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## German Employment Law Update



## Continuing employment in case of constructive dismissal

### **German employment law speaks about constructive dismissal if an employment contract is terminated and continued employment is offered at the same time – with other employment conditions (Änderungskündigung).**

This type of termination is used by many employers to change employment conditions even though the employee may challenge the dismissal in court. Because the employee has to work with the new conditions for the time the case is pending. And this can take time. Now that may change because of a recent ruling of the Hamburg labor court (labor court Hamburg 09/17/2009 – 17 Ca 179/09).

The Hamburg judges published a rather new creative interpretation of the protection against dismissal act (Kündigungsschutzgesetz). The court ruled that the employee can claim continued employment during the litigation based on the old employment conditions. This ruling aims at long standing decisions of the Federal Labor Court. According to the Federal Labor Court's jurisdiction continuing employment in case of constructive dismissal only takes place under the new employment conditions (recently Federal Labor Court, 05/18/2009 – 2 AZR 844/07).

In the Hamburg case the plaintiff was employed as a store manager for several years. With reference to her relatively low selling figures the employer dismissed her and offered at the same time to be employed under altered (less favorable) terms. The plaintiff was offered to be employed as a shop assistant with reduced salary. The plaintiff accepted the offer

under the condition of its legal effectiveness and filed legal action against the dismissal. The labor court in Hamburg decided in favor of the plaintiff and obliged the defendant employer to employ her under the old employment conditions. The labor court held that the real meaning of continued employment was not only to protect the existing employment relationship but is also meant to protect the employee from unilateral changes of employment conditions. The labor court calls the contrary decisions of the Federal Labor Court “meaningless”.

But an important aspect of constructive dismissal is not addressed in the ruling: What is the effect of the employee accepting the offer provisionally? Can she/he then still claim the old conditions while the case is in front of the court? Speaking about contract law the answer is clearly: No. With accepting the offer even provisionally the employee sends a clear signal that she/he accepts the new conditions at least for the time of the litigation.

The Hamburg judgment causes problems for employers because it creates more insecurity in dismissal cases. In practice employers can no longer count on an employee accepting new conditions in constructive dismissal cases. We can hope that it takes not too much time to bring the case before the Federal Labor Court to correct the Hamburg ruling.



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## Imprint

Information in this German Employment Law Update is not intended to be comprehensive legal support. They can not substitute individual legal advice focused on each single case.

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