YOUR BUSINESS LAW FIRM

Employment Tracker

JUNE 2023

Stay up to date with us

With our Employment Tracker, we regularly look into the "future of labour law" for you!

At the beginning of each month, we present the most important decisions expected for the month from the Federal Labour Court (BAG) and the European Court of Justice (ECJ) as well as other courts. We report on the results in the issue of the following month. In addition, we point out upcoming milestones in legislative initiatives by politicians, so that you know today what you can expect tomorrow.

Recent decisions

With the following overview of current decisions of the past month, you are informed which legal issues have been decided recently and what impact this may have on legal practice!

Subject	Date/ AZ	Remark/ note for practice
Federal Labour Court		
Termination for operational reasons – notification of collective redundancies	11.05.2023 - 6 AZR 157/22 (A) -	**If an employer has incorrectly assessed the size of the company and therefore did not issue a mass dismissal notice, it is unclear whether this still leads to the invalidity of the dismissal. The sanction system developed by the Federal Labour Court could be disproportionate because it may contradict the systematics of mass dismissal protection as conveyed by the Mass Dismissal Directive (MERL).** *The 6th Senate of the Federal Labour Court decided this.* Facts The parties were in dispute about the validity of a termination for operational reasons. The plaintiff had been employed at V.-GmbH as a machine fitter and service technician since 1994. Until September 2020, the employer employed 25 employees. At the end of September 2020, the managing director of the employer filed an insolvency petition with the competent district court. On the same day, the district court ordered provisional insolvency administration and appointed the defendant as provisional insolvency administrator. At the beginning of December 2020, the insolvency administrator gave the plaintiff and ten other employees notice of termination for operational reasons. He had not previously filed a mass dismissal notice.

In his action, the plaintiff objected to the dismissal and requested his continued employment until the legal conclusion of the proceedings. He claimed that the termination was invalid. Among other things, the required mass dismissal notice was missing.

The defendant took the view that there was no need for a mass dismissal notice before the notice of termination was issued. The size of the company of generally more than 20 employees employed in the company, which is decisive for the notification, had not been reached. In order to determine the regular size of the company, it is necessary to consider the situation on the day of the dismissal in relation to the reporting date. On this day, there were less than 20 employees. Of the 25 employees originally still employed in September, two had already left the employment relationship with the employer on September 30, 2020. Four further employment relationships had ended in November based on termination agreements.

The decision of the Federal Labour Court

The criterion "generally" in Section 17(1) of the Dismissal Protection Act (KSchG), which is decisive for the determination of the number of employees in the enterprise, neither contains a deadline regulation nor does it require an average consideration. Rather, it is based on the number of employees that is characteristic for the normal course of the business in question. This requires a retrospective view of the workforce to date and, if necessary, an assessment of future developments. Periods of exceptionally high or low business activity are not to be taken into account.

In this case, the relevant company size was still reached at the time of the terminations. The defendant should therefore have issued a mass dismissal notice.

However, if an employer has incorrectly assessed the size of the company and therefore failed to issue a mass dismissal notice, it is currently unclear whether this will still lead to the dismissal being invalid. The sanction system developed by the Federal Labour Court could be disproportionate because it may contradict the systematics of mass dismissal protection as conveyed by the Mass Dismissal Directive (MERL).

The 6th Senate has therefore suspended the proceedings pending the decision of the Court of Justice in Case - C-134/22 - in order to be able to determine, on the legal basis of the

		expected decision, the sanctions in the event of violations by the employer of its obligations under Section 17(1), (3) KSchG.
Termination date of a fixed-term employment relationship	24.05.2023 - 7 AZR 169/22 -	**If, according to an agreement between the parties, the extension of a professional football player's contract is tied to a minimum number of game appearances, this agreement is not to be corrected by way of a supplementary interpretation of the contract with regard to the unforeseeable cancellation of the season due to the pandemic, nor does the plaintiff have a claim to a corresponding adjustment of the extension agreement due to a frustration of contract.** *The 7th Senate of the Federal Labour Court decided this.* Facts The parties were in dispute over the extension of their fixed-term employment relationship based on a contractually agreed deployment-dependent extension clause. The plaintiff is a professional soccer player and concluded a fixed-term employment contract with the defendant as a contract player for the period from September 2019 to the end of June 2020. The 1st team of the defendant played in the regional league in the 2019/2020 season. If the plaintiff made at least 15 appearances in championship matches of the 1st team, the employment contract was to be extended by a further season in accordance with the agreements of the parties. An assignment is counted if the plaintiff has played at least 45 minutes. The plaintiff was used 12 times for at least 45 minutes between September 7, 2019 and February 15, 2020. Thereafter, the coaching staff, which was reappointed in December 2019, decided not to continue to use the plaintiff for athletic reasons. As of mid-March 2020, there was no further play due to the pandemic. In May 2020, the season, which was originally scheduled to last 34 game days, was declared terminated prematurely. In his action, the plaintiff claims the continuation of the employment relationship for a further playing season until June 30, 2021 based on the agreed deployment-dependent extension clause. He argued that the contract should be amended due to the unforeseeable end of the season. If the parties had foreseen the end of the season, they would have agreed on a reduced number of 10 minimum assignments or a percentage assignment quota in line

with the reduced number of assignments actually possible. Since this minimum number of assignments had been reached, his employment relationship had been extended.

The defendant, on the other hand, took the view that the condition for the contract extension had not been met because the plaintiff had not achieved the required 15 assignments. The ability to achieve the minimum number of appearances depended solely on the sporting decisions of the trainer. This had not changed because of the pandemic and the termination of the season, which were not attributable to it. An adjustment of the contract was therefore ruled out.

The decision of the Federal Labour Court

The plaintiff was unsuccessful in his action before the Federal Labour Court. If the parties agreed that a minimum number of matches is required for the employment contract to be extended, this does not change due to the unforeseeable pandemic-related end of the season. Neither does this have the effect of requiring the extension agreement to be corrected by way of supplementary interpretation of the contract, nor does it require it to be adjusted due to a frustration of contract.

European Court of Justice

The mere breach of the GDPR does not constitute a claim for damages

04.05.2023

- C-300/21 -

A breach of the General Data Protection Regulation (GDPR) alone is not sufficient to justify a claim for compensation for non-material damage. The affected party must actually have suffered damage. However, this damage does not have to exceed a "materiality threshold".

This has been decided by the European Court of Justice.

Facts

In the underlying Austrian case, the plaintiff asserted a claim for non-material damages against Austrian Post AG. The latter had determined information on party preferences with

the help of an algorithm and underlying sociodemographic characteristics based on the respective residential address (so-called target group addresses). This data was intended for election advertising purposes by political parties.

This also affected the plaintiff, for whom a projection had been made. This showed that the plaintiff had an affinity with a certain party. His data and the extrapolation concerning him were not passed on to third parties. Nevertheless, he disliked the procedure because he had not consented to the processing of this data.

As a result, he claimed non-material damages in the amount of 1,000 euros pursuant to Article 82 of the GDPR. The Austrian courts of first and second instance rejected his claim. The Austrian Supreme Court (order for reference of 12. May 2021, 6 Ob 35/21 x) then referred the matter to the European Court of Justice for a preliminary ruling. It was asked to clarify whether damages should be awarded for the violation of the GDPR requirements alone or whether non-material damages should be specified more precisely. In addition, it wanted clarification from the European Court of Justice as to whether it was in line with EU law if a legal infringement of some weight, which went beyond the anger caused by the legal infringement, could be required for an order to pay non-material damages.

The decision of the European Court of Justice

In its judgment, the European Court of Justice confirmed that a mere breach of the GDPR does not give rise to a claim for damages. The claim for damages is linked to three cumulative prerequisites: a breach of the GDPR, the existence of material or immaterial damage and a causal link between damage and breach. Thus, not every violation of the GDPR leads to a claim for damages, since an individual damage must be proven.

However, the claim for damages is not limited to immaterial damages with a certain severity. The GDPR does not have a materiality threshold and such a limitation would be contrary to the broad understanding of the term "damage" chosen by the EU legislator. The criteria for determining the extent of the damage must be determined in accordance with the laws of the individual Member States - but always with the understanding that the GDPR is intended to ensure full and effective compensation for the damage suffered.

Can a data protection officer also be a works council member?

09.02.2023

- C-453/21 -

A data protection officer who is also the chairman of the works council may have a conflict of interest. This may be the case – subject to an examination in the individual case – if he or she, as data protection officer, is assigned tasks or duties which would lead him or her to determine the purposes and means of the processing of personal data at the controller or its processor.

This has been decided by the European Court of Justice.

Facts

The European Court of Justice had to decide in particular on the validity of the dismissal of a data protection officer because of his activity as chairman of the works council.

The reference for a preliminary ruling in the main proceedings is based on a legal dispute before the Federal Labour Court with the following facts:

The plaintiff is an exempt works council member as well as deputy chairman of the central works council. In mid-2015, he was appointed by the defendant as company data protection officer and by the other companies belonging to the group as external data protection officer. Two years later, the Thuringian State Commissioner for Data Protection and Freedom of Information, referring to Section 4f of the German Data Protection Act (GDPR) (former version), determined that the plaintiff lacked the necessary reliability for the position of data protection officer due to his activity as works council chairman and the conflicts of interest that may be associated with this. After the entry into force of the GDPR, the defendant dismissed the plaintiff as data protection officer as a precautionary measure for operational reasons pursuant to Section 38(3) sentence 2 GDPR.

The plaintiff is defending himself against this.

The European Court of Justice now had to clarify detailed questions regarding the interpretation of Section 38(3) sentence 2 of the GDPR and Section 38(6) of the GDPR.

The decision of the European Court of Justice

The European Court of Justice has ruled that each member state is free to provide for special regulations for the dismissal of a data protection officer. However, this applies with the condition that these are compatible in particular with Section 38(3) sentence 2 GDPR. However, the objectives of the GDPR would be impaired if stricter national protection prevented the dismissal of a data protection officer even if he or she could not or could no longer perform his or her duties with complete independence due to a conflict of interest. In such a case, a corresponding national provision would no longer be compatible with Section 38(3) sentence 2 GDPR.

A conflict of interest in terms of Article 38(6) of the GDPR could always exist if a data protection officer is assigned tasks or duties, which would have the consequence that he would have to determine the purposes and means of the processing of personal data. Whether such a case exists must be determined by the national court on a case-by-case basis.

Upcoming decisions

With the following overview of upcoming decisions in the following month, you will be informed in advance about which legal issues will be decided shortly and what consequences this may have for legal practice!

Subject	Date/ AZ	Remark/ note for practice
Federal Labour Court		
Amount of a company pension	20.06.2023 - 3 AZR 221/22 -	The parties dispute the amount of the plaintiff's company pension. The plaintiff had initially been employed full-time by the defendant since 1984 and reduced her weekly working hours from 35 to 17.5 hours from 2005. In 2020, the employment relationship ended. The defendant grants its employees pension benefits. The relevant guideline provides for a calculation of the monthly company pension according to the formula "fixed pension amount x years of service". The factor used to calculate the fixed pension amount is the average income earned in the last twelve months of employment. For employees who were employed part-time or full-time during the last ten relevant years of service, the following applies: The fixed pension amount changes in the ratio of the average working time of the employee during the last ten years of service to his or her working time during the calendar year prior to the occurrence of the insured event or early retirement. The defendant informed the plaintiff with regard to the calculation of her pension benefits that, according to the directive, only her employment status during the last ten eligible years of service is taken into account in the case of part-time employment. In her action, the plaintiff seeks a declaration that the defendant is obligated to determine the fixed pension amount in the calculation of her company pension according to the ratio of the average working time during the entire relevant period of service to her working time in the last calendar year before her early retirement. On this basis, the plaintiff calculated a company pension entitlement of 155.19 euros per month. She took the view that if only the

		degree of employment in the last ten years were taken into account when calculating the fixed pension amount, the benefits for part-time employees would be disproportionately reduced. If this method of calculation is used as a basis, the result would only be an entitlement to a monthly company pension of 99.77 euros. By applying the ten-year rule, she is placed in the same position as if she had worked part-time throughout. This, in her opinion is an unjustified unequal treatment compared to full-time employees. Because the majority of the employees were still women, there was also unequal treatment on the basis of gender. The defendant, on the other hand, argued that there was no discrimination because the company pension was only reduced in proportion to the working hours. It was permissible to base the degree of employment on the last ten years. The action was unsuccessful in the lower courts. The plaintiff is continuing to pursue her claims before the Federal Labour Court.
Reimbursement of a commission paid to a personnel service provider for the placement of an employee upon termination of the employment relationship within the first 13 months of its existence	20.06.2023 - 1 AZR 265/22 -	The parties dispute whether the plaintiff must reimburse the defendant for a commission paid to a personnel service provider for the mediation of the employment relationship. The plaintiff was employed as a service technician by the defendant. For the placement of the plaintiff, the defendant paid a placement commission to a third-party company. The employment contract contains, among other things, a provision according to which the plaintiff is obligated to reimburse the defendant for the commission paid if the employment relationship does not continue beyond June 30, 2022 and is terminated by the plaintiff himself, by the defendant or by mutual agreement for reasons for which the plaintiff is responsible. The plaintiff terminated the employment relationship as of June 30, 2021. The defendant retained part of the plaintiff's remaining remuneration and an invoiced meal allowance on account of the placement commission it had paid. In this action, the plaintiff is demanding payment of the outstanding amounts from the defendant. The defendant has filed a counterclaim seeking reimbursement of the remaining provision amount as well. The plaintiff is of the opinion that the provision in the employment contract regarding the reimbursement of the commission is invalid. The provision placed him at an unreasonable

disadvantage because the risk of personnel recruitment costs incumbent on the company was thereby shifted excessively to him and he was also de facto prevented from giving notice of termination during the probationary period. The defendant, on the other hand, argued that the clause in the employment contract was effective. The mediation of the employment relationship by a third-party company was also in the interest of the plaintiff, who had made a conscious decision to do so. It had a legitimate interest in only finally paying the expenses incurred for the conclusion of the employment contract if the plaintiff worked for it for at least a certain, contractually agreed period. In addition, the risk is not passed on to the plaintiff in an undifferentiated manner, since he only has to reimburse the commission in the event of a termination of the employment relationship for which he is responsible. Finally, the amount to be reimbursed was also not disproportionately high in view of the plaintiff's relatively high monthly gross income.

The lower courts ordered the defendant to pay and dismissed the counterclaim. The plaintiff is contesting this on appeal.

Legislative initiatives, important notifications & applications

This section provides a concise summary of major initiatives, press releases and publications for the month, so that you are always informed about new developments and planned projects.

Subject	Timeline	Remark/ note for the practice
German Bundestag and Federal Council agree on amendments to the Whistleblower Protection Act	09.05.2023	The German Bundestag and Federal Council were able to agree on an amended version of the Whistleblower Protection Act (HinSchG). The HinSchG is to come into force one month after promulgation – probably in mid-June 2023. The HinSchG contains the following regulations: ▪ The law regulates the handling of reports on fraud, corruption and other malpractices in companies and public authorities. ▪ The aim is to protect whistleblowers who draw attention to such abuses from the threat of discrimination and consequences under labour law by obliging them to set up suitable structures, such as internal and external reporting offices and measures to protect whistleblowers from reprisals. ▪ At the same time, it also contains provisions on liability, damages and fines in the event of deliberately false information. You can find more information and practical tips in our Legal Update.
Federal Council approves law on International Labour Organization Convention No. 190 of June 21, 2019, on the elimination of violence and harassment in the workplace	12.05.2023	The Federal Council has decided to approve the law adopted by the German Bundestag on the International Labour Organization Convention No. 190 of June 21, 2019, on the Elimination of Violence and Harassment in the Workplace. The Convention is characterised by the following ideas: ▪ It sends a clear signal worldwide that any behaviour that belittles, humiliates, sexually harasses or even physically or psychologically assaults people in the work environment is prohibited and thus also outlawed.

- The Convention is the first of its kind in the world to offer employees and other persons in the world of work far-reaching protection against violence and harassment in the world of work.
- Equally protected are natural persons who exercise the powers, duties or responsibilities of an employer.

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