LEGAL UPDATE
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Manual timekeeping: Always permissible without consulting works council?

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Today, companies normally either monitor the time worked by their employees electronically, which requires consultation of the corresponding works council pursuant to § 87(1) no. 6 of the Works Constitution Act (*Betriebsverfassungsgesetz* – BetrVG), or not at all. However, in the event an employer cannot come to a satisfactory understanding with his company's works council regarding the use of an electronic timekeeping system, the use of a manual time and attendance system can be considered. According to a decision of the Berlin-Brandenburg Higher Labor Court of 22 March 2017 *(File Ref.: 23 TaBVGa 292/17),* such systems do not require consultation of the works council.

Factual Background

The employer operates two call centers in Berlin that employ several team leaders. Prior to creation of the works council, the attendance of employees at the two locations was recorded electronically without taking into account breaks. After the works council was formed, the parties to the works agreement agreed to do away with automated attendance monitoring. The system was deactivated, but the employer then required that a record of the actual beginning and end of the various employees' shifts be kept manually.

The various team leaders were not consistent in the way they recorded the information. Two team leaders recorded the hours of attendance of the employees in their teams themselves, but another team leader instructed employees to report to their superiors punctually at the beginning and end of each shift to have the time recorded by the latter. The employer did not consult the works council on this measure. The works council then requested to no avail that attendance no longer be recorded.

Decision

The proceedings initiated by the works council to obtain a temporary injunction proved unsuccessful. As had the Berlin Labor Court in the first instance, the Berlin-Brandenburg Higher Labor Court denied the works council's petition for injunctive relief. According to the court, such relief presupposes violation of the right of the works council to be consulted by a measure taken by the employer, which was not the case in the situation involving instructions to record attendance manually.

In particular, the court reasoned, no right to consultation existed pursuant to § 87(1) no. 1 of the Works Constitution Act, which makes provision for such a right in matters relating to the rules of operation of the establishment and the conduct of employees in the establishment if they are not regulated by law or collective agreement. But, according to the court, mandatory consultation is limited to matters involving rules governing the conduct of and collaboration between employees in the establishment, in which case consultation of the works council ensures that employees have an equal say in the formulation of rules governing their conduct within the establishment.

However, the court argued, the manual timekeeping at issue in the present case does not have anything to do with conduct, but rather relates to the work of the employees, which is not subject to consultation; it serves specifically to define and obtain information on duties of employees and is exclusively intended to ascertain whether employees comply with the prescribed working hours as regards when they commence and when they end their work. As regards the distinction between rules governing employees and rules governing their work, the court continued, it is in particular irrelevant whether the employees were actively involved in the manual recording of working hours and that attendance is not necessarily also working time.

Comments

The decision is to be sure essentially encouraging; it evokes a practicable method for recording attendance and working time without the necessity of consulting the works council, for example, during protracted negotiations with the works council at the level of the conciliation committee concerning the introduction of automatic timekeeping systems.

However, employers contemplating the introduction of manual timekeeping without involving their works council should not rely completely on the decision of the Berlin-Brandenburg Higher Labor Court, for the case law *(judgment of the Federal Labor Court from 9 December 1980, File Ref.: 1 ABR 1/78)* and scholarly literature acknowledge that works councils must be consulted when attendance lists are kept and employees must report to the individuals keeping the list to have their names entered if they come late to work. This is intended to detect tardiness. In the present case, at least one team leader imposed a similar procedure on employees by requiring that they report to their superiors punctually at the beginning and end of each shift to enable the latter to keep a record of employee attendance. This arrangement ultimately also serves to detect tardiness. It is therefore not possible to exclude the possibility that another Labor Court would recognize a duty to consult the works council on the grounds that the employer's actions pertained to the general conduct of employees.

Note

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