

The Federal Labor Court on Jurisdiction of the Conciliation Board in Occupational Health and Safety Matters

INTRODUCTION

Compliance with the co-determination rights of the works council in occupational health and safety matters under § 87 para. 1 no. 7 of the German Works Constitution Act (*Betriebsverfassungsgesetz - BetrVG*) continues to be a hot topic. In practice, conflicts in this area are often fought with much commitment and passion on both sides, especially since there are a great number of occupational health and safety framework provisions that need to be fleshed out and employees are directly affected. In many cases, a conciliation board is created. The Federal Labor Court (*BAG*) has now had another opportunity to clarify certain issues.

FACTS OF ORDER DATED MARCH 28, 2017 – 1 ABR 25/15

The employer, a textile seller, agreed with the works council at one of its branches to create a conciliation board that would "fully settle all matters involving occupational health and safety." Pursuant to a decision of the conciliation board a "Works agreement on immediate occupational health and safety measures" was signed. The works agreement regulated matters which, in the view of works council and management, involved "occupational health and safety". Examples included the treatment of employees after their return from longer absences, the equipment of certain work areas with standing aids, the purchase of hydraulic platform lifts and toolboxes, the regulation of air temperature in display windows to be decorated, the ring tone volume settings of telephones, and working on screen devices. The employer filed an application in Labor Court (*AG*) contesting the partial decision of the conciliation board. The employer argued that its operations posed no direct health or safety risks so that occupational health and safety framework provisions, such as section 3 para. 1 sentence 1 of the German Occupational Health and Safety Act (*Arbeitsschutzgesetz – ArbSchG*), did not trigger mandatory co-determination, and that therefore the conciliation board had no jurisdiction.

The Labor Court denied the application. The Regional Labor Court of Berlin-Brandenburg (*LAG*) upheld the application in part. The works council appealed to the Federal Labor Court in an attempt to reinstate full denial of the application. This attempt was unsuccessful.

DECISION OF THE FEDERAL LABOR COURT

The Federal Labor Court found that the appeal lacked merit. In addition, the Court even concluded that the works agreement was invalid in its entirety, and not –

as the Regional Labor Court had still found – in part only.

In support of its decision, the Federal Labor Court first cited a procedural issue, stating as follows: the origin of a conciliation board is a specific regulatory conflict between labor and management. To resolve this conflict, every conciliation board must, when it is first established, be provided with a definition of the subject matter to be regulated by the board. This definition delineates the jurisdiction of the conciliation board. Therefore, a decision of a conciliation board is also invalid if the conciliation board insufficiently carries out its regulatory mandate and decides on no final regulation. While co-determination of occupational health and safety matters within the meaning of § 87 para. 1 no. 7 BetrVG is a special case in that the conciliation board must address not only regulatory issues, but also legal issues, there must nonetheless be a specific regulatory subject matter. Generally, the details of the regulatory mandate of a conciliation board depend on the occupational health and safety framework provisions that must be fleshed out or on the constellations to be treated.

The Federal Labor Court went on to state that because in the instant case the conciliation board had been created to "fully settle all occupational health and safety matters," it was unclear which regulatory conflicts and which matters were supposed to be decided by the conciliation board. The conciliation board also could not tell at what point it had sufficiently settled a dispute between works council and management. The circumstance that, by name, the decision of the conciliation board involved a "partial decision" was not decisive. While such a partial decision is an option when a broadly phrased, specific regulatory subject matter includes several factually distinguishable regulatory matters, it was unclear due to the undefined nature of the regulatory subject matter before the instant conciliation board whether the partial decision, as a whole, was not already a final solution. Therefore, the Federal Labor Court concluded, the works agreement was invalid.

The Federal Labor Court then provided additional reasons for the invalidity of the works agreement. First, the Court once again summarized the extent of the co-determination right under § 87 para. 1 no. 7 of the LMR Act. This right relates to occupational health and safety measures of the employer fleshing out framework provisions. The co-determination right is triggered if a legal duty to act is objectively present and, absent mandatory legal requirements, requires regulation at the works level to achieve the stated occupational

health and safety objective. It is irrelevant whether the framework provision serves occupational health and safety purposes directly or indirectly.

The Federal Labor Court went on to state that the application of such framework provisions however requires the presence of (specific) risks, which must either have already been established or must be established by performing a risk assessment. Only then do such framework provisions trigger a specific legal duty of the employer to act, compliance with which requires cooperation of the works council. Section 3 para. 1 sentence 1 ArbSchG has the following special feature. This code section is not only a framework provision, but also a general clause. In view of the co-determination right under § 87 para. 1 no. 7 BetrVG, there must be specific indications of a need for regulation at the works level in order to leave room for voluntary works agreements within the meaning of § 88 no. 1 BetrVG and measures demanded by the works in accordance with § 91 BetrVG. When general clauses are involved, this generally requires the presence of a "specific health hazard."

The Federal Labor Court continued to explain that the interaction between § 3 para. 1 sentence 1 of the OHS Act and § 5 para. 1 of the OHS Act (risk assessment) however means that whether the co-determination right under § 87 para. 1 no. 7 BetrVG in conjunction with § 3 para. 1 sentence 1 ArbSchG is triggered depends solely on whether there is a specific *risk* within the meaning of § 5 para. 1 ArbSchG. The employer must take required occupational health and safety measures in consideration of the circumstances affecting the health and safety of its employees. The employer makes this determination by performing a risk assessment in accordance with § 5 para. 1 ArbSchG. Accordingly, the outlines of the general obligation under § 3 para. 1 ArbSchG depend on a specific *risk* rather than a – more intense – imminent hazard. This clarification by the Federal Labor Court is new.

The Federal Labor Court went on to state such a determination of a specific risk within the meaning of § 5 ArbSchG was a prerequisite for exercising the co-determination right. Absent such determination, a conciliation board is prevented from carrying out its regulatory mandate. Such a risk assessment cannot be made by the conciliation board itself. A conciliation board neither is the party which, according to § 13 para. 1 ArbSchG, is responsible for performing the obligations of the employer under, *inter alia*, § 5 ArbSchG, nor can occupational health and safety obligations be delegated to a conciliation board in accordance with § 13 para. 2 ArbSchG. In the view of the Federal Labor Court, this requirement of determining specific risks applies also with respect to regulations issued on the basis of

the ArbSchG (e.g. regulations on the handling of heavy items) and rules supplementing such regulations. The regulations supplementing the ArbSchG require performance of a risk assessment; these regulations must generally be construed as regulations spelling out the risk assessment provisions of § 5 ArbSchG.

PRACTICAL SIGNIFICANCE OF THE DECISION

The decision of the Federal Labor Court is welcome news. Especially in the area of occupational health and safety, experience has shown that works councils frequently (want to) make very broadly phrased – and thus undefined – issues the subject matter of negotiations and thus, as a general rule, a regulatory subject matter of conciliation boards. The decision of the Federal Labor Court should help delineate such negotiations more clearly in the future. The risk assessment results that must be taken into consideration, and that are a prerequisite for establishing the necessity of rules at the works level in the first place, should add even more focus. This is another reason why performing such risk assessments is in the interest of the employer. Note, however, that the works council, of course, also has a co-determination right with respect to such risk assessments. All in all, the decision should focus discussions of occupational health and safety matters between works council and management, which, in turn, should promote goal-oriented negotiations between the parties – even without involvement of a conciliation board.

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