Internal Investigations and Two-week Notice Period – Noteworthy Comments by the Federal Labor Court regarding a „Never-ending“ Dilemma

INTRODUCTION

Internal Investigations are a permanent aspect of Compliance and are indispensable to business practice. From an employment law standpoint, these kinds of investigations present a classic dilemma: While investigative interests demand comprehensive discovery of the facts of the case, the two-week notice period under Sec. 626 (2) German Civil Code can be a temptation to rush into the initiation of employment law measures, which is then not infrequently at odds with investigative interests. Particularly in the case of employees who cannot be ordinarily terminated (such as works council members), compliance with the notice period is decisive. In a groundbreaking decision for compliance practitioners handed down on May 5, 2022 (File no. 2 AZR 483/21), the Federal Labor Court has now provided assistance in how to find a way out of this dilemma.

THE FACTS

The Federal Labor Court was called on to decide on the extraordinary termination of the „Head of Marketing Defense“ of an armaments and aviation company. The head of the „Legal & Compliance Department“, Dr. R. (who was not authorized, himself, to issue the notice of termination) was advised in July of 2018 that employees were in possession of an internal document of the Ministry of Defense classified as “VS-NfD” “secret – only for official use”. The company then appointed a law firm in October of 2018 to conduct an internal investigation to establish the facts of the case. At the end of June of 2019, the compliance team that had been formed for this task decided to provide an interim report of the situation to management to enable it to decide on further measures, including employment law measures. The report was prepared by the appointed law firm and dealt with misconduct on the part of 89 employees, including the plaintiff.

The interim report was delivered on September 16, 2019 to the general manager who was authorized to issue notices of termination. After hearing the head of marketing and the works council, the company issued a notice of extraordinary termination in a letter dated September 27, 2019.

GROUNDS OF THE DECISION OF THE FEDERAL LABOR COURT

The Federal Labor Court set aside the judgment of the Superior Labor Court and referred the matter back to the Superior Labor Court. It argued that the Superior Labor Court had falsely held the notice of termination to be invalid due to the failure to comply with the notice period under Sec. 626 (2) sentence 1 German Civil Code.

According to Sec. 626 (2) sentence 1 German Civil Code, the notice period begins when the person authorized to issue a notice of termination (in the case of legal entities, an executive board member or a person with the appropriate authorization) becomes aware of the facts governing the decision to terminate. The court thus established that the knowledge of Dr. R. was irrelevant because of his inability to issue a notice of termination, so that the earliest date for the commencement of the notice period was September 16, 2019, when the general manager became aware of the facts of the case. The notice period was complied with in any event with the letter of termination dated September 27, 2019.

This finding is not prevented by the principle of good faith (*Treu und Glauben*) under Sec. 242 German Civil Code. Although an employer can be prevented by Sec. 242 German Civil Code from claiming that the notice period was met, this requires, however, that the party entitled to issue the notice of termination deliberately obstructed the flow of information or created an organization to improperly obstruct the flow of information. Furthermore (cumulatively!), the person who is not authorized to issue a notice of termination and upon whose knowledge the termination is based must have a position and function of such significance that they are actually and legally able to exhaustively establish the facts of the case so that the person authorized to issue the notice of termination can reach a decision without further investigation. The burden of substantiation and proof (which may be graduated) is borne by the employee.

On this basis, the Federal Labor Court then made several comments which are noteworthy for practitioners:

With regard to the knowledge governing the start of the notice period (insofar related to Dr. R., who was not authorized to issue a notice of termination) the court clearly states that such knowledge must also include those circumstances that concern the gravity of the misconduct within the network of other employees involved in the misconduct. This knowledge is different from further investigations following the establishment of misconduct which serve company-related objectives (such as prevention).

With regard to the organization of a compliance investigation, the court emphasizes that it is not in bad faith, but is, rather, appropriate to appoint the compliance department located below management to conduct the investigation. The flow of information, however, must not be obstructed in a bad-faith manner. The argument of the Superior Labor Court that corporate negligence can be assumed because the general manager did not regularly inform himself of the status of the investigations does not establish as such the bad-faith exercise of a legal right, nor was the flow of information obstructed in bad faith because the interim report was commissioned for all of the 89 employees who were the focus of the investigation and not for the plaintiff alone. On the contrary: The interim report, which was specifically meant to inform management, speaks against an obstruction of the flow of information in bad faith. Finally, no facts indicated that management had not sufficiently ensured and monitored the flow of information. The head of a compliance department generally has a duty to inform management of "*relevant interim findings*".

CONCLUSIONS

The following "messages" for the employment-law support of internal investigations can be gleaned from the decision of the Federal Labor Court of May 5, 2022:

- **Haste is uncalled for**: Misconduct can be exhaustively investigated and may also include a look at other employees. This can also justify longer time periods between the start of an investigation and the notice of termination. Investigations (thereafter) with the goal of serving prevention, however, are not capable of extending the start of the notice period.

- The appointment of a third party to prepare a **report** on the extent of misconduct among employees can contribute significantly to guiding the flow of information into an orderly and controllable direction.

- The **delegation** of an internal investigation to an investigatory unit (e.g. Compliance) which is not authorized to issue notices of termination is **advantageous** under employment law. The start of the notice period can be more easily controlled within the restrictions of the good faith principle. The fact that the burden of substantiation and proof for bad-faith conduct lies with the employee significantly improves the position of the employer in litigation. But as always in Compliance, „**Turning a blind eye does not count**". If management creates „Chinese walls" to prosecute misconduct until after the further preventive investigations are concluded, the accusation of bad faith will be easy to substantiate.

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