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Employment Tracker

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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		
Effectiveness of an Arbitration Committee's Decision to Establish a Social Plan in the Case of Economic Unreasonableness	14.02.2023 - 1 ABR 28/21 -	**Funding a social plan is generally not economically justifiable for the company if meeting the resulting obligations would lead to illiquidity, over indebtedness or an unacceptable reduction in equity. No "minimum funding" for a social plan outside of insolvency can be derived from the funding limits for a social plan in insolvency provided for in Sec. 123 of the German Insolvency Code (InsO).** *This was decided by the First Senate of the Federal Labour Court.* The Facts The Federal Labour Court had to decide whether the decision of the conciliation committee on the establishment of a social plan was valid. In particular, it was disputed under which conditions the social plan was not economically justifiable. The affected employers, which are dependent on the Group, are automotive suppliers that operated a joint venture. All operations were discontinued. Prior to this, the employers entered into negotiations with the works council on the conclusion of a social plan. As the negotiations were unsuccessful, an arbitration committee was established. In the conciliation proceedings, the employers pointed out that the economic situation of one of the employers (Party 2) did not allow for a social plan amounting to millions of euros and would inevitably lead to its insolvency. By decision of the Arbitration

Council, a social plan was nevertheless drawn up, which obliged the employers to make severance payments totalling 3 million euros.

Decision of the Federal Labour Court

The Federal Labour Court ruled that the social compensation plan established by the decision of the Arbitration Committee was invalid.

The main reason given by the Federal Labour Court was that the scope of the social plan exceeded the limits of economic justifiability. If the conciliation body draws up a social plan applicable to several sponsoring companies of a joint operation, which establishes social plan claims of the employees only against the contractual employer, the volume of the social plan must be economically justifiable for the respective employer in its utilization. It is not sufficient that the total volume of the social plan for one of the companies does not exceed the economically justifiable limit.

The mere fact that the company is already in economic difficulties does not exempt it from the necessity of a social plan. However, if the fulfilment of the social plan obligations leads to illiquidity, over indebtedness or an unacceptable reduction of equity, the limit of economic justifiability is regularly exceeded.

Contrary to the rulings of the lower courts, the Federal Labour Court clarified that the maximum limits for an insolvency social plan pursuant to Sec. 123 InsO do not constitute a "minimum funding" for social plans outside of insolvency.

No prohibition of exploitation in the case of open video surveillance	29.06.2023 - 2 AZR 296/22 -	**In principle, there is no prohibition on the use of recordings from open video surveillance in proceedings for protection against dismissal if they are intended to prove that the employee's conduct was intentionally in breach of contract. This also applies if the employer's surveillance measures do not fully comply with the requirements of data protection law.** *This was decided by the Second Senate of the Federal Labour Court.*

The facts

The issue was whether video recordings from an open video surveillance system could be used in an unfair dismissal case.

The defendant employer terminated the plaintiff's employment for cause, or alternatively, for misconduct, because the plaintiff had left the premises before the start of his shift, thereby defrauding the employer of his shift pay.

The plaintiff had entered the premises, but had left again before the start of the shift. This was proven by video camera footage. The video camera was marked and could not be overlooked. The evaluation of the recordings was also not done for no reason, but based on an anonymous tip, according to the employer.

The plaintiff claimed that he had been working when he filed a complaint against the dismissal. The video camera recordings were subject to a prohibition on the use of facts and evidence and could therefore not be considered in the proceedings.

Decision of the Federal Labour Court

The Federal Labour Court ruled that the relevant image sequence from the video surveillance system at the gate to the factory premises was not subject to the exclusion of evidence and could therefore be used.

In its reasoning, the Federal Labour Court cited relevant provisions of union law as well as national procedural and constitutional law. It was irrelevant whether the surveillance complied in every respect with the requirements of the BDSG or the DSGVO. Even if this is not the case, use is not excluded if, as in the present case, the data collection is carried out openly and the employee's conduct is in breach of contract. In such a case, it is irrelevant how long the employer had to wait until he saw the footage for the first time.

European Court of Justice

Collective dismissal: Purpose of the obligation to inform under Art. 2(3) of the Collective Redundancies Directive

Preliminary ruling of the Federal Labour Court

13.07.2023

- C-134/22 -

The employer's obligation to provide the authorities with early information on planned collective redundancies is not intended to provide individual protection for employees.

This was decided by the Court of Justice of the European Union.

The facts

The Court of Justice of the European Union had to decide on the details of the interpretation of the Directive on collective redundancies, in particular on the question whether the notification of collective redundancies serves the purpose of individual protection of employees.

The background to the reference for a preliminary ruling was a dismissal protection case. The plaintiff in the main proceedings had been dismissed by his employer. Prior to that, insolvency proceedings had been opened in respect of the employer's assets and a decision had been taken to cease all business activities and to make mass redundancies.

As a result, the consultation procedure was initiated and the works council was provided with the necessary information. However, no copy of this written notification was sent to the relevant employment agency. For this reason, the plaintiff in the main proceedings considers that the notice of dismissal given to him was invalid.

The Federal Labour Court, which heard the case, considered the failure to transmit the data to be a violation of the German law transposing the EU Directive into national law. However, neither the Directive nor the national law provides for an explicit sanction for such an infringement. In these circumstances, the Federal Labour Court expresses doubt as to whether the infringement necessarily leads to the nullity of the notices of termination issued in the context of the mass dismissal. For the purposes of the Federal Labour Court's review, it was necessary to clarify whether the provision in question was intended to provide individual protection for employees. The Federal Labour Court therefore stayed the proceedings and requested a preliminary ruling from the Court of Justice of the European Union.

Decision of the Court of Justice of the European Union

The Court of Justice has ruled that the employer's obligation to provide the competent authority with a copy of the consultation letter in the context of a collective redundancy does not constitute a protective provision in favour of the employees.

According to the Court, the transmission of the information in question is for information and preparation purposes only, so that the competent authority can, if necessary, effectively exercise its further powers. The aim is to enable the authority to assess, as far as possible, the negative consequences of the planned collective redundancies, so that it can effectively seek solutions to the problems caused by the collective redundancies. In view of the purpose of this information transfer and the fact that it takes place at a stage when the employer only intends to carry out collective redundancies, the competent authority should not concern itself with the individual situation of each worker, but should consider the intended collective redundancies in general.

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		
Effectiveness of a fixed-term employment contract without material basis **Requirements for compliance with the written form requirement in the event of a subsequent change to the fixed term**	16.08.2023 - 7 AZR 300/22 -	It is disputed whether the requirement of written form pursuant to Sec. 14 (4) of the German Part-Time and Fixed-term Employment Act (TzBfG) is also met when a fixed-term employment contract is initially concluded with formal effect and the start date is subsequently changed. The plaintiff signed a fixed-term employment contract with the defendant employer, according to which the plaintiff was to be employed on a fixed-term basis for the period from May 15, 2019 to September 30, 2019. Subsequently, the parties orally agreed to start work earlier. The plaintiff was then sent the new version of the fixed-term employment contract with a revised start date, which the plaintiff did not sign and return. As agreed, the plaintiff began work on May 4, 2019. The plaintiff contends that the employment relationship between the parties was not terminated upon the expiration of the fixed term, but continues. According to the plaintiff, the fixed-term agreement in the employment contract does not comply with the requirement of written form, as the start of work contained in the signed contract does not correspond to the actual start of work. The defendant is of the opinion that the fixed-term agreement was made in a formally valid manner. Only the agreed end date of the fixed term was required to be in writing.

		The lower courts ruled in favour of the defendant and held that the fixed-term agreement was valid in form. The Regional Labour Court reasoned that the postponement of the start of work, which was only agreed orally, did not result in the formal invalidity of the fixed-term contract. In any event, the premature commencement of work within the framework of an employment relationship that had previously been formally limited in time does not require a written agreement within the meaning of Sec. 14 (4) TzBfG, if the duration of the fixed term results from a specific end date. The plaintiff contests this with his appeal to the Federal Labour Court.
Requirements for the application of the presumption of conformity pursuant to Section 125 (1) sentence 1 no. 1 InsO	17.08.2023 - 6 AZR 56/23 -	The Federal Labour Court has to decide on the validity of two ordinary terminations for operational reasons. In particular, it is questionable whether the presumption of the existence of operational reasons pursuant to Sec. 125 (1) Sentence 1 of the Insolvency Statute (InsO), applies. The plaintiff is challenging two notices of termination for operational reasons that were issued to him as a result of a plant closure. Prior to this, insolvency proceedings had been initiated against the employer's assets. After no acceptable offer to take over the business was received, the insolvency administrator entered into a reconciliation of interests with the works council. According to this agreement, the company was to be closed down after the end of production and all employment contracts were to be terminated. The reconciliation of interests includes a list of all employees to be dismissed, including the plaintiff. Approximately 6 months after the termination, the defendant (nevertheless) sold parts of the business to the former main customer. For this reason, the plaintiff considers the notices of termination issued to him to be ineffective. In his opinion, the notices were issued only as a precautionary measure in case negotiations with potential buyers failed. Even after the notices of termination were issued, negotiations with interested parties on the sale of the business continued.

		The defendant, on the other hand, stated that a reason for termination for operational reasons was presumed on the basis of the reconciliation of interests with a list of names pursuant to Sec. 125 (1) sentence 1 no. 1 InsO. At the time of the termination, he had decided to shut down the entire business permanently. It was only one month after the termination that the main customers expressed an interest in acquiring parts of the business. The Labour Court dismissed the claim for protection against dismissal and the Regional Labour Court upheld the dismissal. The defendant appealed this decision to the Federal Labour Court.
Duty to inquire about shift schedule changes outside of working hours?	23.08.2023 - 5 AZR 349/22 -	The plaintiff is defending himself against the deduction of hours from his working time account and against a warning issued by the defendant employer. In particular, it is disputed whether the plaintiff was obliged to inform himself about changes in the duty roster during his free time. The plaintiff works for the defendant as a paramedic. For two days of unexcused absences, the defendant issued a warning to the plaintiff and deducted the relevant hours from his working time account. On the days in question, the plaintiff was assigned as a floater, meaning that he was not initially assigned to a specific shift. According to the relevant company agreement, the concrete assignment of floater duties can be made up to 8 p.m. of the previous day before the start of the shift. If no specific information is provided, the jumpers must notify the company by telephone at 7:30 a.m. on the day of the shift that they are ready to work. On the two days in question, the plaintiff was scheduled for a shift that began at 6:00 a.m. and 6:30 a.m. the day before. On the days in question, the plaintiff was not at work and could not be reached by telephone. As a result, the defendant informed him of the details of the shift by text message. At 7:30 a.m. on the day in question, the plaintiff reported that he was available by telephone.

On the first occasion, the defendant assigned another employee to the shift in question because the plaintiff could not be reached by telephone. On the second occasion, the plaintiff reported to work at 8:26 a.m. instead of 6:30 a.m. The defendant considered both the no-show and the tardiness to be unexcused absences and issued a warning to the plaintiff.

The plaintiff argued, among other things, that the specification of the duties took place after the expiration of the period stipulated in the company agreement and therefore did not have to be followed by him. In particular, he was not obliged to find out when he had to work during his free time. In doing so, the defendant circumvented the standby duty agreement in order to save costs. The short-term arrangement also violates Sec. 12 (3) TzBfG, but at least violates the principle of equitable discretion.

The defendant is of the opinion that the plaintiff is obliged to inform himself about his working hours. The time during which he informs himself should not be considered working time. Since the plaintiff did not answer the phone and did not respond to the text message, he was absent without excuse.

The labour court dismissed the claim, while the regional labour court upheld it. It is true that the defendant had assigned the plaintiff a specific float shift the day before. However, the plaintiff did not receive the corresponding change in the work schedule, and thus the change did not become effective for him. The employer's right to issue instructions is exercised by means of a declaration of intent. As a declaration of intent that must be received, it becomes effective only upon receipt. The defendant failed to prove that the plaintiff received the notification of the change in the duty roster. It is undisputed that the plaintiff did not receive the phone call. The text message did reach the plaintiff's reception area. However, the defendant could not have expected to receive it before 7:30 a.m. on a workday because the plaintiff was not required to check an official text message during his free time to find out his work schedule. Rather, the plaintiff was entitled to be unavailable during his free time.

The Federal Labour Court will now decide whether the Regional Labour Court's opinion is correct.

Continued employment pending final resolution of a labour dispute	24.08.2023 - 2 AZR 31/23 -	At last, the parties are still in dispute over a preliminary general claim to continued employment pending the final resolution of the wrongful dismissal lawsuit. The defendant terminated the plaintiff's employment due to illness. The plaintiff's claim for protection against dismissal was successful before the Labour Court and the Regional Labour Court. The defendant was ordered to continue the plaintiff's employment on the same terms and conditions during the pendency of the dismissal dispute. The Regional Labour Court is of the opinion that the doubts raised as to the existence of a right to continued employment have not prevailed. The defendant contests the finding of a right to continued employment. It is of the opinion that the decision of the Grand Senate of the Federal Labour Court, which is used as a legal basis, represents an overstepping of the limits of permissible development of the law and violates Article 20 (3) of the German Constitution. The Federal Labour Court must now decide whether it wishes to adhere to its case law on the right to continued employment.

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
Regulation on the revision of the notification of insured events in statutory accident insurance	20.07.2023	The Ordinance on the Reorganization of the Notification of Insured Events in Statutory Accident Insurance was promulgated on July 20, 2023. The purpose of the ordinance is to fully digitalize the reporting of occupational accidents and suspected occupational diseases by employers and physicians. Occupational accidents and suspected occupational diseases must be reported to the statutory accident insurance institutions. The current law provides for paper-based reporting as the standard reporting method. The content of the report and other formalities are defined by forms prescribed by the legislator. If the formal requirements are met, only an opening clause allows digital data transmission. With the new regulation, the procedure is to be completely digitalized and thus accelerated and simplified.

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