

When Does a Reprimand "Expire"? A Federal Labor Court Ruling on the Shelf-Life of a Reprimand in the Personnel File

INTRODUCTION

In June 2010, and also thereafter, the so-called "Emmely" decision (decision of June 10, 2010 – 2 AZR 541/09) of the Federal Labor Court (BAG) caused some unrest. In many wrongful termination actions terminated employees – citing language of the Federal Labor Court published in the press release for the aforementioned decision – invoked a purported positive "trust capital" balance which they claimed they had acquired in the time period in which they were employed without reprimand. Another frequent point of contention in those cases was whether and, if so, how reprimands issued to the employee a long time ago should be taken into account for purposes of determining the "trust capital balance". A new decision by the Federal Labor Court now elaborates on and clarifies the court's prior decisions on these issues and, at the same time, puts an end to a rumor that has risen to the surface time and again in decisions of local and regional labor courts, namely, that there is a rule according to which reprimands must in all cases be removed from the personnel file after about two years.

FACTS

DECISION OF THE FEDERAL LABOR COURT (BAG) DATED JUNE 19, 2012 – CASE NO. 2 AZR 782/11; COURT OF APPEALS: REGIONAL LABOR COURT OF THURINGIA, JUDGMENT DATED NOVEMBER 23, 2010 – CASE NO. 7 SA 427/09

In the case decided by the Federal Labor Court the employer had issued a reprimand to a female employee. The reason for the reprimand was the loss of a cash ledger, which the employer claimed had been lost by the employee. The employee had been employed as a budget manager and had been responsible for a payment office of the defendant's savings and loan institution. In this position the employee had been responsible for keeping and storing the cash ledger. According to the employee, she had handed the cash ledger over to her substitute before she went on vacation and that she had never received the cash ledger back from the substitute. The employee therefore demanded that the employer retract the reprimand, which from the point of view of the employee was unjustified, and that the reprimand be removed from her personnel file. The local labor court and Regional Labor Court each ruled in favor of the plaintiff. In support of its decision, the Regional Labor Court reasoned, *inter alia*, that the reprimand was no longer valid because of the passage of time and that therefore it had to be removed from the personnel file. In the opinion of the court, the employer no longer had a protected interest in keeping the reprimand in the personnel file.

DECISION OF THE FEDERAL LABOR COURT (BAG)

The Federal Labor Court overruled the decision of the Regional Labor Court and remanded the matter to the Regional Labor Court for a new trial. In support of its decision, the Federal Labor Court first explained that companies keep personnel files in order to have a complete, accurate and careful record of those personal and business-related circumstances of each employee that are inherently related to the employment relationship. Therefore, the court reasoned, an employee has a right to removal of documents from the personnel file only if such documents are incorrect or if a balancing of the interests of both parties shows that under the circumstances of the particular case keeping the documents in the personnel file may result in unreasonable professional disadvantages for the employee, although the events documented are no longer legally relevant for the employment relationship. The same also holds for reprimands, according to the Federal Labor Court.

To determine whether a reprimand must be removed according to this standard, the Federal Labor Court went on to explain, the different functions of a reprimand have to be taken into consideration. One function of a reprimand, according to the court, is to criticize and document an event, in that the employer advises the employee of his or her contractual obligations and of the employee's breach of these obligations. Another purported function of a reprimand is to issue a warning, because the reprimand exhorts the employee to act in compliance with the terms of the employment agreement in the future and threatens adverse consequences in the event of non-compliance.

According to the Federal Labor Court, if the employment relationship continues for a certain time period without any further reprimand, a past reprimand may no longer have a warning function. However, to support a claim for removal of a reprimand from the personnel file, a reprimand also must no longer have the critique and documentation functions. For this to be the case, a reprimand may no longer have any legal relevance whatsoever for the employment relationship. The conduct criticized by the reprimand must have become legally irrelevant for the employment relationship in every respect. According to the Federal Labor Court, this is not the case if a justified reprimand may, for example, still become relevant for a transfer of the employee to a different position and to the employee's suitability for the new position, or for the necessary balancing of the interests of employer and

employee in connection with a future termination. In addition, the Federal Labor Court explained, a reprimand allows an employer to document that the employee's obligations under the employment agreement were clearly explained to the employee and that problems occurred in the course of the employment relationship. As long as the employer has such a continued interest in documentation, the possible loss of the reprimand's warning function, *per se*, is said not to be sufficient for a valid claim for removal of the reprimand from the personnel file. The Federal Labor Court went on to state that if the employment agreement is terminated and termination is later reviewed in court, the loss of the warning function needs to be taken into consideration for purposes of balancing the interests of employer and employee.

At the same time, the Federal Labor Court however also disagreed with the view of some secondary employment law authorities that due to the documentation function of a reprimand, the employer always has a right to keep the reprimand on file for the entire term of employment. Rather – the Federal Labor Court held – it must be reviewed on a case by case basis for how long the employer has an interest in documentation. A past, minor breach that occurred a sufficiently long time ago and that is, *de facto*, outdated and no longer relevant due to the employee's subsequent unobjectionable conduct may lose relevance for purposes of balancing the interests of employer and employee. As in the case of the warning function, there is no fixed time period for the documentation function of a reprimand during which the employer has a rightful interest in keeping the reprimand in the personnel file. Finally, the Federal Labor Court stated

that this was true for conduct-related reprimands as well as performance-related reprimands.

ANALYSIS

With this decision, the Federal Labor Court apparently attempted to eliminate existing uncertainties with regard to the legal relevance of breaches of contract that occurred a long time before notice of termination was given. In particular in case of serious breaches, employers are not bound to fixed time periods for the removal of reprimands, whether a reprimand relates to the performance or the conduct of an employee. It should however be noted that due to the documentation function, a reprimand may be kept in the personnel file for a very long time, whereas the original warning function is lost sooner. It must therefore be reviewed on a case-by-case basis whether a breach justifies immediate termination, or whether a new warning is necessary. Such a new reprimand should however reinforce the documentation interest in a prior reprimand. The negative "trust capital balance" would therefore be preserved..■

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