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GERMAN LABOR AND EMPLOYMENT NEWS

CONTENTS

CAN A YOUNG EMPLOYEE CLAIM AGE DISCRIMINATION? IN GERMANY–YES

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German law sets forth minimum termination-notice periods that employers must observe when terminating an employee; *e.g.*, the notice period must be at least one month if the employment relationship lasted for at least two years, three months if it lasted for at least eight years, five months if it lasted for at least 12 years, etc. Though these termination-notice periods depend on an employee's years of service, under German statutory law, any years of service accumulated prior to an employee's reaching the age of 25 are not included in these calculations.

This raises the issue of whether this statutory provision violates Germany's Equal Treatment Act, which prohibits, among other things, discrimination based on age.

The court reasoned that to ignore any years of service prior to the employee's reaching the age of 25 was a form of age discrimination, as prohibited by Directive 2007/78 and as subsequently transformed by Germany in its Equal Treatment Act.

Putting forth a second line of reasoning, the court held that the prohibition on age discrimination was actually a basic principle of EU law; Directive 2007/78 only buttressed this principle.

THE CASE BEFORE A BERLIN COURT

An employee challenged her termination before a Berlin court, requiring the court to then determine whether the termination-notice period observed by the employer had been sufficiently long. In its July 24, 2007, decision, the court ignored the above-referenced statutory provision calling for the exclusion of any years of service prior to the employee's reaching the age of 25; the employee at issue was 26 years old, and the court determined that the employee had already accumulated five years of service. As a result, the court extended the applicable termination-notice period from one month to two.

THE COURT'S RATIONALE

The court reasoned that to ignore any years of service prior to the employee's reaching the age of 25 was a form of age discrimination, as prohibited by Directive 2007/78 and as subsequently transformed by Germany in its Equal Treatment Act. Persons under the age of 25 were being treated unequally to those who had already attained the age of 25, since the applicable termination-notice periods did not increase based on years of service for employees under 25; conversely, these termination-notice periods did increase for those at least 25 years old. Additionally, employees who had accumulated years of service prior to reaching the age of 25 were being treated differently from those who began accumulating years of service only after turning 25.

The court also concluded that this disparate impact was not justified for any governmental labor or employment policies, since the purpose of this statutory provision was merely to prevent younger employees from enjoying the benefits of a longer termination-notice period.

One could make the argument that Germany transformed Directive 2007/78 incorrectly. The problem with this argument, however, is that this case involved two private parties—the employee and the employer. If only private parties are involved in a dispute, then only German statutory law—as opposed to the EU Directive—applies. A private party (in this case, the employer) cannot be held liable because its country incorrectly (or incompletely) transformed an EU Directive into its national law, as this would result in a directive having an impermissible third-party impact.

Putting forth a second line of reasoning, the court held that the prohibition on age discrimination was actually a basic principle of EU law; Directive 2007/78 only buttressed this principle. Basic EU principles are not subject to the

transformation of any particular directive. Instead, these principles take precedence over member states' national laws.

In fact, the European Court of Justice had already established in a previous decision that the principle of equal treatment is a constitutional right in the EU member states. Therefore, the national courts should actually be required to ignore any provision that conflicts with this basic principle of equal treatment.

WHAT ARE THE CONSEQUENCES OF THIS COURT'S DECISION?

The Berlin court's decision may have serious financial consequences for employers, who may now need to observe longer statutory or contractual termination-notice periods than had been the case in the past. Obviously, this would apply only to those employees who had accumulated years of service with their respective employers prior to reaching the age of 25.

PRESENTATIONS & PUBLICATIONS—LOOKING BACK (2007) AND LOOKING FORWARD (2008)

LOOKING BACK

Jones Day's Munich and Frankfurt offices hosted a client seminar on the initial experiences with Germany's Equal Treatment Act. The statute, enacted in August 2006, prohibits discrimination on the basis of race, ethnic origin, gender, religion, beliefs, disability, age, and sexual orientation. The seminars were held in Frankfurt (in May) and Munich (in July). The presenters discussed legal requirements with respect to this new statute and some of the first court decisions interpreting it; speakers included ***Georg Mikes***, ***Friederike Göbbels***, and ***Jan Hufen***. In addition, ***Oliver Passavant*** and ***Jörg Rehder*** shared insights on some of the differences between longstanding U.S. anti-discrimination laws and those in the German arena. These seminars were organized together with BodeHewitt AG & Co KG, with Carsten Hölscher (BodeHewitt—Wiesbaden) and Thomas Obenberger (BodeHewitt—Munich) giving presentations on how the Equal Treatment Act will impact company pension plans in Germany. We were also fortunate to have representatives from two well-recognized companies discuss the Equal Treatment Act from the corporate perspective: Antje Carl from Motorola GmbH and Thomas Hirner from MAHLE GmbH.

In April ***Friederike Göbbels*** and ***Georg Mikes*** gave a presentation in New York on selected European labor and employment issues to clients from the financial-services industry.

The June 2007 edition of the professional journal *personalmagazin* (*Personnel Magazine*) included an interview with ***Friederike Göbbels***. She discussed employees' rights to use company email accounts and server systems for private email correspondence under German law and problems related to this issue.

In October ***Jörg Rehder*** gave a presentation in Dublin, Ireland, regarding the recognition of professional qualifications within the European Union. The conference was sponsored by The German Marshall Fund of the United States (Berlin) and the European Foundation for the Improvement of Living and Working Conditions (Dublin).

During 2007, ***Georg Mikes*** made significant contributions to the European section of a book on international data protection (with a focus on employee data protection) and the German section of a book on international stock options. He also contributed to Jones Day commentaries on international labor and employment and benefit issues.

LOOKING FORWARD

The February 2008 edition of the professional journal *Arbeit und Arbeitsrecht* (*Labor and Labor Law*) will include an article edited by ***Friederike Göbbels***; the article reviews a book entitled *Nutzung betrieblicher E-Mail- und Intranet-Systeme für gewerkschaftliche Zwecke* (*Use of a Company's Email and Intranet Systems for Trade Union Purposes*). The book provides practical advice to both employees and employers on protecting themselves against trade-union actions that use a company's electronic communications system.

Whether other German Courts of Appeal, or the Federal Labor Court, will recognize this case as precedent remains to be seen; regardless, employers should not ignore this case when calculating the length of the notice period in an employee termination.

Because of the requirement to exhaust judicial remedies, the Labor Court of Appeals was not required to refer to the above-mentioned European Court of Justice opinion. The Court of Appeals had permitted an appeal to be filed, but according to information provided by the Federal Labor Court, this did not occur, meaning this decision is final. Whether other German Courts of Appeal, or the Federal Labor Court, will recognize this case as precedent remains to be seen; regardless, employers should not ignore this case when calculating the length of the notice period in an employee termination.

NEW COURT DECISIONS CONCERNING AN EMPLOYER'S ABILITY TO RESERVE THE RIGHT TO REVOKE BENEFITS UNILATERALLY

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In the 1Q07 issue of *German Labor and Employment News*, we discussed an October 11, 2006, Federal Labor Court decision regarding an employer's right to revoke benefits set forth in an employment agreement. In connection with that decision, this article will discuss court decisions rendered since then involving clauses that ostensibly permit an employer to amend particular provisions of an employment agreement unilaterally.

When discussing this topic, one always needs to start with the issue of whether the employer used a standardized employment agreement. Under German law, any provision in a standardized employment agreement that is egregious, ambiguous, atypical, or too one-sided against the employee is invalid. German courts will not invoke the "blue pencil" doctrine when reviewing these types of clauses.

MONTHLY COMPENSATION PAYMENTS: IMPERMISSIBLE RESERVATION OF REVOCATION RIGHTS

In its April 25, 2007, decision, the Federal Labor Court held that a provision stating that an employee does not have a legal claim to a monthly performance bonus is invalid if this bonus has been granted by way of a standardized agreement. The court's holding was based, initially, on the type of agreement used—an executory agreement pursuant to which both the employer and the employee relied on the enforcement of the mutual contractual promises.

Taking the mutuality of performance into consideration, the employee's interests would be fundamentally impacted if the employer had the unilateral right to discontinue a promised monthly payment. According to the Federal Labor Court, this reasoning applies not only to the contractual basic salary, but also to other aspects of the employee's remuneration that are regularly paid as compensation for the employee's services.

Contractual provisions setting forth that a particular payment may be subject to employer revocation at any time will be enforced only if these payments are special payments, *e.g.*, a Christmas bonus. Such a right of revocation cannot apply to regular employee-remuneration payments.

PROMISE TO PAY BONUSES: THE EMPLOYER CANNOT CLAIM THAT THESE ARE VOLUNTARY PAYMENTS OR MAKE THEM SUBJECT TO THE EMPLOYEE'S STAYING ON

Despite the Federal Labor Court's above reasoning, caution is warranted even when an employer wishes to revoke special employee payments. On October 24, 2007, the Federal Labor Court held that an employer could not revoke an employee's participation in a bonus system, as set forth in

Under German law, any provision in a standardized employment agreement that is egregious, ambiguous, atypical, or too one-sided against the employee is invalid. German courts will not invoke the "blue pencil" doctrine when reviewing these types of clauses.

On December 19, 2006, the court held that such a clause in a standardized agreement is unenforceable if the employee had the right to use the company car for private purposes as well as company business. Such an across-the-board right to revoke a benefit is unenforceable, as its adverse impact on the employee would be too severe.

a written agreement, by merely arguing that the employer had made these past payments voluntarily to the employee. Though the full court opinion has not yet been published, initial reports indicate that the Federal Labor Court applied the same reasoning that it used for regular remuneration payments (see preceding section).

The instant case concerned a bonus system that was tied to the performance of both the company and the individual employee. The court held that since the employee had expressly agreed to be subject to such a bonus system, the employer could not unilaterally discontinue the employee's participation.

In addition, the bonus system required the employee to remain with the company through a certain date (specifically, April 1 of the following year) in order to be eligible for the bonus. According to the Federal Labor Court, this clause was unenforceable, as it was too one-sided against the employee and its application was so broad; *i.e.*, the bonus was subject to revocation, regardless of the length of the employee's tenure with the company.

PRIVATE USE OF A COMPANY CAR: AN EMPLOYER CANNOT UNILATERALLY REVOKE AN EMPLOYEE'S RIGHT TO USE A COMPANY CAR FOR PRIVATE PURPOSES

An employment agreement or company-car agreement often stipulates that the employer has the unilateral right to revoke the use of a company car, and therefore the employee's private use of it as well, at any time. Companies often seek to exercise this right after an employer has issued a notice of termination and released the employee for the duration of the termination-notice period (*i.e.*, put the employee on "garden leave").

The Federal Labor Court also reviewed such a provision within the context of a standardized agreement. On December 19, 2006, the court held that such a clause in a

standardized agreement is unenforceable if the employee had the right to use the company car for private purposes as well as company business. Such an across-the-board right to revoke a benefit is unenforceable, as its adverse impact on the employee would be too severe. The clause would be enforceable only if the revocation was based on a sufficient legal reason. For example, an employer can presumably release an employee—validly—as a basis for the revocation.

One final comment: German courts have not been uniform with respect to an employer's right to release an employee after the issuance of a notice of termination. Regardless, there is a strong argument that an employer cannot agree with an employee that the employer has the unilateral right to release the employee if such a reservation is not supported by a sufficient legal reason.

NEW DEVELOPMENTS CONCERNING THE PROTECTION OF EMPLOYEES AGAINST TERMINATION

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Instead of *resolving* issues that German labor courts have long faced, Germany's Equal Treatment Act has created *new* issues with respect to the termination of employees.

HOW IS A POINT SYSTEM APPLIED?

In an April 25, 2007, decision, a German labor court was confronted with an issue involving the termination of employees for business reasons. Under German law, if an employer wishes to terminate employees for business reasons (*e.g.*, the employer is strapped financially), the employer must engage in a "social selection" process. As part of this process, the employer in this case created a point system (as is quite common under German law), whereby those employees who had many points (based on their years of service, age, number of dependents, and whether they were disabled) enjoyed greater protection against termination than those who had fewer points. This is an oddity of German employment law when it comes to terminations for business reasons, at least when compared to U.S. employment law: In Germany, an employee's performance is not the deciding factor. Instead, the four factors above dictate whether an employee is to be terminated; *i.e.*, under German law, older employees, those with more years of service, those with dependents, and the disabled enjoy greater protection against termination.

If the employer applies this social selection process to a T, it quickly becomes apparent that employers will be left with an older workforce (as these employees enjoy greater protection against termination). In response to this problem, German law permits employers to divide the workforce into various age groups (*e.g.*, employees aged 20 to 29, 30 to 39, etc.), with the same number of terminations to be allocated to each group. Employers may also create point systems that balance the social selection criteria among each other.

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Instead, the court merely concluded—unspectacularly—that an employer may create age groups when terminating employees for business reasons so as to avoid ending up with an older workforce.

For the reasons discussed in the article on page 1 of this newsletter ("Can a Young Employee Claim Age Discrimination? In Germany—Yes"), employers often do not include the years of service an employee had accumulated before reaching the age of 25. However, in the above-referenced case, the employer did include these years of service for all employees. Specifically, the employer awarded two points for every year of service and one point for every year of the employees' ages.

One employee who had been terminated under this point system argued that the system overemphasized years of service compared to age. As a result, the employee argued, the employer's social selection procedure was incorrect, causing the termination to be invalid. The employee also argued that to apply the social selection process within established age groups resulted in a "rejuvenation of the workforce." The court disagreed. It held that the social selection process as

If the works council and management agree on a Name List (the names of the specific individuals to be terminated), then the employer is deemed to have taken the employees' interests sufficiently into consideration, and the court may review the social selection process for "egregious mistakes" only.

established by the employer was sufficiently balanced and within the bounds of the employer's discretion.

Through this reasoning, the court was able to avoid addressing the issue of whether an employer must include the years of service an employee accumulated before reaching the age of 25 (though it did state in its opinion that even if the employer had engaged in age discrimination, this was permissible, since the employer had a compelling reason therefor). Instead, the court merely concluded—unspectacularly—that an employer may create age groups when terminating employees for business reasons so as to avoid ending up with an older workforce.

WORKS COUNCIL FAILED TO ACT

The employer won the above case, but only because it had dodged a bullet: Based on a Federal Labor Court decision a couple of years ago, a works council has a right of codetermination for the creation of the social selection process (even if the point system is to be used only for a single round of layoffs). The employer had not sought the works council's input when it established its point system. However, because the works council had not sought an injunction against the employer's point system, the works council had failed to exercise its right to challenge the system. Accordingly, the employer's point system withstood the court's review.

Though the employee filed an appeal, it does not look as if the appeal will meet with success.

COURT REVIEW OF THE SOCIAL SELECTION PROCESS

When an employer terminates employees for business reasons, the employer's social selection process is subject to a labor court's review. However, German law sets forth that a court may consider only "egregious mistakes" in the social selection process, and only if the terminated employee had been included in a list of names attached to an agreement concluded between management and the works council—the Reconciliation of Interests agreement.

A Reconciliation of Interests agreement sets forth the details regarding the terminations; in particular, this type of agreement presents the "why," "when," and "how" of the terminations (while a Social Plan, another type of agreement often concluded with the works council as part of a mass layoff, sets forth "how much," in terms of severance, will be paid to the terminated employees). If the works council and management agree on a Name List (the names of the specific individuals to be terminated), then the employer is deemed to have taken the employees' interests sufficiently into consideration, and the court may review the social selection process for "egregious mistakes" only.

However, management and the works council may conclude a Reconciliation of Interests agreement only if the action to be taken by management constitutes an "operational change" (as defined under German law). Accordingly, only if an "operational change" is at issue may the parties also conclude a Name List. In a recent Federal Labor Court decision, even though the parties submitted a signed Reconciliation of Interests agreement and the employee at issue had been included on the Name List, the Federal Labor Court did not observe the above-referenced "egregious mistake" threshold when reviewing the validity of the termination.

DOES THIS INVOLVE AN "OPERATIONAL CHANGE"?

The employer was unable to sufficiently draw a line between the various company divisions in which it conducted the social selection procedure. As a result, the court combined the divisions at issue and concluded that the terminations at hand did not meet the materiality threshold to qualify as an operational change. Since the terminations did not constitute an "operational change," a Reconciliation of Interests agreement was not warranted. Following this logic, the court not only ignored the Reconciliation of Interests agreement

that the parties had submitted—and the attached Name List—but also refused to allow the employer to take advantage of the "egregious mistake" threshold. Instead, the employer was compelled to assume the full burden of proof that it conducted the social selection process correctly. Because the employer failed to meet this burden, it lost the case.

This decision should cause employers to take heed: Agreeing with the works council on a Reconciliation of Interests agreement and a Name List may not suffice to ensure that the "egregious mistake" threshold governs. The employer also has the burden of proving that the entire procedure involved an "operational change."

THE RECOGNITION OF PROFESSIONAL QUALIFICATIONS WITHIN THE EU—STEP BY STEP

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On March 25, 2007, the European Union celebrated the 50th anniversary of the signing of the Treaty of Rome. This Treaty established the basis for the "four freedoms": the free movement of (i) goods, (ii) services, (iii) capital, and (iv) persons and labor.

Whether that individual was actually permitted to pursue his profession in another EU member state, however, depended on a number of other factors, most notably whether that person was able to obtain a work permit (if necessary) and whether language was an issue.

Though Article 48 of the original Treaty of Rome set forth that "[t]he free movement of workers shall be ensured" within the EU, and Article 47 of the Treaty states that the EU shall issue directives for the mutual recognition of professional qualifications within the EU, practice has shown that the free movement of workers within the EU has been hindered.

PAST PROGRESS

Over the past few decades, the EU has passed various directives to facilitate the mobility of professionals in various sectors, such as doctors, nurses, dentists, and architects. These directives essentially stated that as long as a member of that particular profession was properly qualified in his home jurisdiction, his qualifications would be recognized in other EU states.

Whether that individual was actually permitted to pursue his profession in another EU member state, however, depended on a number of other factors, most notably whether that person was able to obtain a work permit (if necessary) and whether language was an issue. Each of these factors is separate from the recognition of professional qualifications.

The most recent directive issued by the EU regarding the recognition of professional qualifications is Directive 2005/36, which each member state was to have transformed into its national laws by October 20, 2007. (Not surprisingly, most EU member states failed to meet this deadline.) The essence of this Directive is threefold: (i) it replaces and combines various "sectoral" directives concerning the recognition of professional qualifications within the EU for doctors, architects, veterinarians, etc.; (ii) it sets forth standards that must be satisfied in order for qualifications to be recognized in "non-sectoral professions"—*i.e.*, for tradespeople such as barbers, bakers, and electricians; and (iii) it permits services to be provided in another EU country "temporarily" by relying purely on the home-jurisdiction qualifications. Point (iii) is undoubtedly the most significant "change" introduced by the Directive.

MOVING WITHIN THE EU

If an individual working in a "non-sectoral profession" wishes to work in another EU member state permanently, the terms of Directive 2005/36 determine whether the individual's qualifications will be recognized in the other EU member states. Consider the example of an auto mechanic. According to Article 17 of the Directive (which applies to all tradespeople set forth in "List 1," including auto mechanics), a mechanic's qualifications may be recognized in any one of five ways. Without going into too much detail, the mechanic's qualifications will be recognized essentially if he can demonstrate that (i) he was self-employed for at least six years as an auto mechanic or as a manager, or (ii) he has an aggregate

If the individual's qualifications fall just shy of the required qualifications, then the individual may bridge this gap either by completing additional training or by passing an aptitude test; it is up to the individual to decide which alternative to pursue.

The Directive states only that whether a service is being provided "temporarily" must be "assessed case by case, in particular in relation to its duration, its frequency, its regularity and its continuity."

of at least six years of experience as an auto mechanic (A) on a self-employed basis or as a manager and (B) as a trainee, as evidenced by a certificate or a professional body. Other alternatives are available, but these are the primary criteria by which an auto mechanic's qualifications are recognized within the EU.

If the individual can demonstrate that he meets one of these criteria, then the other EU member states must recognize his home-jurisdiction qualifications. Again, whether he can actually pursue that line of work in another EU member state may depend also on whether he has obtained a work permit (if required) and whether he has demonstrated the necessary language proficiency. Not surprisingly, the more "advanced" a particular "non-sectoral profession" is, the higher the criteria are in terms of the requisite years of experience and/or training.

In the alternative, if an individual cannot satisfy the specific criteria set forth in the Directive, that individual's professional qualifications may be recognized through the Directive's "general system." The essence of this system is that if an individual has the same qualifications required by the member state in which the individual wishes to pursue his profession, then those qualifications must be recognized by that member state. If the individual's qualifications fall just shy of the required qualifications, then the individual may bridge this gap either by completing additional training or by passing an aptitude test; it is up to the individual to decide which alternative to pursue.

Also, Germany, Austria, and Luxembourg issue a certification known as the "Master Craftsman's diploma" (in German, *Meisterbrief*). A *Meisterbrief* is issued only to individuals who have completed a minimum amount of theoretical work and practical training in their professions and have subsequently passed respective tests. In Germany, *Meisterbriefe* are still issued in approximately 50 trades, such as baking, plumbing, and hairdressing. Much to the delight of individuals who are qualified as *Meister*, EU Regulation 1430/2007 ranks the *Meister* certification highly, meaning it will be relatively easy for a *Meister's* qualifications to be recognized in other EU member states, and conversely, it will be relatively difficult for an individual who is not a *Meister* to pursue that profession in the above countries without first completing additional training or passing an aptitude test.

WHAT CONSTITUTES "TEMPORARY"?

As mentioned above, Directive 2005/36 facilitates the temporary pursuit of a profession in other EU member states. The essence of the Directive is that if an individual wishes to work in another EU state "temporarily," so long as he is qualified in his home jurisdiction, other EU member states must also recognize his qualifications. Unfortunately, the Directive does not provide much guidance as to what constitutes "temporarily." The Directive states only that whether a service is being provided "temporarily" must be "assessed case by case, in particular in relation to its duration, its frequency, its regularity and its continuity." It is left to the individual member states to come up with a more precise definition.

WHAT THE FUTURE HOLDS

Unfortunately, since member states did not transform Directive 2005/36 into their respective laws by the deadline, the continued migration of workers within the EU has been delayed. Nevertheless, it is clear that the recognition of professional qualifications is a significant step forward. Of course, other factors, both legal (the harmonization of employment, tax, and pension laws, as well as the eventual withdrawal of work-permit requirements) and cultural (language) continue to play a major role in migration within the EU. Only once all member states have truly opened their doors to EU nationals will it be realistic to expect that EU nationals will take advantage of the alternatives available in other EU member states.

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