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LEGAL UPDATE LABOUR AND EMPLOYMENT LAW

Cologne, 21. August 2023

Presumption of conformity with Section 125 (1) (1) German Insolvency Code for dismissal by reason of redundancy

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Where operational changes are planned and the insolvency administrator and the works council reach an agreement on the reconciliation of interests with a list of names, it is presumed that the termination of the employees listed by name due to urgent operational requirements is in accordance with section 125 (1) (1) of the German Insolvency Code (InsO). In its judgment dated 17 August 2023 the Federal Labour Court (Bundesarbeitsgericht, BAG) looked at the conditions under which this presumption of conformity applies (6 AZR 56/23). In doing so it revised the opinion of the lower court.

Facts of the matter

The Claimant worked at the insolvency debtor, a company that manufactures and distributes special profiles from steel and steel products with approx. 400 employees.

The defending insolvency administrator reached an agreement with the works council on the reconciliation of interests by shutting down operations after winding down the company. Subsequently, part of the workforce was to be dismissed immediately at the next possible point in time. The remaining employees would continue to be employed to wind down the company and therefore would be first dismissed accordingly at a later point in time. The reconciliation of interests contained various lists of names. The Claimant was named on the list of employees required for winding down the company and therefore belonged to the team that would be first dismissed at a later point in time. After signing the reconciliation of interests, the insolvency administrator gave notice of termination to the Claimant in June 2020 with effect from 31 May 2021. The Claimant filed a claim for unfair dismissal. After notice of termination had been given, the insolvency administrator held negotiations with interested investors about taking over operations. The insolvency administrator was ultimately successful in transferring operations to an investor and thus (still) avoided the shut-down.

Decision of the LAG

The Hamm Regional Labour Court (Landesarbeitsgericht, LAG) held that the dismissal was invalid. It ruled that the insolvency administrator was unable to rely on the presumption of conformity with Section 125 (1) sentence 1 (1) InsO:

It is not sufficient here that merely a reconciliation of interests had been agreed but the objective requirements of planned operational changes in accordance with Section 111 of the German Works Constitution Act (BetrVG) must be present and these must be evidenced by the insolvency administrator.

Therefore it would be necessary for the shut-down of the entire operation to be "seriously and finally planned and already underway" at the time notice of termination is given. The implementation of the operational shut-down would have to have already taken on "tangible form" at this point in time.

Decision of the BAG

The BAG opposed this (narrow) interpretation of Section 125 InsO. Instead, it held that for the presumption of conformity with Section 125 (1) (1) InsO to apply it would be sufficient if the operational changes were in the "planning phase" at the time the reconciliation of interests was agreed. The insolvency administrator would therefore not have to produce and evidence that it had already commenced shutting down operations, but rather it would be sufficient that the shut-down had been planned. As a result, the reconciliation of interests would have to be concluded at a point in time where the works council would still be able to influence business decisions. This would only be the case in the planning stage, but not when the shut-down had already commenced.

The "inclusion of a list of names" on agreeing the reconciliation of interests linked to the presumption of conformity could therefore consequently require no more than a plan. As the insolvency administrator had to be able to evidence operational changes in planning the shut-down of operations and concluded a reconciliation of interests in relation to this, it is presumed by the statute that the dismissal is due to urgent operational requirements. It ruled that the Claimant had not rebutted this presumption of conformity. The later development where the insolvency administrator was able to sell the business, did not preclude this. In accordance with the settled case law of the BAG, the circumstances at the time notice of termination is received is decisive when evaluating the effectiveness of a dismissal.

Evaluation

This press release shows that the BAG has thankfully corrected the excessive requirements implemented by the LAG regarding the requirements of Section 125 InsO. The Erfurt judges thus emphasised the purpose of the regulation in Section 125 InsO as both parties in insolvency proceedings must be able to ensure that legally certain dismissals can be carried out under easier conditions in the event of operational changes. The reason for dismissal - here, the shut-down of operations - is presumed by statute when reconciliation of interests is concluded with a list of names. The works council, who are not required to provide a list of names when an agreement is reached, will only then agree, when, in its opinion, such operational changes are actually envisaged and are unavoidable. If the insolvency administrator and the works council do agree in their assessment, the presumption of conformity should apply, provided the requirements for "planned operational changes" have by definition been fulfilled. The LAG's requirements would have taken these to absurd extremes as the insolvency administrator would, at the same time, have to present and evidence what was assumed by the law in Section 125 InsO.

Even though the decision was made in relation to a company "in insolvency" and in relation to

Section 125 InsO which is only applicable in relation to insolvency, the commentary should be transferable to instances of a list of names in an event "outside of insolvency". As even then the reconciliation of interests is concluded in the "planning stage", i.e. also outside of insolvency, it must, in our opinion, be sufficient that the employer is able to evidence corresponding planning after agreeing the reconciliation of interests with a list of names, however does not have to when beginning to implement the plans.

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