

Trust is a good thing, but control is a better one - Works Council Chairs may not conclude valid Works Agreements on the basis of ostensible authority

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I. Judgment

The ruling of the Federal Labour Court (Bundesarbeitsgericht, BAG) dated [8 February 2022 \(case no.: 1 AZR 233/21\)](#) dealt with the question of whether the Chair of the Works Council may conclude a valid Works Agreement under the principles of ostensible authority without a corresponding resolution from the Works Council.

The facts of the case were as follows: The employee who brought the action requested it to be determined that their basic salary should be calculated under a Works Agreement from 1967. The defendant employer dismissed this on the grounds that this Works Agreement had been superseded by a Works Agreement concluded in 2017. The remuneration system in the 1967 Works Agreement was more favourable for the employee than that in the 2017 Works Agreement.

The employee considered the 2017 Works Agreement to be invalid as it was not based on a proper resolution of the Works Council. The employer was of the opposite opinion that the 2017 Works Agreement was valid as the Chair of the Works Council had exercised their ostensible authority.

The BAG disagreed with the lower courts and held that the 2017 Works Agreement was invalid due to the lack of a proper resolution of the Works Council. It also held that the Chair of the Works Council had not acted with ostensible authority. Ostensible authority is generally assumed when the contracting partner legitimately trusts in an existing authority of the representative due to the representative having acted in breach of duty. In this case ostensible authority may have been possible as in accordance with the findings of the Düsseldorf Regional Labour Court (Landesarbeitsgericht, LAG) evidence was provided by the Chair of the

Works Council that the Chair acted with the knowledge of the majority of the Works Council and the good faith of the employer. The Works Council had, in breach of duty, not made the employer aware that the resolution had not been properly passed, despite the knowledge of all the members of the Works Council.

The BAG held that the principles of ostensible authority may nevertheless not be transferred to the Works Council Chair to represent the Works Council. The Chair only represents the Works Council within the scope of the resolutions passed by the Works Council in accordance with [Section 26 \(2\) sentence 1 of the Works Constitution Act \(Betriebsfassungsgesetz, BetrVG\)](#). In addition, Works Agreements cannot be concluded on the basis of prima facie agency as, in contrast to "normal" contracts", Works Agreements could also apply to the detriment of company employees.

II. Practical relevance

This judgment is of great importance to all companies with a Works Council. Employers regularly trust that the (mandatory) written approval of a Works Agreement by the Chair of the Works Council represents a proper resolution passed by the Works Council. This trust may, however, lead to unwelcome surprises, even decades later, as demonstrated in this case. For this reason, employers should make sure that a proper resolution has been passed by the Works Council. This also applies regardless of whether the Works Council is able to retroactively approve a Works Agreement concluded by the Chair of the Works Council. The employer cannot rely on the Works Council exercising this right.

The BAG listed two fundamental courses of action an employer can take to gain certainty over the validity of a Works Agreement. On the one hand they may require resolutions concluding a Works Agreement to be passed at a Works

Council Meeting called by the employer. The Works Council is obligated to provide a transcript of the minutes regarding the corresponding resolution. The transcript will show whether the Works Council passed a resolution to conclude a Works Agreement.

The other option available to the employer if the Works Council has already claimed to have voted on the conclusion of a Works Agreement is to request that the Works Council provide a transcript of the minutes of the meeting where the resolution concluding the Works Agreement was passed by the Works Council. However, the BAG did state that the employer's request must be made "promptly" after the conclusion of the Works Agreement. It is not possible

to determine when such a request is no longer considered to have been made promptly. For this reason employers should request the transcript of the minutes of the meeting with a minimum of delay, i.e. preferably within a few days of the meeting.

Employers are recommended to utilise one of the above options to ensure that the Works Agreement is not invalid due to the lack of authorisation for the Chair of the Works Council to act. The second option is significantly more practical. Reference may be made to this decision of the BAG as the Works Council may be under the impression that the employer does not trust them.

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 authors Pia Pracht on +49 221 33660-524 or by email to ppracht@goerg.de and Dr Hagen Strippelmann on +49 221 33660-504 or by email to hstrippelmann@goerg.de. For further information about the author visit our website www.goerg.com.

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