

### When the Works Council becomes too curious... Or, the limits of co-determination

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The Works Constitution Act (Betriebsverfassungsgesetz, BetrVG) is based on the principle of trusting cooperation between the employer and the Works Council. It is advisable to take the statutory concept seriously, also and especially from an entrepreneurial perspective, as dysfunctional cooperation has the potential to block operational processes, not to mention expensive labour court decision proceedings.

For Works Councils the principle of trusting cooperation means restricting their work to statutory co-determination matters and not burying the employer in demands beyond such matters. But the employer should also not carelessly exceed the limits of co-determination "for the sake of harmony", as employees can be the victims of this, which was compellingly shown in a current decision by the Düsseldorf Regional Labour Court (Landesarbeitsgericht, LAG) (Düsseldorf LAG 23 June 2020, 3 TaBV 65/19).

#### Decision/Facts of the case

The decision was focussed on a Company-Wide Works Agreement ("CWA") regarding electronic personal files.

The employer has many businesses across the whole of Germany which all have Works Councils. In addition there is a General Works Council (GWC). In 2012 the employer and the GWC entered into a CWA regarding the introduction of electronic personal files. The CWA contained numerous detailed regulations on the basis of Section 87 (1) no. 6 BetrVG (co-determination regarding technical devices). In addition the following was agreed verbatim:

*"The Chair of the General Works Council and the local Chair of the Works Council shall receive permanent access to the electronic personal files (...). (...) The Chair of the General Works Council shall receive access to the files of the entire company."*

The employer decided already in 2013 to revoke the permanent access of the members of the Works Council to the electronic personal files once again. The GWC appealed against this measure and demanded full and per

manent access to the personal files of the workforce as per the CWA.

The Düsseldorf LAG rejected the GWC's request. It held that the clause in the CWA was unlawful as it infringed Section 75 (2) BetrVG. In line with Germany's Basic Law (Grundgesetz) this Section obligates the employer and the works council to promote the employee's right of self-determination. If the members of the Works Council had permanent access to the electronic personal files this would infringe the rights of the employees. Personal files contain sensitive personal data, such as maintenance obligations, salary attachments etc. It would be disproportionate for the members of the Works Council to always be able to view the personal files. The court held that there was no justification for exercising co-determination rights. In addition it is evident from Section 83 BetrVG that personal files may only be viewed on certain occasions.

#### Practical relevance

The extensive and very carefully reasoned decision of the Düsseldorf LAG is persuasive. It shows that the statutory co-determination rights in the BetrVG are not at the disposal of employers and works councils but are to be complied with also and especially in the interests of the employee. This certainly applies when concessions made to the Works Council also affect the legal position of the workforce. With permanent read access to personal files this is clearly the case here. The risk of misuse is obvious, especially in view of the sensitive and confidential information in personal files. It follows from Section 80 (2) BetrVG that information requests made by the Works Council must generally be linked to their specific duties. This is not the case with the unfounded inspection of personal files, almost out of curiosity.

In addition, this case gives a reason to once again critically look at the limits of co-determination as per Section 75 (2) BetrVG according to which the employer and the Works Council are barred from infringing on the personal life of employees and their personality rights. This applies, for example, to so-called use of wages clauses that

force employees to incur certain expenses (such as eating in the canteen). The principle of proportionality must also be adhered to, which, for instance, applies to Works Agreements on Work Clothes. Therefore every Works

Agreement should be critically reviewed to check whether the content does not overshoot the mark to the detriment of the workforce, however well-intentioned it may be.

## 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 Mr Jens Völksen on +49 221 33660 504 or [JVaelksen@goerg.de](mailto:JVaelksen@goerg.de). For further information about the author visit our website [www.goerg.com](http://www.goerg.com).

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