PRESS RELEASE

Is the "nice one" the stupid one? - Caution when travelling to training courses before starting work

Munich, 13 October 2020 - Tomorrow, 14 October 2020, the Federal Labor Court (Bundesarbeitsgericht, BAG) has to decide a case in which the employer had allowed a new employee to travel to a training session on the first working day already the day before. The lower instance (Regional Labor Court Dusseldorf) considered this as a consensually advanced beginning of the employment relationship - with serious consequences for the employer. Because the employer-employee relationship was initially limited to half a year and was extended after expiration of this time limit exactly to the maximum legally permissible total duration of two years, which applies to unfounded fixed-term employment relationships. Thus this maximum duration had been exceeded by one day with the consequence that the fixed-term agreement was ineffective and an unlimited employment relationship existed - with full dismissal protection for the employee (Case No.: 7 AZR 375/19).

The employee, who lives in Dusseldorf, had applied to the Dusseldorf branch office of the Federal Office for Migration and Refugees as a "listener". Before beginning his work, he was to be trained in Nuremberg for a period of three weeks starting on September 5, 2016, 9:00 a.m. The employer signed the employment contract, which provided for employment as of 5 September 2016. Subsequently, he informed the (severely disabled) employee upon his request that he agreed to travel the day before (Sunday) and to pay the hotel costs for the overnight stay as of 5 September 2016. Afterwards, the employee also signed the contract, but still with the start of work on 5 September. Later, the parties extended the employment relationship, which was initially limited to six months, to two years. The employer did not continue the employment relationship after expiration of the two years, but the employee wanted to continue working and filed a complaint.

The employee considers the time limit to be invalid because it exceeds the maximum period of two years. The employment relationship had already started on September 4, 2016, due to the necessary travel to the training on that day. It had been a business trip that meant working hours. A limitation until 4 September 2018 therefore exceeded the maximum permissible maximum time limit by one day. The employer, on the other hand, is of the opinion that the journey did not put the employment relationship into effect on 4 September 2016.

"The decision of the BAG is very likely to have significance not only for fixed-term cases, but also for other typical constellations at the beginning of an employment relationship," says Markus Künzel, lawyer, specialist in labour law and partner at the international commercial law firm BEITEN BURKHARDT: "Training at the start of employment is widespread, as is the agreement of a probationary period, for example. It is not uncommon for the last day of a probationary period to give notice of termination. If the BAG decided that the arrival on the day before the beginning of an employment relationship would be brought forward and then terminated only on the last day of the probationary period, this termination would not have been declared in time during the probationary period. The employee would then have protection against dismissal, and the notice of termination would generally be invalid".

Regarding the outcome of the proceedings, the lawyer says: "In this case, it can be argued that the journey to the training the day before was a preparatory measure for the start of the activity, ultimately the journey from the home to the workplace, which is not part of the activity within the employment relationship. Therefore the journey is not to be counted towards the maximum possible two-year period". The lawyer continues: "In addition, the employee has acted contradictorily by referring to an earlier start of work, although the early arrival was in his interest. He signed the contract, which provides for the start of work on the training day, after the employer allowed him to travel earlier and also paid the accommodation costs. It would be an unfair result, if the employer would remain 'the stupid one', just because he was 'too nice'. In addition, companies would then have to be advised in future not to act in such an employee-friendly manner in comparable cases. In this case, in particular: "To leave for training at half past four in the morning," says the lawyer.

Markus Künzel is a specialist in labour law and a partner at the Munich office of BEITEN BURKHARDT. He is available for interviews, guest contributions etc. on this topic.

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