Consultation of Works Council on Hiring – Assignments to Work Schedules

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Headnote

Works councils must also be consulted in connection with assignments to work schedules pursuant to § 87(1) no. 2 of the Works Constitution Act (Betriebsverfassungsgesetz – BetrVG) in the case of new hires. Consultation pursuant to § 87 of the Works Constitution Act is independent of consultation pursuant to § 99 of the Works Constitution Act.

Factual Background

The employer regularly experiences a strong increase in orders at the end of the year. As in previous years, the employer obtained the necessary additional human resources by hiring temporary and contract personnel. The employer consulted the works council as required by § 99 of the Works Constitution Act. The works council refused to approve the hires, and the employer then deployed the workers on a temporary basis as an emergency measure pursuant to § 100 of the Works Council Act. At the same time, the works council invoked its co-determination rights pursuant to § 87(1) no. 2 of the Works Constitution Act and insisted upon the right to be consulted on assignments to work schedules.

In the course of the proceedings brought before the Federal Labour Court to obtain the approval that would otherwise have been obtained from the works council, the works council submitted a motion to the effect that the employer not be allowed to recruit new employees until an agreement was reached as regards working hours or the work schedule.

Decision

The Federal Labour Court sustained the works council's action in a series of last-instance decisions. (Note: The author was involved as attorney of record, inter alia, order of 22 August 2017, 1 ABR 3/16.) The written statement of the court's reasons has not yet been forthcoming. In the course of the proceedings, the court mentioned the fact that the right of co-determination called for in § 87(1) of the Works Constitution Act is independent of the right pursuant to § 99; consent to employment does not therefore release the employer from the duty to obtain consent to the working hours of such new employees (by including them in a work schedule).
The right of co-determination pursuant to § 87(1) no. 2 of the Works Constitution Act can prevent an employer from deploying new employees within the enterprise until an agreement is reached regarding working hours. As a result, the works council is entitled to injunctive relief. Failure to comply on the part of the employer can entail payment of an administrative fine.

Opinion

The decision of the Federal Labour Court is anxiously awaited. It will be particularly important for enterprises that operate on shifts. There has up to now been no case law from the highest courts on the interaction between § 87 and § 99 of the Works Constitution Act. Previously, the opinion to the effect that the right to co-determination pursuant to § 87(1) no. 2 of the Works Constitution Act does not apply in the case of initial employment pursuant to § 99 of the Works Constitution Act wasadvanced only by the Nuremberg Higher Labour Courtand in the scholarly literature. The Federal Labour Court has now abandoned that position.
In my opinion, the decision fails to convince, for § 87 of the Works Constitution Act can be used to defeat the

purpose of the provisions of §§ 99 and 100 of the Works Constitution Act. This can effectively be used to block employment, especially in the case of temporary employees. It is questionable whether this was intended by the legislature. It will in any case be necessary to adapt to this new case law. In order to avoid disadvantageous implications at the level of employment, three possibilities come into question:

– Creation of a permanent mediation committee (§ 76(1) sent. 2 of the Works Constitution Act), which could meet on short notice in the case of any disagreement as regards assignment of a new hire to a work schedule.

– Works agreement on working hours: Such an agreement should accord the employer the right to assign new employees to a work schedule that has already been agreed to by the works council. Such a procedure would be ideal since it would eliminate the risk of any – possibly abusive (!) – refusal to consent to such deployment.

– "Combined involvement" of the works council pursuant to § 87 and § 99 of the Works Constitution Act at the time of hiring: The employment form should also provide information on the planned working hours (i.e., assignments to work schedules). This would, however, entail a risk that employment would be approved, but not the working hours (which would be tantamount to prohibition of temporary employment).

Note

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