

Can Employers Issue Formal Warnings to Works Council Members?

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Decision

In its decision of 9 September 2015 (Ref.: 7 ABR 69/13), the Federal Labor Court ruled on the legitimacy of a formal warning issued to the chairperson of a works council. The case addressed in the decision involved the chairperson of a works council who sent an email containing a works agreement concluded between his employer and its works council to all employees of the group to which his company belonged. The employer then issued a formal written warning to the chairperson that was entered in his personnel file. The formal warning contained an allegation of breach of the recipient's duty of constructive cooperation and threatened application to the Labor Court for his removal from office pursuant to § 23 of the Works Constitution Act (*Betriebsverfassungsgesetz – BetrVG*) as well as his dismissal. In proceedings initiated before the labor court, the works council and its chairperson moved to have the warning removed from the chairperson's personnel file. The works council also requested that the court rule the warning null and void.

After both the Labor Court and Higher Labor Court had granted the motions of the works council, the Federal Labor Court dismissed the motion. The court granted only the motion to have the warning deleted from the personnel file of the chairperson of the works council.

The Federal Labor Court found that the very application for a declaratory judgment was inadmissible since the decision as to the validity of a warning does not involve a legal issue amenable to resolution by the Court within the meaning of § 256(1) of the Code of Civil Procedure (*Zivilprozessordnung – ZPO*), but only a preliminary question, and that there were therefore no grounds for the works council's motion to have the warning removed from the personnel file of the chairperson of the works council. The Court argued that the only possible legal basis for the relief sought by the works council as a col-

lective body, § 78 sent. 1 of the Works Constitution Act, did not apply since the right to have a formal warning expunged represented a very personal right of the respective works council member and did not accrue to any other entity.

According to the court, § 17(2) sent. 1 of the German Judicature Act (*Gerichtsverfassungsgesetz – GVG*) does, however, give the chairperson of a works council a personal right to have a formal warning removed from his personnel file according to §§ 242 and 1004(1) sent. 1 of the German Civil Code (*Bürgerliches Gesetzbuch*) regardless of whether he had breached any of his duties under co-determination law. The Court concluded that the formal warning had to be deleted from the personnel file if for no other reason than because the employer sought to sanction a breach of an official act with a threat of dismissal.

Implications for Practice

This decision of the Federal Labor Court shows once again that it is necessary to make a clear distinction between breaches of law governing co-determination and personal acts when reacting to any act of a member of a works council. An employee may be subjected to sanctions, i.e., a formal warning with the threat of dismissal or actual dismissal, only in the case of breach of duty in the capacity as employee. According to the established case law of the Federal Labor Court, personal sanctions under employment law are on the other hand not permissible in the case of any dereliction of duty on the part of a works council member under co-determination law. The only possibility in such cases – assuming that validity of a formal warning under co-determination law is disputed – is to threaten removal proceedings under co-determination law pursuant to § 23(1) of the Works Constitution Act.

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. Christoph J. Müller on +49 221 33660-524 or by email to cmueller@goerg.de. For further information about the author visit our website www.goerg.com.

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