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German Tax and Legal News

Effect of unreasonable instructions - Inconsistent rulings of the Federal Labour Court

In the past, the Federal Labor Court (Bundesarbeitsgericht) ruled that even unreasonable directives by the employer were binding for the employee until a court adjudicated about the reasonableness and thus binding force of the directive. This jurisdiction might change.

According to the so far established practice of the Federal Labour Court, even unreasonable instructions by the employer are legally binding vis-à-vis the employee until a court has ruled about the unreasonableness and therefore non-binding character of the directive. An employee who does not comply with an order of the employer because he rates the order to be non-binding risks loss of his remuneration, receiving a warning and even risks the termination of his employment relationship for reasons of misconduct. This established jurisdiction could change due to dissenting opinions of the different senates of the Federal Labour Court.

Case

Due to the fact that team members refused further collaboration with the plaintiff and an employment opportunity did not exist, the defendant (employer) transferred the plaintiff in his position as real estate trader from Dortmund to Berlin. Since the plaintiff did not commence work in Berlin, he received two warnings and finally was dismissed without notice. The plaintiff claims that he was not obliged to accept the transfer. He further demands the two warnings to be removed from his personnel file and filed a complaint against the dismissal.

Ruling

The competent Labour Court and the Higher Labour Court (Landesarbeitsgericht) ruled, that according to the underlying employment contract of the plaintiff a change of the workplace was (at least) in principle possible, however the concrete transfer from Dortmund to Berlin did not meet reasonably exercised discretion. This legal opinion was shared by the competent Tenth Senate of the Federal Labour Court (BAG, decision of June 14, 2017, 10 Az 330/16). However, the consequences of the unreasonably ordered transfer – the two warnings and the dismissal itself – were not subject to a final decision.

This was because the Fifth Senate of the Federal Labour Court is of the longtime established opinion that an employee is in principle not entitled to disobey any unreasonable instruction as long as there is no final binding court decision which determines the invalidity of the instruction (BAG, ruling of February 22, 2012, 5 AZR 249/11). Since the Tenth Senate is of the opinion that an employee is not obliged to follow unreasonable instructions, not even temporarily, the Fifth Senate was asked whether it sticks to its jurisdiction. In that case, the so-called Great Senate (Großer Senat) would have to decide the case.

Recommendation

Rulings of the Fifths Senate concerning the (preliminary) effectiveness of an unreasonable instruction have often been criticized. The case law is inconsistent: The Higher Labour Court Cologne and Rhineland-Palatinate follow the Fifth Senate, the Higher Labour Court Hamm and Düsseldorf stay with the Tenth Senate.

Should the opinion of the Tenth Senate prevail, this would be a considerable loss of legal certainty for the employer in respect of its right to give instructions. Whenever an employee refused an instruction claiming its inappropriateness, the employer would have to prove the adequacy of the instruction. In any case of doubt regarding the scope of the authority to give a specific direction, it would have to be examined more thoroughly whether the instruction is within the permissible limits. All circumstances of the individual case would have to be weighed carefully, considering the interests of both sides. In cases of doubt, alternative options like an amicable amendment of the working conditions or even a dismissal with the offer of altered conditions of employment would have to be given consideration. The opinion of the Fifth Senate therefore is awaited with some tension.

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