FOURTH QUARTER 2010

GERMAN LABOR AND EMPLOYMENT NEWS

LOWER SEVERANCE PAYMENTS FOR OLDER EMPLOYEES PURSUANT TO SOCIAL PLANS IN GERMANY: A FORM OF AGE DISCRIMINATION?

By ***Georg Mikes***

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

The psychological effects of losing a job can, of course, be overwhelming. Finding a new job quickly or being close to retiring anyway may deflate the blow somewhat. Receiving a decent severance package from the employer may also have some healing power.

Depending on the situation, laid-off employees in Germany may be eligible for such a severance package—the amount typically depends on a number of factors, such as age, years of service, and salary level. For example, when negotiating a social plan with a works council in Germany, those employees closing in on retirement often receive a lower severance package than their younger colleagues. The practice of providing lower severances to those who are close to retirement has been in existence in Germany for decades. The question is whether this is actually a form of age discrimination.

Prior to the enactment of the General Equal Treatment Act in 2006 (the German statute that governs discrimination based on age, sex, race, etc.), paying lower

CONTENTS

The ECJ had difficulty reconciling the fact that some employees are entitled to severance with the fact that others with just as many years of service are not so entitled, simply because they are old enough to draw a pension.

severances to more senior employees was subject only to a general test of equal treatment. This was usually an easy test to pass.

One would have thought that this test would become more problematic upon the enactment of the General Equal Treatment Act, as this statute specifically prohibits age discrimination. Let's face it, paying a lower severance to older employees is age discrimination, right? Wrong! In fact, the General Equal Treatment Act specifically permits lower severance payments (or none at all) to be made to laid-off employees who are close to retiring. Germany's Federal Labor Court has on more than one occasion opined that this concept does not violate EU law. As long as there is a reasonable rationale for lower severance payments, they would not be subject to great judicial scrutiny. This all became more complicated as of October 12, 2010.

NEW DECISION OF THE EUROPEAN COURT OF JUSTICE

Only the European Court of Justice ("ECJ") has the authority to decide whether a certain statute complies with EU law. On October 12, 2010, the ECJ issued two decisions regarding the interpretation of the Equal Treatment Directive with respect to discrimination based on age. Unfortunately, neither of the decisions is overly informative, and one of them raises the question of whether Germany's General Equal Treatment Act truly conforms with EU law.

In *Rosenbladt v. Oellerking* (Rs C-45/09)—a case originating in Germany—Ms. Rosenbladt, an employee of a cleaning company, was subject to a collective bargaining agreement that set forth that her employment relationship would automatically conclude at the end of the month in which she turned 65. As a result, shortly before her 65th birthday, her employer informed Ms. Rosenbladt that her employment relationship would soon end. Because she wanted to continue working, she filed an action against her employer, arguing that this was age discrimination. Her case was heard by a Hamburg labor court that subsequently called upon the ECJ to determine whether such a mandatory retirement clause violated the EU's discrimination laws.

The ECJ concluded that neither the collective bargaining agreement provision nor Germany's statutory provision permitting lower severance payments to senior employees violated EU law. Accordingly, parties may agree that an employment relationship will (automatically) end as soon as the employee is eligible for an age-related pension. The ECJ added that Germany has long recognized—from both a political and a social perspective—that an employment relationship can end upon the employee's reaching retirement age. Further, it is within the discretion of the individual member states and (in certain circumstances) the unions to establish labor and social policies. And because the employee receives a pension instead of the salary that otherwise would have been earned, the provision does not cause the employee to suffer a financial setback.

Surprisingly, the ECJ reached a different conclusion in *Andersen v. Region Syddanmark* (Rs C-499/08), which dealt with a similar issue. Mr. Andersen was employed by the local government in Denmark until he was terminated. An arbitration court held that his termination constituted wrongful dismissal. Unlike German law, however, Danish law holds that an employee who has been wrongfully discharged is entitled to monetary damages rather than reinstatement.

Mr. Andersen (aged 63 at the time) decided against accepting the pension that would have been financed by his ex-employer; instead, he filed for unemployment. Simultaneously, he requested that his employer pay him severance for the dismissal. Under Danish law, employees may have a claim to severance in certain circumstances; however, if an employee has a claim to an employer-financed pension—as was the case with Mr. Andersen—then the employee is not entitled to such severance. The Danish court referred to the ECJ the question of whether the disqualification from severance payments conforms to EU law.

Though the ECJ concluded that an employee's qualification for severance lies within the discretion of a member state's labor and social policies, the court did state that such disqualification may actually go too far and thus constitute illegal age discrimination. The ECJ had difficulty reconciling the fact that some employees are entitled to severance with the fact that others with just as many years of service are not so entitled, simply because they are old enough to draw a pension. Unlike in *Rosenbladt*, the possibility of receiving a pension did *not* justify the disparate treatment if the employee wished to continue working.

CONSEQUENCES FOR GERMANY

These two ECJ decisions actually result in more questions than answers for German employers (and practitioners). Allowing for a bit of exaggeration, the main question appears to be: To what extent is "forced retirement" permissible pursuant to a provision that allows for the automatic ending of an employment relationship upon attainment of a certain age, even though ending the employment relationship in that manner may simultaneously violate Germany's anti-discrimination statute, since doing so essentially excludes the older employee from being able to continue working due to his age (and his eligibility for a pension)?

It seems that only another ECJ opinion will lead to any degree of clarity. Nevertheless, the decisions provide some confirmation that the past practice in Germany of making lower payments by way of a social plan to laid-off employees who are close to retirement age is acceptable, because if the employer were required to pay the more senior employees severance, the younger employees would naturally receive a smaller piece of the pie. Whether this, in itself, constitutes sufficient justification remains to be seen.

Jörg Rehder copublished "Germany Strengthens Its Data Protection Act and Introduces Data Breach Notification Requirement" in the January 2010 issue of *World Data Protection Report*. A German version of this article, "*Verschärfung des Bundesdatenschutzgesetzes: Einführung einer Informationspflicht bei Datenverstößen—Vergleich mit den Vereinigten Staaten*," was subsequently reprinted in the 2Q 2010 issue of the *German-American Lawyers' Association Newsletter* (*DAJV Newsletter*).

Georg Mikes was interviewed by the *Handelsblatt* (a German business newspaper) regarding "Quota for Women as Directors of German Companies"; the interview was published in its Management Blog on April 10, 2010.

Georg Mikes was interviewed on "Tariff Unity" by the *WirtschaftsWoche* (a German business magazine) for an August 25, 2010, article, and an article he published on this same topic appeared in the *Financial Times Deutschland* on July 20, 2010.

Friederike Göbbels was interviewed by and quoted in the *Financial Times Deutschland* on September 6, 2010, regarding employment matters in Germany.

Jörg Rehder gave a speech in Vail, Colorado, entitled "Proprietary Information and Employee Restrictions in Germany" on January 9, 2011, at the 28th Annual National CLE Conference, sponsored by the Law Education Institute, Inc.

Jörg Rehder will speak at a one-day seminar in Frankfurt on "Labor and Employment Law in the United States" on April 6, 2011, sponsored by Management Circle.

GERMAN COURTS REVIEW FORM AGREEMENTS WITH A HEALTHY DOSE OF SKEPTICISM

By ***Friederike Göbbels***

Munich
German Attorney at Law; Certified Labor and Employment Lawyer
fgoebbels@jonesday.com
+49 89 20 60 42 200

Employers in Germany often use model employment agreements. However, since 2002 model employment agreements have been subject to German statutory terms governing terms and conditions. Since then, German courts have opined on a number of matters impacting the use (and enforceability) of model employment agreements.

Germany's statutory terms and conditions provisions deem unenforceable any clause in an agreement which has not been individually negotiated—such as when using a model agreement—and which is too one-sided, atypical, surprising, or unclear. In essence, the statute is saying that the proverbial "fine print" needs to be fair to be enforceable.

If a court should hold that a clause in an employer's model agreement favors the employer to too great an extent, then not only may the court hold this clause to be unenforceable, but the employer may be faced with serious financial consequences. We discuss two recent Federal Labor Court rulings that demonstrate the rigid applicability of the statutory terms and conditions provisions.

OVERTIME-PAY PROVISION

On September 1, 2010, the Federal Labor Court held a contractual clause unenforceable because it stated merely that any overtime hours worked by the employee would be compensated by his regular salary payments; *i.e.*, the employee was not eligible to earn overtime pay. The employee disputed this clause after the employer terminated the employee. The employee pointed to 102 documented overtime hours and demanded that he be compensated therefor. Not surprisingly, the employer refused to pay this and argued that any overtime hours were already included in the regular salary payments. After all, the employer continued, the contract included a clause often found in employment agreements: "The above-referenced salary payments will serve as compensation for any of the employee's necessary overtime hours."

Despite the seemingly unambiguous wording of this clause, the employer lost at all three court levels and the court ordered the employer to compensate the employee for the overtime hours. The court held that the clause was unenforceable because it was not sufficiently "transparent." According to the transparency requirement, an employee must be clearly informed of his rights and duties at the time of concluding the contract. Any ambiguous clauses or provisions that are open to interpretation are interpreted against the employer, *i.e.*, the party that initially introduced the clause.

According to the court, a clause regarding no overtime pay for extra hours is enforceable only if it specifically sets forth which overtime hours are subject to the clause. At the time of entering into the agreement, the employee must know what he is facing, *i.e.*, in the instant case, the maximum number of hours he must devote to his work in order to receive the agreed compensation. It is imperative that there be a clear threshold so that the employee knows the terms under which he is working. The court stated that, at a minimum, there should be a reference to the maximum number of hours to be worked; this was missing in the instant case.

Because of this transparency requirement with respect to overtime hours and pay, employers are well advised not only to make reference to the maximum number of hours that the employee is to work per week (or per month), but also to include a separate clause in the employment agreement that sets forth at a maximum how many overtime hours are covered by the employee's basic salary, with the understanding that any hours worked in excess of these will entitle the employee to overtime pay. Such a clause should also set forth the level of the overtime pay.

RESERVATION CLAUSE WITH RESPECT TO CHRISTMAS BONUSES

Employers will typically want to give themselves a bit of flexibility when using bonus clauses in a model employment agreement. The reason is obvious—in an economic downturn, the employer will be less inclined to make bonus payments to employees. Also, courts view with some disdain bonus clauses providing the employer with a great deal of leeway and, accordingly, uphold them only in certain circumstances.

In a December 2010 case before the Federal Labor Court, the court struck a clause that was intended to give the employer some leeway in terms of deciding whether to actually pay a Christmas bonus. The result was that the employer was forced to pay the bonus.

The wording of the clause was, in pertinent part, as follows:

> To the extent the employer is not required to make an additional payment pursuant to statute or a collective bargaining agreement payment, such as a bonus . . . , any such payments shall be made on a voluntary basis and without any legal claim thereto. They are, therefore, revocable at any time without observing a notice period.

The employer paid a Christmas bonus to the employee for successive years without expressly stating each time that he was making these payments voluntarily. Because these payments were made "without reservation," the employee eventually had a legal claim to these payments in the future. The Federal Labor Court determined that the contractual clause in the employment agreement should not be given greater weight than the employee's eventual reliance on a bonus. Though a clear and unambiguously drafted reservation clause may cause an employer's payments to be truly voluntary, such a clause must meet minimum requirements.

The primary problem with the above clause is that the employer was trying to make a couple of different statements simultaneously. First, he was saying that any bonus payments made by the employer are voluntary. At the same time, he stated that the employer could revoke such "voluntary" payments at any time.

Because a true voluntary payment from an employer does not culminate in the employee's having a claim to such payment in the future, a revocation by the employer is not necessary in such situations, nor is it even possible from a legal perspective. A revocation is actually an employer's withdrawal of an employee's right. A "voluntary bonus" and a "revocable bonus" are different and, accordingly, cannot be combined as part of a single reservation clause.

In practice, it is advisable to make clear and unambiguous that certain payments are made only on a voluntary basis (rather than to combine all types of bonuses into one) and that a future legal claim shall not arise even if the payments are made on a successive basis. The ideal approach for employers is to make a conspicuous written reservation every time the employer makes such a payment to an employee.

RESTAURANT VOUCHERS FROM EMPLOYERS GENERALLY DO NOT CONSTITUTE PAYMENTS IN KIND

By ***Christian Funke***

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

The Tax Court of Düsseldorf recently held that vouchers provided to employees by an employer generally do not constitute payments in kind pursuant to Section 8(2) of Germany's Income Tax Act; rather, they constitute taxable income from an employment source pursuant to Section 19(1) No. 1 of the Act. Whereas Section 8(2) concerns cash and noncash supplemental payments, Section 19(1) concerns income in the form of salary payments. Restaurant vouchers may be treated as payments in kind only if they specifically set forth what can be purchased with the voucher and in what quantity. This was not the case before the Düsseldorf court.

In the Düsseldorf case, the employer was issuing vouchers to his employees in addition to their salaries. Each voucher had a value of €5.77. The vouchers were redeemable at various restaurants and supermarkets. They could not be exchanged for cash or specific goods—especially not cigarettes or alcohol. Pursuant to Section 40(2) of

Germany's Tax Act, €2.67 of the voucher's value is subject to a 25 percent tax, while the remaining €3.10 is tax-free income.

The Tax Court ruled that the vouchers were not payments in kind pursuant to Section 8(2) of the Tax Act, but instead payments with "cash character." Like salaries and wages, other compensation or benefits are also subject to payroll tax (pursuant to Section 19(1) No. 1 of the Act) if they are paid out in connection with an employment relationship. The vouchers constituted such because they were issued on the basis of the employment relationship. Accordingly, the employer owed an additional tax on the vouchers.

The terms of the vouchers also failed to satisfy an aspect of certain tax guidelines as issued by Germany's tax authorities. One specific guideline sets forth that restaurant vouchers cannot be treated as payments in kind unless they are redeemable during working hours only. This was not the case with the instant vouchers.

EMPLOYER'S TRADE AND BUSINESS SECRETS: CAN AN EMPLOYEE USE THEM IN HIS NEXT JOB?

By ***Jörg Rehder***

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

The scenario is all too common—an employee receives a lucrative job offer from a competitor. The fact that the employee may have information about his ex-employer (*e.g.*, customer information, supplier lists and terms of doing business with suppliers, technical information, short- or long-term strategic plans, etc.) makes him that much more attractive as a new hire. Question: Does the new employer have a right to this type of information?

WHAT ARE BUSINESS AND TRADE SECRETS?

In 2006, Germany's highest court stated that a business or trade secret is any fact associated with a company which: (i) is not in the public domain; (ii) is commercially valuable on the basis of either an express or an implied business interest of the company; and (iii) its owner has an objective and legitimate interest in keeping confidential. "Business secrets" are business aspects of the company, such as customer lists, supplier information, and commercial contracts, while "trade secrets" are technical matters such as drawings and designs as well as information about manufacturing processes.

In that 2006 case, two employees decided to compete with their former employer, a British company, by establishing their own business. Each of the businesses was engaged in the distribution of circuit boards. As it turns out, the two individuals decided to open their own business in the same building as that of their former employer. Unfortunately for the employees, their former employer received the employees' telephone bill (allegedly) in error and discovered that the employees had contacted 44 of the former employer's customers. The British company, believing the customer lists constituted its trade secrets, sued the two ex-employees. The court held that if the two employees had written down the names and contact information of the customers before leaving their employment (which was presumably the case), they were not permitted to use that information in their next job. If an employee is indeed permitted to use his former employer's business or trade secrets (see below), he may do so only if they are not in writing or in electronic form; *i.e.*, he may use only the information stored in his memory.

BALANCING THE EMPLOYER'S INTERESTS AGAINST THE EMPLOYEE'S INTERESTS

To determine whether an employee may use a former employer's trade secrets requires the balancing of an employer's constitutional right to his property against an employee's constitutional right to choose his career path. Article 14 of Germany's Constitution states that "[t]he right to property . . . is guaranteed"; business or trade secrets constitute the employer's property. Article 12 of Germany's Constitution states that "[a]ll Germans have the right to select their career, employment and traineeship position." Restricting an employee from using the know-how learned during his previous job may constitute an infringement on his fundamental right to pursue the career path he chooses.

Criteria used in this balancing test are such things as the significance of the secret for the employer, the significance of the secret in terms of the employee's being able to

As can be imagined, it is often difficult to determine whether a former employee using trade or business secrets is truly pursuing his own career or just disclosing them in an unauthorized manner.

obtain gainful employment, the duration of the employee's employment, the reason for ending the employment relationship, and how the employee learned of the secret.

If an employee (or former employee) discloses business or trade secrets in an unauthorized manner, the employer may seek to terminate that employee, recover monetary damages against the employee or possibly enforce a contractual penalty, or have the employee prosecuted for violating Germany's Unfair Competition Act.

NONCOMPETITION

An employee in Germany generally owes a fiduciary duty of loyalty to his employer *during* the employment period. One aspect of this fiduciary duty is to refrain from competing with his employer during the employment period. This duty also effectively prohibits the employee from disclosing a business or trade secret during his employment.

May an employee, however, compete with his former employer *after* the employment relationship ends? This depends, in large part, on whether the employee is subject to a post-contractual noncompetition obligation. If so, the employee may generally not disclose business or trade secrets for the duration of the noncompete period.

If, however, the employee is not subject to a post-contractual noncompetition obligation, German courts hold that the starting point is that an employee is indeed free to use his former employer's business or trade secrets in the performance of his next job. A limitation on the ex-employee's right to use business and trade secrets is that such use must be proportional and actually necessary for the employee to pursue his career. As can be imagined, it is often difficult to determine whether a former employee using trade or business secrets is truly pursuing his own career or just disclosing them in an unauthorized manner.

WHISTLEBLOWING

Though this is changing, whistleblowing in Germany is still a relatively new concept. It first really hit the public domain in Germany five years ago when it was discovered that meat processors were selling tainted meat in Germany. Many consumers became seriously ill due to food poisoning, and a number of the processors were eventually found guilty of selling bad meat in violation of the various food laws.

Germany's legislature, noting how much information could have been gleaned if the employees of the guilty meat processors had been whistleblowers, considered amending Germany's Civil Code permitting employees to report any criminal activity by their employers if that activity would lead to the illness or death of consumers or the illegal contamination of the environment. This, of course, would have entailed the disclosure of company internal information by employees. Such information could not constitute a trade secret as defined above, however, because the employer would not have had a legitimate interest (one of the elements of a trade secret) in keeping such "illegal" information confidential.

This would have been the first time that German books included a specific whistleblower provision. In the end, Germany's right-of-center coalition government did not pursue the proposed amendment, as: (i) it feared that employees would be overzealous about "enforcing the law" against their employers, and (ii) one aspect of whistleblowing is that the employee must be able to do it anonymously, which would create problems under Germany's data privacy statute, as the accused may not be able to confront the accuser, a basic tenet of German data privacy law.

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 20 60 42 200
Fax: +49 89 20 60 42 293

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

JONES DAY GLOBAL LOCATIONS

ATLANTA	DALLAS	LOS ANGELES	NEW YORK	SILICON VALLEY
BEIJING	DUBAI	MADRID	PARIS	SINGAPORE
BOSTON	FRANKFURT	MEXICO CITY	PITTSBURGH	SYDNEY
BRUSSELS	HONG KONG	MILAN	RIYADH	TAIPEI
CHICAGO	HOUSTON	MOSCOW	SAN DIEGO	TOKYO
CLEVELAND	IRVINE	MUNICH	SAN FRANCISCO	WASHINGTON
COLUMBUS	LONDON	NEW DELHI	SHANGHAI	