

## **Determining Social Criteria for Dismissals for Operational Reasons with an Option of Altered Conditions of Employment**

In case of termination of an employment relationship in Germany within the applicability of the German Unfair Dismissal Act, the social criterias are to be considered carefully.

The German Federal Labor Court (Bundesarbeitsgericht – BAG) has now decided when determining the social criteria for dismissals that the number of years of service with three more years added is not suitable to offset three maintenance obligations if the party obliged to pay maintenance can himself/herself already demonstrate six years of service (BAG, judgement dated 29 January 2015 – Case No.: 2 AZR 164/14).

### **I. Facts of the Case**

The parties were in dispute about the validity of a dismissal for operational reasons with an option of altered conditions of employment.

The plaintiff, who was born in 1972, was married and obliged to pay maintenance for two minor children. He had been employed by the defendant software company since October 2006 with a working week of 38.75 hours. His last gross monthly salary amounted to EURO 3,287.08.

By notice dated 5 November 2012, the defendant terminated the employment relationship with the plaintiff with effect to 28 February 2013. At the same time the defendant offered to continue the employment relationship with the plaintiff from 1 March 2013, with a working week of ten hours and a gross monthly salary of EUR 848.28.

The plaintiff rejected the offer of altered employment and filed a legal complaint against unfair dismissal in due time. The plaintiff was of the opinion that the dismissal was not justified from the perspective of the social criteria since the defendant had not taken the social criteria as stipulated in law into sufficient consideration when determining the social criteria. The plaintiff asserted in particular that he was more worthy of protection from the perspective of the social criteria compared with employee K. who had also been employed by the defendant since October 2003, was born in 1970, single and childless.

After all the previous instances had allowed the legal action, the defendant filed an appeal on a point of law with the BAG.

### **II. Decision**

The defendant's appeal on a point of law was unsuccessful. The BAG confirmed the invalidity of the dismissal with the option of altered conditions of employment.

The previous instances had correctly assumed that the defendant had not taken the social criteria into sufficient consideration when selecting the plaintiff.

Pursuant to section 2 para. 1 in connection with section 1 para. 3 of the German Protection Against Unfair Dismissal Act (Kündigungsschutzgesetz – KSchG) a dismissal with the option of altered conditions of employment is not justified from the perspective of the social criteria despite there being urgent operational reasons if the employer did not take the number of years of service, age, any maintenance obligations and a serious disability of the employee into (sufficient) consideration when selecting the employee. The wording of the law does not state how the specified social criteria are to be compared with each other. No criterion has priority over another one. Instead the individual differences between the comparable employees and their "social data" must be taken into consideration and weighed up.

The BAG dismissed the defendant's opinion that the basic equivalence of the social data meant that it only depended on how many of the four criteria tilted the balance in favor of one employee and how many in favor of the other employee without the extent of the respective difference being of any significance.

Instead the equivalence of the selection criteria meant that the specific data of the

employees concerned needed to be compared. A criterion becomes much more significant if the difference shown by said criterion is much greater in favor of one employee.

The BAG came to the conclusion that the plaintiff was much more worthy of protection from the perspective of the social criteria compared with employee K. who was born in 1970, had been employed by the defendant since October 2003 and was single and childless.

As the BAG continued, the age difference between K. and the plaintiff of roughly one and a half years is to be considered insignificant. At the time of the dismissal both employees were at an age when it was possible to assume similarly good chances of finding work in the labor market.

Nor could it be said in an individual comparison of the respective number of years of service that the comparable employee K. with an employment period of nine years would have been hit considerably harder by the alteration of the conditions of employment in view of the length of the plaintiff's employment of six years.

Based on the approximate equivalence of the social criteria – age and number of years of service – the defendant ultimately made a selection mistake in view of the considerable difference in maintenance obligations.

### **III. Practical Advice**

With its decision the BAG continued its previous policy in assessments of the statutory social criteria for selecting employees for dismissal in section 1 para. 3 KSchG.

Based on the equivalence of the selection criteria it is precisely the weight put on said criteria in comparison with similar employees that is important when determining the social criteria for dismissal.

In order to avoid erroneous assessments and/or exceeding the existing scope of assessment in this context it is recommended to resort to established point systems which have already been approved by the BAG.

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