

Quo Vadis, Severance Pay Boom? A Sea Change in the Making?

INTRODUCTION

It is rather a rare occurrence when, after the magazine SPIEGEL reported on a lower-court judgment at the end of 2022, the „End of the German Severance Pay Boom“ is proclaimed. The significance of this for human resource practitioners appears, of course, to be huge. In the following, we will offer a guide to understand what it all means.

SUPERIOR LABOR COURT OF BERLIN-BRANDENBURG (FILE NO: 6 SA 280/22)

You may be familiar with the case as described in the press release: After several notices of termination were deemed to be void, in the ensuing period an employee asserted a claim to wages for work performance not accepted by the employer (*Annahmeverzugslohn*) for the period since the supposed termination of the *employment* relationship – which was almost four years in the present case. The employer rejected this claim with reference to Sec. 11 no. 2 Protection from Unfair Dismissal Act (bad-faith failure to earn wages elsewhere) and with the argument that the employee had not engaged in sufficient effort to apply for a new job, including job placement offers by the employment.

As reported in the press, the court shared this view. After equivalent claims to information were raised in the proceedings, it was learned that the employee had received a whole range of job placement offers from the employment agency but had only submitted one application a week. This was thus evidence of a willful failure to act under Sec. 11 no. 2 Protection from Unfair Dismissal Act, so that the employee got nothing.

(NO) CLAIMS TO WAGES AFTER TERMINATION

The decision illuminates a key corrective for an abusive practice in German dismissal law which has been neglected by the courts for a long time: While the evaluation of the grounds of a termination is often a gray area, the decision in court is itself black and white: valid or invalid with all of the serious consequences, as the litigation surrounding this claim to wages for nearly four years forcefully proves.

The Federal Labor Court had already sketched out this path some time ago when it agreed in situations such as the present one that the employer has a claim under Sec. 242 German Civil Code to information with regard to job placement offers (BAG, May 27, 2020 – 5 AZR 387/19). Details on the extent of such claims and the requirements for when a failure to act is in

bad faith have been keeping the lower courts busy since then (cf. for instance, LAG Hess., June 25, 2021 – 10 Sa 1233/20; LAG RP, July 27, 2022 – 7 Sa 223/20; LAG Düss. – 14 Sa 727/21); Some of this litigation is on its way to the Federal Labor Court; the standards in the civil law courts for executive board members and general managers are slightly different (cf. OLG München, July 21, 2021 – 7 U 2465/18).

CONCLUSIONS – AN END TO THE SEVERANCE PAY BOOM?

In short: Everything is a little less revolutionary than some headlines would suggest. For businesses, however, this is an important signal that the courts are actually prepared in individual cases to make use of such legal instruments. To the extent employees make their calculations in negotiations on the basis of the total claims to wages (in some cases with pretty irrational expectations), employers may accept this less and less with significant consequences in individual cases with respect to the amount of severance pay.

Experience has shown legal advisers that, by no later than after the Federal Labor Court decision (op cit.), this shift in perspective – that there is no automatic payment even where a termination was invalid - can have an enormous influence on negotiations from the beginning. However, this requires an active employer who actively contributes this perspective to negotiations by asserting claims to information, making their own offers, and customizing how they proceed from the very beginning.

Please do not hesitate to contact us if you have questions concerning this topic. If you would like to be included on our mailing list of the subscribers to our free newsletter, please send us a brief [E-Mail](#) with your request.

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