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■ EDITORIAL

Dear readers,

the current economic situation in Germany continues to be characterised by considerable challenges. In particular, ongoing geopolitical uncertainties and the transformation of key industries are having a significant impact on economic development. The immediate effects on the labour market are noticeable. Employment law issues relating to the flexibilization of working conditions and the design of operational change processes are becoming a focus of attention. All of this illustrates how closely economic conditions and labour law issues are intertwined. We are therefore pleased to present you with the latest developments in labour law, both in terms of court decisions and legislation, in this autumn edition of our newsletter.

Our Hamburg colleagues Sandra Sfinis and Anna Mayr open with a review of the latest case law on pseudo-self-employment – a never-ending topic and an area of enormous practical relevance, especially in times of digital transformation and the development of new business models. Paul Gooren from Berlin afterwards deals with legislative activities and evaluates the recently presented draft of a “Tariff Compliance Act”, with which the German government intends to award public contracts only to companies that comply with tariff agreements.

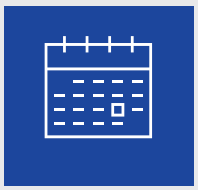
In our analysis of current case law, we are introducing a new feature in this newsletter and will now be presenting what we consider to be the ten most important decisions of the quarter, all accompanied by assessments and practical advice from our colleagues. In this way, we aim to filter out the truly key decisions for you in an even more focused manner. In our “bAV Aktuell” section, our colleague Annekatrin Veit evaluates a ruling by the German Federal Labour Court on deviations from collective agreements in employer contributions to occupational pensions. As always, we conclude with a look abroad, where Xavier Drouin from our French unyer partners Fidal sheds light on the “Plan de sauvegarde de l’emploi”, which states certain duties for employers when they terminate certain numbers of employees at the same time.

We hope you find our selection of topics exciting and insightful. As always, we look forward to your feedback!

Best regards

Achim Braner

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.

■ MAIN TOPICS

New developments on pseudo-self-employment: risks and obligations for companies

The employment of self-employed service providers is common practice in many companies. However, the line between genuine self-employment and dependent employment is blurred and continues to entail considerable legal and economic risks.

The gap between freedom of contract and legal reality

The legal assessment of employment relationships is not based on contractual provisions or the intentions of the parties, but on the actual circumstances in everyday work life. These may change in the course of the collaboration. The latest case law from the social courts and the Federal Labour Court (Bundesarbeitsgericht – BAG) highlights the complexity of distinguishing between self-employment and dependent employment. A careful analysis of each individual case is essential, but also complex, as the limits of freedom of contract are determined not only by legal requirements, but also by actual implementation.

Pseudo-self-employment exists when an employee who is actually dependent is treated as a self-employed person. It is widespread in Germany because, at first glance, it offers advantages for both sides:

- cost savings – employers save on social security contributions, continued payment of wages and holiday entitlements;
- flexibility – self-employed persons do not enjoy protection against dismissal and companies can react flexibly to fluctuations in orders;
- tax advantages – even the supposedly self-employed initially benefit from tax planning options.

In many industries, the use of “freelancers” is so common that the requirements for genuine self-employment are often not questioned.

Legal risks for companies

Before employing self-employed persons, companies should carefully check the requirements for self-employment, as there are significant legal consequences if dependent employment is determined.

Social security contributions and income tax

If an activity is retroactively classified as dependent employment, the client must pay all social security contributions retroactively, Sec. 28e German Social Security Code IV (Sozialgesetzbuch V – SGB IV). This applies to both the employer's and the employee's share and can go back up to four years (up to 30 years in cases of intent). The client is solely liable for the total social security contributions, regardless of whether they have withheld the employee's share. The tax office may also demand additional income tax due to Sec. 38 et al German Income Tax Code (Einkommenssteuergesetz – EStG). Here too, the employer is liable for any unpaid contributions (Sec. 42d EStG).

Labour law

All labour law protection provisions such as the Protection against Dismissal Act (Kündigungsschutzgesetz – KSchG), the Continued Payment of Renumeration Act (Entgeltfortzahlungsgesetz – EFZG) and the Federal Paid Leave Act (Bundesurlaubsgesetz – BUrlG) apply to the employment relationship. Pseudo-self-employed persons can therefore subsequently assert all claims under these laws. Fees already paid may be reclaimed under certain circumstances. In the event of accidents at work, it may no longer be the self-employed person's professional association that is liable, but that of the company.

Criminal law risks

Since the company does not pay social security contributions for the supposedly self-employed person, the offence of withholding social security contributions (Sec. 266a German Criminal Code – Strafgesetzgebuch – StGB) may have been committed. Intentional employment of a pseudo-self-employed person is punishable by fines or imprisonment. If the company also fails to pay income tax for the supposedly self-employed person, this may constitute tax evasion, Sec. 370 German Fiscal Code (Abgabenordnung – AO): intentional non-payment of income tax is a criminal offence.

Distinguishing criteria

The Social Security Code defines employment as "non-self-employed work" (Sec. 7 SGB IV), while Sec. 611a German Civil Code (Bürgerliches Gesetzgebuch – BGB) codifies the concept of an employee: the decisive factors are being bound by instructions, external control and personal dependence. According to case law, the key distinguishing criteria are substantial freedom in terms of the content, performance, time and place of the activity, (non-)integration into the client's work organisation, as well as personal economic risk and the use of own operating resources. Whether the employment is contractually described as freelance work has, at most, indicative effect. Employers should therefore avoid the following sources of error in order to prevent unwanted pseudo-self-employment:

- specifications regarding working hours, place of work, working methods and detailed work instructions;
- failure to use own operating resources or working exclusively for one client;
- actual implementation of the contractual agreements;
- initiation of a status determination procedure (if necessary, before commencing work);
- proof of self-employment.

Latest court decisions

When assessing the status of employees, the courts emphasise in a series of recent decisions that it is always necessary to take a comprehensive view of all the circumstances of the individual case.

The "Herrenberg decision" of the Federal Social Court

In its ruling of 28 June 2022 – B 12 R 3/20 R, the Federal Social Court (Bundessozialgericht – BSG) ruled on the dependent employment of a music teacher with annual contracts and fee payments. Despite cancellation fees and opportunities to make up for lost work, she was integrated into the organisation of the music school, had to follow guidelines and was not allowed to acquire her own students. The BSG clarified that it is not possible to assign employees to the status of self-employed or dependent employment in an abstract manner according to occupational groups. The obligation to follow instructions and integration into operational processes does not have to be cumulative in order to assume dependent employment. The decisive factor in this case was the lack of independent entrepreneurial activity. It is noteworthy that the BAG had ruled differently in a similar case in 2018. This makes it clear that the overall picture in each individual case is decisive.

Regional Social Court Baden-Württemberg

The Regional Social Court (Landessozialgericht – LSG) Baden-Württemberg recently ruled on the status of doping inspectors who were formally listed as freelancers (decision of 18 March 2025 – L 13 BA 3631/22). The court found that

dependent employment exists if the inspectors are integrated into the operational process and are bound by instructions regarding the location, time and type of activity. However, they did not bear any entrepreneurial risk. The contractual designation as “independent doping inspectors” was also irrelevant. The court emphasised the possibility of initiating a status determination procedure with the German Pension Insurance Fund in case of doubt, even before commencing work (Sec. 7a [4a] SGB IV).

Regional Social Court Hessen

In addition, the LSG Hessen (decision of 16 May 2025 – L 1 BA 34/23) ruled that even racing drivers can be dependent employees, even though they are listed as self-employed. The court justified its decision on the basis of the exclusivity of the activity solely for the contracting company, the lack of advertising income/sponsorship, the lack of entrepreneurial risk on the part of the driver and the fact that all specifications are made by the team. In the court’s view, these criteria, when viewed as a whole, indicate that racing drivers are also personally dependent.

Conclusion

Current court decisions emphasise the need for a comprehensive examination of all circumstances in order to distinguish between self-employment and dependent employment. For companies, this means an increased obligation to review and carefully draft contracts, which must also be implemented in practice. Particularly in the case of long-term contractual relationships, it is necessary to regularly check whether the employment (continues to) fulfils the contractual requirements. In cases of doubt, a status determination procedure should be initiated at an early stage. Incidentally, politicians are currently working on a faster and more legally secure status determination process: according to the coalition agreement between the CDU/CSU and SPD, a fictitious approval is to be introduced into the Social Security Code. There are also plans to include self-employed persons in the statutory pension insurance scheme – details are still pending.

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Compliance with collective agreements at federal level

As announced in its coalition agreement, the new federal government of CDU/CSU and SPD has presented a draft bill on compliance with collective agreements in public procurement. An overview of the content, including a critical assessment.

Background

The federal government has presented a draft of the Federal Tariff Compliance Act (Entwurf für ein Bundestariftreuegesetz – BTTG-E). Its aim is to eliminate existing competitive disadvantages for companies bound by collective agreements in federal public procurement and to strengthen the application of minimum standards set by collective agreements. In future, companies not bound by collective agreements will also be required to grant their employees industry-specific working conditions set by collective agreements when executing federal contracts. The former government had already made an attempt to do this, but it was not passed. Current Federal Labour Minister Bärbel Bas

is now reviving the initiative with a view to the special infrastructure fund. Against the backdrop of investments worth billions, the law is intended to ensure that expansion does not come at the expense of fair wages and that "wage dumping" is prevented.

Key provisions

At the core of the draft is the so-called collective agreement compliance promise (Sec. 3 BTTG-E): contractors, subcontractors and temporary employment agencies commissioned by them must grant employees working on federal contracts collective agreement standards that are laid down by the Federal Ministry of Labour and Social Affairs (Bundesministerium für Arbeit und Soziales – BMAS) by ordinance. The working conditions covered include remuneration, paid leave, maximum working hours, rest periods and breaks, Sec. 5 (1) Sentence 2 BTTG-E. However, the provisions on leave and working hours only apply to contracts lasting more than two months and are determined by the Federal Labour Ministry at the request of a trade union or employers' association. The ministry may nevertheless refrain from making a determination if, in exceptional cases, there is no public interest. If applications are submitted for different tariff agreements, the Ministry determines the representative agreement.

The obligation to comply with collective agreements generally applies only to contracts with a volume of EUR 50,000 or more (Sec. 1 BTTG-E). Security and defence-related contracts are exempt from the obligation to comply with tariff agreements. Contractors must provide evidence of compliance with the collective agreement commitment; instead of providing individual proof for each contract, a corresponding certificate may be submitted (Sec. 9, 10 BTTG-E). Compliance with the promise to adhere to collective agreements is to be monitored by a new "Federal Tariff Agreement Compliance Office" to be set up at the German Pension Insurance Fund, Sec. 8 BTTG-E. Violations may be punished with contractual penalties, extraordinary termination of the contractual relationship or exclusion from future tendering procedures (Sec. 11, 14 BTTG-E). Furthermore, according to Sec. 4 BTTG-E, employees have a direct claim against their employer for compliance with these working conditions. The employer is also obliged to inform its employees and temporary workers of the existence of this claim.

Assessment

Given the low level of tariff agreement coverage in Germany – currently around 49 % – the government's motive for strengthening the application of tariff agreements is understandable at first glance. However, the more the state itself specifies working conditions in detail, whether through the minimum wage, generally binding tariff agreements or tariff agreement compliance requirements, the less willing employees and employers generally are to submit themselves to direct collective bargaining coverage. In this respect, a certain degree of scepticism is warranted as to the suitability of the collective bargaining compliance approach. This is also supported by previous experience with existing state collective bargaining compliance laws. In addition, the planned act will lead to further bureaucracy for companies. The business community has long been calling for a reduction in bureaucracy, but the draft is the opposite of this. The proposed submission and documentation requirements and the acquisition of certificates will mean a noticeable additional burden for companies in public procurement and concessions. There is a risk that the project will make participation in the procurement competition even less attractive. Additional bureaucracy is also a further disadvantage for Germany as a business location, especially in the current economic situation.

On a positive note, the submission and documentation requirements for subcontractors have been dropped compared to the former government's draft. Meanwhile, the individual right of action for employees means that employers still face an increased risk of litigation. Another legal issue is that the BMAS is to set the minimum working conditions to be observed by means of statutory orders. This constitutes an interference with collective bargaining autonomy and negative freedom of association, protected by Art. 9 (3) of the German Constitution (Grundgesetz – GG). Sooner or later, the Federal Constitutional Court (Bundesverfassungsgericht – BverfG) will have to decide whether this is constitutionally justified by the objectives of the act. The new inspection body to be set up also creates a superfluous dual structure in the administration. It would make more sense to transfer responsibility to customs, for example.

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■ THE TEN MAIN DECISIONS

No waiver of holiday entitlement through court settlement

Employees cannot effectively waive their statutory minimum holiday entitlement in an existing employment relationship, even by a court settlement. This applies even if the termination of the employment relationship is certain and no further holiday can be taken anyway due to incapacity for work due to illness.

BAG, decision of 3 June 2025 – 9 AZR 104/24

The case

A plant manager was employed by the defendant employer from 1 January 2019 to 30 April 2023. In 2023, he was continuously unable to work due to illness. In the context of unfair dismissal proceedings, the parties concluded a court settlement on 31 March 2023, according to which the employment relationship was to end on 30 April 2023. The settlement contained a provision that holiday entitlements were to be "granted in kind" and a general compensation clause. Nevertheless, the plaintiff claimed compensation for seven days of statutory minimum leave for 2023. He argued that a waiver of this was invalid under Sec. 13 (1) Sentence 3 BUrlG. The Labour Court and the Higher Labour Court ruled in favour of the plaintiff.

The decision

The BAG confirmed this: even during incapacity to work due to illness, the holiday entitlement arises in accordance with Sec. 5 (1) (c) BUrlG. Agreements according to which holiday entitlements are "granted in kind" constitute an inadmissible waiver and are invalid pursuant to Sec. 13 (1) Sentence 3 BUrlG in conjunction with Sec. 134 BGB. The statutory minimum holiday entitlement may not be excluded by financial compensation or waiver as long as the employment relationship legally exists. This also applies if the termination is already certain and the employee is unable to take any more leave due to illness. A claim for compensation only arises upon termination of the employment relationship. Only factual comparisons, i. e. agreements on actual uncertainties (e. g. whether and to what extent leave has already been taken), are permissible.

Our comment

The BAG confirms the indispensability of the statutory minimum holiday entitlement in the existing employment relationship. The key point is that even a contractual or judicial settlement that amounts to an exclusion of the holiday entitlement is invalid. Statutory minimum leave is also subject to special protection in this context. However, arrangements relating to compensation claims that have already arisen after the legal termination of the employment relationship are permissible. As a result, employers cannot rely on comprehensive settlement clauses to settle leave entitlements. In order to avoid subsequent claims, holidays should, if possible, be actually granted before the end of the employment relationship; otherwise, there is a risk of separate compensation. Statutory minimum holiday leave entitlements must therefore always be subject to separate review and, if fulfilment in kind is no longer possible, must be compensated in cash.

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No entitlement to an inflation adjustment bonus in the case of a narrowly defined reference clause

Reference clauses in employment contracts referring to collective wage agreements are general terms and conditions (Allgemeine Geschäftsbedingungen – AGB) and must therefore be interpreted in terms of their scope according to their objective content and typical meaning. The starting point is always the wording of the contract.

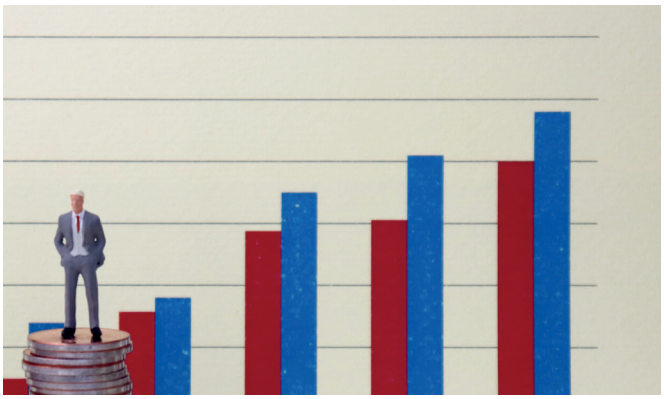
BAG, decision of 21 May 2025 – 4 AZR 166/24

The case

The plaintiff has been employed by the defendant as a geriatric nursing assistant since 1995. Her employment contract contains a provision stipulating that she receives monthly remuneration in accordance with Group KR I, Level 4, with a monthly salary of 3,226.87 Deutsche Mark (approximately 1,613 EUR), and that this remuneration covers all further claims. In addition, the employment contract stipulates that, unless otherwise specified in the employment contract, "all company regulations" apply. Since 1995, the defendant has had a works agreement in place according to which the Federal Employees' Collective Agreement (Bundesangestelltentarifvertrag – BAT) of 11 January 1961, as amended, applies. The parties were involved in a legal dispute over the scope of this reference clause. The settlement that ended the proceedings contained a provision stipulating that the plaintiff would be remunerated in accordance with pay grade P5 of the German Public Servant Tariff Agrrement (Tarifvertrag für den öffentlichen Dienst – TVöD) with an individual final salary of 2,854.51 EUR gross at that time. In 2023, new tariff agreement details were agreed to, including a linear increase in the table salaries and special payments to mitigate the rise in consumer prices, including an inflation adjustment bonus. However, the defendant did not make any of these payments to the plaintiff, whereupon the latter asserted her claims in court. The Labour Court dismissed the claim, but the Higher Labour Court upheld the plaintiff's appeal.

The decision

The Fourth Senate of the BAG upheld the defendant's appeal. The plaintiff was not entitled to the payment claimed. The basis for this was the reference clause contained in the employment contract, which was fully reviewable in accordance with the principles governing general terms and conditions. Therefore, the regulatory purpose pursued by the contracting parties and



the interests of the parties involved, as recognised by the other side, were of significance. The decisive point of reference here was the wording of the clause: the reference was clearly limited to the classification and remuneration regulations of the BAT or TVöD and thus to the table remuneration. Other collective agreement provisions, for example with regard to annual bonus payments and thus also the inflation adjustment bonus, are not covered. This also corresponds to the recognisable regulatory intent of the parties, according to which the table remuneration should cover "all further claims". The inflation adjustment expressly constitutes an additional benefit, the purpose of which is exclusively to mitigate increased consumer prices. A supplementary interpretation of the agreement is also ruled out, as there is no unintended gap: the reference is deliberately narrow in order to secure only future collective agreement increases.

Our comment

The BAG judges correctly interpret the reference clause meticulously in accordance with its wording and confirm that even after a long period of time, a narrowly defined provision must still be based on its regulatory intent. The clause was not ambiguous or lacking of transparency, as it explicitly referred only to provisions on basic salary. This is confirmed by the deliberate distinction and capping of the basic remuneration in relation to subsequent special payments, the amount of which was not foreseeable and could be determined independently of the pay grade. The ruling demonstrates that reference clauses in employment contracts should be formulated as precisely as possible in terms of their scope in order to avoid ambiguities and, ultimately, legal disputes.

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No prevention procedure pursuant to Sec. 167 (1) SGB IX during the waiting period prior to the pronouncement of ordinary termination

Employers are not obliged to carry out a prevention procedure pursuant to Sec. 167 (1) SGB IX before giving notice of ordinary termination to a severely disabled employee.

BAG, decision of 3 Aprl 2025 – 2 AZR 178/24

The case

The parties are in dispute over the validity of an ordinary termination by the employer within the waiting period. The severely disabled plaintiff had been employed by the defendant since the beginning of 2023. The defendant was already aware of his severe disability when the contract was concluded and took this into account when filling the position with regard to the job requirements and the plaintiff's individual performance capabilities. Only three months after hiring him, the defendant terminated the employment relationship due to the plaintiff's lack of professional behaviour. The plaintiff challenged the termination on the grounds that it was void due to a violation of the German Anti-Discrimination Act (Allgemeines Gleichbehandlungsgesetz – AGG). Unequal treatment resulted from the fact that the defendant, the Federal Employment Agency, had not carried out the prevention procedure in accordance with Sec. 167 (1) SGB IX and had violated its obligation to offer a workplace suitable for disabled persons. The lower courts dismissed the action.

The decision

The BAG ruled similarly. In its introduction, the judges clarified that an employer's violation of regulations containing procedural and/or support obligations in favour of severely disabled persons (including Sec. 167 [1] SGB IX) did not in itself constitute discrimination on the grounds of severe disability. However, such a violation generally gives rise to the presumption of direct discrimination on the grounds of disability, as it is likely to create the impression that the employer is not interested in employing severely disabled persons. This is doubtful, however, if the employer hired the employee in question knowing that they were severely disabled and then violated specific regulations in favour of severely disabled persons during the ongoing employment relationship.

The BAG was able to leave open the question of whether the failure to follow the prevention procedure under Sec. 167 (1) SGB IX constituted in itself discrimination on the grounds of severe disability. The defendant had not violated this obligation. The provision does not apply during the six-month waiting period of Sec. 1 (1) KSchG. The prevention procedure should be carried out in the event of "personnel, behavioural or operational difficulties". The provision thus clearly ties in terminologically with the terms used in Sec. 1 (2) KSchG. Incidentally, the BAG also clarifies that the application of Sec. 167 (1) SGB IX is also excluded in small businesses.

Our comment

The BAG confirms its previous ruling on the prevention procedure, which was already issued for the predecessor regulation of Sec. 84 (1) SGB IX. This provides legal clarity: a prevention procedure is not required before giving notice of ordinary termination to a (severely) disabled employee within the waiting period. This is to be welcomed from a practical point of view, as otherwise employers would have to initiate a prevention procedure shortly after the start of employment in order to be able to complete it before the end of the waiting period.

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No age discrimination when rejecting an applicant beyond the age limit specified in the tariff agreement

An employer may reject an applicant because they have exceeded the age limit applicable under the tariff agreement if a younger qualified applicant is hired.

BAG, decision of 8 May 2025 – 8 AZR 299/24

The case

The defendant, a public sector employer, is bound by tariff agreements, one of which stipulates an age limit (standard retirement age) and the possibility of continued employment beyond the age limit. A disabled employee above the age limit applied for an advertised position and pointed out his disability. He was not invited to an interview and received a rejection. He then demanded payment of compensation in accordance with Sec. 15 (2) AGG in the amount of three gross monthly salaries and argued that the failure to invite him to an interview indicated that he had not been hired because of his disability. He also considered the employer's objection that the invitation had not been issued because he had reached the age limit to be evidence of discrimination on the grounds of his age.

The decision

After the two lower courts had already dismissed the action, the plaintiff was also unsuccessful before the BAG. It was true that he had been directly discriminated against on the grounds of his age, as he had been rejected because he had reached the age limit. However, this was permissible under Sec. 10 Sentence 1 and 2 AGG. The employer was pursuing the legitimate aim of achieving a balanced distribution of employment between the generations. The refusal to hire applicants who had already reached the age limit was (as in the case of termination of employment due to age limits specified in individual contracts or collective agreements) intended to promote the professional development of young people. The rejection of the applicant was appropriate and necessary in order to achieve the legitimate aim of hiring an applicant who had not yet reached the age limit. This also applied in the case of a fixed-term employment relationship, as this also offered younger applicants the opportunity to gain professional experience. The BAG also ruled that there was no direct discrimination on the grounds of disability. The legal obligation of public employers to invite disabled applicants to interviews (Sec. 165 Sentence 3 SGB IX) does not apply to applicants who have exceeded the age limit and are therefore legitimately rejected.

Our comment

Employers who, by agreeing on age limits, express their intention to terminate the employment relationships of older employees upon reaching the standard retirement age in order to enable younger employees to enter employment, may also reject applicants who have exceeded the age limit. The associated unequal treatment does not constitute age discrimination. For public employers, the BAG has made things a bit easier by saying that they don't have to invite severely disabled applicants to interviews if they're not obviously unqualified for the job and have already reached the standard retirement age. The case decided by the BAG involved an employer bound by a collective agreement with an age limit. The reasoning behind the ruling suggests that the same applies if the age limit is agreed in an individual contract.

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Limitation of the right to information under the Renumeration Transparency Act

The right to information pursuant to Sec. 10 (1) Sentence 1 Renumeration Transparency Act (Entgelttransparenz-gesetz – EntgTranspG) only applies to remuneration regulations that actually exist and can be fulfilled by referring to works agreements. It is also strictly company-related and limited to one calendar year.

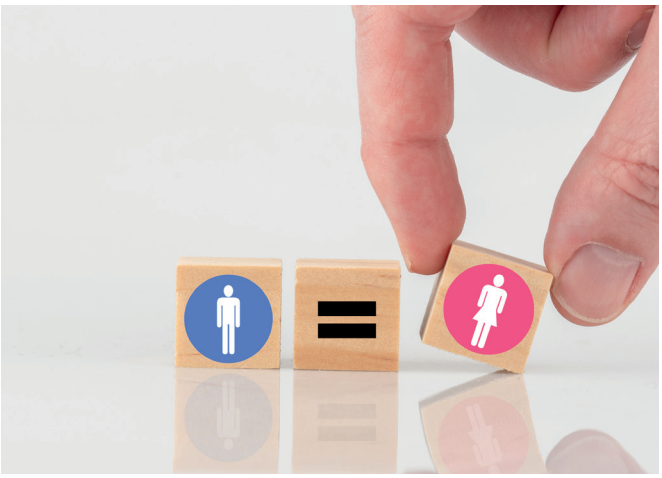
Higher Labour Court Cologne, decision of 12 February 2025 – 5 Sa 479/23

The case

The female plaintiff has been employed by the defendant since 2002 and is assigned to career level "IC 2" and job level 58. Male colleagues were predominantly assigned to higher levels. She requested information pursuant to Sec. 11 (2) EntgTranspG on the criteria and procedures for determining remuneration. In addition, she requested information pursuant to Sec. 11 (3) EntgTranspG on the average gross remuneration of male comparators for the years 2017 to 2020, as well as on their basic remuneration and stock options granted. The defendant referred to existing (overall) works agreements on performance appraisals and career levels and refused to provide further information. The Labour Court upheld the claim in a partial judgment.

The decision

The Higher Labour Court of Cologne upheld the defendant's appeal and dismissed the action in its entirety. Although there was a fundamental right to information about the criteria and procedures for determining remuneration, this right had been extinguished by fulfilment, as the defendant had referred to works agreements containing detailed rules for the classification of employees. The possibility of referral provided for in Section 11 (2) Sentence 2 EntgTranspG for collective agreement provisions was to be applied analogously to works agreements. Whether these had been effectively concluded or were free of errors in terms of content was irrelevant in the context of the right to information. The employer is only required to provide information about the provisions that it actually applies. Insofar as the plaintiff additionally sought information on the determination of the relevant job level within the career level, she had no claim because no such criteria were regulated in the works agreements and the defendant was therefore unable to provide any further information in the absence of existing written provisions. The request also failed with regard to the comparative remuneration under Sec. 11 (3) EntgTranspG: according to the clear wording of the law, the right to information refers exclusively to the calendar year preceding the request. Since the plaintiff submitted her request for information in 2019, the claim therefore only covered the year 2018. Finally, the court clarified that the right to information relates strictly to the business; since the plaintiff requested company-wide information, her application was unfounded in its entirety. An appeal was allowed and is pending before the BAG (Ref.: 8 AZR 83/25).



Our comment

An individual right to information under the EntgTranspG exists in companies or departments with more than 200 employees on a regular basis, Sec. 12 (1) EntgTranspG. The scope of the information obligations is important, as the information regularly serves to enforce the right to equal pay. The court's assessment is convincing both in its reasoning and in its conclusion: the assumption that employers can also refer to works agreements is to be welcomed because of the associated reduction in administrative effort. It also avoids mere formalism. Furthermore, the right to information is always limited to one calendar year and is company-specific. By the end of June 2026, the legislator must transpose the EU Renumeration Transparency Directive into national law, which may result in extended information and reporting obligations.

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Limits of a trade union's "digital" right of access to the company

Trade unions have no blanket right to demand that an employer discloses company email addresses or grant access to communication platforms.

BAG, decision of 28 January 2025 – 1 AZR 33/24

The case

The defendant company is a global sporting goods manufacturer; the plaintiff is the trade union responsible for collective bargaining on behalf of the defendant. Approximately 5,400 employees work at the site in question, up to 40 % of whom can perform their work remotely. Between Monday and Thursday, approximately 3,000 to 3,500 employees are present on the company premises every day. Communication at the defendant's company is mainly digital. For this purpose, employees have been assigned email addresses and a communication platform has been set up. Employees can interact on this platform and view information such as names, work contact details and reporting lines. The plaintiff filed a total of 11 motions, essentially pursuing three concerns: the transmission of all work email addresses, including an ongoing obligation on the part of the defendant to update them; permanent access to the aforementioned communication platform; and a link to her website on the main page of the defendant's intranet. The Labour Court and the Higher Labour Court dismissed the action.

The decision

The BAG also dismissed the appeal and thus all of the plaintiff's requests. Based on the so-called practical concordance, the conflicting interests of the parties involved, which are protected by fundamental rights, must be weighed against each other and reconciled. The BAG then carefully weighed up these complex interests for each individual issue and came to the conclusion that, although the plaintiff had a strong interest in the legal positions she asserted, the interests of the parties involved outweighed this in each case. Digital access rights for trade unions are indispensable in today's working world, as purely physical access rights are not equivalent due to advancing digitalisation. However, this interest is outweighed by the fact that the defendant is exposed to a considerable amount of work and organisational effort due to the obligation to continuously communicate email addresses. The interest of a trade union reaches its

limits in the case of such an intrusive, permanent obligation to cooperate. In addition, the plaintiff would obtain detailed knowledge of internal company processes. Furthermore, reading advertising material to the extent requested would tie up a considerable amount of manpower and thus significantly burden the company's interests. With regard to the digital communication platform, access by a trade union would also significantly impair the interests of the defendant, as details of the organisational structure would be accessible without restriction. Finally, there was no right to a permanent link on the intranet.

Our comment

The (very long) decision is entirely convincing and provides textbook legal explanations, particularly with regard to constitutional considerations. Although the ruling does not completely reject digital access for a trade union to the company, it does show a sensitive consideration of the employer's interests, which must always be included in a comprehensive decision on a case-by-case basis; in doing so, the BAG also takes into account the interests of employees in their informational self-determination. The decision is a reassuring sign for employers who, like the defendant, are increasingly communicating digitally.

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Possibility of multiple conciliation committees with different works council bodies when introducing time recording

If neither the group works council nor the general works council is clearly responsible, two conciliation committees may be set up to regulate the same matter, such as the introduction of a system for recording working hours.

Higher Labour Court Cologne, decision of 28 January 2025 – 9 TaBV 88/24

The case

A system for recording attendance and absence times and for personnel deployment planning is to be introduced at the employer and two other companies belonging to the group, which is why the parent company is calling on the group works council to negotiate. The latter is of the opinion that the competence lies with the central or local works councils. The parent company therefore applied for the establishment of a conciliation committee, and the Labour Court granted the application. Correspondingly, the general works council assumed that it had jurisdiction and applied for the establishment of a conciliation committee. In its opinion, the planned system allowed for client separation, i. e. company-specific use. The conciliation committee would therefore not obviously incompetent. It would not clear whether the scope of the system is also subject to co-determination. The Labour Court granted the application.

The decision

The Higher Labour Court Cologne dismissed the appeal as unfounded. The conciliation committee convened by the general works council is not manifestly incompetent within the meaning of Sec. 100 (1) Sentence 2 Labour Court Act (Arbeitsgerichtsgesetz – ArbGG), because the introduction and application of the system at issue is subject to co-determination pursuant to Sec. 87 (1) No. 6 Works Constitution Act (Betriebsverfassungsgesetz – BetrVG). Conversely, it was not obviously a matter affecting several group companies that could not be regulated by the individual general works councils. There are important arguments in favour of the view that the uniform introduction and application of the time recording system for the three companies in implementation of a “single mandate solution”, including the recording of all working time data in a uniform database, requires a regulation with the group works council. However, without a more in-depth analysis, it cannot be determined with the necessary certainty that the software can only be administered uniformly. Furthermore, in the expedited proceedings pursuant to Sec. 100 ArbGG, it cannot be conclusively clarified whether there is an objective compulsion to adopt a uniform company-wide arrangement. The same applies to the question of whether the decision in favour of the single-client model, i. e. the cross-company introduction of the system, could be made without co-determination. All of this must be examined in advance by the conciliation committee itself, which is why it is appropriate to appoint the same chairperson as in the conciliation committee at group level – precisely to avoid differing assessments.

Our comment

The competence of works council bodies is often not easy to assess, particularly in the case of IT systems; at first glance, both a cross-company group or general works council and a local works council may be competent. Against the background of the obviousness standard, two conciliation committees must then be appointed to assess their competence. An important contribution to the practical manageability of this issue is made when, as the court has decided here, the same chairperson is proposed for both conciliation committees. Incidentally, the obviousness standard does not set high requirements; a right of co-determination must only be possible.

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Invalid dismissal during the probationary period after confirmation of passing it

If a supervisor informs an employee at the end of the probationary period that they will be taken on, this creates a basis of trust with regard to the continuation of the employment relationship after the end of the probationary period, which is why an immediate dismissal is contrary to good faith and therefore invalid.

Higher Labour Court Düsseldorf, decision of 14 January 2025 – 3 SLa 317/24

The case

The plaintiff had been employed as an inhouse lawyer by the three defendants, who operate a reinsurance company, since 15 June 2023. His employment contract was concluded for an indefinite period, with a probationary period of six months and a notice period of two weeks. On 17 November 2023, a meeting took place between the plaintiff and his head of department. The latter announced that HR had asked whether the plaintiff should be taken on. He stated to the plaintiff, without dispute: “Of course we will do so.” After the works council gave its approval, the plaintiff’s employment relationship was nevertheless terminated on 22 December 2023, or alternatively at the next possible date. The Labour Court dismissed the action brought against the termination.

The decision

The Higher Labour Court Düsseldorf upheld the plaintiff’s appeal. The termination was invalid due to breach of trust under Sec. 242 BGB. Outside the scope of the KSchG, employees are generally protected from unfair or unethical dismissal by the general provisions of civil law, Sec. 138 (1) and Sec. 242 BGB. However, the circumstances of the individual case are always decisive, because the protection thus provided must not lead to the employer being practically subject to the standards of social injustice prescribed by the KSchG even outside its scope of application. Nevertheless, a typical and recognised case of termination contrary to good faith is contradictory behaviour on the part of the terminating employer. The termination of an employment relationship may constitute an abuse of rights if the terminating party thereby places itself in irreconcilable contradiction to its previous conduct, but only if a relationship of trust has been established – for example, when the terminating employer has given

reason to believe that the employment relationship will continue and that the employee does not need to expect termination. This is the case here. The statement made by the supervisor had created a legitimate expectation that the probationary period had been passed and that the employment relationship would continue, so that the subsequent termination was to be classified as contradictory and therefore contrary to good faith. The appeal was not allowed.

Our comment

According to the case law of the BAG, dismissal on the grounds of prohibited contradictory behaviour may also be contrary to good faith and therefore invalid when a special relationship of trust has been established. The timing also appears to be relevant for dismissal during a probationary period. However, a relationship of trust does not exist, for example, if the employer offers a fixed-term employee the prospect of a permanent employment contract but then terminates the fixed-term employment relationship – especially if the KSchG would not have applied to the permanent employment relationship (BAG, decision of 5 December 2019 – 2 AZR 107/19). However, the requirements of case law do not lead to a free pass for the employer: as the Dusseldorf judges also emphasise, this does not apply if the employer terminates the employment relationship for another reason, which may have arisen subsequently.

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Reimbursement of detective costs for repeated violations of proper time recording

Termination without notice is justified if an employee intentionally and repeatedly violates his or her obligations to record working hours properly. In this case, he or she may be obliged to reimburse the detective costs incurred in uncovering the violation.

Higher Labour Court Cologne, decision of 11 February 2025 – 7 Sa 635/23

The case

The plaintiff had been employed by the defendant, a local public transport company, as a ticket inspector since 2009. Working hours and breaks were documented via a time recording system using an app. In mid-2022, the defendant received information from a security company about possible irregularities in the plaintiff's time records. It then commissioned a detective agency to conduct a temporary surveillance operation. The investigation revealed that the plaintiff had spent several working days engaged in private activities without recording these times as breaks. In total, the alleged working time fraud amounted to almost 26 hours. At the beginning of 2023, the defendant then issued an extraordinary termination. The defendant filed a counterclaim against the plaintiff's action for unfair dismissal and demanded compensation for the detective costs in the amount of EUR 21,608.90. The Labour Court upheld the counterclaim and dismissed the action for unfair dismissal.

The decision

The Higher Labour Court Cologne also ruled that the extraordinary termination was valid. The plaintiff had deliberately failed to record significant break times and had pursued private activities during working hours. This was "in itself" sufficient to constitute good cause for termination without notice, as it constituted a serious breach of trust. According to the findings of the lower court, the plaintiff had pursued private activities on several days without marking them as breaks. It could be ruled out that he had performed any work during this time. The surveillance by the detective agency was also permissible under Section 26 (1) sentence 2 BDSG; there was no prohibition on the use of evidence. This applied even if the measure was assumed to be inadmissible. This was because the surveillance was limited to a few days, took place exclusively during shift times in public spaces and only recorded generally observable events. This did constitute an infringement of the plaintiff's personal rights and right to informational self-determination. However, the infringement was only minor. Since the defendant had concrete suspicion and the plaintiff was found guilty of intentional breach of contract, he had to reimburse the detective costs.

Our comment

Termination without notice due to working time fraud can also be justified in the case of long-term employment; this must apply all the more so if working hours are recorded independently by employees using mobile systems. General references to possible technical malfunctions are not sufficient to invalidate breaches of duty. Anyone who fails to provide a comprehensible account of the work they actually performed during paid hours not only risks losing their job, but may also have to reimburse substantial detective costs. Employers should therefore document any suspicious circumstances in detail and carefully secure legal cover for the use of external support.

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Written apologies as part of compensation?

A law student works as a waiter in a Munich restaurant and wants to initiate a works council election. As a result, his employer no longer assigns him to work and ultimately dismisses him. The student takes legal action – and the Higher Labour Court Munich not only awards him around 100,000 EUR in damages, but also entitles him to an apology.

Higher Labour Court Munich, decisions of 16 April 2025 and 4 June 2025 – 11 Sa 456/23

The case

The plaintiff was employed as a waiter by the defendant employer. In the summer of 2021, the plaintiff wanted to initiate a works council election together with other employees. After the invitation to the election meeting was posted, the operations manager removed the plaintiff from the company WhatsApp group and no longer assigned him to work. When he was asked to work in the kitchen, the plaintiff refused because he believed that this work was not in accordance with his contract. He also demanded back pay. In April 2022, the employer terminated the employment relationship without notice and, alternatively, with notice due to refusal to work and unexcused absence. In a written statement, the employer argued that the claimant was not dependent on the income due to his age and childlessness, which the claimant complained was age discrimination. However, the Labour Court only granted the application for protection against dismissal. In the appeal, the claimant additionally requested that the defendant be ordered to issue a written apology.

The decision

The plaintiff's appeal was largely successful. According to the Higher Labour Court Munich, he was entitled to gross wages of approximately 25,000 EUR for default of acceptance. In addition, the lack of opportunity to claim benefits in kind, such as discounted food and beverages, had to be taken into account. Furthermore, the plaintiff was entitled to damages of approximately 65,000 EUR under Sec. 823 (2) BGB in conjunction with Sec. 20 (2) of the BetrVG, consisting of loss of earnings and lost benefits in kind as well as tips. The failure to assign him to work since his initiative to establish a works council constituted a disciplinary measure pursuant to Sec.

612a BGB and an obstruction of the works council election. Finally, the court obliged the defendant to apologise to the plaintiff in writing for its statements about his personal circumstances in connection with the dismissal. In the absence of any fundamental significance of the legal dispute, the Munich judges did not allow an appeal.

Our comment

The amount of damages awarded is surprisingly high at first glance, but can be explained by the accumulation of numerous claims and the long-term delay in acceptance. The order to issue a written apology as compensation for damages can be described as innovative – however, against this background, it is surprising that the court did not allow an appeal. According to a new ruling by the European Court of Justice (decision of 4 October 2024 – C-507/23 – Patērētāju tiesību aizsardzības centrs), in addition to financial compensation, a public or written apologvis also considered a suitable symbolic act to compensate for non-material damage. However, it is doubtful whether a forced apology actually has such a compensatory effect.

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■ CURRENT DEVELOPMENTS IN PENSIONS

Employer subsidy for deferred compensation and deviation from tariff agreements

In a recent ruling by the Third Senate of the BAD, which is responsible for pension law, it was clarified that Sec. 19 (1) Occupational Pensions Act (Betriebsrentengesetz – BetrAVG) is to be interpreted as meaning that deviations from the statutory provisions on deferred compensation (Sec. 1a BetrAVG) can also be deviated from in tariff agreements that were concluded before the First Occupational Pension Strengthening Act came into force on 1 January 2018.

The case underlying the decision (BAG, decision of 20 August 2024 – 3 AZR 286/23) concerned the question of whether employees are entitled to the employer subsidy under Sec. 1a (1a) BetrAVG if the tariff agreement does not contain any provisions on the employer subsidy. The BAG ruled that they did not. The judges justified their decision on the grounds that the wording of Sec. 19 (1) BetrAVG provides for a general opening of tariff agreements under Sec. 1a BetrAVG without any time limit. It is irrelevant when the tariff agreement was concluded. The structure of the act and the legislative materials confirm this understanding. The legislature deliberately refrained from introducing a time limit and even explicitly clarified in the explanatory memorandum to the law that existing collective agreements should not be interfered with.

The BAG's decision is in line with previous ones and continues them (see for example BAG, decision of 8 March 2022 – 3 AZR 362/21). In practice, the desicion means that collective agreements concluded before 1 January 2018 that do not contain provisions on employer subsidies pursuant to Sec. 1a (1a) BetrAVG do not give rise to any entitlement to such subsidies. For the exclusion of the entitlement to the employer subsidy, it is sufficient that a tariff agreement provides for independent provisions on deferred compensation and no entitlement to an employer subsidy. This also creates legal certainty for tariff agreements concluded before the Occupational Pensions Strengthening Act came into force on 1 January 2018.

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■ INTERNATIONAL NEWS FROM UNYER

Redundancies plan under French employment law: the “PSE”

In France, medium and big companies willing to dismiss many workers must establish and follow a specific redundancy plan known as “PSE” (*Plan de sauvegarde de l’emploi*, i. e. employment protection plan). The legal framework of the PSE is currently under political debate.

The contents of the PSE

The PSE is a legal requirement when:

- the company employs at least 50 workers or
- the company considers making redundant at least 10 workers on 30 days or
- all the dismissals are based on the same economic grounds.

The PSE should contain concrete and specific measures to avoid as many redundancies as possible (as reclassify the employee in the parent company) and to facilitate the redeployment of employees who are nevertheless made redundant. Thus, the PSE may stipulate that the company will bear the cost of retraining programs, of moving for a new job or else will finance business creations by former employees.

Control of the PSE by public authorities

Every PSE must be approved by the regional employment office, which checks the effectiveness of decided measures. Its aim is to ensure that employment in the area is preserve. Also, the public authorities may refuse a PSE because the grounds for the redundancies are insufficient. These grounds are examined with great care by authorities to avoid redundancies which are purely for profit optimization. Four economic grounds are listed by the French Labour Code: a significant decrease of orders or turnover over a given period, technological changes, a reorganization of the company needed to preserve competitiveness, and business closure.

Statistical development

The PSE has been reformed in 2013, leading to a decline of the number of redundancies plan: from 800 in 2013 to 300 in 2022, passing through 600 during the COVID-19 pandemic. But this downward trend seams now to be challenged: the last two years have seen an increase in the number of redundancies. From the first quarter of 2024 to the first quarter of 2025, the number of PSE has increased by 16,9 % according to the French Ministry of Labour. And growth is not slowing down. In this context, a newly established parliamentary inquiry has produced a report in July that could lead to a change in the PSE’s legal framework.

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■ GENERAL INFORMATIONS

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