

A NEWSLETTER FROM
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Editorial

DEAR READER,

Welcome to our first edition 2011 of our „Focus of German Employment Law“. Even in 2011 we intend to inform you about some practical topics of German labour law practice and some recent developments in the court practice. In this edition we describe some typical “stumbling blocks” in the termination process of employment contracts. Further we deal with a recent decision on handling terminations of handicapped employees and specific formal requirements in this process. It goes without saying that cars play an important role in Germany, not only economically, but also in work life. The disputes around company cars are numerous, some of them are described in our third article.

We hope you find this edition interesting and informative and are available for the questions you may have.

Best regards from Frankfurt,
DR. CHRISTIAN BLOTH



**MANNHEIMER
SWARTLING**

Stumbling blocks when terminating employment contracts in Germany

German law sometimes can be very surprising for international employers, especially if they have never been in touch with it before. Although German law is for the most part found codified in books, labour law cannot be practised without knowledge and experience in labour court rulings. One area of great importance and with the risk of considerable costs is the area of terminating employment contracts.

This article will focus on some typical mistakes in this area.

Termination proceedings in Germany are very formal and the requirements of form have to be complied with carefully in order to avoid ineffective terminations. Additionally these form requirements can also be altered by agreements between the parties.

1. FORM

The most important document when terminating is of course the notice letter itself. One rule, stipulating that the termination of employment contracts and termination agreements must be in written form, causes surprisingly often difficulties. This stipulation is compulsory and cannot be waived by agreement. This is very important as a dismissal that has a formal defect e.g. is not in written form is void and cannot be remedied. Written form also means that the notice letter must be signed. To enable the employee to judge the genuineness of the notice letter the original (!) signed document has to be handed over to the employee. Transmission via fax or e-mail is not sufficient. Also coloured copies are not sufficient and will make the notice letter void.

2. AUTHORISED REPRESENTATIVE

Further it is of importance that only duly authorised persons sign a notice letter. For legal entities as employer, e.g. the GmbH, usually the managing director signs notice letters but often this authority is delegated to other persons, e.g. holders of "Prokura".

Other authorised persons need, when signing a notice letter, to add an original (!) and a duly signed power of attorney since the recipient of a notice letter can reject the acceptance of a notice letter if such original (!) document has not been attached to the notice letter. If the recipient declines such notice he prevents the notice from becoming effective. In this case the employer has to deliver the notice letter again with an original power of attorney attached to it.

However, a rejection of the notice for lack of authorisation is precluded if the recipient of the notice is aware of the authorisation of the respective person. This is often the case for notice letters signed by the head of human resources if that person – generally known – is entitled to sign and usually does sign such documents alone.

Whereas the aforementioned rules for employees also apply to employed managing directors, the notice letter for a managing director can only be signed – on behalf of the Company in case of a GmbH – by the shareholder meeting, in other words the shareholders, for an

AG (Aktiengesellschaft) this would be the supervisory board. These bodies form their collective will by way of shareholders' resolution. The shareholders' resolution also has to be attached to any notice letter. Of course these bodies also have the option to empower a single shareholder or another person for a termination.

A frequent mistake is here that notice letters are signed by a superior in the matrix organisation of the group the legal entity belongs to. Even if the managing director is reporting to such person in his work, this does not entitle the superior to give notice, if he is not – in the same time – legal representative of the GmbH's shareholder, even if this superior is the CEO of the group as such.

3. PROOF OF DELIVERY

Another area of disputes is the proof of delivery. If it were to trust the statements of employees the German mail delivery system is unreliable as notice letters never reach their destination. Employers have the burden of proof for the delivery of notice letters which – if the notice letter is not handed over in person – requires certain measures of precaution. The best way – if the letter is not handed over directly – is to have a witness that can testify that one has inserted the notice letter into the envelope and subsequently inserted this envelope into the mailbox of the employee, e.g. the company's driver can deliver the notice letter, but he should be shown the envelope's content.

A way which is not advisable is to send the notice letter by recorded delivery ("Einschreiben / Rückschein"). In this case Deutsche Post delivers the mail to the recipient and lets him sign that he has received the letter. Even if the recipient will be asked for signing an acknowledgement of receipt, this way is riskful. If the person concerned or anybody else in his household is not present (or doesn't open when the door bell rings), the notice letter has not been delivered with legal effect. Conclusion is that when it is important that time lines are kept, a personal way of delivery or by a reliable courier is of essence.

4. WORKS COUNCIL HEARINGS

Before terminating an employee in a company in which a works council has been established, the works council has to be informed prior to any notice. In cases of ordinary termination, the works council has one week for its statement, in case of extraordinary termination three calendar days. The period for hearing the works council will not prolong the notice period. This period has to be part of the planning process in a notice situation. If e.g. notice shall be given by the end of the calendar month, works council should receive the notification on the intended termination on 22nd day of the calendar month at the latest.

Although there are no formal requirements it is best to inform the works council in writing.

According to Sec. 102 BetrVG the works council has to be comprehensively informed about all circumstances and reasons of termination. The notification shall include personal data, type of dismissal, notice period and the grounds for the dismissal to enable the works council to make a statement on its approval objection. If there are multiple grounds for termination the employer is not obliged to, but should state all of them as otherwise the termination may be invalid if the employer only recurs to one, the not informing the works council has not been informed about. Also the employer is hindered to introduce further grounds for termination in later court proceedings if he did not disclose them to the works council.



5. PROHIBITION OF COMPETITION

Before giving notice it has to be checked whether the employment contract does provide for a post-contractual non-complete obligation. The clauses tend to be expensive in particular if the duration of such non-compete is the maximum of 2 years and grants the minimum remuneration of 50 % of the employees' last regular remuneration. A waiver of such obligations should be considered in particular if it is of no economic importance, since it can be declared only until the date of legal expirations of the employment.

Although a waiver is possible, this cannot be made instantly. A waiver of a non-compete clause has the consequence that the employer is exempted from his obligation to pay within a period of year upon receipt after the waiver, not the end of employment.

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The unnoticed severely disabled employee

Severely disabled persons in Germany underlie a special protection against dismissals according to the German Social Code ("Sozialgesetzbuch"). This special protection is granted to disabled persons that are disabled to a certain extent measured in degrees. A

person is severely disabled in the meaning of the Social Code Book IX if the person has a handicap degree of at least 50 or is regarded as equal after applying for recognition as equally disabled. To be legally recognised as severely disabled a person must apply to the Integrationsamt (state authority for integration of disabled persons) which then issues, as evidence, a certificate of the severe disability, which can be presented to the employer. In order to terminate the employment of a severely disabled person the prior consent of the Integrationsamt is necessary, which the employer can apply for.

To guarantee a high level of protection for disabled persons the courts handle the termination of disabled persons very strict. As a consequence the BAG, the Federal Labour Court, decided in a general ruling that it is sufficient for the special protection to take effect, that the employee, who wants to be recognised as severely disabled, has applied to the Integrationsamt at the time notice was given.

However, since the employee recognised as handicapped or having applied for this status, is not obliged to inform the employer about his status, the employer may give notice to a person who first then at the time when notice is given or shortly afterwards informs about his status. This leads to that the notice is invalid and the employer has to start the application procedure with the Integrationsamt. But how long may an employee wait for disclosing his status as handicapped? When does this right forfeit?

To avoid forfeiture of his rights the employee has a duty to inform the employer about his recognition as severely disabled or about his application for recognition as severely disabled in due time to retain



the special termination protection. Only if the employer already knows about the severe disability or if the severe disability is obvious this rule does not apply.

The period of due time, however, had been in dispute in court rulings.

The BAG ruled in the past that the period for the information of the employer is one month after receipt of the notice.

With regard to the three weeks period for complaints against unfair dismissals pursuant to the Kündigungsschutzgesetz/KSchG (Act against Unfair Dismissal) this distinction of the two periods caused legal problems. In the past the employee could fulfill his duty to inform the employer still in week 4 upon notice, but nevertheless his termination would be deemed as “fair” as the three weeks period for objections according to the KSchG would have been passed.

The BAG was aware of this issue and announced in 2006 (BAG, 12 January 2006, 2 AZR 539/05) that a change of ruling is likely to take place in the future.

To adjust this distinction the BAG changed its ruling and ruled in a consecutive judgement (BAG, 11 December 2008, 2 AZR 395/07) that the period of one month shall no longer apply but instead the employee has to inform the employer in three weeks upon receipt of the notice.

In a recently published judgement a higher regional labour court, LAG Schleswig-Holstein (6 July 2010, 1 Sa 403 e/09), had to deal with a case in between the two aforementioned judgements of the federal labour court.

In this case notice was given only a few days after the BAG changed its ruling. Notice was given on 18 December 2008 whereas the BAG judgement is dated 11 December 2008.

The employer did not know about the (severe) disability of the employee and also not about his application for recognition as severely disabled.

The LAG Schleswig-Holstein ruled that although the change of ruling took place only shortly before he received notice, the employee could have known about this change nevertheless since the BAG in a court ruling from 2006 (BAG 12 January 2006, 2 AZR 539/05) announced that a possible change of ruling is very likely and therefore in this case the period of three weeks was applicable rendering the termination valid.

The LAG Schleswig-Holstein also stated that it is not sufficient to only bring an action against a termination. The action does not imply the information of the employer about the severe disability, the employee has to inform the employer about his severe disability separately.

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The Company Car – “the Employees’ favorite child”

The car is said to be „der Deutschen liebtes Kind“, i.e. „the Germans’ favourite child“. Legal practice has shown that this in particular applies to the company car, which is and has been subject to numerous disputes between employer and employees in and out of German labour courts. Hardly anything else seems to steer up emotions more than the sudden lack of the vehicle in front of the garage door. The main legal aspects relating to the company car, in particular as regards return of the same, shall be outlined in the following:

Prerequisite of the right to a company car is a respective agreement between employer and employee. In order to avoid any uncertainties with regard to e.g. the category of the company car – in 2010 the Higher Labour of Court, (“LAG”), Lower Saxony had to decide whether granting a hearse (“vehicle to transport a corpse”) was satisfying the employees right as a specific contractual definition was missing – and the use, respective details (brand, type, equipment, price limit, maintenance duties etc.) should be stipulated either in the employment agreement itself or in a separate company car scheme. Further it must be determined whether and possibly to what extent the employee shall be entitled to the private use of the company car.

The question whether private use has been granted is essential when it comes to requesting return of the company car.

If the use is limited to business purposes, the employer generally has the right to demand return of the vehicle by issuing a respective directive. Things are different in case the employee has the right to use the car privately as it is in most cases. The private usage is considered an equivalent for the owed job performance granted in addition to the regular salary. As part of the remuneration it is subject to taxes and charges. Thus the right to private use continues connected to the regular remuneration entitlement – i.e., even if the employee is absent from work, e.g. due to vacation, while the employee is released from his duty to perform work or during times of illness.

The latter has just been confirmed by a recent ruling of the Federal Labour Court (BAG) (BAG, decision of 14 December 2010 – 15 Sa 25/09): The judges determined that a company car may be used during the time the employee receives statutory sick pay from the employer, i.e. regularly six weeks according to Section 3 para. 1 Continuation of Remuneration Act (Entgeltfortzahlungsgesetz, EFZG). In case the employer has collected the car earlier, the employee is entitled to receive compensation for the loss of use. The amount of respective indemnification is regularly based upon the tax consideration of the private use, i.e. with 1% of the list price of the company car at initial registration per month. The period the employee is entitled to such pay, the car can be claimed back by the employer.

As part of the remuneration, granting of the private use may generally not be revoked unilaterally. Like other remuneration components it can only be withdrawn by the employer if a respective revocation right has been validly stipulated in the employment or company car agreement.

Requirements applied by the courts as regards validity of such revocation clauses have been enhanced in particular since employment contracts and similar agreements are considered “General Terms and Conditions” and clauses must correspond to respective review principles.

As regards revocation of remuneration components such as the company car the BAG had elaborated that a respective reservation in the underlying agreement is valid only, in case

- the revocable part does not account for more than 25% of the total remuneration,
- the remuneration after the revocation does not fall below the tariff salary, if any
- the revocable component must be clearly defined as regards amount and nature; and
- the revocation must be based on reasonable considerations (“sachliche Gründe”), which have to be made clear in the revocation clause itself. The employee must be able to understand “what might come up”. Thus the reservation shall always refer to a certain reason the revocation may be based on, e.g. an economic reason, the employees’ behavior or performance.

Further the Court pointed out that in principle the degree of “disruption” the withdrawal shall be based on, must be reflected in the contractual reservation.

While the latter was a rather vague demand of the Federal Judges the Court seems – in a recent ruling of a different senate – to have increased the requirements when it declared that not any economic reason may account for a “reasonable consideration” as described above (BAG, decision of 13 April 2010 – 9 AZR 113/09). General reference to a revocation right connected to “market related and economic aspects” was considered too vague as the employee could – based on this wording – never know when exactly such “economic reasons” were given and under which circumstances the obligation to return the company car could be expected. The employer on the other hand could factually base his revocation on any thinkable economic aspect.

Considering this judgment it is henceforth advisable to further specify the reasons, in particular the economic reasons, the reservation to revoke shall be based on in the respective clause e.g. by including respective examples such as certain developments of the company results, a change in the scope of work reducing travelling or a breach of contractual obligations regarding the use of the company car.

Generally, the release from the duty to perform work after termination may also account for a valid reason to request return of the company car and should as such be listed as event triggering the revocation right in a respective reservation. Up until today the BAG has not connected such right to application of a certain notification period. However, the Higher Labour Court of Lower Saxony has in a recent ruling demanded that a revocation clause relating to “garden leave” must provide for a notification period of at least four weeks in order to be valid (Higher Labour Court Lower Saxony, decision of 14 September 2010 – 13 Sa 462/10). A clause without such notification was – according to the judges – violating the employees’

interests, in particular if the employer would not have used the car otherwise and the employee was factually relying on the car for his mobility, e.g. for searching for a new job. The employer has filed an appeal to this decision so the question as to whether and to what extent a notification period must be stipulated is still open.

However, the described status and progression clearly show that discussions and legal developments regarding all aspects of the topic “company car” keep stirring. In order to keep disputes at a low level, employers are well advised to bear the principles elaborated by the courts in mind and base the granting of a company car, if any – in particular if private use shall be allowed – on a detailed contractual foundation with a special focus on the reservation to demand return of the company car.

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