LEGAL UPDATE

Labour & Employment Law

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BAG: Statutory obligation to record working time, yet Works Councils lack the right to take the initiative to introduce electronic timekeeping

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Works Councils lack the right to take the initiative with regard to introducing electronic timekeeping.

This was the opinion of the Federal Labour Court (Bundesarbeitsgericht, BAG) in a ruling dated 13/09/2022 (case no. 1 ABR 22/21) repealing the lower court decision by the Hamm Regional Labour Court (Landesarbeitsgericht, LAG), in favour of the Works Council.

However, the apparent reasoning of the First Senate contained in the press release is quite startling. In the opinion of the BAG, the Works Council's right to take the initiative conflicts with an existing **statutory obligation** of employers to record employees' working hours. The BAG infers this obligation from the German Occupational Health & Safety Act (ArbSchG) in conjunction with the findings of the Court of Justice of the European Union (CJEU).

Decision of the BAG

In this case, the employer had intended to introduce electronic recording of working hours. After being unable to come to an agreement with the Works Council on the matter, the employer backed away from its plan.

The Works Council, however, did not accept this. On its own initiative, it subsequently demanded that the employer introduce electronic recording of working hours and enlisted a mediator. The employer disagreed with the appointment of a mediator and pointed out that the Works Council had no right to take the initiative to exercise its right of co-determination under section 87 (1) (6) Works Council Constitution Act (BetrVG) (introducing technical monitoring facilities).

The Works Council's request for the court to appoint a mediator was rejected at first instance by the Labour Court. However, on appeal by the Works Council the Hamm Regional Labour Court did appoint a mediator. According to the LAG, the Works Council did have the right to take the initiative.

When the employer appealed on a point of law, the BAG overturned the decision on the grounds that the Works Council did not have the right to take the initiative with regard to the introduction of electronic timekeeping.

The BAG's apparent reasoning in the corresponding press release (no. 35/22) led to astonishment and can undoubtedly be characterised as a legal thunderbolt. The BAG used the German Occupational Health & Safety Act and a high-profile 2019 judgment of the Court of Justice of the European Union to support its decision. In the CJEU decision, the Court held that the member states of the European Union must impose an obligation upon employers to precisely record their employees' working hours. Such a comprehensive recording obligation has not yet been expressly formulated in German national law. However, according to the First Senate of the BAG, the obligation has already resulted as a result of an interpretation of section 3 (2) of the German Occupational Health & Safety Act taking the above findings of the CJEU into account.

Since the employer's obligation to record working hours is based upon statutory requirements, this logically leaves no room for the Works Council's right to take the initiative to introduce a system for recording working hours.

Legal background

As a technical system that can be used to monitor employees, the introduction of an electronic timekeeping system is subject to mandatory co-determination. The employer may therefore only introduce such a system on the basis of a Works Agreement.

In this case, it came down to the question of whether the Works Council could demand the introduction of an electronic timekeeping system itself and implement it by seeking recourse to a mediator. The BAG has previously held that the Works Council fundamentally does have the right to take the initiative within the scope of the right of co-determination. The BAG has

always made an exception to this rule when the right of co-determination has a "defensive function", i.e. protecting employees against measures taken by the employer. The right of co-determination at issue here, which results from section 87 (1) (6) BetrVG, has always been seen as such a defensive right by the BAG, and therefore opposes the Works Council's right to take the initiative to introduce technical monitoring facilities.

Electronic timekeeping does indeed fall under "technical monitoring facilities". In this case, however, the Works Council clearly did not intend to monitor the workforce, but instead wished to ensure that the hours worked could be reliably recorded in the interests of the workforce.

Nevertheless, this purpose-oriented distinction and the actual matter in dispute in this case – the Works Council's (non-existent) right to take the initiative to introduce a system for recording working hours – is expected to recede into the background, at least where section 87 (1) (6) BetrVG is concerned, in light of the above reasoning of the BAG.

Comments

The BAG's decision is consistent with previous case law regarding the right to take the initiative under Works Council constitution law. Logically, there is no room for the Works Council's right to take the initiative in conjunction with co-determination rights as long as the employer is subject to a statutory obligation. Conversely, the BAG's hypothesis of an obligation to record working hours arising from section 3 ArbSchG is surprising and – at least given the scant commentary in the press release – barely convincing.

As a result the BAG has "overtaken" the legislature, which the CJEU had actually entrusted with this matter; a cause for concern in and of itself.

It will be interesting to see whether and where the Federal Labour Court draws the boundaries here with respect to recording working hours. In view of the wording of section 3 (2) ArbSchG mentioned by the First Senate, which speaks of "*necessary means*", it is hardly convincing that this standard is met by the recording of working hours in a general and indiscriminate sense. Furthermore, the specific format in which timekeeping must be carried remains an open question. In the relevant case, the CJEU left it to the employer to decide how the latter would carry out timekeeping, insofar as it is possible to objectively and reliably determine the hours worked.

It is already necessary to examine the effects the judgment will have on the numerous companies who use a trust-based system to record working hours.

In summary, the decision of the Federal Labour Court regarding the non-existent right of the Works Council to take the initiative was the correct one. However, the acknowledgement of a statutory obligation to record working hours remains unconvincing, if the BAG indeed wishes to assume such an obligation in a sweeping, indiscriminate manner. In this respect we can still hope that the First Senate's reasoning for the decision contains sensible details and restrictions in this regard. From today's perspective, at any rate, it is a shame that the BAG did not wait for the legislature to take action on this issue, which is so important for corporate practice.

Note

This overview is solely intended for general information purposes and may not replace legal advice on individual cases. Please contact the respective person in charge with GÖRG or respectively the author Dr. Frank Wilke on +49 221 33660-508 or by email to fwilke@goerg.de. For further information about the author visit our website www.goerg.com.

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