Dirty Deals? – Separation Agreements with Works Council Members

The execution of separation agreements belongs to the bread and butter of many human resource departments. It is not seldom that, in comparison to a termination by notice, a separation agreement is the better and more effective means of achieving the termination of an employment relationship because it establishes legal security faster and the need for conducting costly and time-consuming litigation is avoided.

The termination of employment relationships with members of the works council by agreement does not belong, however to the bread and butter of these activities. As we all know, they are subject to special protection under law: Under Sec. 15 Protection Against Unfair Dismissal Act, these employment relationships may only be terminated for good cause and otherwise only upon the consent of the works council body (cf. Sec. 103 Work Constitution Act). According to Sec. 78 Works Constitution Act, members of the works council may not be disturbed or hampered in performing their function nor may they be disadvantaged or favored because of this function. Under Sec. 119 Works Constitution Act a disturbance or obstruction of the function of the works council can be sanctioned under criminal law with imprisonment of up to one year or with a fine.

In light of this background of the privileged legal position of works councils, the people in charge are not seldom overcome by a feeling of uneasiness if a separation agreement is supposed to be entered into with a works council member. This is partially due to the fact that works council members tend to menacingly and (prematurely) raise the accusation of a criminal obstruction of the work of the works council if they receive an offer of a separation agreement. Furthermore, it often happens that works council members will demand significantly higher severance payments in comparison to "normal employees" by referring to their protected status under the law so that the people acting for the employer must deal with the question of whether and to what extent they may yield to these demands without being accused of unlawful favoritism. One is often left with the feeling of being caught between a rock and a hard place and that every decision will be the wrong one no matter what.

DECISION OF THE FEDERAL LABOR COURT OF MARCH 21, 2018 (FILE NO. 7 AZR 590/16)

The 7th Senate of the Federal Labor Court recently had the opportunity to discuss this situation in a very interesting case. The grounds of the judgment, which were published very recently, now provide somewhat more security for practitioners regarding the limits of lawful action. The decision was based on the following facts:

The plaintiff had been employed at the defendant since 1983, and had been a member of the works council since 1990. Since 2006 he had been released from his work duties to act as full-time chairman of the works council. In mid-2013 an accusation arose that he was supposed to have molested and stalked a female assistant working for the works council. After the consent of the works council required for the termination of the plaintiff was refused by that body, the employer filed for the replacement of this consent of the works council for the termination of the plaintiff without notice at the labor court under Sec. 103 Works Constitution Act. Shortly after these proceedings were initiated, an out-of-court separation agreement was made between the employer and the works council member which provided for a termination of contract as per the end of 2015 and the payment of severance in the gross amount of EUR 120,000.00.

After parts of the separation agreement had already been performed and, in particular, the severance payment had already been made to the employee, he had a remarkable change of heart: In a complaint filed in July of 2014, he asserted the invalidity of the separation agreement and thus claimed that his employment relationship would continue. He based this claim on the contention that the separation agreement violated a statutory prohibition in the form of Sec. 78 Works Constitution Act because the agreement favors him personally (!) in an unlawful manner. The separation agreement created claims that a "normal" employee would not have been granted; ultimately, he, as an unpleasant works council member, was "bought off".

THE ARGUMENTS OF THE FEDERAL LABOR COURT

The Federal Labor Court did not follow this idiosyncratic argumentation and ultimately confirmed the legal validity of the executed separation agreement. The court first noted that favoritism toward works council members must always be assumed if their preferential treatment in comparison to other employees is not based on objective grounds but on their function as a works council member. In particular, the grant of benefits merely because of their official function is not allowed. It is not necessary for the assumption of favoritism that the official is supposed to be induced to do or refrain from doing a certain thing or is to be rewarded for a certain behavior.

However, it will regularly not be problematical if an employer enters into a separation agreement with a works council member in the situation where he intends to terminate the employment without notice and this has been preceded by negotiations, even if this includes a sizable settlement and possibly other benefits. In the end, the works council member is only availing himself or herself of an opportunity which is also available to other employees when the separation agreement is made.

Nor does unlawful favoritism follow from the fact that especially favorable financial terms were negotiated with the works council member in light of the special protection from termination under law. The works council member here has a "more favorable negotiating position" than an employee without a mandate merely because of his office and the legal position this offers. However, it is generally not a case of favoritism if this better negotiating position finds expression in the terms of the separation agreement. It is thus irrelevant whether or not the terms of the executed separation agreement are "reasonable" in the individual case when one takes into account the circumstances of the individual case (the Superior Labor Court of Saarland, as the appeals court, had still deemed this to be the governing issue). In the situation of a planned termination without notice, particularly the freedom of contract of the parties will not be generally limited by the prohibition of favoritism.

Of special note is the further remark of the court that the spirit and purpose of the prohibition of favoritism is to protect independence in execution of the office. This is not (or no longer) threatened, however, if the mandate is relinquished in any event by the agreement on the termination of the employment relationship.

IMPLICATIONS FOR EMPLOYERS

The decision of the Federal Labor Court is to be welcomed in both its result and its grounds and is certainly able to provide those in charge with more security when entering into separation agreements with functionaries. It is especially positive that the Federal Labor Court places the freedom of contract of the parties in the forefront and clearly issues a rejection of an overly narrow reasonableness test for the “price/benefit ratio” of a separation agreement. However, the ruling should not be understood to be a free pass: First, the decision relates to the situation of an intended termination without notice of a works council member, and its grounds cannot be automatically transferred to situations in which there is very obviously no reason for a termination without notice, but the works council member is nevertheless approached to enter into a separation agreement. In addition, the Federal Labor Court chooses its words carefully (as is its wont) and notes at various junctures that there is no favoritism (only) "generally" or "as a rule". One can interpret this as a back door for different rulings in justified cases.

One must therefore continue to act in good judgment when drafting separation agreements with works council members and ask critically to which point a better position of a works council member in the separation agreement can still be justified under their more robust protection against termination. It is also advisable to negotiate their immediate resignation from the works council upon the execution of the termination agreement even if the employment relationship will continue for a longer period. If the member immediately resigns from the works council, the basis of possible accusation that the work of the member in the works council for the remaining term of the employment relationship will be influenced by the benefits under the separation agreement will be removed.

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