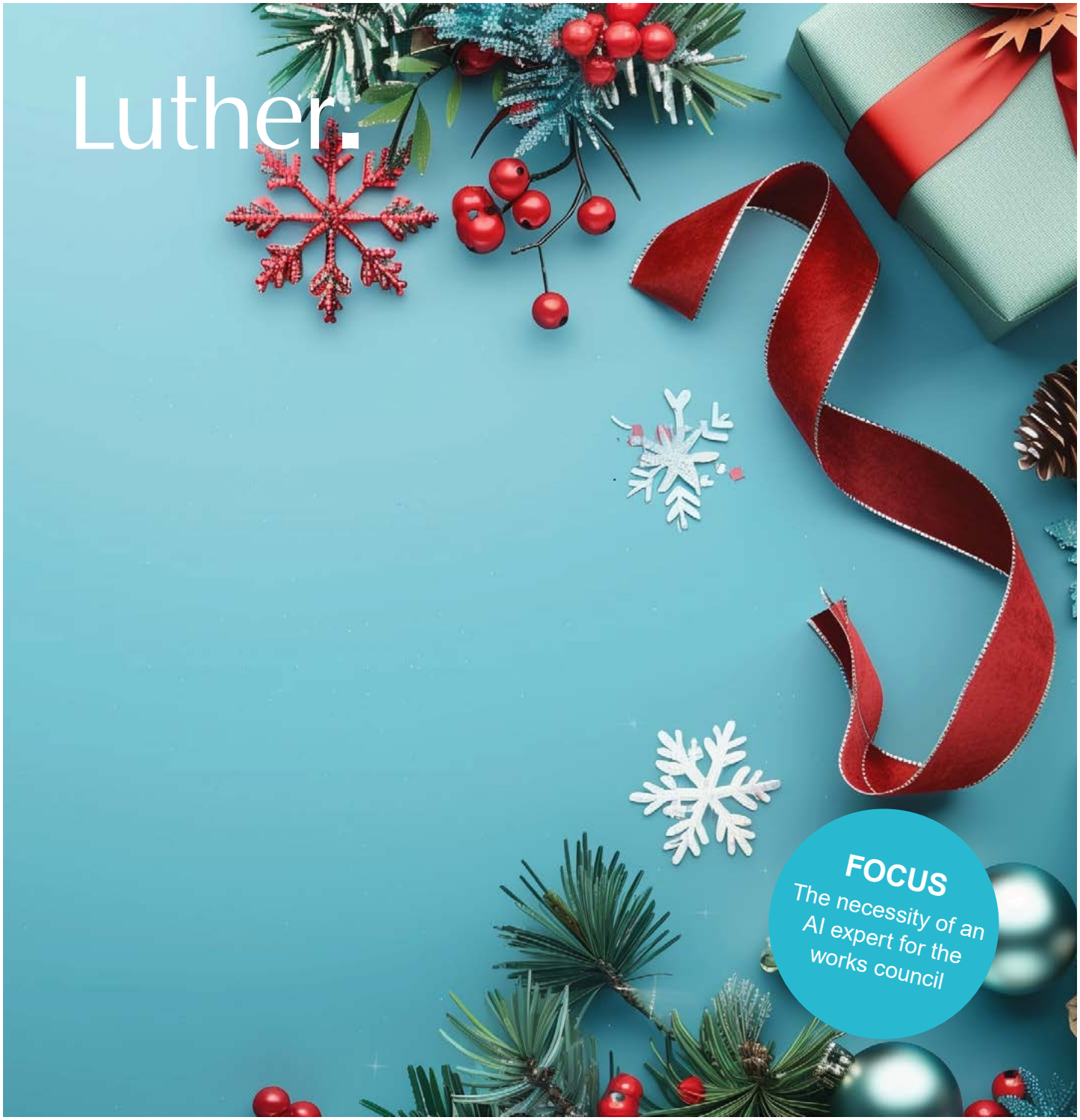

Employment Law Newsletter

Issue 4 2024

unyer GLOBAL ADVISORS

Content

Dear Readers,

In 2024, the world is once again facing significant challenges. We are therefore looking forward even more to a happy and peaceful Christmas. Just in time for the holidays, we are pleased to offer you – as usual – our newsletter as a read for the holidays.

The Christmas edition of our newsletter focuses on topics related to the digitalisation of the workplace. The use of AI in companies is becoming increasingly important. Section 80 (3) sentence 2 of the German Works Constitution Act (BetrVG) makes it easier for the works council to consult an expert in matters relating to AI. The provision is becoming increasingly relevant in day-to-day business as it has significant potential for conflict. In his article, Andre Schüttauf provides an initial overview.

In his article, Paul Gooren deals with the future of the Employee Data Protection Act. Even if the draft bill of the BMAS and the BMI for an Employee Data Protection Act (BeschDG-E), which was presented in autumn 2024, will no longer be passed due to the early new elections, there is still a need for legal regulation of this complex topic, which is often difficult for employers to grasp.

Starting with this issue, we will include the new section ‘bAV-aktuell’ in our newsletters, which will deal with current developments and topics in the field of company pension schemes. In their article, our experts in the field of company pension schemes, Annekatrin Veit and Marco Arteaga, show how an existing company pension scheme can offer opportunities to mobilise additional financial reserves in economically challenging situations. Our experts explain how it is often possible to optimise company pension obligations in such a way as to improve the company’s liquidity.

In this issue, we also report on labour law issues in other European countries in our unyer-Newsflash. Xavier Drouin from FIDAL in Strasbourg explains a recent decision on the use of illegally obtained evidence in labour court proceedings. This is an issue that is also often highly relevant in our judicial proceedings.

In addition to our main topics, this issue also provides you with the usual overview of current decisions by the labour courts that we consider to be of particular relevance for HR work.

We wish you a peaceful and wonderful Christmas season, a restful time between the years, and a happy, healthy and prosperous new year 2025.

Have a good start into the New Year!

Yours

Achim Braner

The necessity of an AI expert for the works council

With the Works Council Modernisation Act of 2021, the German legislator added provisions on artificial intelligence (AI) to the Works Council Act (Betriebsverfassungsgesetz – BetrVG) for the first time. These additions reflect the growing importance of AI in companies. A key innovation is the addition of a second sentence to Sec. 80 (3) BetrVG, which makes it easier for the works council to consult an expert in matters relating to AI.

I. The fiction of necessity: Simplified access to external expertise

The central innovation of Sec. 80 (3) sentence 2 BetrVG is that the necessity of an expert for the works council is irrefutably presumed if it has to assess the introduction or use of AI in the company. This means that the works council can demand that the employer agrees to the involvement of an expert. Unlike previously, the works council no longer has to explain why it needs the expertise of an external expert if there is a specific connection to AI. Even a knowledgeable works council may now request an expert.

II Scope of the fiction

1. Task reference

However, the fiction only applies under certain conditions. The works council must demonstrate that the introduction or use of AI is related to its tasks, for example the right of co-determination in the introduction of technical equipment pursuant to Sec. 87 (1) No. 6 BetrVG or otherwise the participation rights regulated in the BetrVG. Tasks of the works council can arise from the initiation, implementation and termination phases of employment relationships.

2. Sufficient reference to AI

The central prerequisite is that the works council must assess the introduction or application of AI in order to fulfil its tasks. Therefore, on the one hand, there must be at least a reference to elements of AI. On the other hand, the fiction does not apply if the use of AI is only marginally related to the work of the works council. It should therefore not be sufficient if a measure is only "somehow" related to AI – the connection must be concrete and relevant. Think, for example, of AI-supported systems that analyse the behaviour or performance of employees, e.g. driving data analysis in company vehicles or algorithms that influence personnel selection or performance appraisal. If a system contains both AI-supported and non-AI-supported elements, the specific behavioural control to be examined must be assessed on a case-by-case basis according to the extent to which it has a significant AI connection.

3. Defining AI

There is no definition of "artificial intelligence" in German law. There is also no generally accepted understanding of AI. This makes it difficult for legal practitioners to interpret the term in a specific context when assessing whether the works

council's area of responsibility has a sufficient link to AI-related issues. In employment law practice, AI is often understood as a non-deterministic system that produces results that are not completely predictable and includes components of self-optimisation, self-learning or independent task completion. Terms such as machine learning, deep learning, robotics and virtual reality characterise the understanding of AI today, although our understanding of AI is subject to constant change.

III. Burden of proof regarding the requirements of fiction

The works council must demonstrate the requirements of the fiction. It must show that its tasks are actually affected by the employer's planned measure. Furthermore, the provision of Sec. 80 (3) sentence 2 BetrVG does not relieve the works council of the obligation to demonstrate that the task to be performed by it is sufficiently related to AI. One difficulty lies in defining when the required threshold of a sufficient connection to AI is met. If the works council does not succeed in demonstrating such a connection to AI, it cannot rely on the fiction of Sec. 80 (3) sentence 2 BetrVG. In such cases, it may have to use internal sources of information in order to demonstrate the requirements of the fiction.

IV. Agreement with the employer in other respects

If the conditions of the fiction are met, the works council may not commission an expert independently and without consulting the employer. Instead, it must reach an agreement with the employer on the appointment of the expert. This agreement should specify the person, the tasks and the remuneration of the expert. This must also be done in urgent cases. If there are differences of opinion between the parties, the works council must obtain the employer's consent, if necessary by way of interim injunction proceedings. Pursuant to Sec. 80 (3) sentence 3 BetrVG, the parties to the works council may also agree on a permanent expert in matters pursuant to Sec. 80 (3) sentence 2 BetrVG.

V. Conclusion

For the employer, the new regulation represents a cost factor that should not be neglected. In addition, the vague understanding of the term AI harbours potential for conflict. If the criterion of "independent task completion" is applied, it quickly becomes clear that a large number of existing tools already utilise elements of AI. Depending on the interpretation, translation programmes or simple analysis tools could therefore already be considered AI. Employers are required to ensure transparency and agree clear boundaries with the works council in order to avoid conflict situations as far as possible and create acceptance at an early stage.

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The future of employee data protection

The processing of employee data is mainly regulated by case law, which poses considerable challenges for companies in practice. Comprehensive legal regulation therefore appears necessary. In autumn 2024, the BMAS and the BMI presented a draft bill for an Employee Data Act (Beschäftigtendatenschutzgesetz – BeschDG-E). Due to the upcoming federal election, the act will not be passed. Nevertheless, there is a need to discuss the necessity of legal regulations in this complex area, as certain content is necessary regardless of the political orientation of the current legislator.

I. Background

In the coalition agreement, the coalition government had agreed to create regulations on employee data protection in order to achieve legal clarity for employers and employees and to effectively protect personal rights. In addition, there was a judgement by the ECJ (of 30 March 2023 – C-34/21), which found that Sec. 26 (1) sentence 1 German Data Protection Act (Bundesdatenschutzgesetz – BDSG) – the German central standard for data processing in the employment context – is not compatible with the opening clause in Art. 88 GDPR.

Member states are not obliged under EU law to issue specific regulations on employee data protection. However, if they make use of the existing opening clause in Art. 88 GDPR, they must comply with its requirements and limits. It is important here that the member state regulations are “more specific” than the already directly applicable provisions of the GDPR. This presupposes that the national provisions are not limited to repeating the provisions of the GDPR, but are aimed at protecting the rights and freedoms of employees with regard to the processing of their personal data in the employment context and include appropriate and specific measures to safeguard human dignity, the legitimate interests and the fundamental rights of the data subject (ECJ, judgement of 30 March 2023 – C-34/21).

The creation of a standardised law to regulate the handling of employee data is to be welcomed in principle. In practice, clear legal guidelines are more helpful than guidelines developed by case law from individual decisions. The relationship between employer interests and employee interests is primarily a political decision. Nevertheless, a law should always meet the practical needs of those applying the law and respect the room for manoeuvre defined by EU law.

II. Practical regulations

If the need for a standardised employee data (protection) law is recognised, the question arises as to which regulations can be considered to improve the current legal situation under the GDPR and BDSG. The aim must always be to achieve a fair balance between the interests of employee data protection and employer interests, which ensures greater legal certainty in practice.

1. Necessity of the data processing

The central question in data protection law is the justification of data processing. Art. 6 GDPR sets out the principle of necessity as a general standard in this regard. This can be adapted to the specifics of the employment context in a national law in order to facilitate the application of the law. However, more specific national provisions within the meaning of Art. 88 GDPR should not provide for stricter requirements than the general data protection regulations.

Sec. 3 and 4 BeschDG-E show light and shade in this regard: The designation of employment-specific criteria for determining the necessity of data processing is to be welcomed. However, according to the draft bill, data collection must not only be necessary (1st level), but the employer’s interests in the processing must also outweigh the employee’s interests in protection (2nd level). Such an increase in requirements compared to the previous legal situation does not create any practical added value, but primarily leads to additional work in terms of risk management for employers.

2. Consent

The extent to which the consent of employees can authorise data processing in addition to the general justification grounds - in particular that of the performance of the employment relationship - has always been controversial due to the

general imbalance of power in the employment relationship and the associated question of actual voluntariness. It is therefore advisable to create clear legal requirements. Sec. 5 BeschDG-E makes this attempt, although it is debatable in detail which examples of rules make sense and which do not. In this context, it should also be legally clarified that in the event of ineffective or revoked consent, recourse can be made to the other grounds for justification. This is because there is still legal uncertainty on this issue.

3. Utilisation of evidence

According to the case law of the German Federal Labour Court, there is no general prohibition on the presentation or use of evidence with regard to data that has been obtained unlawfully; rather, a case-by-case assessment is always required (BAG, judgement of 23 August 2018 – 2 AZR 133/18). This can either be clarified in an Employee Data Act or such a prohibition can be generally excluded. However, the standardisation of a blanket ban should be avoided if at all possible. This is because, in view of the difficulty of assessing whether data processing is lawful or unlawful, which depends on numerous factors, such a ban would be completely disproportionate – especially in the case of minor offences (Sec. 11 BeschDG-E).

4. Flexibility through collective agreements

With regard to collective agreements – i.e. works/service agreements and collective agreements – a statutory regulation would be desirable that takes into account the EU law dimension. The ECJ is of the opinion that collective agreements are equivalent to the law in terms of their regulatory effect. This case law is laid down in Art. 88 (1) GDPR, which provides for the possibility of specific national provisions by law or collective agreement. The national legislator should therefore follow the guiding principle of European law and strengthen the importance of collective agreements as a practical means of concretising employee data protection. However, this can only succeed if the relevant parties - in particular the employer and the works council - are granted room for manoeuvre “in all directions”. A provision such as Sec. 7 (2) BeschDG-E, which relates the collective legal leeway exclusively to how the level of employee data protection can be increased, falls short of this goal.

5. Right of co-determination in the appointment of the company data protection officer?

In contrast, the works council should not be granted an enforceable right of co-determination with regard to the appointment or dismissal of the company data protection officer, neither with regard to the type (internal/external) nor with regard to the specific person (as per Sec. 12 BeschDG-E). On the one hand, this issue would become the subject of internal conflicts within the company. Secondly, such a right of co-determination would probably violate Art. 37 GDPR.

III. Conclusion

The creation of a standardised law on the handling of employee data is both an opportunity and a risk. In view of the current unanimous calls for a reduction in bureaucratic requirements for the economy, the legislator should focus on the goal of facilitating the processing of employee data for employers by creating clarity and room for manoeuvre. The requirements of the GDPR must also be complied with. This is a feasible task. The opportunity should be seized.

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The Fourth Bureaucracy Relief Act – Labour Law Amendments

Once again, the legislator has adapted the debureaucratisation to ongoing social developments and needs. The Fourth Bureaucracy Relief Act of 23 October 2024 will essentially come into force on 1 January 2025, particularly with regard to the provisions relevant to labour law.

I. Changes

The Bureaucracy Relief Act contains a multitude of regulations in various fields of law. In the following, we will take a look at the significant changes in the field of labour law:

1. Proof of Conditions of Employment

The tightening of the German Law on Proof of Conditions of Employment in 2022 has brought increased bureaucratisation into focus. The consistently criticised requirement for written form has now been weakened. The essential contractual terms of the employment relationship can now be recorded in text form (Section 126b of the German Civil Code (BGB)) and can be transmitted electronically. However, the information must be accessible, storable and printable for the employees and the employer must have proof of receipt from the employee (Section 2 (1) sentence 2 of the German Law on the Disclosure of Information on Employee Conditions (NachwG)). In practice, this means an e-mail with a PDF file as an attachment and a proof of receipt. However, the written form requirement continues to apply in the economic sectors listed in § 2a, para. 1 of the Act to Combat Clandestine Employment (e.g. construction, hospitality, etc.) and if the employee requests the written notification, which they can do at any time.

2. Temporary Employment Act

The text form is now sufficient for the temporary employment contract between the lender and the borrower. This considerably reduces the administrative burden, especially for short-term assignments.

3. Federal Parental Allowance and Parental Leave Act (BEEG) (from 1 May 2025)

Text form is sufficient for the parental leave request, the application for part-time employment, the rejection and the reasons for the decision. This is a significant simplification in view of the fiction effect if the application is not rejected in time. Please note: Particular importance attaches to the requirement to prove that the written rejection was received in good time. It should also be noted that the rejection of early termination in accordance with Section 16 (3) BEEG is still only possible in writing. The legislator is creating a dangerous pitfall for employers here.

4. Youth Employment Protection Act (JArbSchG)

In the future, the text form will suffice for all actions that previously had to be in writing until 31 December 2024. Exception: Sec. 6 (4) sentence 1 JArbSchG (decision of the supervisory authority), 21a (2) JArbSchG (incorporation of collective bargaining agreement provisions into the employment contract).

5. Caregiver Leave Act

The employee may give notice of their intention to take caregiver leave in text form.

6. Family Caregiver Leave Act

The employee may give notice of their intention to take family caregiver leave and take time off in text form.

7. Employment references

According to the new version of Section 630 (3) German Civil Code, it is possible to issue an electronic employment reference with the employee's consent (qualified electronic signature). However, given that the requirements for this are still quite stringent, this is unlikely to be of much practical relevance.

8. Duty to display, Section 16 (1) Working Time Act (ArbZG) and Section 47 JArbSchG

To fulfil the 'duty to display', it is now sufficient to make the information available via the information and communication technology that is normally used in the company or office. However, this requires that employees have access to the information sources.

9. Age limit, § 41 (2) sentence 1 German Social Code VI (SGB VI)

The age limit, i.e. the agreements in the employment contract that the employment relationship will end when the standard retirement age is reached, can now be concluded in text form. However, it is still important that the employment contract is duly concluded before the employee takes up his or her duties. The written form requirement continues to apply to all other time limits.

II. Conclusion

In particular, the text form, which will be sufficient in many cases from 1 January 2025, will considerably ease the burden on employers in the day-to-day work of their human resources departments. However, problems will continue to arise with regard to the unresolved question of the possible publication medium, especially for general, non-personalised information or evidence. Is publication on the intranet or other employee portals sufficient - presumably only if the employer cannot modify it and employees cannot save it. Special caution will also be required if the employer sends the employee evidence etc. in text form exclusively to their business email address. Since the employer can (theoretically) block or delete this at any time, the requirements for storage and retrievability by employees could be lacking. If these are known or have been provided, it may therefore be advisable to send the information to the employee's private email address.

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■ COURT DECISIONS

Calculation of leave compensation for maternity and parental leave

During the maternity protection ban and parental leave, any leave not previously taken or earned during these periods is not forfeited. The employer's right to reduce annual leave by one twelfth for each full calendar month of parental leave relates solely to paid leave, but not to holiday pay in lieu.

BAG, judgement of 16 April 2024 – 9 AZR 165/23

The case

The parties are in dispute over a claim to holiday pay in lieu. The plaintiff employee's annual holiday entitlement amounted to 29 working days. She was on maternity leave from August 2015; at this time, she was still entitled to one day of leave from the current calendar year. Immediately after the end of the maternity protection period, the plaintiff also took parental leave. This was followed seamlessly by the maternity protection period due to the birth of another child and a further period of parental leave, which lasted until the end of the employment relationship with the defendant due to the plaintiff's own termination in November 2020. The plaintiff then requested compensation for a total of 146 days of leave from 2015 to 2020, but the defendant refused the compensation. The subsequent action was upheld by the Labour Court, while the Higher Labour Court dismissed the defendant's appeal.

The decision

The Ninth Senate of the Federal Labour Court ruled in the same way, awarding the plaintiff a claim to compensation for 146 days of leave pursuant to Sec. 7 (4) German Holiday Act (Bundesurlaubsgesetz – BUrlG) and Sec. 17 (3) Federal Parental Leave Act (Bundeselternzeit- und elterngeldgesetz – BEEG). Neither the periods of maternity leave nor the parental leave would have prevented the accrual of holiday entitlements. For maternity protection, this follows without restriction from § 24 sentence 1 Maternatiy Protection Act (Mutterschutzgesetz – MuSchG). The defendant had not made effective use of the employer's option to reduce holiday entitlements for periods of parental leave in accordance with § 17 (1) sentence 1 BEEG, as a corresponding declaration would have to be made in the existing employment relationship. The employer's right to reduce leave presupposes an entitlement to holiday leave upon receipt of the declaration of reduction. However, holiday entitlements would not be converted into a holiday compensation claim after termination of the employment relationship. The "surrogate theory" once advocated – according to which the entitlement to holiday compensation was regarded as a surrogate for the holiday entitlement - had been completely abandoned due to a contradiction with EU law.

In addition, the holiday entitlements had not lapsed, as the due date of the holiday entitlement, which is decisive for the limitation period, did not begin before the end of the maternity protection periods or the end of parental leave. A reduction of the holiday pay in accordance with § 11 (1) Sentence 1 BUrlG should be rejected, as the periods of absence due to parental leave constitute absence from work through no fault of the employee. Only the thirteen weeks prior to the start of (first) maternity leave should be used as a reference period for the calculation of holiday pay in lieu.

Our comment

The ruling confirms the previous case law of the court with regard to the accrual and expiry of leave entitlements before and during maternity leave and parental leave (see, for example, BAG, judgement of 5 July 2022 – 9 AZR 341/21) as well as the option to reduce leave during parental leave. A corresponding declaration by the employer is always essential for the reduction option, although this can also be implied - for example, by only granting the reduced leave (BAG, judgement of 19 March 2019 – 9 AZR 362/18). However, if a reduction is intended, a declaration to this effect should be made as soon as possible after confirmation of parental leave being taken. However, a "precautionary" declaration of reduction before parental leave begins is not possible, as the reduction must relate to a request for parental leave that has already been made.

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Works council's scope for judgement when deciding on training format

If there are different seminar formats for works council training, the works council has a margin of judgement as to whether its members take part in online or face-to-face training.

BAG, decision of 7 February 2024 – 7 ABR 8/23

The case

The employer involved is an airline based in Düsseldorf; the applicant is the staff representative body established at the airline. In mid-2021, two members will join this committee, whereupon they are to take part in a training course on Rügen. As the training provider offers seminars with the same content in North Rhine-Westphalia and also an online seminar, the employer asks to attend one of these options. At the end of August 2021, the two committee members ultimately attend a seminar in Potsdam, as the dates closer to the location are bordered by holiday leave and work commitments. The employer subsequently refuses to reimburse the accommodation and catering costs as it does not consider them necessary. The staff representatives are of the opinion that online and face-to-face training are not of the same quality. The collective agreement on which the staff representatives are based does not contain any provisions on cost reimbursement issues, but refers to the BetrVG.

The decision

The BAG also rejected the employer's appeal on points of law. According to §§ 40 (1), 37 (6) BetrVG, the employer was obliged to exempt the staff representatives from the costs of accommodation and catering. When deciding on the necessity of attending training, the works council has a margin of discretion, whereby the employer's obligation to bear the costs is subject to the requirement of trusting cooperation standardised in Sec. 2 (1) BetrVG. The decision on participation in training must not be based solely on subjective needs; rather, the works council is obliged to only charge the employer with costs that it deems reasonable. It must therefore limit these to what is necessary.

On this basis, the staff representatives were entitled to consider the training course attended here in Potsdam to be necessary. In particular, it did not have to allow itself to be referred to an online seminar because the selection of the training format was also subject to its judgement. This also included the choice of format and methods as well as the type and manner of knowledge and skills transfer, whereby the experience and preferences of its members could also be taken into account. Compared to an online seminar, the assumption of a better communicative exchange in face-to-face training is also justified. Only if several training courses offered at the same time are to be regarded as equivalent, even in the opinion of the interest group, can a limitation of the obligation to bear the costs be considered.

Our comment

The principle of cost-sparing resulting from the requirement of trusting cooperation actually means that participation in more expensive works council training is not necessary and the costs for this do not have to be borne by the employer if the works council can obtain the same knowledge more cheaply in a reasonable manner (see, for example, BAG, judgement of 14 January 2015 – 7 ABR 95/12). What is equivalent, however, is primarily determined by the subjective perspective of the works council. The Federal Labour Court has now extended this scope for judgement to the question of whether face-to-face or online training is preferred, although the argumentation in favour of this is weak. The same learning effect is possible with online seminars with the same content, which is why the cost interest must outweigh the teaching preferences of the persons concerned. A "communicative exchange" is also possible online, while discussions with other participants are irrelevant for the fulfilment of the works council's tasks and therefore do not serve the purpose of Sec. 37 (6) BetrVG. Only the ratio of a later date to the remaining term of office must be taken into account with regard to the effective exercise of the mandate; the BAG classifies four weeks as too long for members who have moved up - this could be different in the case of higher costs at the beginning of a regular term of office and a smaller employer. Incidentally, the Senate does not say that online seminars per se are unsuitable. Reference can be made to such (or closer face-to-face training) if it is offered in a timely

manner with the same content, especially from the same training provider.

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Compensation for discrimination – Disclosure of disability

A job applicant who wishes to have his or her severe disability taken into account in an application must generally inform the employer of this in the application documents. Even in the case of internal applications, a reference is not exceptionally dispensable if it is recognisable to the applicant that the office conducting the application procedure has no knowledge of their severe disability.

BAG, judgement of 25 April 2024 – 8 AZR 143/23

The case

The employee, who is equal to a severely disabled person, requested payment of compensation from the defendant state (the employer) in accordance with Sec. 15 (2) German Discrimination Act (Allgemeines Gleichbehandlungsgesetz – AGG) due to a violation of the prohibition of discrimination on the grounds of disability. She was employed by a university for a fixed term and applied to another faculty at the same university. However, the employer did not invite the employee to a job interview. The Labour Court dismissed the employee's claim for payment and the Higher Labour Court upheld the claim in this respect. On appeal, the employer sought to have the action dismissed.

The decision

The Federal Labour Court rejected a claim for payment of compensation as well in accordance with § 15 (2) AGG due to the lack of a violation in accordance with §§ 7 (1), 3 (1) AGG. The plaintiff had not been discriminated against because of her disability. She had not provided sufficient evidence within the meaning of Sec. 22 AGG to suggest that she had been discriminated against due to her disability, which is why the required causal link between discrimination and disability was lacking. The discrimination of the plaintiff due to her disability is not indicated by the invitation prescribed in Sec. 165 (3) German Social Code IX (Sozialgesetzbuch IX – SGB IX, which was not made. It is true that the employer is obliged under the standard to invite a severely disabled person to a job interview, which applies both to external applicants and to internal vacancies. However, the public employer's failure to invite the employee did not justify the presumption in this case that the employee's disability was the cause of her discrimination. This is because the employee had not disclosed her equal status as a severely disabled person in the application process.

A reference was also not exceptionally dispensable in the present case, as it was recognisable to the employee that the faculty conducting the application procedure had no knowledge of the equality. The job advertisements stated that the application was to be sent directly to the specific institute in the various faculties. It was therefore irrelevant that there was a department responsible for personnel in the central university administration that was aware of the applicant's equal status, as contact details for the central personnel department were not included in the job advertisements.

Our comment

The decision is not only relevant for public employers. According to Sec. 164 (2) SGB IX in conjunction with the provisions of the AGG, the prohibition of discrimination also applies to private employers. Private employers must also comply with the duties of scrutiny standardised in Sec. 164 (1) SGB IX in connection with the recruitment of severely disabled people. The decision confirms the previous case law, according to which the employer can only take into account circumstances in the application process that have been communicated to them in advance (BAG, judgement of 17 December 2020 – 8 AZR 171/20). Such a notice is not exceptionally dispensable in the case of an internal application if the office conducting the application procedure was clearly unaware of it. However, employers are still advised to thoroughly review the application documents. Even a reference in the CV in a prominent position can constitute sufficient notice (see BAG, judgement of 18 April 2014 – 8 AZR 759/13).

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Contractual reservation to switch from target agreement to target specification is invalid

The proviso in a standard employment contract that the employer can waive a target agreement and set a (unilateral) target for a bonus payment without any further requirements is unreasonably disadvantageous within the meaning of Sec. 307 (1) sentence 1, (2) German Civil Code (Bürgerliches Gesetzbuch – BGB).

BAG, judgement of 3 July 2024 – 10 AZR 171/23

The case

The employee is employed in a management position. His salary is made up of half fixed salary and half bonus. The contract stipulates that the bonus depends on targets that are agreed annually between the employee and the company. If targets are not agreed, they are to be set by the company. The bonus is a voluntary benefit that is dependent on the employment contract remaining uncancelled on the payment date and for a further six months. In a letter dated 5 August, the employer gave the plaintiff two days' notice to propose a target agreement. On 13 August, the employer made its own proposal with a deadline for comments of 19 August, and the employee submitted a counter-proposal on 19 August. The employer rejected this on 26 August and at the same time set targets. The employment relationship ended on 31 December as a result of the employee's own resignation; no bonus was paid. In response to the action for payment, the bonus was awarded in full by the Labour Court and 90% by the Higher Labour Court.

The decision

The Federal Labour Court confirmed the decision of the Higher Labour Court, albeit on different grounds. While the Higher Labour Court considered the clause to be invalid under the ambiguity rule (Sec. 307 (1) sentence 2 BGB), the Federal Labour Court had no reservations in this respect. However, the clause was unreasonably disadvantageous if the employer was allowed to switch from target agreement to target specification without further requirements. The court emphasised that both a target agreement and a target specification are permissible contractual arrangements. With the latter, a contract does not deviate from the law due to Sec. 315 BGB. However, anyone who contractually provides for a target agreement must also negotiate with the employee. The principle that is deviated from in the case of unconditional swivelling is simply pacta sunt servanda. Moreover, the voluntary and binding clauses were all invalid, as the target bonus was at least also in direct synallagma with the work performed, so that the consideration could not be subject to voluntary clauses, cut-off dates or repayment restrictions.

Our comment

Target agreements may be an effective means of incentivisation if both parties have a lot of goodwill, but in practice they are very rarely implemented as textbook as they should be in the opinion of third parties involved in their implementation. The decision here should be reason enough to move away from target agreements and set targets straight away. If the amount in EUR behind the targets is appropriate, this will make no difference in terms of incentivisation, and the time saved on target-setting meetings could be invested in achieving the targets.

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Burden of presentation and proof in the remuneration process of works councils

In the context of an action for remuneration, a works council member bears the burden of presentation and proof that there is a claim to the remuneration previously received, even in the event of a reduction in remuneration by the employer.

LAG Lower Saxony, judgement of 12 June 2024 – 8 Sa 687/23

The case

The plaintiff was an exempted works council member at the defendant automobile manufacturer. Prior to his leave of absence, he worked in a project team in the areas of human resources, collective bargaining and work organisation/ workplace design and was assigned to pay grade 13. After the plaintiff acquired a management licence through an internal training course in 2013, he concluded an agreement with the defendant that the collective agreement regulations for employees with a specialist or management function ("Tarif-Plus") would apply to him. From July 2016, he was classified in pay group II of the "Tarif-Plus". Following a judgement by the Federal Court of Justice (of 10 January 2023 – 6 StR 133/22), the defendant reviewed the remuneration of its works councils and reduced the plaintiff's remuneration to pay grade 13 from February 2023. In his lawsuit, the plaintiff claimed remuneration in accordance with pay grade II of Tarif-Plus – i.e. his previous remuneration. The Labour Court upheld the claim.

The decision

The Lower Saxony Higher Labour Court dismissed the defendant's appeal against the judgement of the Labour Court. The court ruled that the plaintiff was entitled to remuneration in accordance with pay group II of the Plus pay scale under Sec. 611a (2) in conjunction with Sec. 78 sentence 2 BetrVG. The court was convinced that the plaintiff would have pursued a career path that would have guaranteed him appropriate remuneration if he had not held the office of works council representative. With regard to the burden of presentation and proof, the Lower Saxony Higher Labour Court clarified that this also lies with the plaintiff works council member if he/she is defending against a reduction in remuneration by the employer and is only requesting the continued payment of the previous remuneration amount.

The plaintiff had met this burden of proof by submitting that positions as an industrial engineer and as a remuneration expert were regularly available, that these positions would

have enabled a remuneration progression at least up to pay group II of the Tarif-Plus, that the plaintiff had the necessary qualifications for the positions and that he had only not applied because of his works council activities. The defendant had not substantiated these allegations. In this respect, the court did not agree with the defendant's view that the plaintiff must first refer to a specific recruitment procedure in order to enable the defendant to make a subsequent statement.

Our comment

The decision shows the dilemma in which many employers currently find themselves. For the defendant employer, it was not possible to establish beyond doubt what hypothetical career path the plaintiff works council member would have taken, so that it had to reduce the remuneration in order to avoid criminal law risks, but was unable to fulfil its burden of proof in the labour court proceedings. The background to this is the judgement of the Federal Court of Justice of 10 January 2023 – 6 StR 133/22, according to which the granting of excessive remuneration to works council members can constitute a criminal offence of breach of trust pursuant to Sec. 266 German Criminal Code (Strafgesetzbuch – StGB). Consequently, it is not sufficient to increase the remuneration of a works council member if the assumed career path is merely possible or plausible. Rather, employers should only increase the remuneration of their works council members if this is in line with customary company practice (see Sec. 37 (4) BetrVG) or if there is concrete evidence that the works council member would have pursued a career path that would guarantee entitlement to corresponding remuneration. If these principles have not been observed in the past, the remuneration should be reduced. This can also be done with the aim of subsequently obtaining legal certainty through labour court proceedings.

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Extraordinary termination without notice due to a grossly negligent breach of work instructions

The violation of work instructions by an employee in a grossly negligent manner may constitute good cause within the meaning of Sec. 626 (1) BGB, in particular if the employee was entrusted with particularly responsible tasks.

LAG Lower Saxony, judgement of 29.7.2024 - 4 Sa 531/24

The case

The parties are in dispute about the validity of an extraordinary termination without notice, or alternatively extraordinary termination with a social expiry period. The plaintiff had been employed by the defendant since 1990, most recently as a crane operator for remote-controlled crane systems, and could not be dismissed on the basis of a collective agreement. The defendant has operating and work instructions for safe working and handling of the cranes operated by the plaintiff and for working in the operating range of these machines. In the past, the plaintiff had repeatedly attracted attention due to careless behaviour and was last warned in 2022.

In 2022, the plaintiff realised that the crane he was operating on that day was no longer in its original position. The crane had been moved during his absence by electricians who were carrying out repair work on another crane. The plaintiff had no knowledge of this. After the plaintiff found the radio remote control of his crane on the ground, he set it in motion without having ascertained its position in advance. As a result, his crane collided with the crane on which the electricians were located. The defendant terminated the employment relationship without notice due to this careless behaviour. The Braunschweig Labour Court initially upheld the action for unfair dismissal.

The decision

The defendant's appeal against this before the Lower Saxony Higher Labour Court was successful. The grossly negligent behaviour of the plaintiff – operating the crane without first ensuring that the roadway was clear - was in itself suitable to constitute good cause within the meaning of Sec. 626 (1) BGB. As a rule, poor or inadequate work performance is not suitable to justify extraordinary dismissal. Extraordinary termination without notice may be permissible if the employee's negligent behaviour is likely to cause particularly serious damage and the employee has assumed special responsibility for the employer's property and, in particular, for the life and limb of colleagues who come into contact with the source of danger. The grossly negligent behaviour resulted from the fact that the plaintiff set his crane in motion without first ensuring that the roadway was clear. Furthermore, he could not rely on the fact that the electricians failed to take appropriate safety precautions. Based on past behaviour, the defendant could also expect that the plaintiff would not comply with important operating and work instructions in the future. Despite relevant warnings, the plaintiff had not adapted his behaviour. Moreover, the defendant did not have to offer any other employment opportunity - in particular as a security guard. The plaintiff's behaviour showed that he basically did not have the necessary care with regard to the implementation of work instructions.

Our comment

The court emphasises the importance of compliance with safety regulations and strengthens employers' options for action in cases of serious breaches of (safety-related) operating and work instructions. At the same time, it emphasises the need for a careful examination of proportionality and possible alternatives to dismissal. Employers should document breaches of duty and consistently use warnings as a precursor to dismissal.

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■ CASE LAW IN BRIEF

No legal presumption that the works council chairman's signature is covered by the works council resolution

The signature of the works council chairman does not give rise to a presumption of fact that the signature is covered by a proper works council resolution.

LAG Düsseldorf, judgement of 5 June 2024 – 5 Sa 506/23

The case

The parties are in dispute as to which pension scheme the plaintiff's company pension entitlements are governed by. The plaintiff was promised company pension benefits via a pension fund from 1 May 1980. The defendant and its legal predecessors recorded losses in the millions in the years 2003 to 2005. On 13 June 2007, the management and the then chairman of the works council signed a "company agreement on the company pension scheme". This company agreement was intended to reorganise the company pension scheme at the defendant with effect for the future. It is disputed whether an effective works council resolution exists. The Labour Court granted the application for payment.

The decision

Although the defendant's appeal was successful with regard to the application for payment (for formal reasons), the application for a declaratory judgement was largely justified. It was true that there were factual-proportional reasons within the meaning of the three-stage theory of the Federal Labour Court for replacing the pension scheme with a works agreement. However, the works agreement did not legally replace the pension promised to the plaintiff because it was ineffective for formal reasons due to the lack of a works council resolution. After the taking of evidence, it could not be established with the necessary certainty pursuant to Sec. 286 German Civil Procedure Code (Zivilprozessordnung – ZPO= that the works agreement was based on an effective works council resolution, taking into account the statements of the witnesses heard and the available documents. The inability to clarify the existence of a proper works council resolution was at the expense of the defendant. The recognising chamber assumed that there was no presumption of fact within the meaning of Sec. 292 ZPO. This meant that the lack of clarification was at the expense of the defendant, which relied on the superseding effect of the works agreement, and not at the expense of the plaintiff, who relied on unauthorised action by the works council chairman.

Possible co-determination of partial content in regulations on desk sharing and a clean desk policy

Employer provisions on desk sharing and a related clean desk policy are generally not subject to co-determination; something else may apply to accompanying ancillary regulations, e.g. with regard to the storage of personal work equipment or private items during non-working hours.

LAG Baden-Württemberg, judgement of 6 August 2024 – 21 TaBV 7/24

The case

The parties are in dispute about the establishment of a conciliation committee. In autumn 2023, the employer presented a new concept for the use of open-plan offices in one of its plants. Previously, the workstations there were permanently assigned, but desk sharing was to take place in future. In connection with this, she planned to introduce a clean-desk policy that would require employees to tidy up the workstations used at the end of the working day and store private items and personal work equipment in cupboards. Furthermore, the workspace should be organised into the areas "Arrive", "Work", "Community" and "Exchange". A technical booking tool for reserving workstations was not planned and no risk assessment was carried out for the new concept.

The works council formed on site then asserted co-determination rights under Sec. 87 (1) No. 1, No. 6 and No. 7 BetrVG and Sec. 111 BetrVG. When the employer rejected this, the works council applied for the establishment of a conciliation committee, including the appointment of a chairman named by the works council and four assessors in each case. The ArbG rejected the applications as the conciliation committee was obviously not competent.

The decision

The Baden-Württemberg Higher Labour Court again partially upheld the works council's complaint. It is true that desk sharing and the clean desk policy are not subject to co-determination per se. However, the new room concept

contains two sub-areas that can be separated out and for each of which the requirements for setting up a conciliation committee are met. On the one hand, this is the organisation of personal items brought in by employees, for which there could be a right of co-determination under Sec. 87 (1) No. 1 BetrVG. According to § 87 Para. 1 No. 1 BetrVG, the works council has a right of co-determination in matters relating to the order of the company and the behaviour of employees in the company. Organisational behaviour within the meaning of the standard is affected if a measure taken by the employer is aimed at shaping collective cooperation or ensuring and maintaining the predetermined order of the company. The subject matter is therefore the company's coexistence and the collective co-operation of the employees. Measures that regulate work behaviour, on the other hand, are not subject to co-determination. If a measure has an effect on both work behaviour and organisational behaviour, the predominant regulatory purpose is decisive for the classification. Since the new concept in the present case also includes regulations on which private items may be brought into the company and how they are to be stored, it cannot immediately be ruled out that the employees' orderly behaviour is predominantly affected. Whether this is actually the case must be examined by the conciliation committee.

The other sub-area that could be subject to co-determination and for which there is therefore no obvious lack of competence of the conciliation committee is the order with regard to behaviour in areas with so-called overlapping uses. According to the employer's planning, the new division of the office into different areas already includes the possibility of fluid transitions, i.e. that spontaneous meetings can also take place in a "community" area such as the kitchen. This affects the company's coexistence and collective cooperation, as employees who are present but not affected must adapt to this transition. Organisational behaviour could also be affected here. Desk sharing and tidying up workstations, on the other hand, clearly only affect work behaviour. A right of co-determination pursuant to Sec. 87 (1) No. 6 BetrVG is also ruled out because no technical equipment is associated with the new concept. The same applies to § 87 (1) No. 7 BetrVG, as no specific hazards were identified. Finally, there were no negotiations on a reconciliation of interests or social plan for a case under Sec. 111 BetrVG. The number of assessors was to be set at two, as no particularly difficult or extensive regulatory issues were to be decided.

Dismissal for operational reasons and release from work of initiators of a works council election

Although so-called pre-initiators of a works council election have special protection against dismissal pursuant to Sec. 15 (3b) German Termination Protection Act (Kündigungsschutzgesetz – KSchG), the scope of application of the standard does not refer to dismissals for operational reasons according to its wording.

LAG Cologne, judgement of 19.1.2024 – 7 GLa 2/24

The case

The parties are in dispute in the interim proceedings regarding a claim for continued employment and, finally, access to company communication tools. The plaintiff had been employed by the plaintiff, an IT company, since autumn 2020. All employees there work permanently from home. In the summer of 2023, the plaintiff was invited by a colleague to join a WhatsApp group in which the establishment of a works council was discussed. This colleague held an informational meeting with workers union ver.di on this topic in September 2023 and subsequently sent the plaintiff information material from the union. On 27 October 2023, the plaintiff submitted a publicly certified declaration that he intended to hold a works council election. In it, he also stated that he had undertaken certain preparatory actions, including making arrangements with colleagues and holding consultations.

Three days later, the defendant terminated the plaintiff's employment relationship for operational reasons with effect from 30 November 2023 and released him from his duties. The plaintiff then filed an action for protection against dismissal and applied for an interim injunction to continue his employment until he was invited to a works or election meeting or until 27 January 2024 at the latest. The release from work had deprived him of access to the official means of communication; continued employment was essential so that he could fulfil his role as a run-up initiator. On 11 December 2023, the defendant terminated the employment relationship again, this time for cause, as the plaintiff had made false statements in his notarised declaration. The Bonn Labour Court granted the application.

The decision

The Cologne Higher Labour Court again upheld the defendant's appeal. The plaintiff was not entitled to the requested obligation. If an employment relationship is terminated and its continuation is disputed, the employer has an overriding interest in not employing the employee, which renders the employment claim invalid for the duration of the proceedings. If the dismissal is not already obviously invalid, there is only a claim to continued employment if special reasons for this are asserted. Such reasons are not apparent here. In the present case, there is also no obvious invalidity of the dismissals from Sec. 15 (3b) KSchG. It is true that the plaintiff falls within the scope of protection of the provision because he made a publicly notarised declaration of his intention to establish a works council. He had also undertaken preparatory acts within the meaning of the provision, including, for example, discussions with other employees to determine support for the establishment of a works council, to discuss the pros and cons of such a council or to plan steps that may be relevant for the planning and implementation of the works council election. He also obtained trade union information material.

However, the special protection against dismissal does not extend to dismissals for operational reasons, nor to dismissals for personal or behavioural reasons for good cause. Both dismissals here would therefore not fall within the scope of the provision. The status of the plaintiff as a preliminary initiator also does not constitute a special reason that would lead to a different weighing of interests with regard to the claim for continued employment. The plaintiff is not hindered by the withholding of access to the company's communication channels in actions related to the works council election. Nor does this result in an obstruction of the election itself.

Selective services as part of a framework agreement as dependent employment - Assignments as a pilot

If a pilot concludes a framework agreement with a company for flight assignments on call, which he can also refuse, but for which he uses an aircraft of the company free of charge and in the execution of which he has no entrepreneurial freedom of choice, this constitutes dependent employment within the meaning of § 7 (1) SGB IV.

BSG, judgement of 23.4.2024 – B 12 BA 9/22 R

The case

The parties involved are in dispute about the insurance status of the employee who has been summoned. The plaintiff is a company that produces and sells sausage products. One of its sister companies has an aircraft that is used across the company for transporting personnel to production sites, among other things. At the beginning of 2015, the plaintiff concluded a "framework service agreement for freelance employees of an aircraft pilot" with the defendant, which ended in January 2017. Under this agreement, the defendant was to fly missions for the plaintiff, which were agreed individually and which he could also refuse. According to the agreement, he was not subject to the plaintiff's instructions. For each flight, he received EUR 300 per assignment day and was also authorised to work for third parties. Apart from the aircraft provided, he did not receive any other work equipment. After termination of the framework agreement, the defendant, Deutsche Rentenversicherung Bund, determined that the defendant was subject to compulsory insurance under the statutory pension insurance scheme. The Social Court upheld the action brought against this decision. At the hearing before the Higher Social Court, the defendant amended its finding to the effect that the defendant was only subject to compulsory insurance from the first flight assignment for the plaintiff. The court then upheld the defendant's appeal and found that he was subject to compulsory insurance.

The decision

This was also decided by the Federal Social Court. Persons who are employed in return for remuneration fall under the insurance obligation pursuant to § 1 (1) sentence 1 SGB VI. According to Sec. 7 (1) sentence 1 SGB IV, employment is non-self-employed work, in particular – but not necessarily – in an employment relationship. The decisive factor is the actual organisation and implementation of the contractual relationship. In the present case, the overall picture favours dependent employment: In the case of arrangements in which the assumption of individual services is agreed individually on the basis of a framework agreement, the obligation to take out insurance is based solely on the execution of the individual orders. Therefore, only the assignments carried out by the defendant were relevant here. The fact that he was integrated into the processes planned by the plaintiff and used the aircraft provided as a central operating resource without being able to exert any lasting entrepreneurial influence himself argued in favour of dependent employment.

The fact that the plaintiff was not entitled to a typical right to issue instructions was irrelevant, as this could be defined in more detail at its own discretion pursuant to Sec. 106 sentence 1 in conjunction with Sec. 6 (2) Trade Business Act (Gewerbeordnung – GewO) could be determined in more detail at its reasonable discretion. It is characterised by unilateral exercise as opposed to mutually agreed contractual content. As Sec. 611a (1) sentence 3 BGB shows, the employee may also be bound by instructions if the contract is drafted or implemented in detail and severely restricts the freedom to provide the service owed. To this end, dependent employment could result solely from integration into the company; even services of a higher nature could therefore be externally determined. The decisive factor is whether and to what extent there is still room for entrepreneurial freedom to organise the activity with corresponding opportunities and risks. In this case, the organisation of tasks and the defendant's obligation to perform them did not leave any such room. In addition to the integration into the specified processes, the defendant had also exclusively utilised the plaintiff's operating resources. The aircraft, which was indispensable for his services, was made available to him free of charge; there was no entrepreneurial risk of his own. In addition, he had to adhere to the plaintiff's time schedule; the possibility of concluding a flight order only existed when the plaintiff needed it. The fact that the defendant was also allowed to work for other clients did not outweigh his overall dependence on the plaintiff's orders.

Permissible linking of an inflation compensation premium to actual work performance

An inflation compensation bonus can be structured as a special benefit related to work performance by only granting it to employees who have performed work in the reference period; the tax privileges of the bonus do not prevent this earmarking

LAG Baden-Württemberg, judgement of 14 August 2024 – 10 Sa 4/24

The case

The plaintiff employee did not perform any work for the defendant employer in the entire year 2023 because he had already been unfit for work for some time. The defendant therefore did not make any continued remuneration payments in 2023; instead, the plaintiff received sick pay throughout. In March 2023, the defendant paid its employees an inflation compensation bonus of EUR 1,500 net, but only to employees who received remuneration for work performed in the current year. Employees who received compensation benefits were not granted a bonus, not even pro rata, which is why the plaintiff did not receive one. At the beginning of May 2023, he therefore demanded payment of the full bonus, which the defendant refused. He subsequently filed a lawsuit; in his opinion, he was entitled to the bonus in full, as the defendant was not allowed to make a distinction as to whether the employment relationship was suspended because an employee was unable to work. The Labour Court dismissed the claim.

The decision

This was also the decision of the Baden-Württemberg Higher Labour Court, which rejected the plaintiff's appeal. He was not entitled to the bonus, not even on the basis of the principle of equal treatment under labour law. Although the defendant had excluded him from the group of comparable and favourably treated persons, it was allowed to make the benefit subject to the condition that an employee was entitled to a performance-related remuneration. This did not constitute an irrelevant group formation. The inflation compensation bonus was designed by the defendant as a special payment related to work performance. No bonus was granted to employees who did not receive remuneration for their work performance or continued remuneration in the event of illness pursuant to Sec. 3 (1) German Sick Leave Act (Entgeltfortzahlungsgesetz – EFZG). This meant that only employees who did not perform any work at all in 2023 and did not receive any remuneration were excluded. In principle, an employer may link a special payment to this condition; it is then remuneration for work performed that is due at a different time.

Nor does the legislative purpose of Sec. 3 no. 11c German Income Tax Act (Einkommenssteuergesetz – EStG) preclude such a structure. According to the legislative materials on the tax-free premium introduced in 2022, no special requirements are to be placed on the connection between the benefit and the price increase. Additional purposes are therefore not excluded. According to Sec. 3 no. 11c EStG, an inflation compensation bonus must be granted in addition to the salary owed. It is therefore not possible to say with certainty whether the employer may also pursue purely labour law objectives such as remuneration for work performance by paying the bonus in addition to the social purpose pursued in Sec. 3 no. 11c EStG. Achieving the objective of the inflation compensation bonus - mitigating increased consumer prices

and avoiding a wage-price spiral - is only possible if employers voluntarily provide their own funds for this purpose. If any differentiation is denied by further objectives, as all employees are equally affected by consumer prices, the premium should not be made dependent on the extent of the work performed in relation to the extent of part-time employees, for example. This does not seem appropriate; those who work voluntarily must also be able to determine the distribution of the benefit. Furthermore, this would lead to the bonus being used rather cautiously. Whether the purpose pursued by Sec. 3 no. 11c EStG was not achieved could be left open, as the principle of equal treatment under labour law would not be violated even if this were the case. The appeal was authorised and lodged (case reference at the BAG: 10 AZR 240/24).

No ineffective cancellation in the event of failure to comply with the duty of disclosure

Compliance with the notification obligation pursuant to Sec. 17 (3) KSchG merely serves to provide the Federal Employment Agency with advance information and is not intended to protect the individual employee.

BAG, judgement of 23 May 2024 – 6 AZR 155/21

The case

The parties are in dispute about the validity of an ordinary dismissal of the plaintiff for operational reasons declared as part of a mass dismissal. The defendant is the debtor's insolvency administrator. On 17 January 2020, the debtor decided to cease operations completely and submitted a draft reconciliation of interests to the works council. The reconciliation of interests negotiations were intended to carry out the consultation with the works council required due to the intended mass dismissal. The debtor did not send a copy of the notification initiating the consultation procedure to the employment agency. The debtor terminated the employment relationships of the employees on 28.1.2020 with effect from 30.4.2020 after the notification of mass dismissal was submitted. The Labour Court dismissed the action. The Higher Labour Court dismissed the appeal.

The decision

The plaintiff's appeal is unsuccessful. The dismissal is effective and terminated the parties' employment relationship at the end of 30 April 2020. The failure to send a copy of the consultation procedure to the competent employment agency in accordance with Sec. 17 (3) KSchG (or Art. 2 and Art. 3 of the Mass Dismissal Directive) constitutes a breach of the duty to notify. Such a breach does not lead to the invalidity of the dismissal. No prohibition order can be inferred from Sec. 17 (3) sentence 1 KSchG; the provision is not a prohibition law within the meaning of Sec. 134 BGB. It is not intended to protect the individual employee. By transmitting the information at the time when a mass dismissal is merely intended, the authority is to obtain an overview for the first time. The course of the consultation procedure can ultimately be modified and supplemented. The invalidity of the dismissal as a legal consequence of a breach of the obligation to provide information is not required by the principle of equivalence under EU law due to the lack of legal consequences provided for in the directive.

■ BRIEF LOOK INTO PENSIONS

Financial reserves from the company pension scheme

Around four out of five companies have made a commitment to their employees to support them with a company pension scheme in old age, in the event of disability or in the event of the death of their dependants. Companies often perceive these pension obligations as nothing more than a financial burden. Wrongly so, because these obligations can actually be a key to mobilising additional financial reserves in situations of economic stress. It is often possible to optimise company pension obligations in such a way that liquidity is improved and costs are reduced.

I. Improving liquidity

- Interruption of contribution payments: By interrupting contribution payments to external pension funds, the outflow of liquidity can be stopped.
- Collateralisation of cover funds: In principle, reinsurance policies and direct insurance policies can be used as collateral. Liquidity can be improved on an ad hoc basis by collateralising cover funds.

II Cost reduction

- Closure of pension plans: Closing pension plans saves future costs. The cost effect is greater if the closure of pension plans affects not only new employees but also existing employees. If certain conditions are met, further increases in pension entitlements can be slowed down or even cancelled completely.
- Switch to pension fund provision: By switching from a direct commitment to a pension fund pension scheme, contributions to the statutory insolvency insurance scheme (Pensionssicherungsverein – PSVaG) can be significantly reduced.

III Accounting relief

- Severance payment offer to employees: Offer your current employees a severance payment for the pension entitlements they have acquired to date: In the existing employment relationship, company pension commitments can generally be cancelled against payment of a severance payment. The severance payment leads to a legal release from the pension obligations and thus reduces the pension provision.
- Reduction in provisions through new benefit plan: In principle, company pension rights can be interfered with.

The more serious the reasons for the intervention, the more likely it is to be possible.

- Introduction of options: A reduction in pension provisions can be achieved by introducing options. If a pension scheme previously only provided for benefits to be paid out in the form of current pensions, the introduction of further payment options (instalment payment or capital payment) can reduce provisions.
- Change of implementation method: By changing the implementation method from a direct pension commitment (direct commitment) to indirect commitments (provident fund, direct insurance, pension fund, pension fund), pension provisions can be completely eliminated.

IV. Conclusion

Company pension schemes in their various forms offer a valuable organisational option for successfully navigating companies through challenging times. There are numerous flexible options for improving liquidity, profitability (costs) and balance sheet debt. The choice of the right instrument depends on the specific situation of the company, its history and other factors. The advice of a competent expert is required here in order to select measures that are legally permissible and suitable for the company.

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■ INTERNATIONAL NEWSFLASH FROM UNYER

France: Unlawfully obtained evidence can also be used in case of doubt

At the end of 2023, the French Court of Cassation changed its case law regarding the use of evidence (Cour de Cassation, judgement of 22.12.2023 – 20-20.648). Evidence obtained in an "unfair" - i.e. unlawful - manner can now also be taken into account in a trial. This brings French case law into line with EU law.

In the underlying case, a sales manager who worked from home was dismissed with extraordinary notice because he had expressly refused to submit reports on his business activities to his employer. The employer was only able to prove the employee's refusal with the help of a secret recording of a conversation. In the appeal proceedings, the judges declared the evidence inadmissible as it had been obtained unlawfully. As there was no further evidence of the employee's refusal to submit his business reports, the judges concluded that the dismissal was not justified. The employer appealed, arguing that audio recordings, even if made without an employee's knowledge, are admissible if they do not prejudice the employee's rights, are essential for the right of proof and the protection of the employer's interests and could be discussed in a fair procedure.

Previously, the Court of Cassation refused to accept evidence that was obtained unfairly. However, it has now changed its position and is thus complying with European law. The judges point out that the European Court of Human Rights does not generally consider evidence that is considered unfair to be inadmissible. As a result, evidence obtained by unfair means is admissible under certain conditions. The right to evidence may therefore in future justify the production of elements that infringe other rights, provided that such production is indispensable and the interference with the other rights is strictly proportionate to the objective pursued. According to the Court of Cassation, it is necessary not to deprive someone of the opportunity to prove their rights if the only evidence available to them leads to a violation of the rights of the other party. As a consequence, both parties to the employment contract can use evidence such as secret recordings or recordings from a hidden camera, but only on condition that this is the only evidence available to enforce their own rights. Furthermore, the evidence must be proportionate to the purpose pursued.

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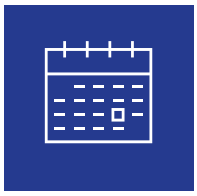
Events, publications and blog



You will find an overview of our events here.

You will find a list of our current publications here.

You will find our blog here.

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