SUMMARY

2016/60 Special protection for disabled employees against termination of employment – international apsects (GE)

<p>An employee may bring a claim for invalid termination before the German Labour courts, irrespective of the law governing the employment relationship. In Germany, it is only possible for an employer to dismiss a severely disabled person if the competent state authority grants a permit enabling it to do so. However, this requirement is limited to those with employment agreements under German Law.</p>

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An employee may bring a claim for invalid termination before the German Labour courts, irrespective of the law governing the employment relationship. In Germany, it is only possible for an employer to dismiss a severely disabled person if the competent state authority grants a permit enabling it to do so. However, this requirement is limited to those with employment agreements under German Law.

Facts

The defendant is a shipping company established according to Italian law. The plaintiff, a German citizen, had been employed by the defendant since May 2006 as Chief Engineer on board cruise ships sailing under the Italian flag.

The employment agreement was concluded in the defendant's branch in Rostock, Germany. It was written in German, but was governed by Italian Law as the chosen law and by certain

Italian collective agreements. Taxes and social security contributions were to be paid in Italy under Italian law. Both the German branch and the defendant were entitled to issue instructions to the plaintiff on board the cruise ships. The plaintiff always worked on ships sailing under the Italian flag.

In October 2009, the plaintiff had an accident during non-working hours and lost one forearm. The competent German authority decided that the plaintiff was severely disabled to a degree of 60 percent on the German scale of disability ('Grad der Behinderung', 'GdB'). The plaintiff was also continuously certified as unfit for work until 24 September 2010.

In August 2010, owing to his disability, the plaintiff lost his 'fitness for sea service certificate', which was his permission to work on a cruise ship. The defendant challenged this decision, arguing that he was in fact fit for sea service, as he had a prosthetic limb. He was therefore granted a limited fitness for sea certificate on 22 September 2010. However, the defendant terminated his employment contract in a letter dated 24 September 2010, which gave him notice until 10 October 2010.

The plaintiff filed a claim of unfair dismissal before a German Labour Court, arguing that the termination was based on his disability and therefore discriminatory. Further, he argued that the prior consent of the competent state authority was a prerequisite for an effective termination according to section 85 of the German Social Security Code IX ('SGB IX').

The defendant countered that the employment and its termination were solely governed by Italian law, which in its view allowed for the termination. Further, the plaintiff was not dismissed because of his disability, but because he had no valid fitness for sea service certificate.

Both the Labour Court and the Regional Labour Court rejected the claim, holding that it was based on Italian law and therefore beyond their remit.

Judgment

The Federal Labour Court ('Bundesarbeitsgericht', the 'BAG') revoked the judgment. It ruled that the Regional Labour Court could not reject the claim solely because the employment relationship was not governed by German Law. According to procedural provision contained in section 4 of the Unfair Dismissal Act, an employee has three weeks in which to make a claim against a termination which he or she believes is invalid. The BAG decided that this procedural section applied irrespective of whether the invalidity was based on German, Italian or any other foreign law, because the stipulation concerned in the Unfair Dismissal Act is lex fori. In other words, this section of the Unfair Dismissal Act applies to more or less any

challenge against the validity of a termination, even if the claim is based on a different protection not mentioned in the Unfair Dismissal Act itself.

The BAG accepted that the governing law was Italian Law and therefore the Regional Labour Court needed to determine whether the termination was effective under Italian Law. Usually, the applicable law is determined by the place of work, but because the plaintiff worked on board ship, there was no usual place of work, even though the ship sailed under a particular flag. The BAG showed some sympathy for the view that the flag determines the applicable law if the employee works on ships on the high seas, but in the end did not base its decision on this. Instead, it assessed the case on the basis of the ordinary principles of Article 30 of the 'German Introductory Act to the Civil Code', (the 'Einführungsgesetz zum Bürgerlichen Gesetzbuch', the 'EGBGB'). According to this, the employee's citizenship, the employer's registered office, the language of the contract language and the regulations in force all needed to be considered and evaluated. The BAG considered all these criteria and finally held that Italian Law applied, since the employee paid taxes and social contributions in Italy in accordance with Italian law (referring to ECJ, 12 September 2013, C-64/12 Schlecker). On this basis, it concluded that the termination of the employment relationship should assessed under Italian law.

The BAG assessed whether the defendant needed to apply for a dismissal permit before issuing notice of termination and concluded that it did not. It held that the obligation to obtain a dismissal permit before issuing notice of termination is laid down in section 85 of SGB IX, under German administrative law, and permission can only be granted for employment relationships governed by German law.

Section 85 of SGB IX stipulates that the termination of a severely disabled person requires the prior consent of the competent state authority. Otherwise, the dismissal will be invalid under section 134 of the BGB. This is a requirement under German civil law. But even if section 85 of SGB IX had applied, for the termination to have been invalid on these grounds alone, there would need to have been a regulation similar to section 134 of the BGB – yet no similar regulation exists in Italian law.

The Regional Labour Court is now tasked with deciding whether the termination was lawful under Italian law.

Commentary

With this judgment the Court has clearly stated that whether a claim can be brought before a German Labour Court does not depend on the applicability of German law, in particular, the provisions of the Unfair Dismissal Act. As explained above, the procedural section of the

Unfair Dismissal Act applies in more or less every case, even if the substance of the claim is not based on the Unfair Dismissal Act. This case extends that principle to show that even if the validity of the termination itself can only be judged on based on foreign law and therefore the material sections of the Unfair Dismissal Act do not apply, the procedural section still does. An employee can bring action in relation to the termination of an employment relationship before a German court irrespective of the law governing the contractual relationship. It is then for the court to determine whether the termination complies with the applicable law.

German law providing severely disabled persons with employment protection only applies if the employment relationship is governed by German law. If not, whether or not a termination is valid will depend on the terms of the applicable foreign employment protection legislation. But what is clear is that prior consent to the termination by the competent authority is irrelevant if German law does not govern the relationship.

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Parties: unknown

Court: Bundesarbeitsgericht (Federal Labour Court)

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