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1. Comment on a Letter for Application Indicates Discrimination

It may be an indication for indirect discrimination of a candidate, if an employer has highlighted and made the comment on the résumé of the candidate that she has a 7 year old child (*Landesarbeitsgericht Hamm* / Regional Labor Court of Hamm, June 6, 2013 – 11 Sa 335/13). The candidate applied for a position as an accountant. Her résumé mentioned: “married, one child”. The employer added a handwritten comment next to it: “7 years old” and underlined the words “one child, 7 years old”. The applicant was rejected and found the highlighted comment on the documents returned to her. She sued for compensation due to discrimination and won the case. The highlighted comment indicates an indirect discrimination on the female gender, because it refers to potentially conflicting issues in child care and employment, which would statistically concern female employees first.

2. Disguised Employment: Criteria for Differentiation between a Contract of Services and an Employment Contract

In a case where the parties formally conclude a contract for services when in reality they perform a contract of employment, the essential criteria for the differentiation between a contract for services and an employment contract is not the content of the agreement itself, but the actual performance of the contractual relationship in practice (*Bundesarbeitsgericht (BAG)* / German Federal Labor Court, September 25, 2013 – 10 ZR 282/12). The subject matter was the question, whether the performing person has provided its services in its capacity as employee or whether it has worked on a self-employed basis. In the case at hand the parties had concluded 10 consecutive IT-service contracts since 2005. The Court qualified the legal relationship as an employment because the alleged service provider was requested to provide any of his services in the business premises of the customer, had no own equipment, used only customer IT-equipment, and respected regular working hours from 7.30 am until 5 pm and any deadline set by the customer. Thus, according to the Court the customer was in reality no customer but rather an employer.

3. Redundancy due to Business Operations and Social Selection: Comparability of Employees

In selecting a particular employee for redundancy due to business operations, an employer must apply the criteria of social selection. The social selection procedure includes all comparable employees in the business. The employee selected for compulsory redundancy must be the one for whom dismissal will have the least negative effect from a social point of view. Which of the employees in question are actually comparable? *Bundesarbeitsgericht (BAG)* / German Federal Labor Court, June 20, 2013 – 2 AZR 271/12 rules: "comparable" means employees, who are replaceable by each other. The jobs in question must not be necessarily identical. It is sufficient that the same skills and abilities are required in order to fulfill the jobs

vice versa. A short training period in order to adjust would be irrelevant. The alternative job opportunity does not need to be in the same department of the company. It just needs to be in the same business of the businesses of the company. However, jobs being part of a higher level in the hierarchy are not comparable.

4. Exclusion from the Works Council due to Breach of Confidentiality

A works council chairman grossly violates his duties of office if he reads out from a letter of application during a public employees meeting which he received during the application process (*Landesarbeitsgericht Düsseldorf* / Regional Labor Court of Düsseldorf, January 1st, 2013 – 12 TaBV 93/12). The employee affected had a dyslexia which became apparent in his application. The works council chairman read the relevant extract without the employee's consent. The chairman intended to prove that the employer actually takes on unqualified employees (cheap) and dismisses qualified employees instead. The reading out of the application is a breach of section 99 para 1 s. 3 BetrVG (*Betriebsverfassungsgesetz* / German Works Constitution Act) prescribing that the works council has to treat any information regarding applications confidential. At the request of the employer the chairman was excluded for having disregarded his obligation of confidentiality.

5. Dismissal of a Member of the Management Board of an AG for Refusal of Repayment of Loan

The deliberate refusal not to pay an installment of a loan granted to the AG (*Aktiengesellschaft* / German Public Limited Company) may justify the premature dismissal of a Member of the Management Board for cause according to Section 84 (3) AktG (German Public Limited Liability Company Act) (*Oberlandesgericht Stuttgart* / Court of Appeals Stuttgart , 28.05.2013 – 20 U 5/12). The Court stated that this ruling had to be made in consideration of all circumstances: The Member of the Management Board had been CFO and had to be held accountable for a gross violation of his duties not only because of endangering the AG by causing the risk of an early termination of the loan agreement but also with regard to the fact that he ignored a decision of the Supervisory Board not to modify the finance facilities of the AG.

6. Shareholder Suffering a "Reflex of Damages"

If the devaluation of the shares in a GmbH (*Gesellschaft mit beschränkter Haftung* / German Limited Liability Company) is due to a damage caused to the GmbH, the shareholder cannot ask for indemnification by payment to himself. His damage is a mere reflex of a damage suffered by the GmbH. Thus, indemnification may only be requested on behalf of the GmbH (*Bundesgerichtshof (BGH)* / German Federal Court, May 14, 2013 - II ZR 176/10). In the case at hand, the majority shareholder had transferred the business of the GmbH to another company. The GmbH had to file for bankruptcy. The minority shareholder argued that the violation of the principle of loyal conduct within a corporation had destroyed justified expectations for

future profit distributions. Therefore, he felt that he had suffered a direct damage rather than a mere reflex of damage. However, the Court was not convinced: The principle to protect the equity of the GmbH and the principle of equal treatment amongst shareholders would exclude any direct claim of a shareholder against the party that had caused the damage to the GmbH.

7. No Personal Obligation of a Partner for a Contractual Obligation of a Partnership not to Commit Certain Business Acts

A contractual obligation requiring a partnership to not commit certain business acts does not justify a personal obligation of a partner to not do the same (*Bundesgerichtshof (BGH)* / German Federal Court, June 20, 2013 - I ZR 201/11). In the case at hand an attorney at law had sign an agreement on behalf of a partnership with an editor not to commit certain business acts. However, at a later point in time one of the partners of this partnership committed the acts in question by himself. According to the highest German court in civil matters the editor could not require the partner not to commit the acts in question by an injunction of relief based on the agreement made with the partnership because the attorney did not act on behalf of the partners as well, when the agreement was made. Also, the principle of acting good faith would not apply in this case because the editor knew about the fact that he was dealing with a partnership and its partners at the point in time when the agreement was made.

8. Termination of Management Agreement in the event of Dismissal as Managing Director?

If the Managing Director is dismissed by the Shareholders of a GmbH (*Gesellschaft mit beschränkter Haftung* / German Limited Liability Company), the management agreement ends automatically in the event that the management agreement provides for such a mechanism and the Managing Director is one of the Shareholders himselfat the same time (*Oberlandesgericht Saarbrücken* / Court of Appeals Saarbrücken, May 5, 2013 – 1 U 154/12-43). A notice of termination of the management agreement had been excluded in the agreement itself. On the other hand the same agreement said that it would end in the event of a dismissal from office as Managing Director. In general, the Shareholders of a company can decide on such dismissals without having any specific reasons for it. The Court ruled that a clause providing for a termination of the underlying management agreement automatically caused by a dismissal is valid in cases where the Managing Director is one of the Shareholders because he could have taken influence on such a dismissal.

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