In God's hands alone?

Litigation in German labor courts: an overview

By Dr. Henning Reitz

According to a popular turn of phrase in Germany, those in court and on the high seas are supposedly in God's hands alone. This serves to express the supposed unpredictability of court rulings and the feeling of helplessness experienced by some in their dealings with the judicial system. Fortunately, this image has very little to do with reality: Particularly the German labor courts, as a rule, are reliable, and, at least as far as their reactions are concerned, they predictable players that act effectively in both a national and international comparison and thus play a positive role for Germany as a place to do business.

In the following, a short overview of the labor court system in Germany and the typical course of litigation will be presented.

The "classic" allocation of roles in litigation before the labor courts

One should be aware of the fact that labor law primarily serves to protect employees, such as in regulating minimum employment standards. This purpose means that company representatives who go before the labor courts will mostly have the feeling that they are more or less engaged in an uphill battle. This should not, however, be misunderstood to mean that the labor courts generally would make decisions that are hostile to business; rather they are obliged to follow the protective goal of the law and establish a balance between the freedom of a company to follow its business pursuits and the social and financial interests of the workforce. Company representatives should take this purpose of law as well as the typical allocation of roles into account and be prepared!

Settlement is often the best solution, if the goal is to avoid costs, extra effort and the risks associated with litigation.

Organizational structure of the labor court system

The labor courts in Germany form their own branch of the judiciary that is separate from the other courts. These are specialized courts that only deal with issues related to labor law. In particular, they have jurisdiction in proceedings where the validity of terminations or other claims under employment relationships are in dispute. They also have jurisdiction over disputes between works councils or trade unions and businesses.

The instances of the labor courts are set up in three tiers. Proceedings begin before the local labor court of the first instance. In most cases, the decision of this court of first instance can be appealed to the next level of the superior labor court *(Landesarbeitsgericht)* as the court of second instance. A further appeal to the Federal Labor Court *(Bundesarbeitsgericht)* is only possible in special cases such as if the legal issue to be settled is of fundamental significance.

Process in the first instance

The majority of litigation already concludes in the first instance. This often occurs even without a court judgment because the parties have come to an agreement and entered into a settlement.

To promote settlement, the first instance comprises two steps: A "conciliation hearing" *(Gütetermin)* takes place quickly – usually within four weeks of filing the action. At this hearing, a professional judge discusses the legal situation and the opportunities for an amicable arrangement with the parties. Many cases already end here in settlement, which, as a rule, is certainly meaningful – despite the required compromises →

– if one wishes to avoid the costs and efforts associated with litigation and the otherwise threatening legal uncertainty until the matter is finally clarified. In actions for protection against dismissal, a settlement will usually provide that the employment relationship has terminated and the employee will receive a severance payment as compensation for the loss of his or her job.

If no settlement is reached, the parties are then requested to present their positions in writing. This leads to the exchange of several legal briefs, whereby care must be given that submissions are accurate and complete. If a party provides incomplete or inaccurate submissions, a danger exists that the party will have already lost the case for this reason!

After some time – usually about three to six months after filing the action, there is a second court hearing before the "chamber" *(Kammer)*. The chamber is comprised of three judges, of which only one is a professional judge. The other two judges are lay judges who are from the working world (one each from the employee and employer side). If no agreement is reached here, the court will, in the majority of cases, hand down a decision that constitutes the conclusion of the first instance.

Consequences of a decision by the labor court of first instance

Usually, decisions by the labor courts are provisionally enforceable. This means that the plaintiff who succeeds in the first instance can (provisionally) enforce the judgment with the means provided under the law of enforcement even prior to the finally adjudicated conclusion of the litigation. In actions for protection against dismissal, it is not uncommon that the employer may be forced to temporarily continue to employ the terminated employee. This is where a peculiarity of German labor law that appears strange to many comes into play: If employment is terminated but the labor court has ruled that the termination was invalid, this does not lead to the employee having a claim to a settlement as compensation for the invalid, unfair termination. Rather, the employee has a right to continue (at least temporarily) to be employed by his or her employer! German law is significantly different on this point than other jurisdictions. If the desire is to rule out this risk, consideration must be given – taking into account the chances of winning – to whether the employee should perhaps be offered a larger severance payment in order to come to an amicable settlement in the sense of a termination.

Conversely, the employee must also give good thought to whether entering into a settlement is the better solution: If, at the end of proceedings, the courts rule for protection against dismissal and that the termination was valid, the principle under German law is that the employee will not have any claim to payment of a settlement at all (unless, as an exception to the rule, a collective bargaining agreement or a social plan provides otherwise)!

Continued litigation

As a result, most labor law conflicts will conclude in the first instance no later than six to nine months after filing the action. Statistically, most litigation does not proceed beyond the court of first instance. More time must be allowed for, however, if the judgment in the first instance is not accepted and the superior labor court or perhaps even the Federal Labor Court deal with the matter (three years may well pass before the Federal Labor Court hands down a decision). For this reason, one should always examine the question of one's own risk of losing and, on this basis, consider whether an amicable (and thus quick) settlement of the litigation is preferable after all.

By taking into account the above principles and being aware of the pertinent case law of the German labor courts and thus of the chances of winning or risk of losing a case, one certainly is not in God's hands alone in the German labor courts. Rather, it is generally possible to positively influence one's own fate through careful planning and management and, where appropriate, by ending the litigation through settlement. ←

Dr. Henning Reitz
Rechtsanwalt
JUSTEM Rechtsanwälte
Frankfurt am Main

h.reitz@justem.de

www.justem.de