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GERMAN LABOR AND EMPLOYMENT NEWS

WORLD CUP SOCCER EDITION

In many parts of the world, it is said that soccer is the most beautiful thing of minor importance. Soccer will not be of "minor importance" during the World Cup championship, however. Players like Ronaldinho of Brazil, Thierry Henry of France, and David Beckham (and Wayne Rooney?) of England will undoubtedly awe the world; the Ivory Coast's national team, nicknamed "the Elephants," hope they can bring some unity to their war-torn country by causing soldiers literally to put down their arms—at least temporarily—during the World Cup; after nearly two years of intense debate, Germany finally answered the "G-question" by choosing Jens Lehmann as goalie over Oliver Kahn, and now it's time to see whether this decision was correct; the often mocked U.S. team (ranked number four in the world!) hopes to surprise a few foes; Ukraine and the "Soca Warriors" of Trinidad and Tobago, each first-time participants, look forward to taking part in arguably the greatest sporting event in history; while regulars such as Argentina, Spain, France, Brazil, England, and the Netherlands seek to bring home the most coveted trophy in sports. And who knows? Maybe, just maybe, the words of Gary Lineker, the former English player, will come true once again: "Soccer is a game of 22 players that run around, play the ball, and one referee who makes a slew of mistakes, and in the end Germany always wins."

Though Jones Day will not go so far as the English solicitor who offered employers and employees mediation services for disputes arising as a result of the 2002 World Cup playoffs, we devote this issue of *German Labor and Employment News* to the World Cup by taking a look at various issues that may arise in the workplace

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during this event, as well as a couple of legal disputes that have had, and will continue to have, a direct impact on the world of soccer. We hope you enjoy it!

VACATION DURING THE WORLD CUP?

By *Angela Autenrieth*

Frankfurt
German Attorney at Law
aautenrieth@jonesday.com
++49 69 9726 3939

Prediction for the World Cup Winner: The Netherlands

It actually happens: Germany makes it to the World Cup finals and your entire staff asks for the day off after the big game, knowing full well they will be in no position to work that day. Or maybe an excited employee comes running up to tell you that he has two tickets to the World Cup finals in Berlin. No, he doesn't want to invite you to the game with him; he only wants to ask you for a day of vacation immediately after the final match. Do these employees have a legal claim to vacation under German law?

THE FEDERAL VACATION ACT

Much to the consternation (and surprise) of many Americans, under Germany's Federal Vacation Act, every employee in Germany has a legal right to at least 24 days of vacation per year, regardless of his or her seniority. Though it should come as no surprise, this statute's provisions continue to apply during the World Cup.

Pursuant to the Federal Vacation Act, the ultimate decision as to when an employee may take vacation lies with the employer. Of course, the employer must consider the employee's wishes to the extent possible. One exception may be if the company needs certain employees to work at particular times (*e.g.*, many restaurants and hotels will not permit employees to take vacation during the World Cup for the simple reason that these establishments would otherwise be short-staffed during a very busy period). Another exception may be if a particular employee's wishes cannot be honored because a co-worker is already taking vacation at that time and the employer needs one of them to be at work.

In the first example cited above, it is clear that the entire staff may not take vacation simultaneously (unless management agrees to the company closing for a week or two and all the employees take their vacations simultaneously; these "vacation shutdowns" are still relatively common in Germany among smaller companies). Assuming, however, that there is not going to be a one- or two-week closure of the facility, the employer's needs (to keep the company operating) would outweigh at least some of the individual employees' interests (to take a day of vacation after the final game). So how do you, as the employer, decide which of the vacation requests to grant?

EMPLOYEES' "SOCIAL FACTORS"

The first question you have to ask yourself is which employees are absolutely necessary on that day. You, as the employer, have a right to deny vacation to these employees.

What to do with the other employees' requests for vacation, however, remains open. The Federal Vacation Act provides the answer by stating that the employer must consider the employees' "social factors"; *e.g.*, does the employee have school-age children, when is the vacation of the employee's spouse scheduled, how old is the employee, how many years of service does he have, is the employee "ripe" for a vacation because he has been working so hard lately, does the employee have an illness? The employer must consider each of these factors.

Unfortunately, if all of the employees put in for vacation on the day after the finals, only a very few of the "social factors," if any, will truly play a role. If the employer were to go strictly by the book, he would then decide that the more senior employees and those with more years of service with the company would be first in line for a day of vacation. However, this does not seem to be fair under the circumstances. Probably the fairest way would be to pick the employees through a lottery system, keeping in mind that the employer would then need to involve the works council, as this employee representative body has a right to be involved in vacation policies if management and employees cannot come to terms on this issue.

TEMPORARY HINDRANCE FROM WORK?

The above analysis would also apply to the employee who came running to tell you that he has two tickets to the finals of the World Cup.

However, a "creative" employee may argue that having two tickets to the World Cup finals is such an extraordinary circumstance that he is temporarily prevented from working. This would mean, as is set forth in Section 616 of Germany's Civil Code, that not only is the employee entitled to take the day off, but he would not even have to take a day of vacation.

Even though some people may equate the World Cup finals with marriage or the birth of a baby (Section 616 is typically applied to these types of extraordinary circumstances), that employee's argument is not going to meet with success. The employee may feel that he is "temporarily hindered" from being able to work because of the upcoming finals, but this will simply not suffice as an excuse for not showing up for work.

FREEDOM OF MOVEMENT FOR WORKERS: THE BOSMAN (AND CURT FLOOD) DECISIONS REVISITED

By *Jörg Rehder*

Frankfurt
Attorney at Law; Solicitor (England and Wales)
jrehder@jonesday.com
++49 69 9726 3122

Prediction for the World Cup Winner: England

Jean-Marc Bosman, unknown as a soccer player during his career except to the most ardent fans of the Belgian soccer league, became a well-known figure to both the soccer world and EU law experts as a result of an action filed before the European Court of Justice (ECJ). Bosman played professional soccer for the Belgian RC Liège club until 1991, at which time his contract expired. RC Liège asked him to accept a significant pay cut for his next contract. Bosman refused this offer and subsequently received an offer from US Dunkerque, a Division Two club in France's soccer league. However, at that time, according to UEFA (the European governing body for soccer) and the Belgian Soccer Federation, if a player transferred teams, the player's new team must pay a "transfer fee" to the player's former team, even if that player's contract with the former team had already expired. This meant that US Dunkerque would be required to pay a transfer fee to RC Liège to sign Bosman as a player.

JEAN-MARC BOSMAN VS. UEFA AND THE BELGIAN SOCCER FEDERATION

Bosman filed an action against UEFA and the Belgian Soccer Federation arguing that the transfer rules violated Article 48 of the EC Treaty (renumbered as Article 39 in the Treaty of Amsterdam), as these fees hindered the "free movement of workers" within the European Community. (Article 48 states that "freedom of movement for workers shall be secured within the Community.")

UEFA argued before the ECJ that sporting events were cultural events rather than economic activities and thus they were not subject to Community provisions to the same extent as regular business transactions. UEFA's argument, however, did not meet with success, as the ECJ held that (i) the various soccer leagues in Europe do constitute an economic activity, and (ii) the Community's provisions apply if there is an employment relationship—as was obviously the case between Jean-Marc Bosman and RC Liège/US Dunkerque.

THE EUROPEAN TRANSFER RULES VS. THE AMERICAN RESERVE CLAUSE

There were distinct similarities between the transfer rules in Europe and the "reserve clause" used by Major League Baseball ("MLB") in the United States until the early 1970s. The MLB reserve clause essentially tied a player to the team that owned the "rights" to that player. Curt Flood, a star outfielder with the St. Louis Cardinals, was traded to the Philadelphia Phillies after the 1969 season. Similar to Bosman's actions a little over 20 years later, Flood challenged his trade, arguing that as an employee, he should be able to dictate the terms of his employment, including whether he wished to play for a particular team.

Flood's case was eventually heard before the U.S. Supreme Court where he brought a number of arguments, including that the reserve clause violated U.S. antitrust rules. The Court followed previous Supreme Court decisions that MLB was exempt from U.S. federal antitrust laws, causing Curt Flood to lose his case. It was clear, however, that it was only a matter of time before free agency would be introduced to MLB.

Only a few years later, the baseball players' union, still reeling from the Flood decision, argued before an arbitrator—

on behalf of Andy Messersmith of the Los Angeles Dodgers and Dave McNally, who was then with the Montreal Expos—that a player (an employee) cannot be forced to play for a particular team after his contract expires; instead, he should be free to sign with any team he wishes (generally the highest bidder). Messersmith and McNally won their arbitration cases. Subsequently, the baseball owners and the players' union agreed on a new collective bargaining agreement that did away with the reserve clause. Free agency became a common practice in Major League Baseball, allowing players like Alex Rodriguez to earn currently more than $25 million per year from the New York Yankees.

- **THE ECJ SPEAKS: TRANSFER FEES AND "NATIONALITY CLAUSES" VIOLATE EUROPEAN LAW**

Similar to the U.S. arbitration, the ECJ held that the UEFA transfer fees violated Community law. Specifically, the ECJ wrote that "the transfer rules constitute an obstacle to freedom of movement for workers prohibited in principle by Article 48 of the Treaty." Just as an engineer with Siemens in Germany whose employment relationship has ended can decide to work for British Airways in England without British Airways having to pay any compensation to Siemens, so can a star player like Michael Ballack of Bayern Munich, whose contract will expire at the end of this season, sign a lucrative new contract with Chelsea London without Chelsea being required to pay a transfer fee to Bayern Munich.

The Bosman decision, however, did not stop with holding that transfer fees between teams of different Member States violated European law. It further held that the UEFA provision prohibiting more than a certain number of foreign players from other EU Member States from being fielded during a league game—under the so-called 3+2 rule—also violated Article 48. Despite UEFA's argument that permitting too many foreign players during a league game would alienate fans, the ECJ held that such a provision discriminated against nationals of other EU Member States. There are plenty of examples to prove that UEFA's argument was unfounded, as teams like Arsenal London, with very few English players on its roster, continue to enjoy great popularity.

Lest anybody think that the Bosman decision would also, for example, permit Spanish citizens to play for the Italian national soccer team, it should be remembered that the ECJ held in 1976 that the EC Treaty provisions "do not prevent the adoption of rules… excluding foreign players from participation in certain matches for reasons which are not of an economic nature [but] of *sporting interest only*." National team games—such as the World Cup—are deemed to be of "sporting interest only."

G14 VS. FIFA

The Bosman decision of 1995 had a major impact on the soccer world in Europe. A pending dispute between G14 and FIFA (the international regulatory body for soccer) may impact European soccer to an even greater extent.

The G14 originally comprised 14 member clubs, including Real Madrid, Bayern Munich, Paris Saint-Germain, and AC Milan. In 2002 four additional clubs, including Arsenal London and Olympique Lyon, became members of the G14.

The purpose of the G14 is to promote cooperation among the member clubs by getting involved with employment affairs, issues concerning revenues, and club competition matters. G14 also provides a forum for dialogue among the member clubs.

The pending dispute involved a Belgian soccer club that was required, in accordance with FIFA's rules, to release one of its players so that he could play for Morocco, his national team, in a game held in Africa. He was injured in that game and as a result was unable to play for his Belgian club for several months.

His club sued FIFA, arguing that FIFA's rules were an abuse of a dominant market position in breach of EU antitrust rules since the clubs—the employers—do not receive any direct compensation from FIFA when they are required to release their players—the employees—for FIFA-sanctioned national team games such as World Cup matches. The G14 subsequently joined the Belgian club in this lawsuit, making comments that it is seeking EUR 2 million in damages from FIFA.

In mid-May the Belgian court referred the case to the European Court of Justice. If FIFA should lose this case—which seems quite likely unless the parties reach a settlement—FIFA will be forced to rethink how it does business vis-à-vis the individual club teams.

LISTENING TO THE RADIO OR WATCHING TELEVISION AT WORK: ANY EXCEPTIONS DURING THE WORLD CUP?

By *Georg Mikes*

Frankfurt
German Attorney at Law; Certified
Labor and Employment Lawyer
gmikes@jonesday.com
++49 69 9726 3939

It's not every day that a government agency issues an employee bulletin as a result of a sporting event. This, however, is precisely what happened when the Bavarian Ministry for Labor, Social Issues, Families, and Women recently issued its "Tips for Employees" bulletin in connection with the upcoming World Cup championship. In this publication, the Bavarian ministry makes clear that the application of employment laws will not be affected by the World Cup, meaning, for example, that employees may watch the World Cup soccer matches on TV at the workplace only with the employer's permission. If the employees fail to adhere to the company's policies, they run the risk of being reprimanded or, if their actions are sufficiently egregious or are repeated despite having received a reprimand, they risk being terminated.

LISTENING TO WORLD CUP GAMES ON THE RADIO WHILE AT WORK

What happens if an employee wishes to bring a radio to work to listen to the games? If the employer has not permitted employees to listen to the radio at work in the past, then this policy rule will continue during the World Cup. Similarly, if the employer has generally permitted employees to listen to the radio at work, then this policy must continue during the World Cup. The exception is if the employee suddenly pays more attention to the radio than to his work; *i.e.*, the radio affects his performance in the workplace. In such a case, the employer may take action.

In a 1986 case before the Federal Labor Court, an employer sought to prohibit an employee from listening to the radio at work even though this had been "standard procedure" for the last 13 years. The works council opposed the prohibition the employer sought to introduce. As a result, the dispute actually had two components: first, the issue between the works council and the employer from a Labor-Management Relations Act viewpoint, and second, the issue between the employee and the employer from an employment agreement viewpoint.

MUST THE WORKS COUNCIL BE INVOLVED?

The Federal Labor Court held that the employer could not unilaterally change the company's policy on listening to the radio at work; instead, the works council must be involved in such a change in policy, as works councils have a right to be involved in all decisions involving "order" in the workplace.

German employment law distinguishes between an employee's "conduct"—which is not subject to the works council's involvement—and "order" in the workplace—which is. When referring to the "conduct" of an employee, one is generally talking about the extent to which an employer may instruct employees in the performance of their particular work obligations. "Order" in the workplace is different, as it involves what freedoms employees have in the workplace, *e.g.*, smoking and the use of alcohol at work, whether employees must wear name tags, the private use of the telephone or the internet at work, etc. In this instance, the Federal Labor Court placed listening to the radio at work in this latter category. However, the Court did point out that listening to the radio at work may constitute an employee's "conduct" if, for example, the employee has direct contact with customers.

VIOLATION OF THE EMPLOYMENT AGREEMENT?

The second component is to what extent an employee may listen to the radio at work without breaching his employment agreement. If the employment agreement does not specifically prohibit listening to the radio at work, the employee may nevertheless be in breach of his agreement if he fails to perform his work obligations in a satisfactory manner because of his listening to the radio at work. In such a case, employers typically first issue a warning to the employee. Employees are well advised to heed such warnings; if they continue to listen to the preliminary rounds of the World Cup on the radio at work despite having received a warning from the boss, they may no longer have a job by the time the World Cup finals are played.

EMPLOYEES' RIGHT TO WATCH WORLD CUP GAMES ON TELEVISION AT WORK

What if employees want to step it up a bit and watch the games on television while at work? Perhaps because it is self-evident that employees may generally not watch TV at work, there is no case law specifically discussing this issue.

An employer's first response would probably be to simply apply the above-discussed rules regarding listening to the radio at work. This would not be the correct action, however, because a televised game would undoubtedly be more distracting to an employee than one broadcast over the radio. It would seem that an employer may prohibit the watching of TV at work without having to involve the works council. Also, employees may generally not watch TV while at work unless specifically permitted by the employer. This will also be the case during the World Cup.

EVEN THE WORLD CUP DOES NOT WARRANT A DIFFERENT APPLICATION OF LAWS

Just as the person who was arrested for drunk driving last year failed to convince a Munich judge that the DUI laws should be applied more leniently during Oktoberfest, an employee will not have any luck trying to convince the boss that employees have a right to watch the World Cup games on TV while at work. Not even the World Cup warrants Germany's employment laws to be applied differently.

Of course, an employer seeking to create a positive work environment may permit employees to watch the games as long as an acceptable compromise is found with the works council or the employees on how to make up for the missed work.

One word of caution: Permitting employees to watch TV during the World Cup may create problems in the future. Will an employer violate the principle of equal treatment by permitting employees to watch TV during the World Cup while prohibiting them from doing so during less popular televised events? Will certain employees then also have the right to watch, for example, the World Gymnastics Championships? Maybe the answer depends on the popularity of the sport in question. We only hope we never have to litigate this issue; the only thing that's clear is that, like the World Gymnastics Championships, the World Cup does not warrant a different application of Germany's employment laws.

ALWAYS UP TO DATE: PRIVATE USE OF THE INTERNET AT WORK–CHECKING THE WORLD CUP SCORES ON THE INTERNET

By *Friederike Göbbels*

Munich
German Attorney at Law; Certified Labor and Employment Lawyer
fgoebbels@jonesday.com
++49 89 2060 42 200

Prediction for the World Cup Winner: Brazil

It seems pretty clear that use of the internet in the workplace will increase during the World Cup championship. The employee who wants to check out the current score of a World Cup match may not have a radio or TV available at work. No problem—he can look up the score on the internet, where games can be followed on a minute-by-minute basis. But with the vast amount of information available, the employee may spend so much time on the various web sites that he neglects his work duties.

COURT DECISIONS PROVIDE GENERAL PRINCIPLES

Can an employee's use of the internet in the workplace lead to a reprimand or, even worse, to termination? This question cannot be answered with a simple yes or no.

Since 2001 various court decisions in Germany have grappled with this issue. Because the facts of the cases differed so significantly, the court decisions have run the gamut. However, there are a few principles that have become clear with respect to using the internet for private purposes at work:

- Since use of the internet at work involves using company property, employers have the right to prohibit employees from using the internet for private purposes at work. If an employer does not want to permit employees to use the internet for private purposes at work, he must make this clear to the employees in no uncertain terms.
- The notification prohibiting employees from using the internet at work for private purposes should be given in such a manner that it can be proven that the employer gave the notification. Therefore, it is preferable to have the employee countersign the notification by including it in an employment agreement or in a supplement to the employment agreement.

- It is quite possible that employees will permit limited use of the internet for private purposes at work. This limitation should be worded clearly so that it can also be applied in a practical sense. The employer may, for example, permit the employees to use the internet at work for private purposes outside working hours, *e.g.,* during breaks, or may permit use of the internet for a set period of time each day.
- If the employer fails to clearly prohibit the employees from using the internet for private purposes, then the employees may assume that they may use the internet to a reasonable extent for these purposes. A court held in 2005 that unless the employer prohibits employees from using the internet at work, they may do so for 80 to 100 hours per year, as this is considered "reasonable."
- Regardless, employees may not use the internet for private purposes at work if such use is "excessive," either from a quantitative point of view (*e.g.*, for long periods on a daily basis) or from a "content" point of view (*e.g.*, viewing or downloading criminal material or pornography), or if this creates costs for the employer.
- If the employer knows that the employees are using their computers at work to surf the internet for private purposes and the employer does nothing to stop this, then the employees can assume that this is tolerated by the employer; this "approval" can be in the form of either a "company practice" or a legal claim that the employees have acquired, neither of which the employer can change unilaterally.
- Whether an employer may reprimand or terminate an employee for using the internet at work for private purposes depends entirely on the facts at hand, *i.e.,* whether the prohibited private use was material, whether the employer suffered damages as a result, how many years of service the employee had without being reprimanded, etc.

CODES OF CONDUCT

It is safe to assume that the use of the internet at work will increase sharply during the World Cup playoffs. For this reason, employers should seriously consider issuing a code of conduct regarding general use of the internet at work, along with regulations concerning the World Cup in particular. The specifics of such a code of conduct will depend on the types of jobs held by the employees as well as the employer's needs.

LAWYER CONTACTS

FRANKFURT
Hochhaus am Park
Grüneburgweg 102
60323 Frankfurt am Main
Germany
Tel.: ++49 69 9726 3939
Fax: ++49 69 9726 3993

Georg Mikes
German Attorney at Law;
Certified Labor and
Employment Lawyer
gmikes@jonesday.com

MUNICH
Prinzregentenstr. 11
80538 Munich
Germany
Tel.: ++49 89 2060 42 200
Fax: ++49 89 2060 42 293

Friederike Göbbels
German Attorney at Law;
Certified Labor and
Employment Lawyer
fgoebbels@jonesday.com

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