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Contributing Editor:
Charles Wynn-Evans

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Germany

Dr. Arno Frings, Michael Bogati & Dr. Benedikt Inhester
Frings Partners Rechtsanwälte Partnerschaftsgesellschaft mbB

General labour market

The economic upturn in Germany has stabilised in spite of the uncertainties of the worldwide economy at the beginning of 2018. Germany's real Gross National Product (GNP) increased in 2017 by 2.2%.

The Forecast of the Institute for Labour Market and Occupational Research for the Economy and the Labour Market 2018 *[IAB-Prognose für Wirtschaft und Arbeitsmarkt 2018]* expects the real GNP to grow by 2.1%. There are, however, risks from, above all, US trade policy and the consequences of the Brexit vote.

Unemployment in Germany continued to decrease and with approx. 2.33 million unemployed has meanwhile reached its lowest level since the reunification in 1990. In spite of this positive outlook, there are structural problems in finding jobs for the unemployed whose qualifications often do not meet the requirements of employers or when supply and demand do not concur due to regional discrepancies.

The good economic situation substantially reduces the risk of job losses and dismissals are also at their lowest level since the reunification. Logically, the number of unfair dismissal claims continues to fall. On the employment side, recruiting problems are increasing. The time taken to fill a vacancy increases and the number of vacancies is at a record level. The additional potential of employing refugees will still, in practical terms, take some time because considerable investment in training and language knowledge is required.

The volume of work is also at a high level. In 2018, the weekly full-time working hours under collective bargaining agreements, in practice at an average of 38 hours, will equal the figure for the previous year. The average weekly working hours over all full-time and part-time employees is 29.7 hours. 29.8 days remains the usual number of holiday days under collective bargaining agreements. The average level of absence due to illness in 2018 is expected to be 4.3% which is slightly above the figure for the previous year, with a gradually rising tendency. This level corresponds to 63.9 hours' work lost per employee annually.

Redundancies, business transfers and reorganisations

Developments in court judgments have occurred in the area of transfers of undertakings. In the course of such a transfer, the employer or the new owner must, prior to the transfer, give notice in text form of the details of the transfer to the employees affected by the transfer according to § 613a Civil Code (BGB). The employees then have one month after receipt of the notice to object to the transfer of their employment. In practice, this notice is often a source of formal errors in the course of a transfer of undertaking because details are forgotten or unclearly described. The period for objecting does not then begin to run for the employees

and there is a considerable period of legal uncertainty as to whether the employees can avail of their right to object or not to the results.

In its judgment of 21.12.2017 (File No. 8 AZR 700/16), the Federal Labour Court has specified the duration of the period of legal uncertainty which must be accepted. According to the judgment, employees now have up to seven years after a transfer of undertaking within which to object to the transfer. The Court clarified that this seven-year period begins to run only if the employee has been informed in text form of the transfer of the employment with the (planned) time and subject matter of the transfer and the identity of the transferee, and given instructions on their right to object. Without this information being given to the employee, the period for objecting continues to run indefinitely. Simply continuing to work for the new owner does not justify curtailing the right of the employee to object. This judgment is unsatisfactory in practice because an employee, who certainly knows that a transfer of undertaking has occurred, can defer his objection for seven years.

§ 17 Protection Against Unfair Dismissal Act (KSchG) often constitutes a practical obstacle to dismissals following a transfer of undertaking. This provision imposes complex obligations on the employer to notify the Employment Agency of dismissals which reach certain thresholds. A consultation process, according to which a works council must be informed and discussions conducted for the avoidance or reduction of dismissals with it, is imposed. If the employer breaches these formal obligations, a dismissal can be invalid for that reason alone.

According to the wording of § 17 KSchG, the thresholds must be calculated according to the number of employees, not including temporary agency workers. Since this German provision implements EU law, the provisions of EU law must always be considered when interpreting the German provision. If, in national court proceedings, interpretation is disputed, the Court of Justice of the European Union (CJEU) decides. The Federal Labour Court had such a case at the end of 2017 (File No. 2 AZR 90/17 (A)). The issue was whether and under what conditions temporary agency workers are to be taken into account together with employees when calculating the thresholds. The Court's judgment is anxiously awaited by practitioners. The number of temporary workers has tended over the long term to increase even more dynamically. On average, there were approximately 1 million such workers in Germany in 2017.

It is very difficult to predict the decision the CJEU will make. From the perspective of labour market policy, it is not necessary to include temporary workers in the calculation for the purposes of the thresholds under § 17 (1) KSchG, since the Employment Agency is not obliged to cater for them. Temporary workers return to their leasing agencies and are not on the labour market. If one, on the contrary, regards the character of § 17 KSchG as a provision of operational cooperation, the indications for the inclusion of temporary workers are strong. It has already been decided by the highest courts that temporary agency workers are to be included for the purpose of calculating the thresholds for the size of the works council and reconciliation of interests in the event of operation changes.

Business protection and restrictive covenants

Directive (EU) 2016/943 of the European Parliament and of the Council of 8 June 2016 "on the protection of undisclosed know-how and business information (trade secrets) against their unlawful acquisition, use and disclosure" has considerable labour law implications.

This directive is aimed at harmonising know-how protection standards throughout Europe in order to strengthen start-ups and small and medium-sized businesses in their research

projects. It strengthens free enterprise and promotes innovation. The effects on labour law are particularly evident in the areas of compliance and whistleblowing.

At present it is observed that the European Know-how Directive must still, in principle, be transposed into German law. The German legislator tabled a bill on 18.7.2018 for that purpose. The period for implementation had, however, already expired on 8.6.2018. Legally, this means the provisions of the Know-how Directive must now be considered in interpreting German law and are already indirectly applicable.

There is no single statute in Germany so far which regulates all aspects of the protection of trade and operational secrets that are protected to date by contractual damages claims because employees are subject to an ancillary obligation to protect them. The Act against Unfair Competition (AUC) increases that protection by creating criminal offences. Betrayal of trade and operational secrets by employees can lead to criminal prosecution under § 17 AUC. Injunctions under the Civil Code may also be considered.

The Directive will continue to be relevant – in interpreting German law – in the future, and therefore the changes faced by businesses are already visible today.

A significant change from the present legal situation is the amended definition of a trade secret, which the Directive defines in Art. 2 Nos 1 and 2 as information which:

> *"has commercial value because it is secret;*
> *has been subject to reasonable steps under the circumstances, by the person lawfully in control of the information, to keep it secret."*

The Directive thereby adds a new feature in comparison to the previous definition of a trade secret in German law; namely, reasonable steps to keep it a secret are now required in order to constitute a trade secret. That is new and demands action on the part of businesses.

While it has already been required that an intention of the entrepreneur to maintain secrecy must be objectively demonstrated, it has also been required so far that the entrepreneur has an interest in the secrecy. Now, however, purely objective criteria apply to trade secrets, the satisfaction of which must be proved by the entrepreneur even in court in case of dispute. Actual protective precautions are required, e.g. the classification of information according to the degree of confidentiality attributed to it, access or security controls and valid confidentiality clauses. In the interests of legal certainty, especially important and highly classified information should therefore be expressly marked as "secret" or "confidential". The specific precautions must also be "reasonable". That means that the nature and significance of the flow of information must influence the degree and the intensity of the necessary measures. That applies in particular to the kinds of control and the cost of the measures.

Business will now be forced to take action to protect trade secrets because of the "*reasonable steps*" requirement. The following may be indicated as reasonable secrecy measures:

- clear responsibility for specific trade secrets;
- classification of trade secrets according to the level of confidentiality they demand;
- setting up access controls and technical security measures; and
- conclusion of updated confidentiality agreements.

In order to be able to prove these measures in case of dispute, a Compliance Officer should direct and document the measures. Depending on the circumstances, training of personnel in dealing with secret information may be indicated.

According to Art. 5 b) of the Know-how Directive, the protection of external whistleblowing is dealt with for the first time. So far, the right of employees to disclose irregularities in their own business to external bodies was vindicated or rejected by a comprehensive weighing in

each particular case of the obligation of the employee to protect the employer's trade secrets against the right to file a complaint against the employer of irregularities in the business. Internal remedies, in so far as they were reasonable for the employee in the particular case, took priority. A general public interest in the disclosure of irregularities was an additional requirement. Finally, the office of the public prosecutor was, in the prevailing opinion, the only addressee of admissible external whistleblowing coming under consideration.

In future, the threshold for legal disclosure of trade secrets will be lower. Furthermore, the press is considered as an addressee in addition to the office of the public prosecutor.

The Know-how Directive – which refers to "revealing" (and not "filing a complaint") – suggests that a disclosure in the form of a publication, for example, in public media, can be legitimate. In addition, the whistleblower is, in future, not only entitled to report illegal activity but also "misconduct, wrongdoing", which does not reach the threshold of criminality. Immorality, for which German law has not so far imposed penalties, is covered by the terms "misconduct, wrongdoing". Tax structuring abroad, which is not illegal but morally questionable, is an example.

Against this background, businesses should reassess their current protection of trade secrets and – if they have not done so already – voluntarily establish internal compliance systems which can prevent external whistleblowing. Internal whistleblower and compliance systems are, in view of the new legal situation of improved whistleblower protection, the safest method of avoiding disclosure conflicts.

Finally, the Know-how Directive may affect collective agreements (industry-wide or works agreements), since whistleblower protection may not be undermined by collective agreements. The extent to which ethical guidelines, internal reporting systems or confidentiality clauses in collective agreements are worded to conform to the Directive or require amendment must be reviewed. While there is a disputed opinion that ethical guidelines and internal reporting systems are not directly subject to the Know-how Directive, to the extent they constitute a restriction of external whistleblowing, they may be in breach of the Know-how Directive.

Discrimination protection

A German judgment favourable to businesses on discrimination protection was handed down by the Federal Labour Court on 23.11.2017 (File No. 8 AZR 372/16) in a case about the requirements placed on a job advertisement. A restrictive judicial position was thereby reversed. According to the judgment, the requirement in a job advertisement that the applicant must have "very good" written and spoken German and "good" written and spoken English did not constitute indirect discrimination punished by § 3 (2) General Equal Treatment Act (AGG) as discrimination on grounds of "ethnic origin". The court did not accept that a particular ethnic group – a remarkable aspect – was specifically discriminated against by this language requirement. The question of whether the language requirement was materially justified in the specific case was therefore no longer crucial.

The argumentation is so remarkable because the court, referring to a judgment of the ECJ of spring 2017, now takes the position that (indirect) discrimination because of "ethnic origin" requires that members of a "specific" ethnic origin are particularly discriminated against in comparison to other persons by the requirement – here, such requirement being "very good" German in the job advertisement.

The argumentation has also been criticised on the ground that the condition of discrimination against a "specific" ethnic group leads to paradoxical results. The discrimination must always be against a "specific" ethnic group – for example Sinti. If a number of ethnic groups suffer discrimination, no ethnic discrimination arises.

The judgment must be welcomed by businesses in Germany because it draws clear lines as to when discrimination arises and increases the protection of businesses – which according to experience do not wish *per se* to engage in inadmissible discrimination – against the proliferation of discrimination claims.

Statutory employment protection rights

The special protection of severely handicapped persons against dismissal under the Social Code IX (SGB IX) has meanwhile been strengthened by the Federal Participation Act (BTHG).

It is provided in the Act that now the participation of representatives of handicapped persons is a mandatory requirement in the course of the dismissal of a handicapped employee. Handicapped persons representation, which can be elected under certain conditions, advocates the special interests of handicapped persons and employees with equivalent conditions. Employers must now involve handicapped persons representation in each dismissal. The situation is therefore similar to that of the participation of the works council. According to § 178 (2) SGB IX, the dismissal of a handicapped person issued by the employer without such participation, is invalid.

The pending amendments to labour law agreed in the Coalition Agreement of the Federal Government must also be noted. After long negotiations on the formation of a government, the government parties agreed these points at the beginning of 2018. Precisely when they will be implemented is not foreseeable at present. Some amendments can, however, be anticipated, as set out below.

The law on temporary employment contracts, which has made a considerable contribution to the flexibility of German businesses, will be amended in important aspects mostly to the benefit of employees.

Making employment temporary without a material reason, i.e. in the absence of special grounds, e.g. substitution during pregnancy or long-term illness, will be considerably restricted, though not abolished. In future, employers with more than 75 employees will be entitled to limit the employment of a maximum of 2.5% of the employees without a material reason. If that percentage is exceeded, any additional temporary employment without material reason is deemed to be permanent employment. The percentage refers to the time of the last temporary employment without material reason. The duration of temporary employment without material reason will be admissible only for 18 instead of 24 months and only one extension will be permitted instead of the present three extensions according to § 14 (2) sent. 1 Part-time and Temporary Employment Act (TzBfG).

At present, a temporary employment contract with material reason can be extended a number of times. Limits arise from European law and complex German judgments which apply only after many limited periods or a long overall duration. In future, temporary employment is intended to be inadmissible if previously there has been permanent employment or a number of temporary employment periods with a total duration of five or more years. The maximum period of five years is also to include any leasing of the employee by one or more lessors. A new temporary employment with the same employer will become possible only after a period of three years.

In the course of work on call, which means that the employee must provide his/her work in accordance with the fluctuating work requirement in the business, the employee is intended to be given more planning and income security. The proportion and remuneration of work on call should in future be permitted to fall below or exceed the agreed minimum working time

by, at most, 20% and 25% respectively. Without an agreement on weekly working hours, at least 20 hours per week are deemed to be agreed. "Zero-hour contracts" used especially in the restaurant and retail businesses are thereby intended to be excluded.

The law on part-time working presently only provides a right to a permanent reduction of working hours. The employee has no right to later increase the working hours again at his/her own wish. The employer is only obliged to take into account the interests of the employee in increasing the number of working hours when filling vacant positions.

In future there is to be a genuine right to temporary part-time working. An automatic return to the former working hours after the expiry of the temporary period logically follows.

Only amendments to the following points are clear at present.

- The right to temporary part-time work will apply only in businesses with more than 45 regular employees. In businesses with between 46 and 200 employees, a reasonable limit will be introduced. Only one in 15 employees will have a right to temporary part-time work. For that calculation, the first 45 employees will be included. If that limit is exceeded, the employer can reject the application.
- During the temporary part-time work, there is no right to increase or reduce the working hours or premature return to the previous working hours.
- The employer can reject the temporary part-time work application if it is for less than one year or for more than five years.
- On the expiry of the temporary part-time working period, the employee can apply for a further period of temporary part-time work at the earliest after one year.
- The parties to a collective agreement will be entitled to agree provisions differing from the above.

Employee privacy

The most extensive changes to labour law come without doubt from the new data protection law applicable since 25.5.2018.

In order to understand the new data protection law, one must firstly consider a special feature resulting from the hierarchical position of various sources of law, i.e. the European General Data Protection Regulation (GDPR) and the new German Federal Data Protection Act (BDSG 2018). Both codifications now apply, i.e. the GDPR and the BDSG 2018, simultaneously and parallel to each other. However, the GDPR takes precedence in the hierarchy over the BDSG 2018 – with some exceptions.

Although the BDSG 2018 deals comprehensively with many issues and is similar in structure to the old BDSG, it must be noted now when applying the law that any situation relevant to data protection cannot be considered only under the provisions of BDSG 2018, but simultaneously with the GDPR. In employee data protection – as in other areas with data protection relevance – since 25.5.2018, two cogs, namely the GDPR and the BDSG 2018, interact with the same wheel.

The new legal situation can then be approached with the awareness that the German legislator has not fundamentally changed data protection, in any event not in the area of labour law. While the new provisions of § 26 BDSG 2018 do not leave everything as it was, there remains a certain continuity and structural similarity to the former data protection provision, the old § 32 BDSG. This has the enormous advantage that the decades of labour law judgments on the extent and limits of employees' personality rights, on the resulting right of the employee to informational self-determination and the strengthened judgments in recent years on the interpretation of the old § 32 BDSG, can assist in the understanding of § 26 BDSG 2018.

For the new data protection law, therefore, a recent judgment of the Federal Labour Court, still under the old law, is as relevant as before. The judgment of 27.7.2017 (File No. 2 AZR 681/16) dealt with a case in which an employer installed software, a keylogger, on an employee's work PC which recorded all keyboard strokes and took screenshots at regular intervals.

Previously, the employer had informed its employees that all "Internet Traffic" and the use of its systems would be logged. After examining the data created with the help of the keylogger, the employer confronted an employee with the accusation that he used his work PC for private purposes during working hours. A dispute about the extent of the private use arose between the parties and ultimately the employee was dismissed. In the subsequent unfair dismissal claim, the Federal Labour Court emphasised that the knowledge of the private use by the employee derived from the keylogger could not be considered in the court proceedings. The employer, by the use of the keylogger, breached the employee's constitutionally guaranteed right to informational self-determination as part of the general personality rights.

Sourcing the information was not admissible on data protection grounds because the employer had no suspicion based on facts of the commission of a crime or other serious breach when installing the software. The installation of the software in the absence of such suspicion was therefore inadmissible.

Although legal uncertainty affecting some established principles is limited by the national BDSG 2018, the provisions of the new European legislation of the GDPR must be included in future legal assessments. The GDPR places special importance on a transparent, and for those affected, intelligible provision for dealing with personal data. Art. 5 GDPR summarises the fundamental principles of the new employee data protection as follows:

- "lawful, processing in good faith, transparency"
  Personal data must be processed lawfully, fairly and in a transparent manner in relation to the data subject. This principle is made more specific by the detailed information and notification obligations of the employer in Art. 12 ff. GDPR.
- "purpose limitation"
  Personal data may be collected only for specified, explicit and legitimate purposes. Any data processing is therefore to be recorded in writing with a detailed description of the purpose of the planned data processing and provided to the affected person, i.e. in labour law, applicants and employees.
- "data minimisation"
  Data collection and processing must be limited to what is necessary in relation to the purposes for which they are processed.
- "accuracy"
  Personal data must be accurate and kept up to date. Personal data that are inaccurate must be erased or rectified without delay.
- "storage limitation"
  Data may not be kept for longer than is necessary for the purposes for which the personal data are processed. This principle is closely connected to the data protection law erasure obligation.
- "integrity and confidentiality"
  Personal data must be processed in a manner that ensures appropriate security of the personal data, including protection against unauthorised or unlawful processing and against accidental loss, destruction or damage.

These new measures force businesses to take action if they are to reduce the risk of drastically increased fines and damages claims of their employees. Art. 83 GDPR provides fines of up to 4% of global turnover or up to €20m. The fines are thereby greatly increased compared to previous law, which under the old § 43 BDSG provided a maximum fine of €300,000.00.

Generally, it must be said that probably only a few businesses in Germany can present a data protection system fully compliant with the present legal position. Realistically, implementation will still take some time. In the meantime, some general implementation steps which must be undertaken by businesses have become apparent. One can say overall that the following areas must be subjected to more precise review:

- amendment of works agreements;
- amendment of employment contract provisions to ensure compliance with the employer's duties of transparency, notification and information;
- amendment of employment contract provisions to impose data secrecy;
- amendment of consents of employees to the use of employees' personal data;
- changes in dealing with applicants or employment investigations;
- changes to the private use of work communications systems; and
- changes to employers' supervision measures.

Other recent developments in the field of employment and labour law

In 2018, it was also decided, for the second time, to increase the statutory minimum wage introduced three years ago. In two stages – as is usual in collective bargaining negotiations – the relevant commission consisting of representatives of employers, trade union, and academics decided to increase the minimum wage on 1 January 2019 from €8.84 to €9.19 per hour and on 1 January 2020 to €9.35.

Finally, in April 2017 the maximum period for leased employees introduced in the Employee Leasing Act (AÜG) in 2018 expired for the first time. The period is 18 months in principle for an employee leased to one customer. It can, however, be extended in collective bargaining agreements. Only few industries have availed of that so far. In the metal and electrical industry, the electrical trade and the steel industry, such general collective bargaining agreements have been concluded. Without such extensions of the leasing period, businesses were instructed to cease the engagement of such leased employees; for example by agreed termination of the relevant lease or other termination thereof.

Dr. Arno Frings
Tel: +49 211 229 821-40 / Email: frings@fringspartners.de

Prior to the founding of fringspartners, Dr. Arno Frings managed the German employment law practice group of the major international law firm Orrick.
Dr. Arno Frings has a history of more than 30 years practising as an employment law lawyer. Soon after being admitted to the Bar in 1986, he concentrated fully on employment law and quickly acquired the qualification as a specialist lawyer for employment law (*Fachanwalt für Arbeitsrecht*). His practice focuses on personnel reduction measures and restructuring. He is also highly experienced in advising managing directors and board members regarding the conclusion, the carrying out and the termination of their employment relationships.

Michael Bogati
Tel: +49 211 229 821-20 / Email: bogati@fringspartners.de

Michael Bogati is one of the founding partners of the highly renowned employment law boutique fringspartners. He has worked for several leading law firms in Germany, always exclusively in employment law.
His advisory experience focuses on complex collective employment law issues, such as company and restructuring tariff agreements and works constitution cases. He advises on all aspects of employee co-determination, both on the level of works constitution as well as on the corporate body level. He has advised on numerous restructuring and personnel reduction measures and successfully implemented respective entrepreneurial plans, either in cooperation with works councils and trade unions or, if necessary, against their resistance. His industry experience is wide with a special focus on metal, food, insurance, trade and logistics.

Dr. Benedikt Inhester
Tel: +49 211 229 821-0 / Email: inhester@fringspartners.de

Dr. Benedikt Inhester began his labour law career in the major international law firm Orrick, Herrington & Sutcliffe in a team of the founding partners of fringspartners, before moving at the end of 2014 to a leading European commercial law firm in Munich.
In mid-2017, he decided on a change of perspective and became in-house counsel for labour law at Giesecke+Devrient GmbH in Munich, a worldwide active company group for security technology with approx. 11,600 employees in 32 countries. Since the beginning of 2018, as Head of Employment Law & Industrial Relations, he headed the Labour Law Department and was responsible for all labour law aspects of the Group.
Since mid-2018, he has worked in free cooperation with fringspartners and supplements the team in Düsseldorf with his expertise.

Frings Partners Rechtsanwälte Partnerschaftsgesellschaft mbB

Königsallee 76-78, 40212 Düsseldorf, Germany
Tel: +49 211 229 821-0 / URL: www.fringspartners.de

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