TaylorWessing

10 pitfalls in German employment litigation

German (employment) litigation is somewhat different to litigation abroad and often uncharted territory for foreign clients. This is especially the case given that every employee can contest a termination of the employment relationship before a labor court, regardless of the employer's opinion that the termination is valid. Litigation in Germany is however usually driven by the goal to have speedy proceedings and to quickly find a mutual solution. Foreign clients should keep in mind certain pitfalls and concepts that are unique to German employment litigation compared to foreign jurisdictions.

1 Specific competent courts

Labor courts are competent for all individual civil-law disputes between employees and employers that may arise in connection with an existing employment relationship, but also with its establishment or termination. In addition, labor courts also have jurisdiction over disputes under collective labor law, in particular between employers and works councils. In Germany, the labor jurisdiction is a separate jurisdiction and independent of the civil court. This ensures that judges of the labor courts are not dealing with other civil lawsuits at all.

On the other hand, civil courts are competent for disputes between board members of corporations and managing directors who are not perceived as employees.

2 Observe the local jurisdiction

Parties have to file their lawsuit at the correct court. Employees tend to submit the lawsuit at the place they are performing their work, i.e. (home) office. They may of course also choose the judicial district where the administrative seat of the legal entity of the employer is located. Even if an employee is hired by a company incorporated outside of Germany (e.g. UK, USA), the company can be sued before a German labor court if the employee is usually working in Germany.

If an employer seeks legal action against an employee, the place of jurisdiction shall be either the employee's place of residence or the place where the work is performed. If a claim is filed with a labor court that has no local jurisdiction, it is referred to the labor court that does have the local jurisdiction but this can of course delay the process.

3 Chose the correct type of proceeding

There are two different types of proceedings for legal disputes before German labor courts: (1) the judgment proceeding (*Urteilsverfahren*) and (2) the resolution proceeding (*Beschlussverfahren*). Which of the two proceedings shall be chosen mainly depends on the intent of the plaintiff as to which type of court decision (judgment or resolution) shall be retrieved. Below, we have outlined the major procedural differences of these two proceedings:

In judgment proceedings, similarly to civil proceedings, the parties themselves are responsible for informing the court of the facts

required for the decision and, if necessary, for proving them. The most common action in the judgment proceeding is the employee's action for protection against dismissal and/or claim for (variable) compensation.

In resolution proceedings, generally the court is responsible for the investigation and clarification of facts (so-called *Amtsermittlungsgrundsatz*). In particular, the resolution procedure is the right type of procedure for matters arising from the Works Constitution Act and the various co-determination laws.

4 Three possible instances

The labor jurisdiction consists of three instances where we act on your behalf.

The first instance is formed by the local labor courts (*Arbeitsgerichte* – "**ArbG**") which decide through a panel of judges which is called chamber (*Kammer*), in each case consisting of one professional judge (chairman of the chamber), one honorary judge from the sphere of employees and one from the sphere of employers. An obligation to be represented by a lawyer before a local labor court does not exist.

The second instance is formed by the regional labor courts (*Landesarbeitsgerichte* – "**LAG**"), which are responsible for the review of first-instance decisions in appeal proceedings. An appeal proceeding is only possible in the event that (i) a local labor has granted the appeal because of its fundamental importance, (ii) the amount in dispute is higher than EUR 600 **or** (iii) the proceeding concerns the (non-)existence or termination of an employment contract. The composition of judges within the chambers of the regional labor courts is the same as for the local labor courts.

The third and last instance of the labor jurisdiction is the Federal Labor Court (*Bundesarbeitsgericht* – "**BAG**"), which solely deals with appeals against the judgments of regional labor courts. If an appeal to the Federal Labor Court has been permitted in the judgment of the regional labor court or in a decision of the Federal Labor Court, the Federal Labour Court is bound to review the respective court ruling, whereas it is restricted to solely base its' review and decision on legal and procedural grounds. New evidence cannot be introduced by any party. The Federal Labor Court's adjudicating bodies are the senates (*Senate*) (currently ten senates exist), each of which consist of three professional judges (a chairman and two associate judges) and two honorary judges from the sphere of employees and one from the sphere of employers.

5 See first hearing as a chance

The proceedings before the local labor court are structured into a **conciliation hearing and a hearing in chambers**. German procedural code does not foresee deposition. The conciliation hearing is scheduled (between six and eight weeks after the action has been filed) by the court with the aim of reaching an amicable settlement between the parties. As the court schedules the first hearing quite quickly, it must be assured that regular mail is checked frequently and the addresses are up to date.

Legal letters are not exchanged before the first hearing. Judges often aim to help negotiating a settlement during that hearing which ends the proceeding right away. The greatest majority of legal proceedings (>85 %) are settled within the first instance by mutual agreement.

If a **settlement is not reached** and thus, the conciliation hearing fails, a further appointment is set by the court for a hearing in chambers to settle the dispute. This date usually takes place three to six months after the conciliation hearing. In preparation for the main hearing, the parties are required to present the facts of the case and the legal arguments in written submissions within certain deadlines. At the hearing in chambers, the chairman usually once again tries to reach an amicable agreement. If this also fails, the labor court decides by judgment at the end of the chamber hearing.

6 Keep periods for filing (dismissal) lawsuits and deadlines in mind

Lawsuits against a dismissal by an employee must be filed with the competent court within three weeks of receipt of the notice of termination.

If this deadline is missed, the dismissal is seen as valid by virtue of law. In addition, labor or collective agreements often contain so-called exclusion or forfeiture periods (*Ausschluss- oder Verfallfristen*). This means, for example, that a claim (e.g. financial claim regarding outstanding remuneration or vacation compensation) must be filed in court within a certain period after rejection by the employer.

7 Principle of publicity

Court hearings are open to public and the courts are required to publish a list of the hearings of the day on a blackboard within the court premises. However, hearings are not broadcasted or videotaped and it is very uncommon that a huge crowd of spectators join such hearings.

8 Burden of proof

Generally, each party must prove facts that support their arguments. Based on the evidence provided, the labor court makes its decision. In exceptional cases the burden of proof is reversed (mainly in such cases, where the other party is closer to the fact to be proven) or a graduated burden of proof is established (e.g. a discriminated employee must only prove circumstantial evidence). If a party does not meet the respective burden of proof, such party loses the case. Therefore, proper prior preparation and counselling is not only important but indispensable for the conduct of a possible lawsuit (e.g. the proper documentation for the delivery of a notice of termination) and the inherent pitfalls, at least in such cases where the official investigation principle (as in the resolution procedure) does not apply.

9 Duration of the proceedings

The duration of labor court proceedings depend on workload of the specific court and the region they are in. Usually, the first conciliatory hearing should take place within a few weeks after filing the lawsuit. As regards to the second hearing, it may take months (sometimes more than half a year) until such hearing can take place; which, however, also largely depends on the respective local court. If the proceedings extend over several instances, a period of one to two years can be expected.

10 Costs of a proceeding

In the **first instance**, each party must bear its own attorney's fees, regardless of whether a party wins or loses the case. The underlying rationale is to secure that employees, who are regularly classified as economically weaker than an employer, make use of their statutory rights and do not refrain from asserting their claims in court due to the cost risk. However, most employees do have insurance that covers their costs within such proceedings, so the employer does not have to reimburse them.

Within the **second instance** this concept does not apply anymore, as the losing party is required to pay for all costs of the proceedings, which include not only its own costs but also those of the opposing party, limited, however, to the statutory fees. This should not be an unimportant contribution to the fact that the greatest majority of legal proceedings (>85 %) are settled within the first instance by mutual agreement.

Taylor Wessing's Employment & Pensions Team

The Employment & Pensions practice area of Taylor Wessing comprises about 100 lawyers. Some 30 recognised specialists work at our German offices. What makes our consultancy different is our in-depth familiarity with the challenges and concerns of the industries of tomorrow:

- Technology, Media & Communications
- Life Sciences & Healthcare
- Financial Institutions & Insurance
- Energy & Infrastructure
- Logistics & Transport

In addition, we are of course fully up-to-date on the particularities of many other industries and offer the full range of advice on all employment-related issues there as well.

Flexible, reliable project management is one of our key strengths. Based on our partner-led approach we will build a team of experts tailored to your individual requirements and managed by a responsible partner who will be available to you at all times.

Contacts

Dr. Christian Maron
Partner, Munich
+49 89 21038-257
c.maron@taylorwessing.com

Dr. Benedikt Groh
Senior Associate, Munich
+49 89 21038-414
b.groh@taylorwessing.com

Larissa Burger, M.A.
Associate, Munich
+49 89 21038-323
l.burger@taylorwessing.com

We're a global law firm that serves the world's most innovative people and businesses. Deeply embedded within our clients' sectors, we seek to challenge expectation and create extraordinary results. We work closely together with our clients to crack complex problems, enabling ideas and aspirations to be successful.

By shaping the conversation in our sectors, we enable our clients to unlock growth, protect innovation and accelerate ambition.

taylorwessing.com