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From Dusk till Dawn

How long should one consult with the works council in case of collective dismissals? (Federal Labor Court, decision dated September 22, 2016 – 2 AZR 276/16)

In case of collective dismissals, companies are required to undergo a consultation process with the works council. The process is complicated, full of formal requirements and prone to errors. The Federal Labor Court has now provided important clarification concerning the length and substance of the consultation. The work of those responsible for personnel is becoming (somewhat) easier.

September 2017, Dr. Jan Tibor Lelley

In the case decided, based on a plant closure, the employer had initially issued dismissals to the staff based on operational reasons, which due to the defectiveness of the collective dismissal announcement had been declared ineffective by the labor court. The employer had failed to provide the works council with all relevant information pursuant to sec. 17 para. 2 sentence 1 Special Protection Against Dismissal Act (German KSchG) and had insufficiently conveyed this to the employment agency. The employer subsequently repeated the consultation process and informed the works council by fax concerning the relevant circumstances surrounding the collective dismissal per sec. 17 para. 2 sentence 1 KSchG. The company now submitted a collective dismissal announcement again and by way of precaution terminated the employment relationships again.

The Federal Labor Court decided that the second collective dismissal announcement

was effective. And therefore also the terminations. In particular, merely the information transmitted to the works council by fax was sufficient to fulfill the requirements of sec. 17 para. 2 sentence 1 KSchG. Compliance with the written form per sec. 126 b Civil Code (German BGB) is sufficient. The Federal Labor Court justified this decision based on the fact that neither the employer had to be protected from excessively hasty action nor did the works council need to be protected from possibly forged correspondence. Ultimately, the onus was said to be on the employer to be able to provide documentation on the information of the works council. By contrast, according to the Federal Labor Court, compliance with the written form requirement of sec. 126 BGB for informing the works council per sec. 17 para. 2 sentence 1 KSchG, was said to be unreasonable and onerous.

Furthermore, the Federal Labor Court then addressed the duration of the consultation process. This is even more important for the practice of collective dismissal than the currently permissible written form: The court made it clear that there is no mandatory requirement to reach an agreement in the consultation process and therefore no minimum duration of negotiations with the works council.

Recommendation for practice:

With this decision, the formal requirements of a collective dismissal announcement have been further clarified. Up to now, companies were required for good measure to uphold the strict written form of sec. 126 BGB when informing the works council. Only a few months ago, the Sixth Senate of the Federal Labor Court had left unresolved the question as to whether the prescribed forms are upheld even without the “strict” written form requirement. Now the Federal Labor Court has adapted the formal requirements for communication with the works council within the scope of the consultation process to the requirements in the Works Constitution Act (German BetrVG) that have long been recognized for collaboration of the works council, specifically for hiring decisions/transfers (sec. 99 BetrVG) and terminations (sec. 102 BetrVG). Independent of this form requirement, it is often difficult in a concrete negotiation situation in the consultation process to decide how long negotiations with the works council should last. Tough-negotiating works councils sometimes deliberately create uncertainty and gravely mention to employer representatives the catastrophic consequences of errors in the consultation process (invalidity of all dismissals). Here, the new Federal Labor Court case law provides counterarguments. According to the decision, companies have judgment latitude as to when the need for consultation with the works council has been fulfilled. The condition for success in case of collective dismissal continues to be, however, that all necessary information is provided to the works council (sec. 17 para. 2 sentence 1 KSchG). And caution is still advised: The simplifications in the consultation process do not change the fact that in case of errors, the collective dismissal announcement is not in order and any terminations subsequently issued are invalid.

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