

Default Wages: Just a Blunt Sword in the Dismissal Protection Process?

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If the employer loses the dismissal protection process, many employees look forward to the retroactive payment of the outstanding salary: they demand payment of default wages. They often forget that what they earned in the period after the supposed end of the contract or what they could reasonably have earned otherwise must also be taken into account in the late acceptance wage. Given the many vacancies on the job market, it will be difficult to justify, especially in metropolises, that no other employment opportunity could be found. This article will shed light on what employers can do to massively reduce the risk of litigation to their benefit.

Background

If an employer terminates an employee's employment relationship and the employee files a dismissal protection claim with the labor court, it can take months or years for the labor court to make a first-instance decision. We are currently experiencing in some labor courts that chamber appointments are made with a lead time of 11 months - after having already waited two months for the conciliation hearing.

The overload of the courts has a direct impact on the **risk of litigation** ,

both for the employer and the employee. If the employee does not look for employment and trusts in the positive outcome of the legal dispute, he risks not receiving any wages for a long period of time if he is unsuccessful. At the same time, if the employer loses the legal dispute, he risks having to pay default wages to the employee. If a legal dispute drags on for such a long time, these claims for late acceptance of wages are often economically more important than the severance payment claims in dispute.

Restrictions on late acceptance wages

What many employees and often their legal representatives ignore is that the late acceptance wage is subject to two restrictions according to Section 615 of the German Civil Code (BGB):

(i) On the one hand, the employee must take into account what he has acquired in the meantime as a self-employed person or from another employer. This prevents the employee from earning double income during this time, namely from the old employer and from a new employer. This regulation is “on the radar” for most plaintiffs, as this restriction cannot result in them receiving less than they were contractually entitled to with their previous employer.

(ii) The further restriction is the crediting of what the employee maliciously fails to acquire. So it's not just about what the employee actually earned, but what he could have earned. When you look at the extremely employee-friendly labor market, you quickly come to the conclusion that there is likely to be an oversupply of job opportunities for the vast majority of professional sectors, especially in metropolitan regions. In addition, employees generally have to accept jobs for which they are overqualified. The limit is unreasonable.

Consequences for employers and employees

Employers are entitled to written information about the placement

suggestions made to the employee by the employment agency and the job center, stating the activity, working hours, place of work and remuneration (BAG, judgment of May 27, 2020 - 5 AZR 387/19). The employer can assert its failure to provide information in a counterclaim at the latest in a lawsuit over claims for late acceptance of wages. It has not yet been conclusively clarified whether he or she has a right to disclosure of the invalidly terminated employee's own efforts when looking for a job, for example via online job portals such as StepStone, Indeed & Co. In practice, it is advisable to extend the claim for information to your own efforts. Resourceful employers further increase their chances of reducing the risk of late acceptance of wages by sending a terminated employee unsolicited job advertisements for suitable vacancies during the dismissal protection process, ideally close to the employee's home. This makes it possible to document in a later legal dispute that there were reasonable alternative employment opportunities for the terminated employee that he did not pursue. The burden of proof for the malicious failure to obtain other income lies with the employer.

In this way, employers can significantly reduce the risk of litigation at the expense of the employee. This will increasingly be economically forced to quickly find new employment. If he is successful, he will usually not want to return to his old employer: the initial success in the dismissal protection procedure will then not pay off for the employee or will pay off significantly less than he had hoped. Employers who have the necessary "stamina" can avoid not only back salary payments in full, but also, in some cases, significant severance payments.