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Employment Law Newsletter

Issue 3 2026

unyer GLOBAL ADVISORS

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Legal information

Published by: Luther Rechtsanwaltsgesellschaft mbH
Anna-Schneider-Steig 22, 50678 Cologne, Telephone +49 221 9937 0
Fax +49 221 9937 110, contact@luther-lawfirm.com
V.i.S.d.P.: Achim Braner
Luther Rechtsanwaltsgesellschaft mbH
An der Welle 10, 60322 Frankfurt am Main, Germany
Telephone +49 69 27229 23839
achim.braner@luther-lawfirm.com

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EDITORIAL

Dear readers,

Autumn marks not only the start of a new season, but also a period in which current developments in employment law continue to unfold at a rapid pace. In particular, it remains to be seen with great interest whether the Federal Ministry of Labour and Social Affairs in Germany will table a draft bill to amend the Working Hours Act before the end of this year. In this issue of our newsletter, we would like to provide you with an overview of selected court decisions, legal developments and practical issues in the meantime.

We begin with an analysis of a decision by the Federal Labour Court from March this year concerning the conditions for the validity of garden leave clauses. Jan-Moritz M. Hahn from Leipzig examines the key points of the decision and its significant practical relevance.

Next, Paulina Noppeney and Robert von Steinau-Steinrück present another decision by the Federal Labour Court which addresses key issues under the Whistleblower Protection Act. It is one of the first rulings on this area of legislation, which has been in force since 2023.

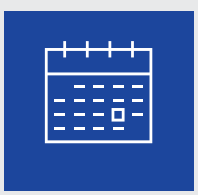
In 'The ten most important decisions', we additionally present selected recent labour court rulings which, in our view, are of particular practical relevance. Furthermore, in our section "Current developments in pensions", Annekatrin Veit provides an update on current pension policies and their implications for occupational pension schemes. Finally, Simone Lerch and Nina Stephan examine the legal and practical challenges posed by social security audits and highlight the areas where early legal support may be advisable.

We hope that the articles in this issue will provide helpful insights and valuable information for your day-to-day practice, and we hope you find it an interesting read.

Yours

Achim Braner

Events, publications and blog



You can find an overview of our events here.



A list of our newest publications can be found here.



Our employment law blog is here.

■ CURRENT TOPICS

The end of garden leave clauses?

Employment contracts often allow employers to place employees on leave with continued pay following notice of termination. However, a blanket provision of this kind does not stand up to scrutiny under the rules governing standard terms and conditions, as the Federal Labour Court has now ruled. Consequently, contract templates must be reviewed and garden leave provisions must be carefully justified on a case-by-case basis. However, more nuanced leave clauses are likely to remain valid.

Background

Following a notice of termination, it is not uncommon for employers to wish to dispense with the continued services of the departing employee. Reasons for this may include the protection of confidential information, concerns about poaching customers, or conflicts within the workplace. Garden leave clauses in employment contracts are intended to provide a reliable basis for such situations. However, they are invalid if formulated in a blanket manner, as the Federal Labour Court has now ruled (decision of 25 March 2026 – 5 AZR 108/25).

The clause examined by the judges in Erfurt entitled the employer to suspend the employee upon or following the giving of notice of termination, regardless of which party had given notice. The provision contained no further conditions. According to the Federal Labour Court, such a provision places the employee at an unreasonable disadvantage and is therefore invalid under Sec. 306 (1) German Civil Code. Even during the notice period, there is, in principle, a right to actual employment. The continued payment of remuneration does not automatically compensate for the loss of that right. A garden leave clause must not unilaterally override this interest.

Unilateral release from work

However, the invalidity of such a blanket clause does not mean that any form of leave of absence is ruled out. Even without a concrete agreement, a unilateral grant of leave of absence may be justified. The decisive factor is whether the employer remains obliged to provide actual employment because the employee has a right to employment derived from Sec. 611a (1) Sentence 1, Sec. 613 in conjunction with Section 242 German Civil Code. In this regard, a distinction must be made between two scenarios: on the one hand, the right under Sec. 275 German Civil Code may be impossible to fulfil, for example as a result of a business closure or the cessation of an employment opportunity. On the other hand,



overriding employer interests worthy of protection may preclude continued employment. Here, it is necessary to weigh up all the circumstances of the specific individual case.

Employer interests that may be relevant include, in particular, the protection of trade secrets and the prevention of imminent competitive activity or the poaching of customers. A mere fear of disloyal behaviour, however, does not constitute a valid justification. On the employee's side, factors such as the maintenance of job-related skills or opportunities for professional development must be taken into account. Employers should therefore ascertain and document the actual reasons for imposing garden leave.

Remaining options for clauses

The enduring benefit of a contractual provision lies, in turn, primarily in transparently describing possible grounds for the garden leave and the associated legal consequences. A detailed clause remains valid and can, for example, specify protection interests relating to the business and the employee's role. For employees with access to sensitive information or close client contacts, typical conflict situations can thus be addressed in the employment contract itself.

However, a clause cannot pre-empt the necessary balancing of interests. Even an explicitly listed ground for suspension must not automatically lead to suspension. Rather, there must be scope to take into account the specific circumstances and conflicting employment interests.

A garden leave clause should therefore be explicitly linked to an overriding, legitimate interest on the part of the employer in the employee's non-employment. The employee's employment interests must be able to be factored into the balancing exercise. The Federal Labour Court has not conclusively clarified whether an abstract balancing formula alone is sufficient for a clause to be valid. From a drafting perspective, it is therefore advisable to additionally specify concrete grounds for exemption tailored to the business and the relevant role. These should be formulated as possible, non-exhaustive reasons, the weight of which must be assessed on a case-by-case basis. A mere list of buzzwords such as 'operational peace' or 'protection of trade secrets' does not, however, provide a reliable basis. The decisive factor remains what specific risk exists and why it outweighs the employer's interests. Nor should the dismissal itself be cited as an independent ground for the garden leave.

Holidays and overtime

Garden leave does not automatically settle outstanding holiday entitlements and time credits. If holiday is to be granted during the period of exemption, this must be done irrevocably for the relevant holiday period. The declaration must make it clear that holiday entitlements are to be settled and to what extent. The relevant agreements also apply when it comes to reducing overtime. An entitlement to payment for overtime that has already arisen cannot simply be fulfilled by leave of absence. The provisions governing overtime and leave of absence should therefore be coordinated. Any remaining right to determine the nature of the work must be exercised at the employer's reasonable discretion.

Consequences

Existing contracts should be reviewed to determine whether they permit garden leave without conditions following termination. Such provisions should be replaced with more nuanced ones for future use. In every specific case of leave of absence, it is important to document the reasons, weigh up the interests of the employer, and deal clearly with holiday entitlement and time credits. Unjustified garden leave may give rise to claims relating to employment and, possibly, claims for damages. Where a unilateral leave of absence cannot be substantiated on sound grounds, a mutual agreement may be considered.

Author

Dr Jan-Moritz M. Hahn
Luther Rechtsanwaltsgesellschaft mbH, Leipzig

Whistleblower protection in proceedings relating to protection against unfair dismissal

The Federal Labour Court has recently clarified the conditions governing the prohibition of reprisals under the Whistleblower Protection Act: whilst dismissal following a report of wrongdoing triggers the statutory presumption of a causal link to reprisals, employers may rebut this presumption if they can demonstrate that a decision to dismiss had already been taken and justified prior to the report.

Case background

The Federal Labour Court's decision of 4 December 2025 – 2 AZR 51/25 marked one of the first significant decisions on the Whistleblower Protection Act. In the underlying case, the plaintiff had been employed since May 2023 in the field sales force of a company that distributes medicines and pharmaceutical chemicals. During a visit to a pharmacy with his line manager, the latter signed an authorisation for future contact himself, as the pharmacy owner was unable to sign on the tablet the line manager was carrying. That very evening, the line manager asked the HR department to prepare the plaintiff's dismissal. The plaintiff only reported the line manager's unauthorised signing to internal departments a few



days later. Following consultation with the works council, the employer terminated his employment contract. The plaintiff regarded the dismissal as an unlawful act of reprisal under the Whistleblower Protection Act on the basis of his report.

Necessity of an actual report / Prior decision to terminate

On appeal, the Federal Labour Court first noted that dismissals may constitute reprisals within the meaning of Sec. 3 (6) and Sec. 36 (1) Whistleblower Protection Act. However, the protection afforded by the Act is contingent upon an actual report or disclosure having been made. Neither mere knowledge of a reportable breach nor an internal decision to report it at a later date is sufficient to trigger statutory protection. The court ruled out the applicability of the Act to precautionary measures that do not yet relate to a specific report.

Under Sec. 36 (2) Sentence 1 Whistleblower Protection Act, it is generally sufficient for the whistleblower to allege a link between the report and the disadvantage. Given the chronological sequence of events, the court therefore initially presumed that reprisals had taken place. However, the employer was able to rebut this presumption: as the line manager had already initiated the dismissal proceedings prior to the report, the measure was not based on the subsequent report.

Implications

The decision does not constitute a blanket all-clear. Even a close temporal or factual link between a report and a dismissal can shift the burden of proof onto the employer. In court proceedings, it must then be proven why the measure was taken independently of the report. Retrospective reconstructions are generally more open to challenge than documents drawn up promptly. Before proceeding with a dismissal, it should therefore be clarified whether the employee has previously made, or announced, a report, complaint, allegation or disclosure. Where possible, internal reporting channels and departments responsible for human resources should not be staffed by the same individuals. Information flows and responsibilities must be defined in a transparent manner. It is particularly important to document the date on which the decision to dismiss was taken, the level of knowledge held by the decision-makers, and the key grounds for dismissal. It should also be noted that promotions, transfers and other career decisions may also constitute reprisals relating to whistleblowing.

Authors

Dr Paulina Noppeney
Luther Rechtsanwaltsgesellschaft mbH, Berlin

Prof. Dr Robert von Steinau-Steinrück
Luther Rechtsanwaltsgesellschaft mbH, Berlin

Scope of the right to information regarding pay transparency

The right to information under the Pay Transparency Act regarding the criteria for determining pay and the comparative pay of colleagues of the opposite gender applies only at company level and is limited to one calendar year.

Federal Labour Court, decision of 19 February 2026 – 8 AZR 83/25

The case

The plaintiff, an employee, had been working in the defendant's sales department since 2002 and was classified at career level 'IC 2' (job level 58). Male colleagues were predominantly classified at a higher level. The plaintiff requested information on the criteria and procedures for determining remuneration, as well as on the average monthly gross remuneration, basic pay and share options of male comparators for the calendar years 2017 to 2020. The defendant refused to provide the information. The Labour Court upheld the subsequent claim, but the Higher Labour Court dismissed it, on the grounds that the claim was limited in time to the previous year, restricted in scope to the business unit, and had, moreover, been satisfied by reference to general works agreements.

The decision

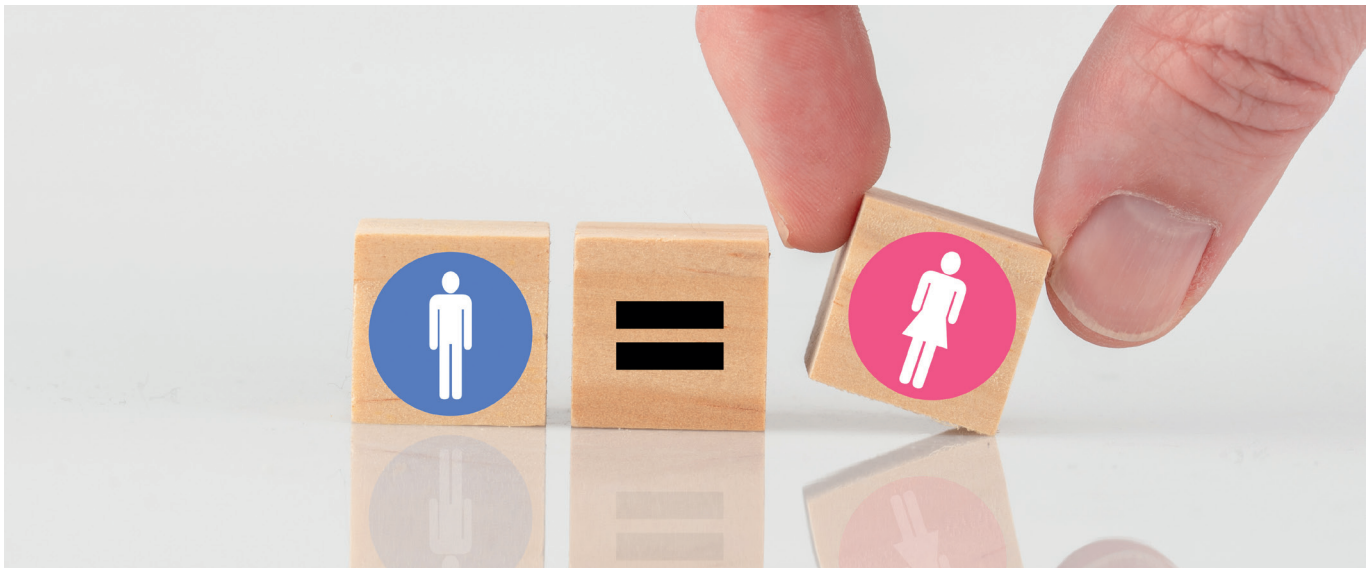
The Federal Labour Court partially set aside the appeal decision and referred the matter back to the Higher Labour Court with regard to the comparative remuneration claimed for 2018. In all other respects, the appeal was unsuccessful. The right to information under Sec. 10 (1) Pay Transparency Act extends to the criteria for determining remuneration as well as to the comparative remuneration, but always only in respect of the last calendar year completed prior to the request. Furthermore, the right under Sec. 12 (2) Sentence 1 Pay Transparency Act is establishment-specific. The fact that remuneration schemes apply company-wide does not alter this. The court interpreted the plaintiff's application as meaning that she was seeking information to the extent permitted by law. Information for 2018 was therefore eligible.

Our comment

The Federal Labour Court confirms that the right to information under the Pay Transparency Act is limited: in time to one calendar year and in scope to the establishment. The EU Pay Transparency Directive, for which the transposition deadline expired on 7 June 2026, provides, however, for a more extensive right to information. Nevertheless, the implementation of the Directive is not (yet) foreseeable. Until then, the provisions of the Pay Transparency Act remain in force, as the Directive does not have direct effect. Employers are advised to base their own pay structure on a transparent, gender-neutral assessment scheme as of now and to always document pay decisions. This reduces the risk of losing an equal pay case – regardless of when and how the legislature transposes the Directive.

Author

Daniel Greger
Luther Rechtsanwaltsgesellschaft mbH, Hamburg



Works council involvement in the recruitment of a matrix manager

The works council's right to be consulted on recruitment may also apply to managers who are employed by another group company.

Federal Labour Court, decision of 27 January 2026 – 1 ABR 18/25

The case

The employer manufactures medical products and operates a single site in Germany. Its parent company is based in the USA. An employee working there is employed by a sister company in Austria and carries out her duties via video conferencing. She supervises five field staff, all of whom are employed by the German employer. A manager from a sister company in the UK has the authority to issue instructions to the employee. The works council established at the site is of the opinion that the employment in question constitutes a recruitment within the meaning of Sec. 99 (1) Sentence 1 Works Constitution Act. Furthermore, it is argued that she has been integrated into the workforce, not least due to her supervisory role. The works council therefore sought to have the employee's appointment set aside until such time as its consent had been granted or replaced by a court order. The Labour Court dismissed the application, whilst the Higher Labour Court upheld it.

The decision

The Federal Labour Court upheld the employer's appeal. A recruitment within the meaning of Sec. 99 (1) Sentence 1 Works Constitution Act exists where a person is integrated into the undertaking in order to fulfil its operational purpose, together with the employees already working there, by carrying out tasks subject to instructions. A person is deemed to be integrated if they perform work which, by its nature, is subject to instructions organised by the employer. The employee must be integrated into the organisation of the undertaking in such a way that the employer holds a right to issue instructions typical of an employment relationship and determines the nature, location and timing of their deployment. The Higher Labour Court wrongly assumed that, when determining whether managers employed by another employer are integrated, it is irrelevant whether they are subject to the business owner's right to issue instructions. Employment presupposes that the person in question



themselves carries out work subject to instructions. The basis for the works council's involvement, even in the case of supervisors, is always the necessary 'employment' within the business, which, by definition, requires that the business owner be entitled to a minimum level of authority to issue instructions. The fact that a manager, in turn, has 'professional authority to issue instructions' over subordinate employees of the undertaking does not, however, automatically mean that they work together with these employees to achieve the undertaking's purpose. What is decisive is the actual exercise of this authority, from which involvement in the performance of the tasks or work processes to be carried out arises. The Federal Labour Court referred the case back to the Higher Labour Court for further findings in this regard.

Our comment

The Federal Labour Court recently ruled that, in accordance with Sec. 99 (1) Sentence 1 Works Constitution Act, recruitment is in principle also possible for managers who have an employment relationship with another group company within the framework of a matrix structure, provided that they are at least partially subject to instructions on site and (jointly) pursue the operational purpose (decision of 23 September 2025 – 1 ABR 25/24). The works council's involvement in recruitment may therefore also be triggered in the case of a manager who is not in an employment relationship with the business owner at all, but who carries out work-related activities and is, at least in part, subject to the instructions of the local employer. The fact that there may also be an affiliation with another organisation is irrelevant. Indeed, this may even give rise to a right to vote multiple times in works council elections (Federal Labour Court, decision of 22 May 2025 – 7 ABR 28/24).

Author

Stephan Sura

Luther Rechtsanwaltsgesellschaft mbH, Cologne



(No) Compensation for damages in the event of a delayed target

A delay by the employer in setting a target automatically gives rise to a claim for higher variable remuneration, particularly where a court has ruled that a target set retrospectively was within the bounds of reasonable discretion despite the delay.

Federal Labour Court, decision of 20 May 2026 – 10 AZR 88/25

The case

The plaintiff employee asserted a claim for damages on the grounds of a delayed target setting for variable remuneration in the 2021 financial year. The relevant commission scheme provided for a performance-related component of remuneration, the amount of which depended on the pre-tax profit of the relevant global business division. Management was obliged to set the relevant 100 per cent target figure in November each year. For the 2021 financial year, the defendant employer did not set the target figure until the end of March 2021. After initially communicating a figure of around 18 million EUR, the figure was revised to 60 million EUR on the very same day. It subsequently paid out the variable remuneration on this basis. Before the plaintiff brought a claim for damages before the court, he had brought a claim for a higher variable remuneration based on the lower target figure initially communicated. That claim was unsuccessful. In his latest claim, he is now seeking damages of 107,236.80 EUR on the grounds that, had the target been set in good time, the initially stated target figure of approximately 18 million EUR would have been the relevant figure.

The decision

The Federal Labour Court dismissed the plaintiff's appeal. In the previous proceedings, the plaintiff had asserted a contractual claim for performance in respect of variable remuneration. The decisive factor there had been whether the target figure of 60 million EUR had been validly set. In the subsequent legal proceedings, however, the plaintiff had based his claim on a breach of a contractual obligation due to the delayed setting of the target. Although the defendant had culpably breached its duty to set the target in good time (as it should have set the target as early as November), there was nevertheless no compensable loss. In the previous proceedings, it had already been established with legal force that the target figure of 60 million EUR was within the bounds of reasonable discretion. This finding could not be called into question again in the subsequent proceedings. Consequently, the objection that, had the defendant acted in accordance with its duties, a lower target figure would have been set, which would have justified a claim to higher variable remuneration, was ruled out.

Our comment

Where a target is set late, employees may, in principle, assert claims for damages. However, if the relevant target figure has already been confirmed as reasonable in a previous legal proceeding, the same economic interest cannot be enforced through a claim for payment based on different grounds in new proceedings.

Author

Martina Ziffels
Luther Rechtsanwaltsgesellschaft mbH, Hamburg

No invalidity of a notice of collective redundancy for minor errors

Incorrect information in a notice of collective redundancy will only render the related dismissals invalid if it prevents the Employment Agency from fulfilling its duty to manage the consequences of the collective redundancy.

Federal Labour Court, decision of 25 June 2026 – 6 AZR 7/26

The case

Following the opening of insolvency proceedings in respect of the employer's assets, the defendant insolvency administrator intended to close down the business. The figures regarding the number of employees affected differed between the consultation and notification procedures: Whilst the documents relating to the consultation procedure stated, amongst other things, 61 intended terminations, the mass redundancy notification cited 34 terminations. In fact, 31 employment contracts were terminated. The plaintiff employee contended that his dismissal was invalid due to the incorrect figures. The Labour Court upheld the claim. Following the defendant's appeal, the Higher Labour Court dismissed it.



The decision

The plaintiff's appeal was unsuccessful. The Federal Labour Court confirmed the validity of the dismissal. The consultation procedure had been conducted in accordance with the law. The court regarded the mention of 61 rather than 31 employees to be made redundant as an obvious typo. The subsequent documents had made it clear what the actual intended number of terminations was. Nor did the incorrect information in the mass redundancy notice preclude its validity. Not every objectively incorrect statement was decisive. Rather, the decisive factor was whether the error prevented the Employment Agency from seeking solutions to the problems raised by the mass redundancy and from developing appropriate measures. A redundancy figure that was only slightly overstated did not normally give rise to such a situation.

Our comment

The Federal Labour Court focuses on the relevance of the error to the purpose of the collective redundancy procedure. The European Court of Justice had recently ruled that errors which frustrate the purpose of the procedure generally render the redundancy invalid (decision of 30 October 2025 – C-134/24 [Tomann] and C-402/24 [Sewel]). Now, however, a flawed notification may also be deemed valid, provided that the error does not affect the Employment Agency's ability to fulfil its duties. For employers, this offers some limited relief: minor deviations do not automatically render all dismissals invalid. However, this does not imply a general lowering of the standards of care: formal errors continue to entail significant risks of invalidity, and the collective redundancy procedure must therefore continue to be conducted with the utmost care.

Author

Achim Braner

Luther Rechtsanwaltsgesellschaft mbH, Frankfurt am Main

No right to be provided with a compliance report

The provision in Article 15 GDPR does not confer any right to the provision of a complete copy of a final compliance report, except for documents containing personal data.

Federal Labour Court, decision of 16 April 2026 – 8 AZR 169/25

The case

Following reports of an employee's poor management style, the employer commissioned a law firm to carry out an internal compliance investigation. The final report contained, amongst other things, allegations, the names of whistleblowers and witnesses, the content of conversations, assessments of statements, as well as legal analyses and client advice. After the findings had been used in administrative proceedings relating to a proposed dismissal, the employee requested a full copy of the report pursuant to Article 15 (1) in conjunction with Article 15 (3) GDPR. The Labour Court granted the request, whilst the Higher Labour Court denied the claim for the handover of a copy but granted access to the report.

The decision

The Eighth Senate of the Federal Labour Court dismissed the appeal. Article 15 (3) Sentence 1 GDPR does not establish an independent right to the handover of a complete document. Rather, what is required is a faithful and comprehensible reproduction of personal data. Only where it is essential for the understanding of such data and the effective exercise of rights under the GDPR may extracts from documents or, exceptionally, complete documents be required to be provided. Legal analyses, however, do not constitute personal data insofar as they reflect the legal assessment of a set of facts by the employer or its advisers.

Our comment

The decision establishes important guidelines for internal investigations. A compliance report is neither entirely subject to disclosure nor entirely protected. The decisive factor is the specific content of the information: facts about employees, statements regarding their conduct and personal assessments may fall within the scope of Article 15 GDPR. Legal assessments, strategic recommendations and client advice generally do not. In practice, it is advisable to make a clear distinction between the establishment of the facts and legal assessment. Investigation findings should, where possible, be documented in such a way that personal information can be specifically disclosed without simultaneously revealing legal advice or litigation strategy.

Author

Kevin Brinkmann, LL.M.
Luther Rechtsanwaltsgesellschaft mbH, Hamburg



Admissibility of unlawfully obtained data in court

The GDPR does not prohibit a national court from admitting as evidence personal data that was previously obtained by one of the parties in breach of data protection regulations.

ECJ, decision of 18 June 2026 – C-484/24 (NTH Haustechnik)

The case

The plaintiff, an employer, is the owner of a heating and air-conditioning engineering firm where the defendant, an employee, was employed until autumn 2019. As the defendant was married to the employer's CEO, she had access to the premises and the computers there until the termination of her husband's employment in mid-2022. Immediately afterwards, the plaintiff discovered that the defendant had sold items belonging to the business on eBay for her own gain. The loss amounted to approximately 46,500.00 EUR. In the subsequent proceedings, the defendant claimed that the items had been given to her as a gift by the plaintiff. Furthermore, she claimed that the plaintiff had unlawfully obtained the information about the sales by changing her eBay password via the phone number of her former work mobile phone. The Higher Labour Court stayed the proceedings and referred several questions to the ECJ regarding the admissibility of data potentially obtained unlawfully as evidence in court.

The ruling

The ECJ first noted that the GDPR generally applies to data processing carried out by courts and public authorities. The concept of 'processing' also encompasses the inclusion of personal data in a case file, whether in physical or digital form. No provision or principle of the GDPR generally or absolutely precludes a court from being authorised to take into account personal data that was previously processed unlawfully by the person who transmitted it within the meaning of the Regulation. It is not necessary for the data subject affected by the potential infringement to be aware of this, because the processing of personal data by a court in connection with the data contained in offers of evidence is, in principle, necessary in order to fulfil the obligation to rule on the admissibility of those offers of evidence. The right to the protection of personal data is not an unrestricted right, but



must be balanced against other fundamental rights, such as the guaranteed right to effective judicial protection.

Our comment

The ECJ confirms the criteria established by the Federal Labour Court regarding the admissibility of information obtained in breach of data protection law: In summer 2023, the judges in Erfurt ruled that neither the GDPR nor the German Civil Procedure Code imposes a general prohibition on the use of personal data where such data has been obtained in breach of applicable data protection regulations (decision of 29 June 2023 – 2 AZR 296/22). Consequently, the inadmissibility of such evidence is, in essence, only conceivable if the data protection breach committed to obtain the evidence is so serious that it can no longer be regarded as proportionate at all, for example where covert video recordings in changing rooms infringe on employees' private sphere.

Author

Stephan Sura
Luther Rechtsanwaltsgesellschaft mbH, Cologne

No general ban on strikes in essential public services

Strike action in the public services sector is not prohibited as a matter of principle and is not disproportionate provided it is announced with sufficient notice and does not endanger the life, limb, health or other vital interests of third parties.

Nuremberg Higher Labour Court, decision of 19 March 2026 – 7 GLa 4/26

The case

The plaintiff is a local public transport company bound by the collective agreement for public transport operators in Bavaria. This agreement was terminated by the trade union that had concluded it – the defendant in this case – with effect from 31 December 2026. The defendant submitted collective bargaining demands which, in particular, provided for a 30 per cent increase in pay alongside a reduction in weekly working hours. The parties negotiated on a total of four days, up to 9 March 2026. During this period, the defendant called for and carried out three warning strikes. No agreement could be reached, apart from rules on emergency services. On 17 March 2026, the defendant called for a further warning strike to begin on 18 March 2026. The plaintiff objected to this and applied for an interim injunction ordering the revocation of the strike call and the cessation of any strike action. The Labour Court dismissed the application.



The ruling

The Nuremberg Higher Labour Court confirmed this. The strike pursued an objective that could be regulated by collective agreement, meaning that the demand for a pay rise was not contrary to public policy under Sec. 138 German Civil Code. A strike demand is not subject to judicial review for proportionality, as this would otherwise constitute a breach of the freedom of association under Article 9 (3) German Basic Law. Furthermore, the strike did not contravene the principle of proportionality in the broader sense, as sufficient negotiations had already taken place between the parties and the strike was therefore necessary. Ultimately, the strike was also proportionate in the narrower sense. In particular, there is no general ban on strikes in essential public services: a case-by-case assessment is always required, in which, above all, the nature of the public service, the extent to which third parties are affected, the duration and scope of the strike, advance notice periods and the availability of emergency and alternative services must be taken into account. As the health sector was not affected in this instance, the restrictions were not severe enough to warrant prohibiting the strike, particularly as an emergency service agreement was in place.

Our comment

Prohibitions and restrictions on strikes are subject to strict conditions and are therefore rare. This also applies to essential public services. In the present case, this was specifically the case, as no vital services or goods were affected and, consequently, no serious danger to life, limb, health or other existential interests could be identified. Furthermore, an emergency service was maintained throughout all the strike days. The situation may be assessed differently if the strike takes place in the healthcare sector and no (adequate) emergency service agreement is concluded. Employers should therefore carefully document, during collective bargaining, the negotiating positions that were exchanged. It should also be recorded, whilst ensuring that meaningful evidence is secured, to what extent emergency service agreements were negotiated and whether they were possibly boycotted by the trade union. This may be decisive in legal proceedings concerning the legality of a strike.

Author

Sophie Haeberlein
Luther Rechtsanwaltsgesellschaft mbH, Leipzig



Disproportionality of a dismissal for insulting a line manager

Although referring to a superior as a 'child' and making vulgar criticisms of her management style constitute breaches of duty, they do not justify dismissal if the insult is minor and the employee remains manageable.

Düsseldorf Higher Labour Court, decision of 18 November 2025 – 3 SLa 699/24

The case

The plaintiff was employed by the defendant as a warehouse worker. In April 2024, he received a written warning for repeated breaches of duty. In August 2024, a contentious incident occurred with his new shift supervisor. According to the defendant's account, he allegedly failed to comply with instructions and said: 'You've got no right to tell me what to do. You're just a child.' When she asked him to calm down, he is alleged to have replied in Turkish: 'You've fucked the shift mum.' The plaintiff admitted to making the statement but claimed that, when translated, the sentence meant "You made the shift mother cry" and referred to excessive pressure to perform. The defendant terminated the employment contract with notice on grounds of misconduct. The plaintiff brought an action for unfair dismissal, which the Labour Court dismissed.

The decision

The Düsseldorf Higher Labour Court ruled the opposite. It held that the termination was not justified on grounds of conduct within the meaning of Sec. 1 (2) Unfair Dismissal Act and had therefore not terminated the employment relationship. Although gross insults directed at superiors or colleagues could constitute a significant breach of duty and even justify summary dismissal, the court found that both of the plaintiff's remarks constituted a breach of duty. Nevertheless, the dismissal was disproportionate. Whilst the term 'child' was indeed derogatory, it lay at the lower end of the materiality threshold. The second statement was to be classified as vulgar criticism. Even if there had been a further relevant warning within a short period of time, this would have been the primary course of action, particularly as there were no significant operational disruptions and the plaintiff was capable of being managed. The appeal was not allowed.

Our comment

Employers often tend to rush into dismissals in cases of insults without assessing the risks of the dismissal being deemed invalid. A fundamental distinction must be made between an insult and criticism, even where the language used is coarse. In the case of a genuine insult or abuse, the severity is decisive in determining a proportionate sanction. As a rule, a written warning is the appropriate measure. In cases of doubt, a second warning may also be issued, provided that the statement does not take the form of gross abuse, business operations are not disrupted, and the employee shows understanding or is amenable to guidance.

Author

Andre Schüttauf
Luther Rechtsanwaltsgesellschaft mbH, Essen

Warning letter for xenophobic remarks in the workplace

Slogans such as 'Germany for the Germans, foreigners out' may, despite freedom of expression, constitute good cause for summary dismissal. However, in the case of a first-time offence, a written warning is usually required.

Bremen Higher Labour Court, decision of 9 December 2025 – 1 SLa 7/25

The case

The plaintiff has been employed as a car mechanic by the defendant employer since 1991. A group works agreement in force at the company prohibits any discriminatory behaviour. During a night shift at the end of November 2023, the plaintiff spoke to a colleague about changes in language usage regarding terms with racist connotations and ended the conversation with the phrase: 'Germany for the Germans, foreigners out'. Subsequently, an internal reporting office of the parent company launched an investigation and also interviewed another employee who had been present at the time of the incident. This employee stated that the plaintiff had looked at him and, whilst doing so, said the N-Word and laughed. As a result, the defendant dismissed the plaintiff summarily without notice, or alternatively with notice. The Labour Court upheld the subsequent action for protection against unfair dismissal.

The decision

The Bremen Higher Labour Court reached the same conclusion. Gross insults directed at work colleagues could, in themselves, constitute good cause for summary dismissal, including the use of the N-Word. Derogatory remarks based on ethnic origin are generally to be regarded as discrimination under the General Equal Treatment Act, whilst employers are obliged under its Sec. 12 (3) to prevent such remarks. The term used by the colleague, which the plaintiff disputed, would, if proven to be true, in itself constitute just cause under Sec. 626 (1) German Civil Code. However, the Higher Labour Court was unable to establish that the remark had been made, nor could it affirm the existence of sufficient strong suspicion. The undisputed remark 'Germany for the Germans, foreigners out' likewise did not justify dismissal. The remark could, in itself, constitute good cause within the meaning of Sec. 626 (1) German Civil Code. Freedom of expression under Article 5 German Basic Law is subject to the limits set



by general laws, which also include the duty of consideration under the employment contract. However, the summary dismissal was disproportionate in the absence of a prior warning. Such a warning had not been ineffective, nor was there a breach of duty so serious that tolerating it for the first time would be unreasonable.

Our comment

Even in the case of xenophobic remarks in the workplace, the individual circumstances are always decisive: without a prior warning, dismissal is generally disproportionate, even in the case of slogans such as those in the present case. The assessment may be different in the case of deliberate racist denigration of work colleagues if the employee shows no sign of remorse. This was the ruling, for example, by the Federal Constitutional Court in the case of an employee who made monkey noises at a colleague with dark skin. This was specifically not covered by freedom of expression and constituted 'good cause' under Sec. 626 (1) German Civil Code (decision of 2 November 2020 – 1 BvR 2727/19). The decisive factors in this case were precisely the individual's dismissive, unrepentant attitude and a previous written warning. Employers should therefore always issue such a warning in the event of a first-time incident, in order to make it unambiguously clear that discriminatory remarks will not be tolerated and to increase the likelihood of a subsequent dismissal being upheld.

Author

Luisa Sause
Luther Rechtsanwaltsgesellschaft mbH, Cologne

Entitlement to the minimum wage in dual study programmes

If an employer fails to provide a student on a dual study programme with the necessary knowledge and the student consequently fails to achieve the required academic standards, the placement is no longer considered compulsory. Consequently, the student is entitled to remuneration at the statutory minimum wage rate for the work performed.

Baden-Württemberg Higher Labour Court, decision of 12 December 2025 – 15 Sa 47/24

The case

The plaintiff was a student on the dual study programme 'Fitness Science and Fitness Economics' from 1 October 2022. As part of this, she entered into a 'dual study and training contract' with the defendant employer, which operates a fitness centre. Under this contract, she was to undertake the in-company training phases with the defendant for seven semesters. The defendant undertook to provide the plaintiff with the necessary knowledge and skills. For the first academic year, a monthly remuneration of 750 EUR was agreed, with an increase of 100 EUR per month in each subsequent academic year. The weekly working hours were to be 35 hours. In the second semester, the plaintiff failed to submit any practical reports to her university, whereupon the university refused to recognise the semester. In mid-July 2023, the plaintiff unsuccessfully demanded a higher salary from the defendant. Later, in mid-September, she terminated the contractual relationship and subsequently brought a claim for remuneration at the statutory minimum wage for her work, as this had not constituted a compulsory work placement in accordance with Sec. 22 (1) Sentence 2 Minimum Wage Act. The Labour Court dismissed the claim.



The decision

In contrast, the Baden-Württemberg Higher Labour Court partially upheld the plaintiff's appeal. She was entitled to remuneration at the minimum wage rate for the second semester. The first semester had constituted a compulsory internship pursuant to Sec. 22 (1) Sentence 1 Minimum Wage Act. In this sense, an internship is equally compulsory if it takes place within the framework of cooperation between higher education institutions and companies, which is why internships in dual study programmes might also be exempt from the Minimum Wage Act. A high volume of working hours or a long overall duration of training would not preclude this, provided that the period complies with the relevant provisions governing education. However, a different situation applies to the second semester: the training was not carried out in accordance with the provisions of the university during this phase, as the defendant was unable to prove that it had imparted the knowledge and skills required. This was demonstrated in particular by the plaintiff's lack of practical reports. The appeal to the Federal Labour Court is pending.

Our comment

The decision is wrong and would mean that a student's failure to pass an examination, where their assessment is linked to the completion of a practical study period, could potentially lead to a claim for the minimum wage without any action on the part of the placement provider. When enacting the Minimum Wage Act, the legislature explicitly intended to include practical placements in dual study programmes under Section 22 (1) Sentence 2 No. 1 Minimum Wage Act, meaning that the question of a time limit does not arise in this case. A claim to the minimum wage in the case of compulsory work placements can only arise if these are not (or are no longer) compulsory, or if, based on the nature of the work, the focus is de facto not on the learning objective but on the performance of regular work. This then, however, concerns the distinction from an employment relationship. It is to be hoped that the Federal Labour Court will correct the decision.

Author

Stephan Sura
Luther Rechtsanwaltsgesellschaft mbH, Cologne

■ CURRENT DEVELOPMENTS IN PENSIONS

Pension policies in flux

All three pillars of pension provision are regularly subject to new statutory requirements and socio-political reform proposals. Demographic change and the associated demands on the long-term financial sustainability of pension systems necessitate ongoing adjustments. Numerous developments are particularly evident during the current parliamentary term.



What happened so far

New legislation can have a significant impact on the legal framework and the design of future occupational pension schemes, as well as on employees' expectations. The recently introduced 'active pension', for example, creates tax incentives for continued employment after reaching the standard retirement age. This should make it easier for employers to persuade experienced employees to continue working after reaching the standard retirement age. This can be particularly useful in the event of skills shortages and when training successors. Existing pension schemes should be reviewed to assess whether they need to be adapted to take account of extended working lives.

The 2025 Pension Package, in turn, stabilises pension levels and extends periods spent raising children under the statutory pension scheme. The 2026 Pension Value Determination Ordinance recently increased the current pension value by 4.24 per cent. However, these regulations are of practical relevance to employers with occupational pension schemes only where the pension commitment is linked to the statutory pension, for example in the case of older pension schemes offering comprehensive provision.

The Second Occupational Pension Strengthening Act aims to promote the uptake of occupational pension schemes, in particular through developments relating to the social partner model and improved support for occupational pensions for low-income employees. The improved support for low-income earners is of particular interest to companies with many part-time staff or employees in lower pay bands. The extended option for lump-sum settlements for small pensions enables employers to be relieved of the long-term administrative burden associated with smaller pension liabilities.

What lies ahead

Further changes are already on the horizon: as part of the reform of the 'Riester pension', the so-called retirement savings account will receive state subsidies from 2027 onwards. This will also be available as a 'standard account'

(with specified requirements). Support in the form of allowances and special expenditure deductions will remain in place. However, the granting of the full allowances will no longer depend, as was previously the case, on the payment of a minimum contribution based on the previous year's income. The group of those eligible for support will be expanded, so that self-employed persons and those insured under professional pension schemes are now also eligible.

In addition, the draft bill for the 'Early Start Pension' has been published. The aim of the legislation is to establish a funded pension scheme starting from the age of six. This is intended to facilitate long-term wealth accumulation. The plan provides for a state contribution of ten euros per month, either into a pension savings account contract taken out by the parents or – if no such contract is taken out – into a collective investment scheme on the capital market.

In June 2026, the Pension Security Commission also presented its report on the further development of pension provision, setting out numerous recommendations for a financially sustainable pension system. The proposed measures include, for example, statutory pension insurance to cover further groups, and introducing a funded pension component. The take-up rate of occupational pension schemes is to be increased.

■ EVENT ANNOUNCEMENT:

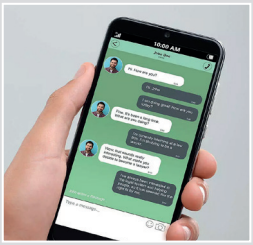
The author of this article will speak on the topic 'Occupational pensions and the EU Pay Transparency Directive: contribution or benefit?' at the upcoming Handelsblatt conference 'Occupational Pensions 2026', 9–11 November 2026 in Berlin. ovember 2026 in Berlin.

Further information is available at:
https://live.handelsblatt.com/event/jahrestagung-betriebliche-altersversorgung/programm/

Author

Prof. Dr Annekatrin Veit
Luther Rechtsanwaltsgesellschaft mbH, Munich

■ LATEST ENTRIES FROM OUR EMPLOYMENT LAW BLOG



Tanja Treib:
Weiterleitung privater Chatnachrichten an den Arbeitgeber – ein Verstoß gegen die „Haushaltsausnahme" der DSGVO? | →



May Linda Chhor:
Vorwirkender Kündigungsschutz vor jedem Elternzeitabschnitt | →



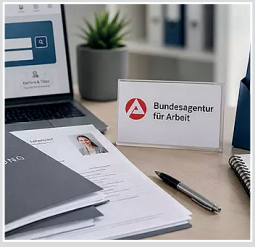
Hans-Christian Ackermann:
Materieller Schadensersatz nach Diskriminierung im Bewerbungsverfahren | →



Prof. Dr. Robert von Steinau-Steinrück:
Öffentliche Stimmauszählung bei der Wahl der Schwerbehindertenvertretung | →



Lukas Paetzold und Charlotte Elsner, LL.M.:
Auswirkungen einer einseitigen unwiderruflichen Freistellung nach erfolgreicher Kündigungsschutzklage | →



Dr. Jan Hufert:
Umfang des Auskunftsanspruchs bei Streitigkeiten um Annahmeverzugslohn | →

■ ADVISORY INFORMATION

Social security audits

Identifying risks early on, safeguarding room for manoeuvre



Social security audits can result in additional contribution claims, late payment penalties and significant organisational burdens. They often also raise issues relating to labour law, tax law, administrative offences and criminal law.

Pension insurance providers audit employers as part of audits under Section 28p of Book IV of the Social Code (SGB IV). In addition, the Financial Control Unit for Illegal Employment (FKS) at the main customs offices has audit responsibilities and powers. We support you from preventive risk assessment right through to representation in appeal and legal proceedings.

Our advisory approach

We identify social security risks at an early stage and provide you with legal and strategic support during audit situations.

- Preventive risk analysis and practical recommendations for action;
- Legal support throughout the audit process and communication with the authorities;
- Assessment of consequential and liability risks, as well as representation in the event of disputed findings.
- Typical areas of risk
- Additional contribution claims arising from differing assessments under social security law;
- Reporting, record-keeping and documentation obligations;
- Use of external staff, service providers, subcontractors or persons working within the group;
- Late payment penalties, fines and associated personal and organisational risks.

Prevention and preparation for audits

A timely review helps to identify sources of error and prevent objections during tax audits.

- Assessment of remuneration and benefits structures;
- Establishment of documentation and approval processes;
- Review of information relevant to audits and preparation for meetings and statements.

Support during DRV and FKS audits

In the event of announced DRV audits, we assist with the preparation of documentation, the legal assessment of critical issues and communication with the German Pension Insurance (DRV). For audits conducted by the Financial Control Authority for Illegal Employment (FKS), we are

available at short notice to provide initial advice, address communication and documentation issues, and assess specific risk situations.

Audit findings, contribution notices and appeals

We review audit reports and contribution notices on the basis of the facts, legal assessment and economic consequences. We develop the procedural strategy, conduct discussions with the relevant authorities and represent you in appeal and social security court proceedings.

- Assessment of potential contribution and associated costs, as well as necessary adjustments for the future;
- Monitoring of deadlines, lodging and substantiating appeals;
- Coordination with tax advisers, payroll agencies and other advisers.

Note on meeting deadlines: As a general rule, an appeal must be lodged within one month of notification of the administrative decision (Section 84 of the Social Court Act (SGG)).

Your added value

- Early risk identification and, consequently, prevention of objections;
- Legal support in sensitive audit and decision-making situations;
- Representation of your interests in the event of disputed findings and legally sound recommendations for process improvement.

Legal support when it matters most.

Authors

Simone Lersch
Luther Rechtsanwaltsgesellschaft mbH, Cologne

Nina Stephan
Luther Rechtsanwaltsgesellschaft mbH, Essen

■ GENERAL INFORMATION

Autorinnen und Autoren dieser Ausgabe



Achim Braner
Lawyer, Partner, Certified Specialist in Employment
Frankfurt a.M.
+49 69 27229 23839
achim.braner@luther-lawfirm.com



Simone Lersch
Lawyer, Partner
Cologne
+49 221 9937 16776
simone.lersch@luther-lawfirm.com



Prof. Dr Robert von Steinau-Steinrück
Lawyer, Partner
Certified Specialist in Employment
Berlin
+49 30 52133 21142
robert.steinrueck@luther-lawfirm.com



Prof. Dr Annekatrin Veit
Lawyer, Tax Advisor, Partner
Munich
+49 89 23714 12913
annekatrin.veit@luther-lawfirm.com



Nina Stephan
Lawyer, Counsel
Certified Specialist in Employment
Essen
+49 201 9220 24758
nina.stephan@luther-lawfirm.com



Martina Ziffels
Lawyer, Counsel
Certified Specialist in Employment
Hamburg
+49 40 18067
martina.ziffels@luther-lawfirm.com



Andre Schüttauf
Lawyer, Senior Associate
Essen
+49 201 9220 24620
andre.schuettauf@luther-lawfirm.com



Kevin Brinkmann, LL.M.
Lawyer, Senior Associate
Certified Specialist in Employment
Hamburg
+49 40 18067 11184
kevin.brinkmann@luther-lawfirm.com



Daniel Greger
Lawyer, Senior Associate
Certified Specialist in Employment
Hamburg
+49 40 18067 12195
daniel.greger@luther-lawfirm.com



Sophie Haeberlein
Lawyer, Associate
Leipzig
+49 341 5299 1225
sophie.haeberlein@luther-lawfirm.com



Dr Jan-Moritz M. Hahn
Lawyer, Associate
Leipzig
+49 341 5299 24874
jan-moritz.hahn@luther-lawfirm.com



Dr Paulina Noppeney
Lawyer, Associate
Berlin
+49 30 52133 21142
pia-paulina.noppeney@luther-lawfirm.com



Stephan Sura
Legal Consultant
Cologne
+49 221 9937 21785
stephan.sura@luther-lawfirm.com



Luisa Sause
Research assistant
Cologne
+49 221 9937 10030
luisa.sause@luther-lawfirm.com

Luther.

Bangkok, Berlin, Brüssel, Delhi-Gurugram, Düsseldorf, Essen, Frankfurt a. M., Hamburg, Hannover, Ho-Chi-Minh-Stadt, Jakarta, Köln, Kuala Lumpur, Kyjiw, Leipzig, London, Luxemburg, München, Shanghai, Singapur, Stuttgart, Yangon

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