Ogletree Deakins

OGLETREE DEAKINS ON POINT

Employment Law News.

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Current judgments and practical tips on Terminations of Employment Relationships

Below you will find our latest OnPoint newsletter, with which we would like to update you on the most recent court rulings in connection with the termination of employment relationships – from termination agreements to dismissal letters.
In addition, in today's newsletter we comment on the heavily debated decision of the European Court of Justice on the employer's obligation to record the daily working time of its employees.
We hope you enjoy reading our latest articles and are of course happy to answer any questions you may have.

Your Ogletree Deakins Team Berlin

- Dismissal letters can be signed before the mass dismissal notification has been recieved by the Federal Employment Agency.
- A termination agreement must be negotiated fairly, otherwise it is invalid.
- The General Equal Treatment Act also protects managing directors of a company from discriminatory dismissals.
- Member States must oblige employers to record daily working time.

Commented Federal Labor Court decision: Dismissal letters can be signed before the mass dismissal notification has been received by the Federal Employment Agency.

Federal Labor Court, Ruling of June 13, 2019 (File no. 6 AZR 459/18)

In June 2019, the Federal Labor Court ruled that the mass dismissal notification to the Federal Employment Agency required under sec. 17 (1) of the German Dismissal Protection Act is also effective if the employer has already made the decision to terminate the employment relationship at the time the notification is received by the competent Federal Employment Agency.

The facts of the case:

On June 26, 2017, the mass dismissal notification submitted by the employer was received by the competent Federal Employment Agency (Bundesagentur für Arbeit) employment agency together with an attached balance of interest agreement. The employer had already signed 45 dismissal letters dated June 26, 2017. The plaintiff received his dismissal letter on June 27, 2019. In the course of the litigation against the dismissal, the plaintiff argued that the mass dismissal notification had to be received by the Federal Employment Agency before the employer makes a decision to dismiss an employee.

Accordingly, the employer can only sign the dismissal letters after the mass dismissal notification has been filed to and received by the Federal Employment Agency. The Baden-Württemberg State Labor Court had originally agreed with the plaintiff's view that the notification had to be received by the Federal Employment Agency before the employer made the decision to dismiss the employee—a timeline, which had to be reflected in the date on the notice letter. The court hence upheld the complaint.

Decision:

The Federal Labor Court however did not share the view of the State Labor Court of Baden-Württemberg. The Federal Labor Court justified its decision by stating that the consultation procedure pursuant to sec. 17 (2) of the German Dismissal Protection Act and the notification procedure pursuant to sec. 17 (1) of the Dismissal Protection Act were parallel proceedings independent of each other. The Federal Employment Agency should be informed of an imminent mass dismissal in due time in order to prepare for the dismissal of a larger number of employees and to be able to adjust their placement efforts accordingly. According to the Federal Labor Court, this mandates that the employer has already determined how many and which employees are to be dismissed.

Unlike the works council in a consultation procedure, the Federal Employment Agency neither wants to influence the employer's intent to dismiss the employees nor should it do that. Notice of termination must however only be given to the employee once the mass dismissal notification has been received by the responsible Federal Employment Agency. Based on the current facts and findings, the Federal Labor Court was not able to determine whether in this case the plaintiff received the notice of termination after receipt of the mass dismissal notification by the Federal Employment Agency. Therefore, the Federal Labor Court referred the complaint back to the State Labor Court.

Practical Advice by Ogletree Deakins:

As always, the employer should exercise great care when planning mass dismissals. Employers should in particular observe the strict legal requirements and, above all, report the mass dismissal in due time and in full to the responsible Federal Employment Agency.

The Federal Labor Court decision does however clarify a few points previously still in dispute:

The employer is allowed to prepare and sign the dismissal letters already before submission of the mass dismissal notification to the competent Federal Employment Agency. This is particularly helpful in the case of a large number of dismissals or in cases in which the dismissal must be signed by a person abroad.

However, employers should wait until the confirmation of receipt has been received from the responsible Federal Employment Agency before dismissal letters are handed over or delivered to employees. The dismissal letter must be received by the employees concerned only after receipt of the notification of mass dismissal by the Federal Employment Agency.

It is still important that the employer adheres to this chronologically to secure that the dismissals are ineffective already for formal reasons.

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Commented Federal Labor Court decision: A termination agreement must be negotiated fairly, otherwise it is invalid.

Federal Labor Court, Ruling of February 7, 2019 – 6 ARZ 75/18

Termination agreements concluded in the private home of the employee are principally so-called consumer agreements, but nevertheless cannot be revoked according to secs. 312 et seq. of the German Civil Code. Agreements that were concluded in the employee's home could, however, be ineffective due to the violation of the principle of fair negotiation.

The facts of the case:

The parties disagreed about the (continued) existence of the employment relationship between them. The employee worked as a cleaning assistant. On February 15, 2016, the employer's life partner visited her in her private home at around 5 p.m. and presented her with a termination agreement, which she signed immediately. The agreement provided for an immediate termination of the employment relationship without any severance payment, but a compensation for overtime.

In a letter dated February 17, 2016, the employee's legal counsel declared to the employer that the employee would dispute the termination agreement on the grounds of error, fraudulent misrepresentation and threat. Additionally, he declared that she was making use of her right to revocation.

The employee reasoned that she had been sick in bed on the afternoon of February 15, 2016, when the employer's life partner rang the doorbell. Her son let the person in and woke her up. According to her, the employer's life partner told her that he would no longer support her laziness, and then presented the termination agreement to her. She had signed under the influence of painkillers and "in a haze" and only realized afterwards what she had done.

The lower instance courts dismissed the employee's action as unfounded. The Federal Labor Court however overturned their rulings and referred the case back for retrial.

Decision:

Like the previous instances, the Federal Labor Court agreed that the termination agreement was not subject to a right of revocation, since termination agreements are not covered by secs. 312 et. Seq. of the German Civil Code. The type of consumer contracts referred to therein each concerned a service provided by a company against payment. Including employment contracts in the scope of the application of secs. 312 et. seq. would therefore not reflect the will of the legislator.

The Federal Labor Court did however see the danger of a possible violation of the principle to fair negotiation—unlike previous instances (which had not examined this aspect at all). Pursuant to sec. 311 para. 2 no. 1 in connection with sec. 241 of the German Civil Code, the principle of fair negotiation is a secondary obligation for the commencement of negotiations on a termination agreement, because a termination agreement is an independent legal act.

In the opinion of the Federal Labor Court, however, it would be impossible to draw up a conclusive list of obligations for employers to abide by the principle of fair negotiations. Decisions on whether that principle was followed can only be made on a case by case basis. The Federal Labor Court provided some examples such as:

It can violate the principle of fair negotiations, if the employee risks being taken by surprise during the negotiations, e.g. because those negotiations take place at unusual times or in unusual locations.

A violation can also exist if the party's freedom of decision was influenced in an abusive manner. However, not granting the employee time to properly consider the decision or not granting a right of withdrawal or revocation upon signature do not constitute such abusive influence.

However, a negotiation situation has to be considered unfair if psychological pressure is created or exploited, making it difficult or even impossible for the other party to take a free and reflected decision.

This might also be achieved by creating a particularly unpleasant situation that considerably distracts or raises fear, or by consciously exploiting a physical or mental weakness or inadequate language skills of the other party.

Ultimately, however, the violation of the principle of fair negotiation must always be based on fault. Only in such a case, a termination agreement would be ineffective.

If a termination agreement is ineffective, the employee is entitled to the position held prior to the conclusion of the agreement. Consequently, the employment relationship is to be continued at unchanged working conditions.

Due to the non-existence of corresponding findings by the Lower Saxony Labor Court, the Federal Labor Court was unable to conclusively assess whether a violation of the principle to fair negotiations had actually taken place in this case, which is why the case had to be referred back for retrial.

Practical Advice by Ogletree Deakins:

The Federal Labor Court followed previous case-law with regard to the rejection of a right of revocation in the case of a termination agreement for an employment relationship, but it adapted its reasoning to the legal situation that has existed since 2014. Although the decision does not introduce any new legal directions in this respect, it nevertheless creates legal certainty.

The "principle of fair negotiation" is not entirely new either. The Federal Labor Court has already pointed out in the past that unusual times or places for contact negotiations pose a risk of an employee being overwhelmed and consequently can be interpreted as a violation of the principle of fair negotiation.

Obligations arising from the principle of fair negotiation can only be determined on a case-by-case taking into consideration all facts of the negotiations. However, employers should always avoid unusual circumstances in connection with negotiations on a termination agreement. In particular, home visits or visits at unusual locations (e.g. at a hospital) especially when they are sick, should be avoided. Usually negotiations relating to termination agreements should take place during working hours at the employer's premises and employees should have the time to consider an offer.

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Commented Federal Labor Court decision: The General Equal Treatment Act also protects managing directors of a company from discriminatory dismissals.

Federal Court of Justice, Ruling of March 26, 2019 - II ZR 244/17

The German Federal Court of Justice had to decide whether a managing director of a limited liability company without participation in the share capital is protected as an employee by the General Equal Treatment Act in case of a dismissal agreement.

The facts of the case:

A managing director who had been appointed by a limited liability company (GmbH) in 2005 at the age of 50 brought an action before court. In the 2005 service agreement, the contracting parties had agreed, among other things, that the service agreement entered into could be terminated by each of the contracting parties, regardless of whether the employment had a fixed term or not, by means of a unilateral declaration giving six months' notice to the end of the year. The service agreement was extended several times, most recently for an additional five years until August 31, 2018.

After the defendant removed the managing director from his position in 2015, he received notice of his termination in June 2016, i.e. at the age of 61, with reference to the above agreement. By his action, the plaintiff challenged the validity of the dismissal.. The plaintiff was unsuccessful in the lower instances.

Decision:

According to the Federal Court of Justice, the plaintiff was directly disadvantaged pursuant to sec. 7 para. 1, sec. 3 para.1 sent. 1, sec. 1 of the General Equal Treatment Act due to the termination clause in his service agreement, which was linked to one of the reasons stated in sec. 1 of the General Equal Treatment Act, namely age. The defendant did not offer a legitimate reason pursuant to sec. 10 sent. 1 if the General Equal Treatment Act for the unequal treatment of the plaintiff on grounds of age.

In particular, The Federal Court of Justice applied the provisions of the General Equal Treatment Act to the present case. The termination of the managing director is a condition for a dismissal condition within the meaning of sec. 2 para. 1 no. 2 of the General Equal Treatment Act.

Rather, if interpreted in conformity with European law, the managing director of a GmbH must be regarded as an employee within the meaning of sec. 6 para. 1 sent. 1 no. 1 of the General Equal Treatment Act to such extent that sec. 2 para. 1 no. 2 of the General Equal Treatment Act applies in the event of termination of his contract of service as managing director.

Directive 2000/78/EC and its transposition, the General Equal Treatment Act, aim to protect a wide range of persons. According to the Federal Court of Justice, this objective allows the managing director of a limited liability company who does not hold any shares in the company to be regarded as an employee protected against discrimination within the meaning of sec. 2 para. 1 no. 2 of the Federal Equal Treatment Act.

Giving notice based solely on the fact that the individual has reached retirement age, however, is not justified pursuant to sec. 10 sent. 1, 2, and sent. 3 no. 5 of the Federal Equal Treatment Act. We therefore recommend including a legally safe fixed-term clause in the service agreements or employment contracts of managing directors in order to ensure in a legally permissible manner that the appointed managing director can no longer work for the company starting on the date he reaches retirement age.

Practical Advice by Ogletree Deakins:

Previously, the Federal Court of Justice always left the question whether a managing director has no shares in the company has to be regarded as an employee who falls under sec. 6 para. 1 of the Federal Equal Treatment Act. Now, this question has been answered. The Court thus ensures greater clarity in the drafting of service agreements for managing directors.

Termination of the agreement "without notice", i.e. a phrase that sets the automatic termination date as the date the employee reaches retirement age is permitted pursuant to sec. 10 sent. 3 no. 5 of the Federal Equal Treatment Act.

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Commented ECJ decision: Member States must oblige employers to record daily working time.

ECJ v. 14.5.2019 - C-55/18 (Organization of working time)

The European Court of Justice (ECJ) ruled that the Member States of the European Union must oblige employers to systematically record the working time of their employees. The court reasoned that this is the only way to monitor and enforce that working time regulations will be observed to guarantee the intended safety and health protection of employees.

The facts of the case:

The Spanish trade union CCOO brought an action before the National Court of Justice in Spain for the determination of the obligation of Deutsche Bank SAE to set up a system for recording the daily working time of its employees. The union took the view that this system is the only way of verifying the compliance with the specified working time and with the obligation to provide the trade union representatives with information on overtime worked each month. According to the CCOO, the obligation to establish such a system resulted in particular from the Charter of Fundamental Rights of the EU and from the Directive 2003/88/EC. Deutsche Bank, on the other hand, argued that pursuant to case-law of the Tribunal Supreme (Supreme Court in Spain), Spanish law did not provide for such a general obligation. According to that case-law, Spanish law only requires employers to record the overtime hours worked by employees and to communicate the amount of the overtime hours to the employees and their representatives at the end of each month unless previously agreed upon.
The National Court of Justice had doubts as to whether the interpretation of the Spanish law by the Supreme Court was compatible with Union law and petitioned to the Court of Justice of the European Union (ECJ of 14.5.2019 - C-55/18, Organization of working time).

Decision:

In its judgment of May 14, 2019 (C-55/18), the ECJ ruled that in light of Art. 31 (2) of the Charter of Fundamental Rights of the European Union, Directive 2003/88 must be interpreted in such a way as to preclude the regulation of a Member State which, according to its interpretation by the national courts, does not oblige employers to set up a system by which the daily working time of each employee can be recorded. Article 31 (2) of the Charter of Fundamental Rights of the EU expressly enshrines the right of every employee to a limitation of maximum working hours and to daily and weekly rest periods, which is specified in Directive 2003/88.

In order to ensure the practical effectiveness of the rights provided for by Directive 2003/88 and the fundamental right enshrined in Article 31 (2) of the EU Charter, the ECJ stated that the **Member States must require employers to establish an objective, reliable and accessible system for recording the daily working time of each employee.**

According to the ECJ, it is up to the Member States to lay down the practical conditions for implementing such a system, in particular its form, taking into account, where appropriate, the specific nature of the work field or characteristics, even the size of certain companies. In this respect, it must be taken into account that the employee is to be regarded as the weaker party of the employment contract. Therefore employers must be prevented from imposing restrictions on the employees' rights. Without such a system, neither the number of hours actually worked by the employee nor when they were worked, nor the number of overtime hours can be determined objectively and reliably, making it extremely difficult or even practically impossible for employees to enforce their rights.

Effects on German Law and Ogletree Deakin's Practical Tip:

Up to now, employers in Germany **only** had to record **overtime,** i.e. working hours exceeding regular working hours. However, this is not observed by all employers. In particular in companies in which there exist so-called trust-based working time, home office arrangements or flexible working time regulations, overtime is often not recorded by the employer. Also working from home or field service activities does not make time recording easy for employers. After the ECJ decision, the legal situation should change now. It does not seem unlikely that employers will face a wave of bureaucracy and that in the future all employers will have to set up comprehensive time recording systems. One possibility would be to implement appropriate mobile apps or an electronic working time recording on laptop.

We recommend to every employer to use the ECJ ruling as an opportunity to **review** and possibly **update existing time recording systems**. The requirements of the ECJ initially only affect the Member States.

The EU States themselves can decide what the time recording systems must look like in specific terms. The EU Member States have a certain scope of action with regard to the implementation of the ruling and they also have the option to add exceptions for certain activities that are difficult to be precisely measured. Although the ECJ has not set a deadline for the implementation of the ruling, it only seems a matter of time before the German legislator will react to the ECJ ruling. We do not rule out that the German legislator will amend the Working Time Act or even create a new law.

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Impressum

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