

Employment Law Update Germany:

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Newsletter

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Introduction

Please allow us to present you with a new issue of our quarterly update on new and ongoing important German labour and employment developments. This newsletter aims at providing a brief but comprehensive overview on the latest court decisions and legal changes, intended to enable you to quickly identify possible impacts on your daily business.

General Case law

Cross-border Transfer of Business

BAG, 8 AZR 37/10 (Federal Labour Court)

Summary

The German Federal Labour Court has applied Section 613 a German Civil Code to a transfer of work from an employer in Germany to an associated company in Switzerland. The decision has implications for those involved in international restructuring, off shoring and business sales, involving the transfer of businesses or functions between countries.

Background

In Germany as well as in other European countries, there has been a long debate as to whether the automatic transfer rules under the EU Acquired Rights Directive (the "ARD", which is implemented in Germany through Section 613 a German Civil Code) could apply to a transfer between two countries, and surprisingly little case law.

The ARD applies where there is an identifiable undertaking which "retains its identity" after the transfer. In a 1995 case, a French Court held that the relocation of a function from France to Brazil did not constitute a transfer of an undertaking because the function had transferred to a different "environment" and therefore the retention of identity test was not satisfied.

By contrast, in a 2003 case, the Regional Labour Court Hamburg concluded that in principle, the equivalent German legislation could apply to the transfer of part of a news publishing business from Germany to Ireland (*Decision of 22.05.2003, file reference: 8 Sa 29/03, Landesarbeitsgericht Hamburg*). It held that, provided the relevant test for a transfer was satisfied, the change in location did not prevent the legislation applying. The Regional Labour Court did,

Berlin

Friedrichstrasse 79-80
10117 Berlin
Tel.: +49 (0) 30 2 03 87 600
Fax: +49 (0) 30 2 03 87 699

Duesseldorf

Neuer Zollhof 2
40221 Duesseldorf
Tel.: +49 (0) 211 3 11 16 0
Fax: +49 (0) 211 3 11 16 199

Frankfurt / Main

Bethmannstrasse 50-54
60311 Frankfurt/Main
Tel.: +49 (0) 69 2 99 08 0
Fax: +49 (0) 69 2 99 08 108

Munich

Theatinerstrasse 23
80333 Munich
Tel.: +49 (0) 89 5 52 38 0
Fax: +49 (0) 89 5 52 38 199

www.bakermckenzie.com

however, comment that it considered there could not be a relevant transfer to a state outside the EU.

In the 2008 case *Holis Metal Industries Ltd v (1) GMB (2) Newell Ltd [2008] IRLR 187*, the UK Employment Appeal Tribunal ruled that ARD did apply to a business sale where the business moved from the UK to Israel.

German Federal Labour Court decision, May 26, 2011 (8 AZR 37/10)

The latest case involved an internal group restructuring as part of which a German employer transferred part of its business to a Swiss affiliate, and the work was relocated. The affiliate acquired machines and tools, the warehouse and stock, and various ongoing projects. All 22 German employees were offered roles – at lower pay – at the Swiss affiliate, and 6 accepted. The remaining staff did not accept and their employment was terminated. The new site was just 36 miles away - but over the border in Switzerland. Customers, suppliers and employees were told that activities were being concentrated in Switzerland

The plaintiff was one of those who did not accept a role in Switzerland, and he was dismissed on the basis that his employment had terminated due to a closure of the German business. He brought a claim alleging that the termination was void.

Decision

The German Court ruled that Section 613a of the German Civil Code applied to the transfer. Under German law, employees are entitled not to be dismissed on grounds of a business transfer covered by Section 613a, unless there is an economic, technical or organizational reason entailing changes in the workforce.

The court said the Swiss company took over all relevant assets in order to be able to seamlessly continue the business, and therefore this was not a closure but a transfer. Consequently, the termination was given "because of the transfer" and therefore invalid. The fact that the business crossed a European border (even to a non-EU country), was not relevant to the court.

Impact on Employers: This decision is most important for employers operating internationally and intending to transfer their German business, or a part of such, from Germany to another country. Previously, it was argued that the employees do not transfer cross-border, and that consequently they could be terminated by the German employer for reason of redundancy. That has changed now. The general rules on a transfer of business will have to be applied, which means that the employment relationships of the affected employees will automatically transfer to the new employer. Consequently, the new employer, regardless of whether it is a German or a foreign entity, assumes all rights and obligations attached to the employment relationships. The new employer in principle will be obliged to continue employing the employees of the transferred business on basis of their contractual arrangements with the former employer. The employment contracts in fact are not changed or otherwise influenced by the occurrence of the transfer of business. Thus, if the employment contract of the affected employees provided for a certain place of work (this most often be-

ing a place in Germany), the new employer basically would have to keep the employees employed at such place. Since the new operational site, however, will be located outside of Germany, the employer will have to terminate the employment relationships with the affected employees for altered conditions of employment and will have to propose to the employees a new employment at the operational site abroad. Although in practice, depending on the distance between the current and the future place of, it can be reasonably expected that not many employees will accept such termination for altered conditions of employment, there indeed is a risk that the new employer cannot hire a completely new workforce (on different working conditions), but will have to continue some of the old employment relationships. Therefore, if the main purpose of the transfer of business in fact was to save costs by benefiting from better working conditions (and esp. a lower salary level), this target due to the new decision of the Federal Labour Court may be influenced to the detriment of employers.

Contracts of Employment: Restrictions on fixed term employment contracts eased

BAG, 7 AZR 716/09 (Federal Labour Court)

The Federal Labour Court has held that a company is not prohibited from offering ex-employees a fixed term contract, nor are they required to justify their decision, if the employee has not worked for the company for more than 3 years.

Until now, German employment law on fixed-term contracts provides that any previous employment with an employer prohibits the employer from concluding a fixed-term contract with an employee, unless they can justify their reasons for it e.g. as temporary replacement for an employee on parental leave, if hired for a specific project or if the business need for a certain position is limited to a specific period of time. In fact, previous to this decision, unless an employer could justify their decision, lower labour courts were operating a blanket ban on them offering fixed term contracts to ex-employees.

The Federal Labour Court has now stated that this approach is not in line with the purpose of the employment law provisions governing this area. According to the Court, the purpose of the law was to prohibit the continuous use of fixed-term contracts as opposed to offering permanent employment. It went on to state that employers had to be granted a certain amount of flexibility in hiring employees and a strict application these provisions could result in a severe obstacle for hiring employees. Thus, a blanket ban on offering fixed term contracts to all ex-employees without justification was not reasonable. It therefore concluded that such contracts could be offered to ex-employees if they had not worked for the employer for more than 3 years.

Impact on Employers: Employers now have much greater flexibility to employ ex-employees on fixed term contracts as they do not need to justify the use of a fixed term contract (as long as the ex-employees have not worked for the employer for more than 3 years).

However it should still be noted that fixed term employment contracts can only have a maximum duration of 2 years and that they can only be renewed a maximum of 3 times during these two years.

Rights of ex-employees to access their personnel files

BAG, 9 AZR 573/09 (Federal Labour Court)

The Federal Labour Court held that an employee also after the end of his/her employment relationship has a right to access his personnel file which is stored at his former employer. This right derived from the employer's obligation to protect the interest of its employees which was also effective after the end of the employment relationships. The post-contractual right to access the personnel file would also not require proof of a justifying interest of the employee to access the file (and, consequently, the employee may not be required to prove such interest to the employer). Since an employee had a general right to have wrong information potentially stored in the personnel file corrected, he/she would generally be entitled to access the file. Such right existed as long as the file is stored at the former employer to enable the employee to correct wrong information because only the concrete knowledge about wrongful information contained in the personnel file would enable the employee to properly exercise his/her right to correction.

Impact on Employers: This decision is useful for employers as it clarifies the post-contractual relationship between employer and employee. Employers should ensure they keep (and maintain proper storage) the personnel files of former employees as their obligation to grant access to these files does not end when the employee leaves their employment.

Legal Developments

New Provisions on Employee Lease

On 30 April 2011, the German Act on Employee Lease has been amended.

The amendments essentially aim at:

- Prohibiting cases of misuse of employee lease ("lex Schlecker" - in the past there had been cases in which companies had terminated a majority or even all of their current workforce just to "rehire" the employees through a different, newly founded entity and lease the employees then back to the former employer through the new entity to implement salary reductions), and
- implementing a minimum wage for lease employees.

In more detail:

Prohibition of misuse of employee lease

If employees are leased to a client who, in the previous six months, had been their employer, or, in that same period, had previously been employed with a company forming a trust (Konzern) with the client, then a collective bargaining agreement providing for less favourable working conditions (for the employees) may not be applied.

While these new statutory provisions in principle sound quite clear, in practice the question arises whether employment relationships that are governed by the new provisions are only prohibited from the application of the less favourable collective bargaining agreements for a time period of (max.) six months or for the full duration of the employment relationship with the new employer. In this respect, it remains to be seen how this is viewed at by the competent labour courts.

Minimum wage

Similar to other industry sectors (e.g. building, cleaning), the amendment of the provisions of the Act on Employee Lease now permits the parties of collective bargaining agreements in the employee lease sector to apply at the competent German Federal Ministry for Labour and Social Relations for setting a mandatory minimum wage level. The minimum wage level is determined by an agreement between the parties of collective bargaining agreements (i.e., the respective employers' association and the respective union) and after it has been declared mandatory by the Federal Ministry, it will be binding for every company operating in the business sector of employee lease (not only for such employers organized in an employers' association). The minimum wage level has not yet been set, but the parties of the collective bargaining agreements in the employee lease business sector have already applied for the ministry to declare EUR 7.79 for employees in the western part of Germany and EUR 6.89 for employees in the eastern part of Germany to be such minimum wage level.

Impact on Employers: The new provisions had been expected to be implemented for a long time and follow several incidents of employers trying to lower their personnel costs by "re-hiring" their former employees via a newly founded subsidiary as lease employees ("Causa Schlecker"). Although in practice this should have a limited impact on most employers, they should nevertheless be aware that following this amendment there will be increased scrutiny surrounding the leasing of employees - particularly in relation to transfers between group companies.

Also, it should be noted that further amendments of the Act will come into force in early December 2011, additionally limiting the lease of employees within a group of companies. We will report on these in the next edition.

For further information, please contact:

Berlin

Alexander.Wolff@bakermckenzie.com
Ulrike.Conradi@bakermckenzie.com
Matthias.Koehler@bakermckenzie.com

Dusseldorf:

Markus.Kappenhagen@bakermckenzie.com
Luisa.Einsporn@bakermckenzie.com

Frankfurt/Main:

Guenther.Heckelmann@bakermckenzie.com
Gregor.Dornbusch@bakermckenzie.com
Christian.Reichel@bakermckenzie.com
Petra.Hess@bakermckenzie.com
Verena.Boehm@bakermckenzie.com
Hagen.Koeckeritz@bakermckenzie.com
Tobias.Landgraf@bakermckenzie.com
Lena.Kern@bakermckenzie.com
Annekathrin.Lindner@bakermckenzie.com
Lara.Link@bakermckenzie.com

Munich:

Bernhard.Trapppehl@bakermckenzie.com
Steffen.Scheuer@bakermckenzie.com
Matthias.Nussbaum@bakermckenzie.com
Katja.Haeferer@bakermckenzie.com
Annika.Bauer@bakermckenzie.com
Esther.Holzinger@bakermckenzie.com



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