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RECHT AKTUELL

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1. No Requirement to Extend a Fixed-Term Contract with a Works Council Member

A fixed-term contract of an employee who has become a member of the works council does not have to be extended (*Bundesarbeitsgericht / German Federal Labor Court*, June 25, 2014 – 7 AZR 847/12). A member of a works council has no special protection against unfair dismissal in such an event. Therefore, the contract could be let run out by the employer without any further extension. However, the Court indicated that this may have to be seen differently if the only reason of letting the contract run out was to get rid of the employee as member of the works council. The employee bears the burden of proof in this regard.

2. Works Council: Access to Gross Salary Information without Employee's Consent

The employer must disclose gross salary information to the works council, even if the employee concerned objects (*Bundesarbeitsgericht / German Federal Labor Court*, January 14, 2014 – 1 ABR 54/12). The Court ruled that the responsibility of the works council to secure full compliance with Law and with collective bargaining agreements justifies such a disclosure. Works council responsibilities would prevail over individual data protection interests.

3. Advertisement for a „Junior Consultant“ is no Age Discrimination

An advertisement for a “Junior Consultant” is no age discrimination (*Landesarbeitsgericht Rheinland-Pfalz / Regional Labor Court of Rhineland-Palatinate*, February 10, 2014 – 3 Sa 27/13). The term “Junior” was only meant to illustrate the operational rank position and that no professional experience is required. This was also illustrated in the job advertisement that promised an intensive introductory training. Also the statement that the candidate can expect a “young and dynamic team” is not discriminating but rather a description. The decision is not legally binding yet. Other labor courts have recognized in similar circumstances indications for age discrimination. The Court's decision is not effective yet because the employee has filed an appeal which is still pending.

4. Termination without Notice of Employment Agreement: Excessive Private Use of Internet

Employees using their PC in the company for private matters such as internet surfing, downloading and using up 90 % of the Internet capacity, may face a termination of their employment without notice by their employer. Even 21 years of service for the company would not affect the validity of such a termination (*Landesarbeitsgericht Schleswig - Holstein / State Labor Appeals Court Schleswig-Holstein, May 6, 2014 – 1 Sa 421/13*).

5. Subordination of Salary Claims of Shareholder in the event of Insolvency of a GmbH?

If a shareholder of a *GmbH (Gesellschaft mit beschränkter Haftung / German Limited Liability Company)* who is also employee of the GmbH has granted an extension for payment of his salary, his salary claims will be treated as subordinated loans in the event of an insolvency of the GmbH (*Bundesarbeitsgericht (BAG) / Federal Labor Court, March 27, 2014– 6 AZR 204/12*). According to the Court, the extension for payment of salary claims must be considered as a transaction that corresponds to shareholder loans. Thus, such claims must be subordinated to claims of other creditors in the event of insolvency according to Section 39 (1) No. 5 *InsO (Insolvenzordnung / German Insolvency Code)*. An extension leading to such a subordination lies already in the fact that the employee as not claimed seriously payment at the time when the salary was due. Since the claimant was under no constraint when he failed to request payment in due course, the Court ruled also that the salary could not even be claimed partially on the grounds of the constitutionally guaranteed margin of subsistence.

6. Court Appointment of Member of Supervisory Board: Company Interests Prevail over Shareholder Interests?

The court's decision to select and appoint a new member of the supervisory board of an AG (*Aktiengesellschaft / German Stock Corporation*) in case of a vacancy is a matter of equitable discretion primarily taking into account the interests of the company. Such interests are not necessarily identical with those of the largest shareholder (*Oberlandesgericht Bamberg / Court of Appeals of Bamberg, February 19, 2014 – 8 W 2/14*). Usually the members of the supervisory board are elected by the general meeting of shareholders. In the case at hand, two members left the board prematurely so that the court was requested to appoint replacements as in-

terim solution. Instead of appointing the candidate nominated by the largest shareholder, the court expressed explicitly concerns about individual interests of the largest shareholder who was functioning as the largest supplier of the AG at the same time. The court appointed another candidate suggested by the management board.

7. Termination without Notice of Managing Director's Agreement: Private Coaching at the Expense of the GmbH

A termination without notice of a managing director's agreement is justified, if the managing director grants benefits to his relatives at the expense of the company (*Oberlandesgericht Koblenz / Court of Appeals of Koblenz, July 11, 2014 – 6 U 1359/12* in a not legally binding decision). The managing director of municipal utilities GmbH (*Gesellschaft mit beschränkter Haftung / German Limited Liability Company*) had arranged coaching lessons at the expense of the GmbH for an employee who was a relative of his. However, the coaching lessons had nothing to do with the job responsibilities of the relative. Furthermore, he had allowed his relative free use of equipment and facilities of the GmbH. According to the Court, each incident justified in each case for itself a termination without notice. A managing director always has to keep in mind the common good of the company rather than his own benefit or the benefit of third parties. He had violated this duty of loyalty in both incidents. Therefore, a termination without notice or warning letter was justified according to Section 626 (1) BGB (*Bürgerliches Gesetzbuch / German Civil Code*). Also the declaration of termination was not late. The 2-week deadline for declaring such a termination had not started before the shareholders' meeting had become aware of the incidents and had concluded its investigations.



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