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GERMAN LABOR AND EMPLOYMENT NEWS

NEWS ON VACATION REGULATIONS

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It is hardly surprising that vacation, "the happiest time of the year," sometimes gives rise to legal disputes. What *is* surprising is how varied the specifics of each case can be and how strong the influence of EU case law has become, as can be seen in recent decisions in this area.

VACATION, FITNESS FOR WORK, AND FORFEITURE OF THE VACATION ENTITLEMENT

The judgment of the German Federal Labor Court (*Bundesarbeitsgericht*; BAG) of March 18, 2014 (9 AZR 877/13) reflects the German comprehension of vacation as a paid release from the duty to work. In the case in question, the plaintiff, a pilot who was temporarily unfit to fly, demanded that his employer, an airline, grant him vacation for 2009, the year he was unable to work. However, the court decided against the plaintiff in all instances.

According to the German Federal Vacation Act (*Bundesurlaubsgesetz*; BUrlG), an employee's entitlement to vacation for a given calendar year begins on January 1, provided that he or she has been employed for at least six months (the waiting

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period). The entitlement, of course, ceases to exist if the vacation was actually granted; if it was not taken within a certain period, it may be forfeited. In principle, the right to vacation in a given calendar year ceases to exist at the end of that year, since the BUrlG stipulates that vacation "must be granted and taken during the ongoing calendar year" (Section 7 Para. 3 Sentence 1 BUrlG). However, the BUrlG also provides that vacation must be granted and taken within the first three months of the following calendar year if urgent operational matters (such as a heavy workload) or the employee's personal circumstances prevented him or her from taking it (Section 7 Para. 3 Sentence 3 BUrlG). So transfer of the vacation entitlement into the first quarter of the following year has come to be viewed as a right by many employees.

However, problems frequently arise, especially if illness prevents the employee from taking vacation even during the legal transfer period. In such a case, the employee may believe that he or she is entitled to compensation for the unused vacation time. Yet the law provides that compensation may be taken only in connection with the termination of the employment relationship (Section 7 Para. 4 BUrlG). Moreover, it is obvious from what has been stated above that the granting of vacation requires the employee to be fit for work, because it is only in that case that the duty exists from which vacation serves as a release.

If an employee can neither be granted vacation nor be compensated for it, its legal fate can only be expiration. And yet, contrary to what one would expect from Section 7 Para. 3 BUrlG, in the case of illness, the vacation entitlement does not expire by the end of the first quarter of the following year. Rather, an element of European Community law must be considered: in 2009, the European Court of Justice (ECJ) had to decide whether the expiration of vacation, as mandated by Section 7 Para. 3 BUrlG, is consistent with Community law when vacation cannot be taken due to long-term illness. In the *Schultz-Hoff* decision (Rs. C-350/06), the ECJ held that a national provision of this kind would constitute a violation of the Working Time Directive (Directive 2003/88/EC), which requires EU member states to provide employees with a minimum of four weeks of vacation each year.

The wording of the ECJ judgment, however, gave rise to the fear that in the case of long-term illness, vacation could accrue for years, necessitating considerable compensation payments. In response, the ECJ held in the *KHS* decision of November 22, 2011 (Rs. C-314/10) that vacation entitlement which had accrued because of illness could expire after

15 months. In an unexpectedly flexible reaction, the BAG concluded that Section 7 Para. 3 BUrlG, despite its wording, was to be construed "in conformity with Community law," so that in cases of this kind, the vacation entitlement should expire after 15 months.

In the case of the pilot who was unfit to fly, the BAG argued that unfitness to fly meant unfitness for work, so vacation, viewed as a release from the duty to work, was simply not possible. Moreover, the vacation entitlement for 2009 would have had to be added to that of the year 2010 and "thus was subject to the time-limit regime of Section 7 Para. 3 BUrlG." But after the first quarter of 2011, the vacation entitlement expired because Community law does not permit an extension of this length. Therefore the pilot, who was obviously fit to fly again, could not expect the vacation to be granted. And while compensation for the untaken vacation was not in dispute, the BAG expressly ruled out damages with regard to the vacation pay: since the vacation entitlement could not be fulfilled, damages were out of the question as well. This is particularly applicable when, following the ECJ, a "uniform entitlement" to paid vacation exists: if the entitlement for release from the duty to work cannot be fulfilled, no other aspect of the entitlement, namely the vacation pay, can be satisfied.

VACATION PAY

An ECJ decision of May 22, 2014 (Rs. C-539/12; the *Lock* decision) also dealt with vacation pay. In this decision, the ECJ held that not only basic salary but also sales commissions constitute vacation pay.

The starting point was a dispute before an English court. The employee's compensation arrangement provided for a base salary along with sales commissions, which constituted approximately 60 percent of his total remuneration and which he received several weeks after completing the sales. During a vacation in December 2011, the employee was actually paid a sales commission in addition to his basic salary, but this commission represented his compensation for business transactions concluded earlier, rather than sales commissions he might have accrued in December if he had not taken vacation. Since no transactions subject to sales commission were concluded during the vacation period, the missing pay became noticeable later on. The employee brought an action against this before the Employment Tribunal Leicester, which finally brought before the ECJ the question of whether such practice is in conformity with the Working Time Directive.

The ECJ denied this. The court stated that in the case of such practice, during vacation the employee has at his disposal compensation which corresponds to his compensation during normal working time. However, due to the deferred financial disadvantage, the employee might decide not to exercise his right to annual vacation in order to avoid receiving reduced remuneration at a later point in time.

This decision does not really introduce a new wrinkle to German law. The calculation of vacation pay is stipulated in Section 11 Para. 1 BUrlG, which provides that such pay is calculated on the basis of the average income of the 13 weeks preceding the vacation, and only overtime payments and salary increases of a temporary nature are exempt from this calculation. Accordingly, sales commissions would automatically be included. However, this is not often the case, and the pressure to include commission in vacation pay could increase in the future.

VACATION ALLOWANCE

Unlike "vacation pay" (the full payment of an employee's regular remuneration during his or her vacation), "vacation allowance" (a sum provided to employees *along with* vacation pay) is not mandatory under German law; rather, this payment is an additional benefit. If it is not stipulated by, for example, a collective bargaining agreement, the employer is free to decide not only whether to grant it at all, but which purpose to attach to doing so.

The latter should be considered carefully by the employer, as the decision of the BAG dated July 22, 2014 (9 AZR 981/12) makes clear. In the case in question, the employer had agreed in the employment contract to pay a vacation allowance. The granting of the allowance was dependent on the following provision: "Prerequisite for the payment is an employment relationship that is not under notice."

The dispute with the plaintiff arose when the employer provided her with notice of termination at the end of March 2011. During the notice period, the plaintiff was granted vacation in April and May, for which she was paid only the regular (mandatory) compensation, i.e., her vacation pay. When the

employer refused to grant the additional vacation allowance, the plaintiff sued for payment. She succeeded in the first instance before the labor court but lost in the appeal.

As was to be expected, the BAG scrutinized the employment contract with a view to the general terms and conditions (*Recht der Allgemeinen Geschäftsbedingungen*; AGB); i.e., it considered the employer to be a "user" of general terms and conditions and the plaintiff a "consumer" (generally in need of protection). However, the BAG arrived at the conclusion that the employment contract withstood examination under the AGB.

It should be noted that the BAG did not believe that the vacation-allowance clause had put the employee under an unreasonable disadvantage within the meaning of Section 307 Para. 2 No. 1 of the German Civil Code (*Bürgerliches Gesetzbuch*; BGB). This result was not quite a matter of course; the BAG in many cases reacts quite sensitively to aggravations pertaining to termination, and in the case of an employee's resignation, such an aggravation could at first glance be seen in the loss of the vacation allowance. However, the BAG explained that the employer is "not per se" barred from attaching commitment clauses to special payments, "as long as the payments are not (also) a consideration for work already performed." This is probably one of the pivotal statements in the decision. Had the BAG found that the employer intended to use the vacation allowance as compensation for work performance, it would have inevitably concluded that the plaintiff's claim justifiably existed—after all, remuneration may not be withdrawn *ad libitum*, especially as a penalty for resigning.

In the present case, however, the BAG found that the employer had intended only to offer a loyalty bonus. It was incumbent upon the employee to decide whether she would someday prefer to seek a higher-paying job or take advantage of such a bonus. (The BAG was obviously speaking generally, since the plaintiff in question did not have this choice, having been dismissed by the employer.) Nor did the BAG find an unreasonable disadvantage in any other respect; i.e., it approved of the cutoff date determined by the wording.

Last but not least, the BAG determined that no violation of the transparency requirement (Section 307 Para. 1 Sentence 2 BGB) had taken place. The term "not under notice" is sufficiently clear and unambiguous. The chosen wording would not have prevented the employee, in an unreasonable way, from making justified claims.

In summary, it can be said that the existence or nonexistence of claims can depend on a few words, which should be chosen with care.

COMPENSATION CLAIMS BASED ON DISCRIMINATORY DISMISSALS

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On December 12, 2013, the Federal Labor Court (*Bundesarbeitsgericht*; BAG) ruled that an employee whose dismissal is discriminatory may be entitled to compensation (8 AZR 838/12). In Germany, combining a compensation claim pursuant to the General Equal Treatment Act (*Allgemeines Gleichbehandlungsgesetz*; AGG) with a lawsuit contesting the validity of the dismissal pursuant to the Act Against Unfair Dismissal (*Kündigungsschutzgesetz*) had previously not been possible. Section 2 Subsection 4 AGG states that dismissals fall only under the general termination-protection provisions of the Act Against Unfair Dismissal and specific laws on termination protection (such as those that protect employees who are pregnant or disabled).

In the case in question, a pregnant employee had presented her employer with a medical certificate prohibiting her from working. Her employer ignored the prohibition and asked her to continue working, which she refused to do. She subsequently suffered a miscarriage. Upon returning from the hospital, the employee found a termination notice in her mailbox. She filed a lawsuit contesting the dismissal, which was found to be invalid by the lower courts, since it contradicted the provisions of the Maternity Protection Act *(Mutterschutzgesetz)*. The employer then served her with two further dismissal notices. The case was subsequently reviewed by the BAG, which was required to decide whether the dismissal was discriminatory and whether the plaintiff was entitled to compensation pursuant to the AGG.

COMPENSATION IN ADDITION TO PROTECTION AGAINST DISMISSAL

The core question of the litigation was therefore not the validity of the dismissal but whether the dismissal had discriminated against the employee by reason of gender, which would entitle her to compensation. Section 15 AGG provides that in a case of discrimination (i.e., when a person is less favorably treated because of race or ethnic origin, gender, religion or conviction, disability, age, or sexual orientation without a justifying reason), the employer must compensate the employee for the damage suffered, including nonpecuniary losses.

The BAG found that if a discriminatory dismissal which is invalid under termination-protection provisions results in injury beyond the usual disadvantages of a termination, compensation is justified. It ruled that Section 2 Subsection 4 AGG, which states that dismissal shall be governed exclusively by the provisions on general and specific protection against unfair dismissal, does not hinder that compensation claim. If a discriminatory dismissal is invalid pursuant to the termination-protection provisions of the Act Against Unfair Dismissal, the dismissed employee may still be entitled to compensation for nonpecuniary damage suffered, in accordance with the provisions of the AGG.

DISCRIMINATION

Regarding the question of whether the employee had been treated less favorably than another person because of her pregnancy (which would be deemed unequal treatment on the basis of gender), the parties' arguments in the lawsuit would be decisive. If a dismissal violates a provision of protection against discrimination, as the BAG found here (the employer terminated the employment even though he was well aware of the employee's pregnancy), a causal link between the pregnancy and the act of discrimination will be assumed. The employer bore the burden of proving that he had terminated the employment not because of the pregnancy but for some other cause, such as operational reasons. In this case, the employer failed to prove that the dismissal was based on such other reasons.

PARTICULARLY SEVERE DISCRIMINATION

The BAG found that the employer's action was particularly severe and that the dismissal had caused more emotional and other harm to the employee than dismissals "usually" do. This is because the employer, apparently as a precaution, had issued the second termination notice after the employee's pregnancy had ended, when the provisions of the Maternity Protection Act no longer applied. In the BAG's opinion, this action indicated that the employer had issued the first notice *because of* the pregnancy.

Finally, the BAG viewed the dismissal as "ill-timed"; the employer had given notice to an employee who had recently experienced a series of calamities: she had lost her unborn child, her own life had been in danger, and she had had to be hospitalized. Thus, the employer had totally ignored the employee's personal circumstances.

PRACTICAL RECOMMENDATION

It may now look as if, contrary to Section 2 Subsection 4 AGG, every dismissal in the future will be judged in view of the AGG and that employees will see themselves in a position to demand higher severance payments when contesting the validity of a termination. However, this is not likely to happen, since the validity of a dismissal continues to be contested on the basis of termination-protection provisions, not the AGG itself. Furthermore, to award compensation, the BAG requires discrimination to be beyond the norm.

It is strongly recommended that employers carefully prepare termination notices, as well as their arguments in legal briefs. This is crucial for two reasons. First, the validity of such a dismissal is likely to be contested, and the employer needs to show justification for it. Second, the employer must ensure that the employee will not be able to claim compensation for discrimination.

Nevertheless, it is likely that such claims for compensation will increase the monetary amount in dispute and therefore lead to higher litigation costs. Furthermore, the sum sought by the employee as compensation for the act of discrimination may affect the severance payment agreed upon by the parties to conclude both the litigation and the employment relationship, since the BAG has raised the possibility that economic loss suffered, such as the loss of future salary, should be taken into account.

Finally, it should be noted that different statute-of-limitation periods apply. If the employee wants to contest the validity of a dismissal, he or she must file a claim for wrongful dismissal within three weeks of receiving the termination notice. In such a case, the employer will know relatively soon whether the dismissal is being challenged. Yet the employee has up to six months to formally file a claim for compensation. If this occurs, the employer may be confronted with a claim for compensation even after the period for contesting the validity of the dismissal has expired.

ISSUES UNDER LABOR LAW IN CONNECTION WITH EBOLA

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The Ebola epidemic in West Africa is still perceived as a faraway threat by most Germans, but that may be changing: thousands of volunteers who enlisted as aides for the German Red Cross are now serving in Ebola infirmaries in Sierra Leone, Liberia, and Guinea, and reports about infected people being flown home for treatment are increasing. An American physician who returned to the United States from such a mission in Liberia during the past year was also found to have been infected.

The Ebola virus is transmitted by direct contact with the blood or other bodily fluids of infected persons. In August 2014, the World Health Organization declared Ebola an "international health emergency." The German Federal Foreign Office (*Auswärtiges Amt*) strongly advised against traveling to the affected countries and asked all German citizens to leave Guinea, Sierra Leone, and Liberia. According to the German Federal Center for Health Education (*Bundeszentrale für Gesundheitliche Aufklärung*), a protective vaccine "is not available."

In this context, issues have been raised regarding the employee's obligation to work and the employer's obligation to protect employees. For instance, if an employer instructs a sales representative to make a business trip to Liberia, may the employee refuse, citing the risk of infection or the travel warning issued by the Federal Foreign Office? May employees of a German parent company refuse to attend meetings in Germany with customers who traveled there from Sierra Leone? May a sales representative based in Guinea who complied with the Federal Foreign Office's request to leave the country demand another job in Germany? May an airline pilot refuse to fly to West Africa? May a nurse refuse to enter the hospital room of an infected aide flown to Frankfurt?

AN EMPLOYER'S OBLIGATION TO PROTECT

An employer's duty of care as an accessory obligation under the employment relationship forms the basis for further considerations. The employer must exercise its rights under the employment relationship in such a way that the employee's legitimate interests are safeguarded in a manner that is justifiably feasible with respect to the concerns of the business and the interests of the entire staff. Pursuant to Section 618 Para. 1 of the German Civil Code (*Bürgerliches Gesetzbuch*; BGB), the employer must arrange for the duties that are to be performed under its direction to be rendered in such a manner that the employee is protected against any danger to life and health to the extent permitted by the nature of the duties. This general clause is further substantiated by numerous protective provisions in special laws. Such laws specify the employer's right to issue directions (Section 106 of the German Trade Regulation Act (*Gewerbeordnung*)), i.e., the employer's right to specify the "when, where, and how" of the work performance by means of instructions to its employees.

With regard to the risk of infection, the employer must continuously inform its employees about the safety situation as well as occupational safety and health protection as soon as the risk becomes apparent (Section 12 Para. 1 of the German Occupational Safety and Health Act (*Arbeitsschutzgesetz*)). This responsibility applies not only at the beginning of the employment relationship, but throughout its duration, especially if the risk increases. If the employer does not sufficiently comply with the obligation to inform employees about potential risks of infection in the course of performing their duties, it violates its accessory obligation under the employment relationship and may possibly be held liable for damages.

In addition, the employer must take care that employees are sufficiently protected against infection transmitted not only by infected colleagues, but by third persons with whom the employees come in contact while performing their duties. If the direct possibility of infection exists, the employer must take suitable countermeasures, such as educating employees about the risk and taking the steps necessary to avoid infection. Of course, risk can never be wholly eliminated, and an employee is expected to tolerate it to some degree. But as the risk of harm increases for the employee, so does the employer's responsibility to protect him or her against such an occurrence.

Any employee working in an affected area should be redeployed. This means that a sales representative who exited an affected area in compliance with official recommendations has not only the right but also the duty to temporarily perform other sales activities in the home country or a secure foreign country. If the employer does not offer the employee such an acceptable position, it must compensate the employee for the loss of salary, although, according to prevailing opinion, the employer is not obligated to create a new position.

THE EMPLOYEE'S RIGHT TO WITHHOLD PERFORMANCE

The employer's right to issue instructions has exceeded its limit if the employee is expected to perform tasks that threaten his or her health beyond the normal extent.

The employee may withhold performance that cannot legally be expected of him or her (Section 275 Para. 3 BGB). In other

words, the employee can refuse to carry out tasks that constitute a considerable objective danger to his or her life or health or even the serious, objectively founded *suspicion* of such a danger.

An assignment to meet customers in Sierra Leone may therefore be refused by an employee if such a trip would pose a real threat to his or her health. According to the established practice of the German Federal Labor Court (*Bundesarbeitsgericht*), an alleged danger that is perceived only subjectively does not suffice. However, refusal would be justified if the World Health Organization as well as the Federal Foreign Office warned against traveling to affected areas in West Africa.

If, as a consequence, the employee justifiably asserts his or her right to withhold performance, the employer cannot take disciplinary action, such as issuing a warning letter or providing notice of termination due to persistent refusal to work. Salary payments must also be continued.

The situation is different with regard to risks "typical of the profession." Hospital staff, firefighters, and similar professional groups may not simply refuse to work with infected persons, and the nature of such work exposes these employees to an increased risk of infection. However, this disclaimer is not without limitation. For example, a nurse would be entitled to withhold performance if his or her employer failed to take necessary and reasonable protective measures.

If, as described in one of the initial examples, an employee refused to meet West African customers in Germany, the circumstances would have to be carefully examined. The employee's right to withhold performance would be recognized only if there were indications that the customers had been infected with the disease. But in any case, the employer would be obligated to take reasonable protective measures, such as asking the visitors whether they had been exposed to the infection or having them medically examined prior to meeting with the employees.

"TREATMENT" OF AN INFECTED EMPLOYEE

The case of an employee who returns from a trip to West Africa where he or she was exposed to Ebola is also conceivable. If infection is suspected, the employee may be obligated to undergo a medical examination. And if the employee is found to be ill but still reports to work, the employer would be permitted to release the employee from his or her work obligation in order to protect the remaining staff; the employee is not *entitled* to work. Whether the employee is entitled to continued payment of remuneration, however, may be contested. While employees who are unable to work are usually paid, remuneration could be withheld from a person who, despite an express warning from the Federal Foreign Office, traveled to Sierra Leone and contracted the infection, since the disease could be considered self-inflicted.

Other issues relevant under labor law could include an employee's duty to disclose to the employer any possible exposure, the employer's potential duty to provide medical care for an employee while abroad and assume the costs for the return trip, and matters pertaining to data protection and discrimination. While it is sincerely hoped that such issues will not be encountered in practice, cases that arose during recent outbreaks of avian flu and Mexican swine flu have shown that such scenarios are all too likely.

DISCRIMINATION WITHOUT END—EVIDENTIARY FACTS, BURDEN OF PROOF, AND OTHER MATTERS

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TO BE OR NOT TO BE DISCRIMINATED AGAINST—THAT IS THE QUESTION

Even if the introduction of the German General Equal Treatment Act (*Allgemeines Gleichbehandlungsgesetz*; AGG) in 2006 did not result in the massive wave of legal action feared by many experts, the AGG has occupied the labor courts to a considerable extent, and it is primarily the legal actions taken by rejected applicants that worry employers. This is caused by the structure of the act. Its objective is to prevent discrimination on the basis of race or ethnic origin, gender, religion or conviction, disability, age, and sexual orientation, and employers in violation of this act are threatened with claims for damages. At first, employees or applicants who believe themselves to be the victims of discrimination

bear the burden of proof. To start, it is sufficient merely to establish "*evidentiary facts*" on the basis of which it may be presumed that discrimination occurred (Section 22 AGG). Then, if the employee or applicant has succeeded in establishing such facts, it is incumbent on the employer to exonerate itself. Thus, due to the structure of the act, an employer might be sentenced to pay damages even if it never had any intention of discriminating against the employee. Since the courts are quite generous when it comes to accepting evidentiary facts, it is in employers' interest to avoid not just the act of discrimination, but any semblance of it.

DISABILITY

Severe handicap occupies an exceptional position among the discrimination criteria. A certain interdependency between the AGG and the Ninth Book of the German Social Security Code (*Sozialgesetzbuch IX*; SGB IX), which deals with "severely handicapped persons," can be found. Pursuant to Section 71 SGB IX, employers who normally offer at least 20 jobs must fill a "compulsory quota" of 5 percent of those jobs with severely handicapped employees.

However, particularly in Section 81 SGB IX, a large number of duties are imposed on employers. First, they must check whether vacancies can be filled with severely handicapped persons; in the process, the employer is required to consult the severely handicapped persons' representation and the works council. The employer must then report such suitable vacancies to the German Employment Agency (*Bundesagentur für Arbeit*), because this is the only way to fulfill the express legal obligation to check whether it is possible to fill a vacancy with a severely handicapped person who is registered as seeking employment.

The employer also has the express legal obligation to inform the works council and the severely handicapped persons' representation of all applications submitted by the handicapped. If the employer does not fill the compulsory quota of severely handicapped persons, or if the works council or the severely handicapped persons' representation does not agree with the employer's intended hirings, the employer must explain the reasons for the decision to the works council and/or the severely handicapped persons' representation. In the process, the severely handicapped person must be given the opportunity to speak on his or her own behalf. In addition, the employer must inform all the parties involved about the decision, stating the reasons for it, i.e., ultimately justifying the decision to reject the severely handicapped person. The violation of a single one of these obligations can be regarded as an evidentiary fact of discrimination, quickly shifting the burden of proof from employee to employer.

Recently, in a rare opposition to these strict court rulings, a decision was made that reduced the scope of application of Section 81 SGB IX to a certain extent. In its decision of September 18, 2014 (8 AZR 759/13; see also press release No. 45/14), the German Federal Labor Court (*Bundesarbeitsgericht*; BAG) clarified that a severely handicapped person who intends to make use of the special protection of SGB IX must mention the handicap in his or her application. Such mention must be made, with obvious emphasis, either in the cover letter or in the *curriculum vitae*. According to the BAG, it was not sufficient for the plaintiff to have included on the 24th page of his 29-page application a copy of the certificate that is issued in Germany to all severely handicapped persons upon application. Nor was it sufficient that the plaintiff had pointed out his handicap in an earlier application to the same employer.

A certain limitation of the quick assumption of evidentiary facts militating against the employer can also be found in another recent decision. For a long time, it had been disputed whether a rejection that failed to state the reasons behind it could be considered an evidentiary fact against the employer, even if the employer had fulfilled the disabled persons' quota. It became clear only from the BAG decision of February 21, 2013 (8 AZR 180/12; see also press release No. 13/13) that in such a situation, no indicative effect of discrimination can be deduced from the failure to state the reasons for the rejection.

UNEQUAL TREATMENT IN THE CASE OF AGE DIFFERENCES

The BAG decision of October 21, 2014 (9 AZR 956/12; see also press release No. 57/14) dealt with the amount of vacation voluntarily granted by the employer. According to this company's practice, employees aged 58 and older were granted 36 days of vacation each year. The 36-year-old plaintiff, who had been granted 34 days of vacation, believed that the company had discriminated against her on the basis of age. She sued, claiming that she too was entitled to 36 vacation days.

However, the BAG decided differently. It assumed that the employer, a shoe manufacturer, had an assessment prerogative according to which it is adequate, necessary, and appropriate to grant older employees the two additional days of vacation. In this case, an instance of unequal treatment was therefore declared permissible pursuant to Section 10 AGG, the justification for which was the fact that older employees often need more time for rest and recuperation than younger employees. In addition, the BAG pointed out that the shoe industry's framework collective bargaining agreement, which was not applied in the present case, also provides for two additional days of vacation for employees aged 58 and older. The decision of the BAG would certainly have been the same even without the parallel to the collective bargaining agreement.

CLAIM FOR DAMAGES, AGAINST WHOM?

In practice, companies with vacancies to fill often turn to third parties to fill them. If it appears that the third party has acted in breach of the AGG, the question arises: Against whom can claims for damages pursuant to Section 15 Para. 2 AGG be asserted? The BAG's decision of January 23, 2014 (8 AZR 118/13) therefore deserves to be mentioned here.

In the case in question, a rejected applicant demanded indemnification for alleged discrimination by the company that had initiated the application procedure (via an internet advertisement). Had the application been accepted, this company would not have become the applicant's employer; it merely acted as the recruitment agency. For this reason, the BAG did not even check the factual justification of the asserted violation. Rather, it considered the action to be inadmissible, not just unfounded. The BAG explained that although the opponent of a claim is not mentioned in Section 15 Para. 2 AGG, it can only be the employer, because Section 15 AGG does not provide for claims against third parties.

In this context, the BAG also emphasized that in a case of discrimination, the employer may be held liable, no matter who was actually at fault. In addition, the BAG approvingly quoted opinions in the relevant literature according to which Section 15 AGG does not grant any claims against recruitment agencies even if the final selection is made by them on their own authority. Therefore, the action of the present plaintiff failed, as in those other instances, because he had sued the "wrong" defendant.

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