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General labour market trends

The increasing importance of small, specialised craft unions

For several years, it has been possible to observe the increasing importance of small craft unions, focussing on strategically relevant professions such as air traffic controllers, pilots, train drivers, doctors, etc. Traditionally, labour unions in Germany are organised according to the "branch principle", meaning that workers in the same industry belong to the same union, irrespective of their profession (e.g. chemical industry, logistics, etc.). This structure was reinforced by the established case law of the Federal Labour Court, which established the principle that only one tariff or collective bargaining agreement may apply to each enterprise, the so-called "single-tariff principle" ("*Grundsatz der Tarifeinheit*").

However, in a decision from 2010, the Federal Labour Court abandoned this principle, resulting in employers facing the risk that certain highly qualified and strategically important groups of employees may leave industry-wide unions and use their structural power in order to negotiate higher than average tariff or pay increases. Furthermore, while the single-tariff principle ensured that the employer may only be confronted by a strike once every two or three years, depending on the duration of the relevant collective bargaining agreement, some employers have experienced in 2011 and 2012 several strikes by different groups of employees during the same time period (e.g. airlines may be affected by strikes by pilots, cabin crew and ground personnel). It goes without saying that traditional industry-wide labour unions are very critical *vis-à-vis* this new development as they fear the strategic loss of important groups of employees who, in the past, have ensured the negotiating power of the union from which less qualified employees have also benefitted. This poses a risk to the collective solidarity principle on which industry-wide unions are based.

It is not surprising then that industry-wide labour unions as well as employers' associations have called for the German legislator to re-establish the single-tariff principle. However, it is doubtful whether the government will engage in such a politically, and also legally, highly controversial legislative process. The reason being that such an act would obviously restrict the freedom of employees to establish labour unions and the right to strike. Both are fundamental rights protected by the German constitution (*Grundgesetz*) and, in fact, the Federal Labour Court justified its decision to give up the single-tariff principle by declaring its incompatibility with these rights. Therefore, we do not expect any activities by the legislator in this respect, at least not prior to the next federal elections in September 2013. Consequently, employers who are confronted with different labour unions operating within their enterprises will have to develop specific defence strategies in response to tariff conflicts.

Minimum wages

Another rather political discussion that has already been taking place for several years now relates to the introduction of a general, nationwide statutory minimum wage. Unlike most other EU-countries, there is no general statutory minimum wage applicable in Germany. This means that, in the absence of any binding collective bargaining agreement, employers are able to set the wages as long as their level is not considered to be immoral. The Social Democratic Party (SPD) and the labour unions in particular, want to maintain this topic on the political agenda whereas the parties of the government

coalition (CDU/CSU and FDP) have been and remain traditionally opposed to a statutory approach. However, the debate has gained some momentum due to on-going discussions about the precarious working conditions of temporary agency workers as well as employees in other industry sectors where collective bargaining agreements traditionally do not apply on a larger scale.

As a consequence, minimum wages have been introduced by way of statutory ordinances in several areas such as construction, security and cleaning services, temporary agency workers and geriatric care. The particularity of these ordinances is that the minimum wage has in each case been negotiated by the competent labour union and the employers' association beforehand. Given that this approach still leaves a vast majority of workplaces uncovered, the labour unions and the opposition parties have maintained their claims for a nationwide general statutory minimum wage. In a very recent initiative, the governing party CDU has now reacted and developed an alternative model which aims to introduce minimum wages on a larger scale. We therefore expect that statutory minimum wages will also be implemented in Germany in the near future.

Key case law

Equal pay for temporary agency workers

Two decisions of the Federal Labour Court in 2010 and 2012 have had a great impact on the working conditions of many thousands of temporary agency workers in Germany and in particular on their remuneration entitlements. The German Temporary Agency Worker Act (*Arbeitnehmerüberlassung sgesetz*) establishes the "Equal Pay Principle" for temporary agency workers. According to this law, temporary workers have to be paid the same wages as comparable employees of the hiring company they are temporarily working for. An exception to this rule is only legally valid if a collective bargaining agreement applies to the employment relationship between the temporary worker and the temporary employment agency either by way of a reference clause in the worker's contract or by virtue of the membership of the temporary employment agency in an employers' association which has entered into a collective bargaining agreement. Therefore, in practice, although the German legislator has enacted the "Equal Pay Principle", the vast majority of "temps" in Germany are remunerated at hourly wages that are far below the rates applicable to comparable employees of the hiring company. To this end, temporary employment agencies generally apply collective bargaining agreements that have been agreed specifically for the temporary agency workers industry. The exception to the Equal Pay Principle therefore becomes the norm.

However, the exception to the Equal Pay Principle obviously only applies if the relevant collective bargaining agreement applied by the temporary employment agency is valid. This requires that the collective bargaining agreement is concluded by a labour union or an association of labour unions that is empowered to conclude those agreements. The above mentioned decisions of the Federal Labour Court clarified that the association of labour unions called "*Tarifgemeinschaft Christlicher Gewerkschaften für Zeitarbeit und Personalserviceagenturen*" (short "CGZP"), whose collective bargaining agreement for the temporary agency workers industry is applied by many agencies in Germany, had neither in the past nor in the present the power to conclude collective bargaining agreements. Consequently, all collective bargaining agreements the CGZP had signed are invalid, which has a significant financial impact for those temporary employment agencies, who had applied these collective bargaining agreements, as well as for the hiring companies, as the Equal Pay Principle has to be fully implemented, even retrospectively.

Temporary employment agencies are therefore currently confronted with a wave of law suits as many temporary workers are now claiming the higher wages they should have been paid during the last four years (it is estimated that some 1,500 equal pay claims have been brought before the German labour courts after the first of the two relevant decisions of the Federal Labour Court in December 2010). In addition, the social security authorities will claim the higher social security contributions that should have been paid, as well. In this respect, the social security authorities are entitled to the higher contributions, even if the relevant employee does not bring an equal pay claim. It is therefore expected that the retroactive claims for additional social security contributions will put many smaller temporary employment agencies into economic difficulties. In such a scenario, the social security

authorities may also claim any outstanding social security contributions from the hiring company as the Temporary Agency Workers Act stipulates that the hiring company is severally liable for such outstanding contributions. Employers are therefore well advised to make sure that the temporary employment agency with which they are engaging applies valid collective bargaining agreements.

No overtime remuneration for executive staff?

Collective bargaining agreements and/or works council agreements generally provide comprehensive rules regarding the extent to which employees are obliged to work overtime and the remuneration of such overtime (in most cases either by additional paid leave or by additional salary payments). However, if no such collective agreements apply (for example, if the employer is not a member of an employers' association or in the case of more senior employees, whose remuneration exceeds the ceiling of the applicable tariff), the parties are free to agree in the employment contract how extra hours shall be compensated.

In the past, many employers have therefore included a clause in their standard employment contracts stipulating that any overtime is already compensated by the base salary (e.g.: "The above Salary shall be deemed to cover any and all of the Employee's claims for remuneration, including any overtime work."). However, in a decision from September 2010, the Federal Labour Court ruled that such a clause lacked transparency according to the provisions of the German Civil Code (*Bürgerliches Gesetzbuch*) on standard contract clauses and is therefore invalid. The Court criticised the fact that the clause did not specify the amount of extra hours the employee has to work without being entitled to any additional payments. According to the Court, the contract clause must be explicit enough to enable the employee to assess in advance how many hours he has to work in exchange for the agreed base salary. In the aftermath of this decision, legal commentators were unanimous that contract clauses which stipulate that any extra hours are deemed to be covered by any base salary should not be used anymore. Instead, the question was how many hours overtime per week could still be covered by the base salary?

It was therefore very surprising that the Federal Labour Court in a decision from August 2011 rejected a retroactive claim for payment of overtime pay by a lawyer working as an associate for a German law firm. It goes without saying that the decision received much attention from various sides. The lawyer, who was entitled to a fixed annual salary of EUR 80,000, claimed compensation for approximately 930 extra hours accrued during the preceding three years after his expectations to become a partner did not materialise and he was served notice of termination.

In line with its previous decision in 2010, the Federal Labour Court first stated that the contractual clause stipulating that any extra-hours are deemed to be compensated by the salary is invalid, meaning that the employer could not rely on this clause as a defence to the payment claim. Therefore, the question was whether statutory law supported the overtime payment? In this respect, the Court made reference to §612 German Civil Code, which applies in a situation in which the parties did not explicitly agree on a specific level of remuneration when entering into a service agreement. According to this provision, the employee shall be entitled to a remuneration in exchange for his services, if, given the circumstances, the employee could reasonably expect to be remunerated.

In the case of the lawyer claiming compensation for his extra hours, the Federal Labour Court found that there was no such reasonable expectation. The Court stated that employees, who are performing high level services and who receive remuneration that is significantly above average cannot expect to be paid for any extra hours worked. Although the outcome of this decision makes sense, the question remains, why the contract clause denying any overtime payment was non-transparent and therefore invalid, if the employee could not reasonably expect any such overtime payment anyway. Therefore, as a matter of precaution, it may still be advisable to include clauses in the contracts of executive staff excluding any overtime payment. Even if a labour court should come to the conclusion that the clause is invalid, it might help to prevent the employee from having an expectation that his extra hours will be remunerated separately.

In a further decision in February 2012, the Federal Labour Court had the opportunity to clarify its decision. In the case at hand, the Court had to decide whether an inventory surveyor in a warehouse with a salary of around EUR 22,000 p.a. could claim overtime payments. The Court granted such

payment as, given his salary, the employee could reasonably expect to be paid for any extra hours worked.

Fixed-term employment contracts

An important and indeed surprising decision by the Federal Labour Court in April 2011 has made the interpretation of fixed-term contracts a lot easier. According to the Act on Part-Time Work and Fixed-Term Employment Contracts (*Teilzeit- und Befristungsgesetz*), the duration of an employment contract may be limited if this is justified by a legitimate reason. Such a legitimate reason can be the temporary substitution for a sick employee or for an employee on maternity leave, etc. Alternatively, if no such legitimate reason applies, a limitation of up to a maximum limit of two years is permitted. However, this rule does not apply if the employee has already been employed by the same employer in the past. The law itself is very specific on this requirement: any previous employment relationship with the same employer renders the agreement of a fixed-term null and void. Nevertheless, the Federal Labour Court has now ruled that only those employment relationships are able to impede the validity of a fixed term agreement, where they have been in force within the three years immediately preceding the date on which the fixed-term employment contract was entered into.

In our view, the Federal Labour Court was right to argue that the intention of the Act is to prevent "chains of fixed-term contracts" and that this risk does not exist if a significant amount of time has elapsed since the end of the last employment relationship. Considering that German labour laws guarantee very extensive protection against dismissals, it is crucial that employers have the option to first enter into a fixed-term contract before entering into an employment contract with an indefinite term. This recent decision of the Federal Labour Court will therefore prove quite helpful in practice. Although it is not fully comprehensible why a time span of three years between two contracts should be sufficient while one or two years is not, the definitive determination of the necessary time period between two contracts by the Court – whether it is two, three or four years – has brought legal certainty and such a transparent and practical solution offered by the Federal Labour Court is to be welcomed.

Formation of age groups for social selection does not violate the Anti-Discrimination Act

In December 2011, the Federal Labour Court ruled that the formation of age groups in order to simplify the social selection process required in the case of mass redundancies is permitted. According to the German Protection Against Unfair Dismissal Act (*Kündigungsschutzgesetz*), an employer can only dismiss an employee, who has been employed in the same establishment or the same company without interruption for more than six months, if the dismissal is justified by legitimate reasons. Such a reason could be a serious breach of contractual duties, personal reasons relating to the employee (e.g. long-term illness) or operational reasons (e.g. restructuring such as site closures or downsizing). In order to be valid, a dismissal for operational reasons has to be based on an entrepreneurial decision whose implementation results in the loss of existing jobs. In addition, there must not be a vacant yet reasonable position within the company in which the employee could continue to be employed. If those requirements are fulfilled, the employer has to undertake a so-called "social selection". This means that, rather than dismissing the employee whose position has become redundant, the employer may instead dismiss an employee who is comparable to the "redundant" employee but who is less in need of social protection. The decision of which employee from the group of comparable employees deserves social protection the least, and therefore has to be the first to be dismissed, is based on the following four social factors: length of service; age; number of dependants (such as children or spouses); and severe disability. It might sound surprising that – considering the European prohibition of discrimination on the grounds of age – the factor "age" should also be taken into account for the selection process. However, the Federal Labour Court has now clarified that this practice is not discriminatory as it is legitimate to consider age as a criteria for the selection process as long as this helps to reflect the employee's chance on the labour market.

Especially when a company intends to eliminate a large number of positions, the result of such social selection is that first and foremost younger employees are dismissed. Not only are they younger, but they usually have a shorter length of service, have fewer dependants and are less likely to be severely disabled than older employees. Therefore, in order to avoid a resultant ageing of the workforce, companies often set up age groups before carrying out the social selection. This means that, at the

outset, the personnel who are affected by the restructuring project are divided into age groups and then the social selection is executed only within those groups. Even though this practice has its basis in the German Protection Against Unfair Dismissal Act itself, which explicitly allows companies to ensure a balanced personnel structure within the company, some legal commentators have considered this practice to be a violation of the prohibition against discrimination on the grounds of age as regulated by the German General Equal Treatment Act (*Allgemeines Gleichbehandlungsgesetz*). The earlier mentioned decision of the Federal Labour Court has now rejected this argument and has decided that the formation of age groups is permitted, as long as the age groups are reasonably constructed. The Court thereby finds an adequate balance between the goal to protect older employees on the one hand and the goal to promote the integration of younger employees on the other hand.

Payment *in lieu* of vacation not taken on account of incapacity for work

In the aftermath of the well-known decisions of the European Court of Justice *Schulz-Hoff* and *Schulte*, a variety of German labour court decisions have discussed the question if and for how long, employees that have been on long-term sick leave are, in cases of their recovery, still entitled to take accrued vacation, and, in cases where their employment ends, may claim compensation *in lieu* of paid leave.

According to the German Federal Vacation Act (*Bundesurlaubsgesetz*), vacation has to be granted and taken in the current calendar year, while the transfer of the vacation to the next calendar year is only permitted if justified by compelling operational reasons or personal reasons of the employee, e.g. sick leave. In case of a carry-over, the vacation must be granted and taken within the first three months of the succeeding calendar year. After that date the vacation is forfeited. The German Federal Vacation Act is absolute, which means that, according to the statutes, those rules apply without any exceptions even if the employee has been ill and therefore unable to work.

These rules, however, have been doubted ever since the European Court of Justice ruled on that matter. In its *Schultz-Hoff* decision, the European Court of Justice decided that national legislation may provide that an employee on sick leave is not entitled to take paid annual leave during that sick leave, provided however that the employee in question has the opportunity to exercise his right to vacation during another period. This means that an employee who has been absent on sick leave during the whole holiday year and the carry-over period, cannot be deprived of his right to holiday pay for that year. Instead, irrespective of the length of the sick leave, holiday will accrue while the employee is unable to work. Upon termination of the employment relationship, the employee is entitled to an allowance *in lieu* of paid annual leave accrued but not taken.

However, in the case of *Schulte,* in 2011 the European Court of Justice established some limits to its rules previously set in *Schultz-Hoff*: the purpose of the entitlement to paid annual leave is to enable the employee to rest and to enjoy a period of relaxation and leisure. However, an unlimited accumulation does not answer this purpose, since the relaxation effect diminishes as the time span between the holiday year and the year in which the vacation is actually taken, increases. Therefore, the laws of the European Union do not preclude national legislation which provides that the right to paid annual leave is extinguished at the end of a carry-over period as long as the carry-over period is significantly longer than the reference period. The European Court of Justice also decided that a carry-over period of 15 months is to be considered as "significantly longer" and therefore compatible with European Law.

German jurisprudence is now facing the following situation: although the European Court of Justice ruled that a carry-over period of 15 months should be sufficient, the German Federal Vacation Act only provides a carry-over period of 3 months and is therefore, even in the light of the *Schulte* decision, still void. Since German employers continue to demand an attenuation of the dramatic financial implications of the *Schultz-Hoff* ruling, it is not completely unlikely that German Courts decide to "interpret" the 3-month carry-over period as a 15-month carry-over period, so that any holiday claims are forfeited after that period. However, as long as the Federal Labour Court has not ruled on that issue, the legal situation remains uncertain.

The majority of German verdicts concern scenarios in which the employment relationship is terminated before the employee can recover, resulting in a claim for payment *in lieu* of annual leave. However, just as important is the question how to proceed after the recovery of an employee after long-term sickness absence. Assuming that the Vacation Act cannot be interpreted as providing for a 15-month

carry-over period, a recovered employee could return to work claiming to be granted the accumulated vacation of the last few years. The Federal Labour Court has not finally decided whether it will follow this conclusion. However, until this question is answered, employers have to deal with the risk that an employee who has just returned to work will soon take his legitimate vacation.

Clauses providing for longer vacations for older employees can be discriminatory

Not only has the discussion about the forfeiture of paid annual leave and the allowance *in lieu* of occupied German Courts in the last few months but so has the question whether clauses providing for increased vacation days depending on the age of the employee are discriminatory on the grounds of age. The collective bargaining agreement that was the subject of a decision of the Federal Labour Court published in March 2012 contained the following provision: "Employees who are younger than 30 years are granted 26 holiday days per year, employees who are younger than 40 years are granted 29 holiday days per year and employees who are older than 40 years are granted 30 holiday days per year." The Federal Labour Court decided that the provision discriminates against younger employees and is therefore incompatible with the German General Equal Treatment Act. According to this Act, employees may not be treated adversely on the grounds of age, unless the differences in treatment are objectively and reasonably justified by a legitimate aim.

In the case at hand, the employer argued that the legitimate aim of that provision was the protection of older employees. Although the Court conceded that the protection of older employees can be qualified as a legitimate aim in general, it argued that in this particular case the provision under discussion could not be considered as protecting older employees. According to the Court it was not plausible that the parties of the collective bargaining agreement wanted to promote the older employees' increased need of relaxation. If they had followed that aim, they would have designed a different provision in which the amount of vacation days would continue to increase after the employee had reached the age of 40. Instead, the Court questioned why, under the relevant clause, a 30-year old employee should need three more holiday days per year than a 29-year old employee, while a 40-year old employee should deserve the same amount of holiday days as a 65-year old employee. According to the General Equal Treatment Act, a provision which violates the prohibition of adverse treatment shall be invalid. However, in this case the Federal Labour Court decided that it was not sufficient to declare the provision as invalid, but that the only way to eliminate the discrimination was to grant every employee the maximum amount of holiday days.

The resulting consequences are drastic. Employers who are bound to that very collective bargaining agreement or those whose employment contracts contain similar provisions will have to grant to all of their employees – even retrospectively – the maximum amount of holidays in the highest age-category. As it remains unclear which kind of clause would subsist the anti-discrimination test of the Equal Treatment Act, we would instead recommend complete avoidance of any clauses in the employment contract that provide for longer vacation according to the age of the employee.

Recent statutory or legislative changes

Reform of the Temporary Agency Workers Act

As already mentioned above, a very strong public debate has taken place in recent years regarding the working conditions of temporary agency workers, fuelled by some cases of abuse which have received broad media coverage. The most striking case related to a chain of chemists which had dismissed large numbers of its staff and hired these employees back from a temporary workers' agency immediately thereafter, but at much lower salaries. Although this practice was legal, the public uproar was strong and the legislator had to react.

The German Temporary Agency Workers Act has therefore been amended in several respects. The most important change relates to the heavily criticised "fire and hire back" practice. To the extent that an agency worker is hired by a company or a group of companies where s/he was employed within a period of six months prior to being re-hired, the temporary workers' agency has to now pay the same remuneration to that agency worker as a comparable employee of the hiring company is paid (Equal Pay Principle).

Another important modification of the relevant Act relates to the access to social facilities. Temporary agency workers shall now have the right of access to social facilities (e.g. a canteen, a company kindergarten, etc.) under the same conditions as the regular employees of the hiring company. Finally, the legislator has introduced a system of minimum wages for temporary agency workers. The modifications came into force on 30 April 2011 and 1 December 2011.

Likely or impending reforms to employment legislation and enforcement procedures

Proposal for a new Act on the Equality of Remuneration

According to statistics presented by the Social Democratic Party of Germany (SPD) there is a gap of 23% between the average salaries of men and women. In the party's opinion, this gap cannot be explained by different social or professional qualities but is the result of discrimination on the grounds of gender. Therefore, the SPD submitted a proposal for a new act to the German Federal Parliament, the Bundestag, that provides regulations, which are supposed to decrease this gap. The party argues that the current acts of discrimination cannot be prevented by the intervention of governmental institutions. Instead, employers, works councils and the parties of collective bargaining agreements should be obliged by law to promote the equality in payment.

The main feature of the proposed act is the introduction of an examination procedure, certified by the Federal Anti-Discrimination Agency. Employers, who regularly employ more than 15 employees, shall be obliged to examine their payment policy on a regular basis by using certified procedures. This means that a representative of the Federal Anti-Discrimination Agency or an investigator approved by this Agency has to carry out the procedure. If the result of the examination is that the payment policy in the company is indeed discriminatory, there are two possibilities for the way in which the procedure must be continued. Firstly, if a works council exists in the company, a conciliation board has to be formed. The board must review the examination procedure and then grant the employees against whom the employer has discriminated the same salary as the other employees receive. However, if there is no works council, the employer has to take measures to eliminate the discrimination, supervised by the Federal Anti-Discrimination Agency. The proposal was submitted in June 2012. This means that the parliamentary debate is still on-going. Due to the extensive administrative procedures this proposed Act would create, it is in our view rather unlikely that it will be ratified. However, the topic in general is quite popular and we expect that the legislator will adopt a law aiming to promote the equal pay principle after the general elections in September 2013.

Reform of the Data Protection Act

The German Data Protection Act (*Bundesdatenschutzgesetz*) only contains one rather generic clause (§ 32) regarding the use of employee data, leaving it to the courts, the legal commentators (and the employers) to deal with the manifold problems resulting from the increasing use of modern communication technologies in the workplace. The legislator is well aware of this problem and in 2010 presented a draft proposal for an act implementing comprehensive rules regarding the protection of employee data in a modern working environment. The draft Act contained, among others, rules on the use of biometric data, the use of internet and email, surveillance by using GPS systems and background-checks of applicants using social media networks. Although the different political parties still disagreed on two essential points (firstly, to what extent the employee may by explicit consent waive certain rules of the act and secondly, to what extent the employer and the works council may deviate in works council agreements from the level of protection in the act), it was expected that the parties would reach a compromise and that the act would enter into force in 2012. However, on 25 January 2012 the EU-Commission presented its proposal for a General Data Protection Regulation, which could render large parts of the German Data Protection Act obsolete, and given that the government is currently absorbed by other, more important projects such as the Euro-crisis, we do not expect that the reform on the protection of employee data will be implemented any time soon.

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