Occupational Safety and Co-determination – To be Sure

INTRODUCTION

The legislation on occupational safety has a long history in Germany. However, the humane organization of work, and measures to prevent work accidents and health hazards caused by work have recently shifted, again coming more and more into the focus of attention. Numerous occupational safety provisions have been reformed recently or are being revised to keep up with actual developments. Since November of 2013 the updated *Regulation on Preventive Occupational Medicine* (ArbMedVV) has been in force, which provides for a new program of check-ups with a view to muscular and skeletal diseases. Similarly, a new *Regulation on Safety and the Health Protection during the Use of Equipment* (Plant Safety Regulation) will come into effect on June 1, 2015. The federal government has also resolved a change in the *Workplace Regulation* (ArbStättV) which will simultaneously incorporate the previous *Visual Display Workstations Regulation*.

A major aspect in this field is the assessment of risks in the jobs of a company, most recently upon inclusion of the psychological stresses associated with a job. Both the drafting of the risk assessment as the governing starting point for the additional measures to be taken by the employer and the briefing of the employee which results from this has been the source of disputes between employers and works councils in recent times. Particularly the differentiation between when a co-determination right existed and when it did not, was of relevance. The Federal Labor Court (BAG) has had the opportunity to clarify this again in a judgment from September of 2014.

THE FACTS

BAG, ORDER OF SEPTEMBER 30, 2014 - 1 ABR 106/12

An employer had entered into a "Service Agreement for Safety-Engineering Services" with a third-party company under the "Company Doctor, Safety Engineer and Other Occupational Safety Professionals Act (Occupational Safety Act)“. An element of this Agreement was the provision of the "duties arising from Sec. 6 of the Occupational Safety Act in conjunction with the accident prevention provision BGV A2 of the competent Employers Liability Insurance Association“ and "the drafting of risk analyses". A draft shop agreement presented by the works council for the promotion of company health programs was rejected by the employer; the proceedings before the conciliation board were suspended.

The employer initiated the action for a court order itself and sought the determination that the works council was not entitled to any co-determination rights with respect to the risk assessments to be prepared (Sec. 5 Occupational Safety Act), and when employees were briefed (Sec. 12 Occupational Safety Act), where duties of this nature are delegated to a third party. The employer itself merely exercised monitoring rights in relation to the third party with respect to these duties, claiming that these monitoring rights were excluded from co-determination as well. The lower courts had each dismissed the application

DECISION OF THE BAG

The BAG dismissed the appeal of the employer. The appointment of a third party to conduct risk assessments and the briefing of employees does not prevent the co-determination rights of the works council.

Under Sec. 87 (1) no. 7 Works Constitution Act, the co-determination rights of the works council applies to company rules on health protection. The co-determination right relates to the specific measures taken by the employer under the regulatory framework in the statutes to protect against health hazards. This is meant to achieve the most effective implementation of the statutory occupational safety provisions in the interests of workers. Co-determination comes into play if a statutory duty to take action exists on objective grounds and this demands company rules to achieve the goal of occupational and health protection under the law because mandatory specifications are missing in the law. A right of co-determination will thus exist with respect to the risk assessment of the jobs and the briefing of the employees; this had already been fundamentally decided by the BAG in its order of June 8, 2004 (file no.: 1 ABR 13/03).

This is not prevented by the execution of an agreement with a third party. The employer must ensure, when negotiating the agreement with the third party, that the proper exercise and protection of co-determination rights are warranted. The employer may not enter into any commitments that designate otherwise.

The appointment of third parties to carry out risk assessments and brief employees, which is allowed under Sec. 13 (2) Occupational Safety Act and is subject to certain conditions, does not exclude the right of co-determination. Although it is true that the delegation of certain employer duties in the field of occupational safety to third parties means that that party will execute the duties under his own responsibility, this serves to expand the group of those bearing responsibility, but does not release the employer from his own responsibilities. Rather, he remains the party having the (main) respon-

sibility in addition to his contractors. The co-determination right of the works council thus remains in place, provided the employer retains some leeway when implementing occupational safety measures. This will also influence the delegation of duties to third parties.

One must differentiate, however, between framework regulations that allow for leeway and demand a collective, abstract and general solution and the individual (personnel) measures that are based on those solutions. If there were provisions with the works council concerning, for instance, the execution of the risk assessments (also) by third parties, the specific selection and appointment of the third party would no longer be subject to co-determination.

In light of the fact that the application was dismissed on the grounds described above, the BAG did not deal with the issue of whether the terms of contract selected by the employer were at all sufficient to effectively structure the tasks concerning occupational safety.

PRACTICAL IMPLICATIONS OF THE JUDGMENT

In this decision, the BAG confirmed the line it has taken until now. If the statutory requirements provide the employer with some leeway in implementing company work safety, the works council has a co-determination right. There are numerous framework regulations of this nature in the area of occupational and health safety, as it is stated in the Works Council Act. The Works Council Act itself provides for the involvement of the works council at various points concerning measures surrounding occupational safety or the humane design of the workplace. Accordingly, the possibilities of the works council to influence the structure of business processes are broad, and this is happening more and more often. The present decision shows that even the - lawful - delegation by the employer of certain obligations under occupational safety law to a third party may not limit the rights to co-determination.

This judgment again clarifies what the BAG had already formulated in its order of March 18, 2014 (file no.: 1 ABR 73/12). It follows from Sec. 3 Occupational Safety Act, as the "prototype" of a "generally worded master provision" that the employer has a duty to set up a suitable occupational safety organization. This also includes the abstract delegation and allocation of certain tasks and duties to management and other employees. If a certain management level is thus allocated extensive authorities and tasks, this requires the prior compliance with the co-determination rights of the works council. Whether the specific allocation to an individual employee or a third-party company is to be deemed to be an individual measure that is not subject to co-determination, or it is also a collective situation that triggers the co-determination process, must be examined in the individual case. If duties are to be delegated to a third party, that agreement must be drafted with care.

One must also bear in mind the employer's monitoring and adjustment duty set down in Sec. 3 (1) Occupational Safety Act. All action taken must be monitored with respect to its effectiveness and the possible need for adjustment with the goal of improvement. There is a constant need to involve the works council due to the continual development of business procedures and processes concerning both this monitoring process, but also, if necessary, the adjustment process. Ignoring this will allow the works council to initiate actions for court orders before the labor courts, to initiate proceedings before the conciliation board and to involve the supervisory agencies of jurisdiction in order to ensure that it can exercise its influence and co-determination rights.■

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