
PRESS RELEASE

Federal Labour Court decides on highly charged issue: New all-purpose weapon of the works council? Is the works council permitted in the future to hire new personnel against the will of the employer?

Erfurt/Munich, 18 November 2019 - The Federal Labour Court (*Bundesarbeitsgericht, BAG*) has to decide tomorrow, to what extent the co-determination right of a works council of a clinic applies to the employment of personnel for the wards: Do enterprises have to involve the works council in the future, when they conceive their personnel planning? Can the works council enforce a minimal occupation of personnel, e.g. on wards of clinics, against the will of the employer (1 ABR 22/18)?

The Employer operates a clinic with 300 employees and approximately 350 beds. A works council has been elected which had objected to various work schedules of the Employer, since it deems the occupation of the care personnel on the wards as not sufficient. The disputes regarding the minimal occupation have given rise to the establishment of a so-called conciliation committee. A conciliation committee is an instance stipulated in the German Works Constitution Act for the settlement of conflicts between employer and works council with the assistance of an impartial chairperson of the conciliation committee. In the first meeting 2013, it was decided to commission an external expert, who should assess the health risks of the personnel. The expert report stressed various health-related problems. From the Employer's point of view, these problems had been processed subsequently - however, not from the works council's point of view, which further assumed a concrete health risk of the employees. Therefore, the conciliation committee was reconvened in 2016 and decided - this time without consent of the Employer - to obtain a further expert report focusing on the psychological stress of the personnel. On the basis of this expert report, a decision of the conciliation committee was made after again unsuccessful negotiations, which contained detailed regulations on the minimal occupation on the wards. The Employer has contested this decision.

The Employer argues that the works council had no co-determination right in this matter, the regulations exceeded the competence of the conciliation committee and compromised the Employer's entrepreneurial freedom. The works council argues that these health measures are taken for the protection of the employees. Pursuant to the Works Constitution Act, the works council has a co-determination right in this matter.

"The forthcoming judgment is expected to be the most important labour law decision this year", says *Dr Wolfgang Lipinski*, Labour Law Partner at the international commercial law

firm BEITEN BURKHARDT in Munich. "If the Federal Labour Court followed the position of the works council, the explosive nature of the decision would consist in the fact that the works council in the future could enforce the employment of new additional personnel against the will of the employer through the "back door" of health protection", the Labour Law Specialist further states. "Such a judgment would provide works councils with an all-purpose weapon and it would have an impact far beyond the hospital sector, in particular, on the retail sector and on logistics companies." *Dr Lipinski* concludes: "From an employer's perspective, it is hoped that the Federal Labour Court refuses an enforceable co-determination right of the works council in the personnel planning, that it creates legal clarity in this respect and, thus, respects the core area of the constitutionally protected entrepreneurial freedom. The decision on the number of employees, who have to carry out the works required, is part of this core area, as well as the decision, whether the employer copes with the workload with its own permanent staff or with external staff."

Please contact *Dr Wolfgang Lipinski* should you need more information, further statements or guest commentaries on this issue.

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