Federal Labor Court Provides "Timeline" for Hearings Preceding Termination for Suspected Wrongdoing

INTRODUCTION

Corruption by a managing employee, theft by a cashier, embezzlement by a branch manager, insurance fraud by a corporate officer, faked disability, working time fraud, or sexual harassment at the workplace – in practice, there are many different situations in which even just suspicion that criminal or other substantial wrongdoing has occurred may justify termination. Because it is rare for employers to be able to prove such charges beyond a doubt, it is generally advisable, even in apparently clear cases, to issue a notice of termination based on suspected wrongdoing as a precautionary measure.

However, termination based on suspected wrongdoing differs from terminations on other grounds in that it requires a prior hearing of the suspected employee. Because the requirements for a proper hearing are inconsistent, and most recently also have been made more stringent by the Federal Labor Court (*BAG*) and various regional labor courts, the hearing in particular creates considerable problems in practice. This is true in particular for cases in which the suspected employee is avoiding the hearing, e.g., by "calling in sick." As a result, employers in the past often faced substantial legal uncertainties as to whether and how to hold the necessary hearing – especially in view of the two-week exclusionary period for terminating employees for good cause. These issues were addressed by the Federal Labor Court in a recent decision.

DECISION OF THE FEDERAL LABOR COURT DATED MARCH 20, 2014 – AVR 1037/12

In the case decided by the Federal Labor Court the plaintiff had been terminated for good cause based on suspected involvement in the manipulation of bidding documents. The suspicion arose from a report the defendant employer had received from its internal audit department on December 7, 2010. The defendant then invited the plaintiff, who had been on sick leave since July 2010, to attend a hearing on December 13, 2010. When the plaintiff asked for a written hearing, the employer sent the plaintiff a questionnaire on December 14, 2010 asking that the plaintiff complete the questionnaire by December 17, 2010. The plaintiff then notified the employer that due to his sickness he would be unable to respond until January 2011. On December 27, 2010 the defendant employer terminated the plaintiff's employment without notice. The plaintiff filed a wrongful termination action and the lower courts ruled in favor of the plaintiff on the grounds that the employer had failed to comply with the two-week exclusionary period of § 626 para. 2 of the German Civil Code (*BGB*; hereinafter "Civil Code"), which began on the day after the employer received the internal audit report on December 7, 2010.

DECISION OF THE FEDERAL LABOR COURT

The Federal Labor Court set aside the judgment and remanded the matter to the regional court. The Federal Labor Court reasoned that the employee in question could be provided with a hearing without the exclusionary period of § 626 para. 2 of the Civil Code beginning to run. The hearing is a requirement for a valid termination based on suspected wrongdoing and generally must be held within one week after the employer discovers the circumstances giving rise to the suspicion. The plaintiff's request for a written hearing was a circumstance that justified an extension of the normal one-week period. Consequently, the exclusionary period of § 626 para. 2 of the Civil Code did not begin to run until after the deadline set for the plaintiff had expired, i.e., on December 18, 2010. In the view of the Federal Labor Court, it was irrelevant that ultimately no hearing was held. Even if the employee is unable to attend the hearing due to sickness the employer does not necessarily have to wait for the employee's response. Any additional delay may, depending on the particular circumstances of each case, be unduly burdensome for the employer. In this case the plaintiff had initially indicated that he was willing to provide a written response despite his sickness, but then requested an extension of several weeks. Under the circumstances of this particular case it was not necessary for the employer to grant the employee such an extension.

PRACTICAL SIGNIFICANCE OF THE JUDGMENT

The decision of the Federal Labor Court clarifies the timing requirements for a hearing preceding termination for suspected wrongdoing. The court initially states that, as a general rule, the hearing must be held within one week from discovery of the circumstances giving rise to the suspicion, in order to toll the two-week exclusionary period for termination without notice. If – as is standard practice – the employee will also be invited to a hearing, it is important to make sure that the invitation provides the employee with prior notice of the hearing before the end of the one-week period (i.e., at the latest at the beginning of the last work day of the one-week period, with the hearing being held later on the same day). In the view of some regional courts, the invitation must at least enable the employee to associate a confidant – e.g., an attorney or member of the works council (decision of the Regional Labor Court of Berlin-

Brandenburg dated March 30, 2012 – 110 Sa 2272/11; for a different view, see decision of the Regional Labor Court of Rhineland-Palatinate dated April 18, 2013 – 2 Sa 490/12). In order to avoid the alternative of expressly notifying the employee to that effect, it is therefore advisable to time the invitation so that there is no direct temporal nexus to the meeting as such, thus providing the employee, in principle, with an opportunity to associate a confidant. According to the prevailing opinion, no express notice of this opportunity is necessary, however (see Hunold, NZA-RR 2012, p. 399).

In addition, and above all, the decision of the federal labor record clarifies the procedure for the hearing if the employer cannot "get hold of" the employee at the workplace. In practice, this is often the case if the employee has learned that he is under investigation by the employer and, as a result, has "called in sick." Especially when employees are advised by legal counsel, it is in some cases part of the strategy to demand an extension for the employee's response on the grounds of the employee's sickness, in order to put pressure on the employer. For the employer is required, on the one hand, to comply with the two-week period for termination without notice and, on the other hand, must hold a proper hearing before issuing a notice of termination. While this "playing for time" strategy still paid off in the lower court that decided the original dispute, the Federal Labor Court now affords the employer with an "option" to choose whether to wait for the employee's response in such cases (during which time period the two-week period does not begin to run) or to terminate the employee for good cause (in which case no hearing is required). However, the Federal Labor Court also emphasized that this option has limits, in that any termination without a final response by the employee requires that any additional waiting period would be "unduly burdensome" for the employer, e.g., if the employee has requested repeated extensions for responding to the employer's charges, without providing valid reasons.

Our practical recommendation therefore is not to wait for the sick employee to return to work before scheduling a hearing, but rather to hold a written hearing. If the employee offers credible, valid reasons why he or she is unable to respond to the charges, the employee should be granted at least one extension. Because of the high hurdles involved (e.g., hospital treatment for a serious medical condition) this will remain the exception to the general rule, in practice. In the event that the employee fails to respond to charges and also offers no valid reasons for an extension of the time period for responding, the employer may consider terminating the employee for good cause. If the employee later responds to the charges – invoking that the employee was previously unable to respond – it may be advisable, depending on the particular circumstances of each case, to issue a second notice of termination as a precautionary measure – after a renewed hearing of the works council. In view of the above decision of the Federal Labor Court, at least the second notice of termination will be in compliance with the exclusionary period – even if under the circumstances the employer should have waited for the employee' response before issuing the first notice of termination.

The Federal Labor Court also defined the substantive requirements for a regular hearing. Above all, the Federal Labor Court confirmed prior case law holding that the employer must present "concrete facts" at the hearing (decision of the Federal Labor Court dated May 24, 2012 – 2 a ZR 206/11). Whether the facts must also be outlined in the invitation remains an open question, however (for a decision leaning in this direction, see decision of the Regional Labor Court of Berlin-Brandenburg, *supra*). To avoid confusion, terms such as "staff interview" or similar language should be avoided, as they may cause the employee to draw wrong inferences about the nature of the hearing. In addition, an inadequate invitation is likely enough to render the hearing invalid (decision of the Regional Labor Court of Düsseldorf dated June 25, 2009 – 5 TaBV 87/09). Because of the numerous requirements for the timing and substance of the hearing, we also recommend that the employer provide the employee with a written questionnaire after or at the beginning of the hearing – which for practical reasons should be held to gain a better understanding of the facts. Otherwise, it may be very difficult in a subsequent wrongful termination action to introduce admissible written evidence proving that a proper hearing was held.

Despite the clarifying decision of the Federal Labor Court there remains a risk for the employer that insufficient preparations may render a termination for suspected wrongdoing invalid. As part of such preparations the employer must also determine whether under the particular circumstances the employer should proceed with the hearing or conduct additional investigations. The coordination of investigation measures and the scheduling of the hearing is crucial to the success. Exacerbating the risks associated with an insufficient hearing is the fact that, in the meantime, it has become part of the "standard repertoire" of employment attorneys to claim that no proper hearing was held. In many cases, this allows courts to rule that terminations for suspected wrongdoing are invalid for procedural defects, thereby avoiding possibly protracted discovery proceedings, e.g., as to whether there is strong

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suspicion of wrongdoing. From the point of view of the employer, it is therefore of fundamental significance when holding the hearing – despite the time pressure associated with the two-week exclusionary period – to keep in mind the consequences for the investigations, while at the same time holding the hearing in compliance with applicable laws and documenting compliance in a way that is admissible in court.

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