Newsletter Employment

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Legal information

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■ EDITORIAL

Dear readers,

just in time for Christmas, we are pleased to present our traditional Employment Law Newsletter, keeping you informed about the most important developments as the year draws to a close.

In our editorial, Moritz Mentzel from Berlin and Stephan Sura from Cologne take an interdisciplinary look at a current decision by the Tenth Senate of the BAG (Bundesarbeitsgericht / Federal Labour Court) from a corporate and labour law perspective: In this decision, the court established new, stricter rules for employee participation schemes, specifically with regard to the expiry of rights when they are granted as virtual stock options.

Following on from our special newsletter published in autumn on the works council elections coming up next year, this issue also deals with a works constitution law topic: Robert von Steinau-Steinrück and Hannes Raff from Berlin discuss the as yet unresolved question of whether an employer can issue a warning to the works council and its members for breach of official duties.

Our ten most important court decisions this quarter cover a veritable mix of topics from various corners of labour law, from collective bargaining unity over “associated” discrimination to voting rights in works council elections in matrix structures. In our section on current developments in pensions, Annekatrin Veit provides information on the status of the legal changes brought by the “Betriebsrentenstärkungsgesetz II” (Second Company Pension Strengthening Act). As usual, we conclude with a look at our foreign partner law firms: In our international news from unyer, Caroline Ferte from FIDAL in Paris describes how the topic of employee statements on social media is dealt with under labour law in France.

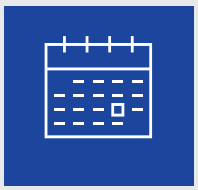
We hope you enjoy reading this issue and look forward to your feedback. Last but not least, we wish you a peaceful and relaxing holiday season and a healthy, happy and successful New Year!

All the best and see you soon

Yours

Achim Braner

Events, publications and blog



You will find an overview of our events here.

You will find a list of our current publications here.

You will find our blog here.

■ MAIN TOPICS

New rules for option-based employee participation programmes

In March, the BAG tightened the requirements for employee participation programmes that grant virtual stock options. This means that some of the opportunities for retaining employees through the use of this form of special benefit are no longer available – but not all of them.

Background

Employee participation programmes in the form of share options, virtual share options or virtual shares primarily serve to remunerate employees and managers. At the same time, they are intended to retain beneficiaries for as long as possible and create an incentive to contribute to the success of the company and its increase in value through good performance. Employees are then supposed to participate in this increase in value by means of their options or virtual participation. Employee retention is achieved in the case of "real" stock options through statutory waiting periods (Sec. 193 [2] No. 4 AktG [Aktiengesetz / German Stock Corporation Act]) and in the case of virtual shareholdings through contractual agreements (vesting periods, "cliffs" or good or bad leaver clauses). What they all have in common is that an employee should only receive or retain his or her (virtual) participation if he or she serves the company for at least a certain period of time.

In its main ruling on retention and forfeiture provisions in share option plans, the Tenth Senate of the BAG, which is responsible for special benefits, ruled in 2008 that its requirements for other, "classic" bonus payments were not transferable to these. Stock options were less a consideration for services rendered and more an opportunity to make a profit and an incentive for future work (BAG, decision of 28 May 2008 – 10 AZR 351/07). In contrast to other special payments, they are much more speculative in nature and also pursue a different goal by providing an incentive for future work. It would be contrary to this if employees were still able to exercise rights from an option programme after leaving the company during the lock-in period. Within the framework of share option plans, it has therefore been possible to date to attach a multi-year binding effect to large parts of employee remuneration. However, the BAG has now restricted this, at least for virtual options.

BAG's decision of 19 March 2025 – 10 AZR 67/24

In the facts of the BAG decision primarily relevant here, the plaintiff employee was granted virtual stock option rights with a vesting period of four years. The first 25 % of the options were to become exercisable after twelve months, with the remainder becoming exercisable successively each month thereafter. No consideration was explicitly required for the options, but vesting was to be suspended if the employee was released from their work obligations, for example in the event of occupational disability or parental leave. Options that were not exercised were to expire if the employment relationship ended before an exercise event, regardless of the reason. Exercisable options should also expire gradually if the employment relationship ends before an exercise event due to termination for personal reasons, conduct-related reasons or extraordinary termination: 12.5 % of the exercisable options every three months after the end of the employment

relationship. When the plaintiff terminated his employment relationship, 31.25 % of his options were exercisable. He asserted the associated claims for the first time in June 2022. In his opinion, these had not expired because earned remuneration could not be withdrawn.

After the competent Labour Court and Higher Labour Court dismissed the claim, the BAG upheld the plaintiff's appeal. The options vested upon termination of the employment relationship did not expire either directly or subsequently in stages, as the associated provisions were unreasonably disadvantageous and therefore invalid. Vested options were also consideration for the work performed during the vesting period. This was already evident here from the option conditions, according to which vesting was suspended in the event of occupational disability or parental leave, for example. It was therefore linked to the exchange of work and remuneration (Sec. 611a BGB [Bürgerliches Gesetzbuch / German Civil Code]). Furthermore, an incentive had been created to contribute to increasing the value of the company through good performance; other benefits linked to the company's success, such as profit-related bonuses, were also paid as additional remuneration. All this did not mean, however, that vested options could not be subject to forfeiture after the end of the employment relationship. In view of the characteristics of virtual options, the assessment of whether there is unreasonable disadvantage must be based on the meaning and purpose of the respective programme. An expiry provision does not appear unreasonable if the former employee's efforts can no longer influence the exit proceeds generated by the exercise event. However, this generally depends on the length of time until the event – the longer this is, the more likely it is that no influence can be assumed. Here, the provision on the successive expiry of the options was equally unfairly disadvantageous, though, because it did not regulate an appropriate, i.e. equal, relationship to the length of the vesting period spent in the employment relationship.

The BAG's decisions of 27 March 2025 – 8 AZR 63/24 and 8 AZR 139/24

Just a few days later, two decisions were handed down by the Eighth Senate of the BAG, which is responsible (among other subjects) for competition law. Each of the decisions dealt with the question of whether and when virtual options should be included in the compensation for a post-contractual non-competition clause. The BAG stated that this was the case if the options were exercised during the current employment relationship and concurred with the assessment of the Tenth Senate regarding the remuneration character of virtual options, which is why they should also be regarded as "contractual benefits" in accordance with Sec. 74 (2) HGB (Handelsgesetzbuch / German Commercial Code). The fact that option conditions may stipulate the opposite is irrelevant. Stock options are to be classified as part of the remuneration under the employment contract, regardless of the contractual basis. This also applies to virtual options. It is harmless if a parent company has assumed the obligation to transfer shares: although stock acquisition rights are not normally included in severance pay if the employee concludes a related agreement with a parent company instead of with his contractual employer. However, this is not the case if the employer originally enters into its own obligation. Ultimately, the only factor relevant for calculating severance pay is the amount of earnings at the end of the employment relationship. Options that have only been granted but not yet exercised by the end of the employment relationship are not to be included.

Effects on the structure of share-based remuneration

Unlike in 2008, the Tenth Senate of the BAG now assumes that stock options are fully remunerative in nature – at least in the case of vested virtual options. Whether the Erfurt judges would apply their assessment with all its consequences to genuine stock option programmes is questionable, even based on the grounds for the decision. Real stock options come with additional value characteristics such as potential voting rights or the chance of a further rise in the share price if the shares are held. This aspect was not addressed by the Tenth Senate, while it still seems to allow for the possibility of expiry as long as this does not happen faster than the "earnings" of the options.

For real stock options, Sec. 193 (2) No. 4 AktG stipulates that the exercise period must be at least four years, resulting in a kind of minimum commitment period that – unlike virtual options – cannot be undercut. This also rules out gradual vesting, at least until then, but after that, real options must also have the option to expire, as otherwise employees could continue to benefit from the increase in value of the options for years to come, even though their influence on the company's development is waning. Even for virtual options, immediate expiry remains possible as long as they have not yet vested. In future, corresponding provisions in option programmes should therefore explicitly differentiate between vested and unvested options; to this end, a narrower definition of exercise events may be adopted. De-vesting, i.e. the reduction of vested options, may not occur faster than vesting.

Post-contractual non-competition clauses

The Eighth Senate's guidelines on the role of option rights in post-contractual non-competition clauses are very clear. The Senate had already ruled that option claims are not included in severance pay if they are originally granted by another group company – unless there is an (express or implied) co-obligation on the part of the contractual employer (BAG, decision of 25 August 2022 – 8 AZR 453/21). However, for the options to be included in principle, they must not only have been granted, but also exercised during the current employment relationship, so that an actual, quantifiable increase in assets has taken place.

Granting by another group company

In the above mentioned ruling of 2008, the Tenth Senate of the BAG emphasised that the granting of stock options *by the employer* is part of the remuneration provisions of the employment contract and thus becomes part of the remuneration. In the cases now decided, the court did not have to take a new position on this issue, but the following is likely to apply: if a parent or sister company grants option rights, these are granted with regard to the employment relationship, but are not synallagmatic with the work performed. The above provisions do not apply, especially if the granting company is based abroad.

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The warning under works constitution law as a sanctioning instrument?

The tools available for responding to breaches of duty by an employee are widely known – but what options does an employer have when works council members breach their official duties? In particular, whether an employer can issue a warning to the works council or its members is a matter of debate.

Introduction

The employer's option to impose sanctions for a works council member's breach of works constitution law duties is basically regulated in Sec. 23 BetrVG (Betriebsverfassungsgesetz / Works Constitution Act). According to this, the employer can apply to the labour court to have a member excluded from the works council or to have the works council dissolved altogether. The prerequisite for this is a gross breach of legal duties by the works council member. Examples of this include concluding a works agreement in violation of Sec. 77 (3) BetrVG or failing to convene mandatory meetings in accordance with Sec. 43 BetrVG.

If one compares this sanction mechanism for breaches of official duties with the differentiated system of sanctions for breaches of employment contract obligations – warning,

formal warning, ordinary and extraordinary dismissal –, it is striking that the legislator has expressly not provided for any milder measure than removal from office for works council members. A "works constitution warning" could serve as such a measure. The term is deliberately used in quotation marks, as it is legally unclear in the context of works constitution law, among other things because the employer does not have creditor status. There is also disagreement in case law and literature as to whether the employer is authorised to issue such a "warning" to a works council member.

Content of the "warning"

The "works constitution warning" differs from the individual warning in that it does not sanction breaches of employment contract obligations with a threat of dismissal, but only reprimands breaches of duty by the works council or its members. This can only be linked to the threat of exclusion from the works council in accordance with Section 23 (1) BetrVG. According to prevailing opinion – and in particular according to the BAG – it is inadmissible to issue a warning with the threat of dismissal on the basis of a breach of official duties under works constitution law alone (see, for example, BAG, decision of 9 September 2015 – 7 ABR 69/13). Since dismissal may not be based on a breach of official duties, such an approach would violate the prohibition of discrimination under Sec. 78 BetrVG.

Legal (in)admissibility?

Based on an older decision by the BAG, the inadmissibility of a "works constitution warning" was long held (BAG, decision of 5 December 1975 – 1 AZR 94/74). In a later decision, however, the judges in Erfurt considered the "promise of an application under Sec. 23 BetrVG in the event of a repeat breach of official duties" to be permissible (BAG, decision of 26 January 1994 – 7 AZR 640/92). This essentially describes the content of the "warning" discussed here. More recently, however, the Higher Labour Court of Hessen has concurred with the (probably) prevailing opinion in the literature and has not recognised the legal institution of warnings under works constitution law as a whole (decision of 30 September 2019 – 16 TaBV 82/19). The Solingen Labour Court, on the other hand, considers a warning under works constitution law preceding the application under Sec. 23 BetrVG to be an appropriate milder measure (decision of 18 February 2016 – 3 BV 15/15 lev). Some legal opinions also support the admissibility of a "works constitution warning" as a milder measure. The principle of trust-based cooperation between the employer and the works council under Sec. 2 (1) BetrVG is used as the legal basis for this. Within the resulting legal obligation, the employer is regarded as a creditor and is therefore entitled to demand compliance with the obligations standardised in the BetrVG. On the other hand, however, it is argued that Sec. 23 (1) BetrVG expressly provides for sanctions under works constitution law only for gross breaches of duty and deliberately leaves less serious misconduct unsanctioned; moreover, the warning letter as an instrument of contract law is contrary to the system of collective law because the employer has no contractual claim against the works council member for proper performance of his or her duties. The assumption of a power to issue warnings therefore violates the principle of trust-based cooperation and the prohibition of discrimination under Sec. 78 BetrVG. In extreme contrast, the Berlin Labour Court once held that a "works constitution warning" was necessary before initiating exclusion proceedings under Sec. 23 (1) BetrVG (decision of 10 January 2007 – 76 BV 16593/06).

Conclusions

In our opinion, a "warning under works constitution law" should be permissible in any case if the employer indicates that proceedings under Sec. 23 (1) BetrVG will be initiated in the event of a repeat offence. It is not apparent why the employer should be prevented from communicating its legal opinion on a breach of official duties by the works council and at the same time pointing out the existing legal situation under Sec. 23 BetrVG. This is not precluded by the prohibition of discrimination under Sec. 78 BetrVG either: this does not provide any protection for conduct that is contrary to official duties. Ultimately, it is a warning. Acceptance of this instrument does not merely constitute an inadmissible reprisal by the employer. Rather, it also serves to protect the works council member, who is thus given the opportunity to adjust his or her behaviour before the ultima ratio of dismissal from office is applied. However, a "works constitution warning" or a corresponding notice may not be included in the personnel file because it is not related to the employment relationship (see Labour Court Stuttgart, decision of 30 April 2019 – 4 BV 251/18).

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■ THE TEN MAIN COURT DECISIONS

Active voting rights in cross-company matrix structures

An employee who belongs to several companies within the same enterprise has the right to vote in works council elections in all of these companies – even in a matrix structure.

BAG, decision of 22 May 2025 – 7 ABR 28/24

The case

The works council partners are disputing the legality of a works council election held in the summer of 2022. The employer has approximately 2,600 employees in a total of five establishments. The electoral roll in one of them listed 128 managers (matrix managers) in addition to the approximately 500 employees who were undisputedly eligible to vote there. These matrix managers performed cross-company supervisory functions and were originally/historically assigned to another establishment. Their employment contracts specified a particular location as their place of work, although some of them worked from home. They were free to choose which of the employer's offices they wanted to work in. The works council was consulted on the deployment of the 128 matrix managers in accordance with Sec. 99 BetrVG.

The employer contested the election in question on the grounds that the 128 matrix managers were not eligible to vote within the meaning of Sec. 7 (1) BetrVG, meaning that the list of voters had been drawn up in violation of Sec. 19 (1) and (2) BetrVG and thus a key election regulation. The core issue in the proceedings was therefore whether the matrix managers were entitled to vote not only in their "home company" but also in those companies where their subordinate employees were employed.

The decision

Both the Labour Court and the Higher Labour Court declared the election invalid, while the Seventh Senate of the BAG referred the proceedings back to the Higher Labour Court for further investigation of the facts and (merely) provided a legal assessment of the fundamental legal issues. The BAG stated that a violation of essential provisions would indeed exist if the 128 managers considered eligible to vote by the election committee did not have the right to vote. However, it could not be decided on the basis of the court's findings whether this was the case. In addition to being at least 16 years of age, the

right to vote under Sec. 7 BetrVG also requires integration into the company – comparable to employment under Section 99 BetrVG. According to the established case law of the BAG, integration exists if the employer pursues the technical purpose of the company through the employee's work, which is subject to instructions. The contractual provisions of the employment contract are not of decisive importance in this regard, as only the actual circumstances are relevant.

However, the assignment of matrix managers to another company does not preclude their affiliation with other companies: there is no legal provision for such an exclusion, and a different view would also raise teleological concerns. Even alleged factual and legal difficulties in determining the company affiliation of matrix managers are irrelevant. Incidentally, the question of integration arises not only in the context of Sec. 7 BetrVG with regard to active voting rights, but also in the context of hiring pursuant to Sec. 99 BetrVG – a differentiation between the two standards with regard to the concept of integration under works constitution law is not permitted, so that the consultation of the works council pursuant to Sec. 99 BetrVG allows for a "certain conclusion" to be drawn. Finally, the Senate established some practical guidelines for the integration of managers: integration exists if the manager must regularly work with the employees working in the company in order to perform the tasks assigned to them and thus actually exercises their professional authority. However, the decision must always be based on an overall assessment of the circumstances of the individual case.

Our comment

The decision is convincing: the actual circumstances are decisive for the right to vote (as well as for the question of employment pursuant to Sec. 99 BetrVG). Many of the BAG's key statements are neither surprising nor new: there was no serious debate about the fact that the right to vote in multiple companies is fundamentally possible (and required by democratic theory), just as there was no debate about the fact that the actual circumstances are decisive for integration. However, anyone hoping that the BAG would provide a fundamental clarification of the question of whether and when matrix managers are "integrated" was disappointed. It is possible that the next decision of the Higher Labour Court in this matter will also find its way to Erfurt. The facts of the case did not concern a cross-company matrix structure with its special problems – so the BAG has still not clarified these specific issues in any case. Meanwhile, the decision does provide indications that the hurdles for integration will not be particularly high in these constellations.

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Immediate displacement of the minority collective agreement

The displacement of a minority collective agreement in the event of a collective agreement conflict pursuant to Sec. 4a (2) 2 TVG (Tarifvertragsgesetz / Collective Agreements Act) occurs immediately and does not require a decision by a labour court pursuant to Sec. 99 ArbGG (Arbeitsgerichtsgesetz / Labour Court Procedures Act).

BAG, decision of 19 March 2025 – 4 ABR 35/23

The case

The applicant is the GDL (Gewerkschaft Deutscher Lokomotivführer / Union of German Train Drivers), which – like the EVG (Eisenbahn- und Verkehrsgewerkschaft / Railway and transport union) – has in the past concluded a large number of collective agreements with the employers' association AGV MOVE for companies belonging to Deutsche Bahn AG, including DB Regio AG. Until 31 March 2021, the latter applied the collective agreements of both trade unions in an elective operation in Upper Bavaria, but since then only those of the EVG. Shortly before, Deutsche Bahn AG announced that it expected the EVG to organise a majority of members there. In autumn 2021, AGV MOVE concluded several new collective agreements with the GDL and the EVG. Subsequently, DB Regio AG now applied only these collective agreements with the EVG. The GDL then argued that, at the relevant time of the conflict on 31 May 2022, more members from its ranks were employed at the electoral company. It subsequently applied for a court ruling that its collective agreements had been the applicable collective agreements since that date and, in the alternative, that its collective agreements were at least applicable to the GDL members at that company. The Labour Court and Higher Labour Court rejected the applications.

The decision

This was also the ruling of the Fourth Senate of the BAG. The special decision-making procedure under Sec. 99 ArbGG serves the purpose of supporting the protection of the parties to collective agreements arising from Art. 9 (3) GG (Grundgesetz / German Basic Law) with regard to the application of the collective agreements they have concluded, by enabling them to determine which collective agreement is to be applied in a company in the event of a conflict between collective agreements. However, the displacement of the minority collective agreement stipulated in Sec. 4a (2) 2 TVG does not require a legally binding decision pursuant to Sec. 99 ArbGG. The wording of both provisions already supports this interpretation, in particular the fact that, according to Sec. 4a (2) 2 TVG, in the event of conflicting collective agreements in a company, only the legal provisions of the majority collective agreement "are" applicable. The provision of Sec. 99 (3) ArbGG also states that the decision on the "applicable" collective agreement is effective for and against everyone. The meaning and purpose of the Collective Bargaining Unity Act (Sec. 4a TVG) confirm this view, as it serves to ensure the functioning of collective bargaining autonomy by resolving collective agreement conflicts. This function can only effectively fulfil its displacement effect if it intervenes ipso iure in the event of a conflict and not only after the final conclusion of proceedings under Sec. 99 ArbGG. If the conflict rule required this, it would in fact rarely come into play.

Our comment

Incidentally, the BVerfG (Bundesverfassungsgericht / Federal Constitutional Court) also took the view that the legislator uses the conclusion of the conflicting collective agreement as the decisive point in time for a collective agreement conflict in its decision on the constitutionality of Section 4a TVG (decision of 11 July 2017 – 1 BvR 1571/15 et al.). Despite the collective character of the decision, it is necessary to mention that employees are free to assert their rights in individual proceedings if they are covered by another majority collective agreement.

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The absence of an inclusion officer does not in itself constitute discrimination

The mere failure to appoint an inclusion officer does not constitute direct discrimination on the grounds of disability. However, such a violation may constitute an indication within the meaning of Sec. 22 AGG (Allgemeines Gleichbehandlungsgesetz / General Act on Equal Treatment) if the contested measure affects the specific interests of severely disabled persons.

BAG, decision of 26 June 2025 – 8 AZR 276/24

The case

The plaintiff employee is severely disabled with a degree of disability of 50. For several years, there has been a dispute between her and the defendant employer as to which activities the plaintiff is capable of performing. Due to several alleged instances of discrimination, she demanded compensation totalling EUR 20,000.00. The focus was on the failure to appoint an inclusion officer and two warnings for refusing to follow work instructions, which were issued without consulting the representative for severely disabled employees. The plaintiff considered the lack of an inclusion officer to be discrimination in itself and derived the indicative effect for the warnings from Sec. 22 AGG. The Labour Court partially upheld the claim, while the Higher Labour Court dismissed it in its entirety.

The decision

The Eighth Senate of the BAG partially upheld the plaintiff's appeal. However, the Higher Labour Court must make a final decision on whether and to what extent the employee is entitled to compensation payments. In particular, it must be clarified whether the employer's measures disadvantaged the plaintiff by assigning her tasks that were not suitable for her disability in accordance with Sec. 164 (4) SGB IX (Sozialgesetzbuch IX / Social Security Code IX). However, the failure to appoint an inclusion officer did not constitute direct discrimination. The relevant provision, Sec. 181 SGB IX, did indeed stipulate a procedural and/or support obligation in favour of severely disabled persons. The mere fact that there was no inclusion officer did not mean that these persons were treated less favourably than persons without a disability. Nevertheless, the violation could trigger the presumptive effect of Sec. 22 AGG if the contested measure concerned

specific interests of severely disabled persons. In this case, this was relevant for the warnings issued without the involvement of an inclusion officer. In addition, Sec. 178 (2) 1 SGB IX on the involvement of the representative body for severely disabled persons is also to be classified as a procedural obligation that applies when a severely disabled person is particularly affected in a matter due to their disability. Here, too, a violation could constitute prima facie evidence under Section 22 AGG – and again, this could affect both warnings, which were issued without consulting the representative body for severely disabled persons.

Our comment

The decision shows that failure to appoint an inclusion officer does not automatically trigger compensation claims by severely disabled employees. At the same time, however, it also shows how quickly failures to involve inclusion officers and representatives for severely disabled persons can become expensive. Employers should therefore nevertheless appoint an inclusion officer and involve the representative body for severely disabled persons at an early stage. At the same time, the disability-friendly nature of each measure must be carefully examined and documented for evidence preservation purposes.

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Tariff agreement ban pursuant to Sec. 77 (3) 1 BetrVG applies to works agreements even with the same contents

A provision in a works agreement that violates the collective bargaining regulation ban is also invalid if its content complies with the provisions of a relevant collective agreement.

BAG, decision of 20 May 2025 – 1 AZR 120/24

The case

The defendant employer provides local public transport services and is a member of the German Railway Employers' Association. The collective agreement applicable to it contains provisions on the possibility of paid leave from work. Without any explicit provision, the defendant allowed its employees to take a 15-minute paid breakfast break during working hours for a long period of time. It later concluded a works agreement with the works council which, among other things, provided for the abolition of this break. The plaintiff employee, who was employed by the defendant, took the view that the abolition violated Sec. 77 (3) 1 BetrVG. He argued that the company practice of a breakfast break, which had developed over many years of established practice, continued to exist. He therefore demanded, among other things, that the lost break times be credited to his working time account. The action was unsuccessful in the first two instances.

The decision

The BAG overturned the appeal ruling and referred the legal dispute back to the Higher Labour Court. The latter had wrongly assumed that any company practice regarding paid breakfast breaks had been abolished by the works agreement in question. Rather, the works agreement violated Sec. 77 (3) 1 BetrVG and was therefore invalid in this respect. Working conditions that are regulated by collective agreements could not be the subject of a works agreement. The subject matter of the present works agreement was already conclusively covered by the relevant collective agreement. Even if the provisions of the collective agreement on the possibility of paid leave did not specifically preclude the abolition of the breakfast break, the prohibition on regulation in Sec. 77 (3) 1 BetrVG applied. The blocking effect also applies to works

agreements whose content does not “violate” the collective bargaining provisions. The provision serves to safeguard collective bargaining autonomy and to maintain and strengthen the functioning of coalitions. It is intended to prevent matters agreed upon by the parties to the collective agreement from being regulated in a competing manner – even if the content is identical – in works agreements. Furthermore, the regulatory ban is not lifted in this case pursuant to Sec. 87 (1) BetrVG, as it does not constitute a case of mandatory co-determination.

Our comment

The BAG confirms the principle that collective bargaining agreements preclude competing works agreements on the same subject matter. Although collective bargaining agreements may allow the parties to the works agreement to deviate from the provisions of the collective bargaining agreement by means of opening clauses (Sec. 77 [3] 2 BetrVG), this is subject to strict requirements. The specific wording of the collective bargaining agreement and its interpretation are always decisive in this regard. Employers should examine this thoroughly and not rush to comply with any demands made by works councils after the conclusion of a corresponding works agreement; if necessary, the collective bargaining agreement blocking clause may even justify the obvious lack of jurisdiction of the conciliation committee in proceedings under Sec. 100 ArbGG.

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Fictitious promotion entitlement of a representative of severely disabled persons

In accordance with the principles applicable to works council members, representatives of severely disabled persons are entitled to higher remuneration if the conditions for a fictitious promotion entitlement are met. The representative bears the burden of proof in this regard.

BAG, decision of 25 February 2025 – 9 AZR 5/24

The case

The parties are in dispute as to whether the plaintiff employee, who was exempted from work as a representative of severely disabled persons from January 2014 to October 2022, is entitled to higher remuneration on the basis of a fictitious promotion entitlement from August 2020 onwards. Prior to her exemption, the plaintiff was rated “Hay Grade VII” under the job evaluation and remuneration system initially applicable at the defendant employer, which had 14 ascending levels (known as “Hay Grades”). In December 2017, the defendant introduced a new system with descending levels from 1 to 7. As a result, the plaintiff was assigned to level 5. After new elections in October 2022, the plaintiff was still a member of the representative body for severely disabled persons, but no longer fully exempt from work. She demanded a higher classification in the new system, justifying this with a comparison to a colleague who was also part of the representative body for severely disabled persons in the previous election period but was not exempt from work and was classified higher in the new system after a transfer. The plaintiff demanded classification at the same level, as she

would have prevailed over her colleague in a fictitious application and recruitment process due to her better qualifications and greater experience. The Labour Court and Higher Labour Court dismissed the action.

The decision

The BAG also ruled that the plaintiff was not entitled to higher remuneration. The principles developed in relation to Sec. 78 Sentence 2 BetrVG concerning the fictitious promotion entitlement for works council members also apply in this context to representatives of severely disabled persons. The representative bears the burden of proof and presentation with regard to the eligibility requirements, in particular unlawful discrimination on the grounds of voluntary work. They must first demonstrate that they refrained from applying for a higher position because of their leave of absence. However, in the absence of a job advertisement, it cannot be required that they demonstrate that they refrained from applying because of their leave of absence. Nevertheless, a prerequisite for the fictitious promotion claim is that the position in question is vacant at the time of the requested fictitious promotion. This was not the case here, as the relevant position was not vacant but occupied at the time the plaintiff asserted her fictitious promotion claim from August 2020 onwards.

Our comment

The BAG is consistently applying the principles developed for the fictitious promotion entitlement of works council members to representatives of severely disabled persons for the first time. The Erfurt judges correctly state that for the fictitious promotion entitlement to apply, a vacant position must be available and this position must also be higher paid. Only then can the office holders be entitled to higher remuneration. In addition, the BAG confirms the procedural protection mechanisms for exempted office holders, especially in the absence of a job advertisement by the employer. Therefore, advertising and recruitment processes should be conducted transparently and the evaluation of vacant positions should be documented throughout. This reduces the risk that simplified burdens of proof will have a procedural impact on the employer.

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Associated discrimination as unlawful discrimination

The prohibition of indirect discrimination on the grounds of disability also prohibits the discrimination of third parties, e.g. family carers. Employers are obliged to adapt working conditions as necessary to avoid such discrimination, provided that this does not place a disproportionate burden on them.

ECJ, decision of 11 September 2025 – C-38/24 (Bervidi)

The case

The case originated in Italy. The plaintiff, an employee working as a station supervisor on the underground and a mother caring for a severely disabled son, had repeatedly requested a permanent agreement on fixed working hours in the past so that she could look after her son in the afternoons. The defendant employer refused to grant a permanent agreement on the location of working hours and only granted temporary adjustments. The plaintiff considered this to be discrimination on the grounds of her son's disability and sought legal protection. After the action had been dismissed in the lower courts, the Court of Cassation referred the case to the ECJ for a preliminary ruling.

The decision

The ECJ concluded that the prohibition of indirect discrimination on grounds of disability also covers cases in which an employee is disadvantaged because of caring for a child with a disability. It justified this with an interpretation in line with EU law in the light of the Charter of Fundamental Rights of the European Union (in particular Art. 21, 24 and 26) and the United Nations Convention on the Rights of Persons with Disabilities. The court also emphasised the importance of the best interests of the child and the obligation to promote the independence and social participation of persons with disabilities and their family members. It also affirmed that working conditions may need to be adapted to enable employees to care for disabled children. Employers are therefore obliged to take measures to enable employees to provide care. However, this applies subject to the proviso that employers are not disproportionately burdened.

Our comment

The decision continues the line of reasoning already developed in the ECJ's "Coleman"-decision from 2008 (ECJ, decision of 17 July 2008 – C-303/06). In this, the court already ruled that EU discrimination law also protects persons who are disadvantaged because of their relationship with a person with a disability. The ECJ thus strengthens the protection of family members of disabled persons in working life by also covering protection against "discrimination by association" (also known as third-party or associated discrimination). Nevertheless, questions remain unanswered in practice: in other cases, it may be necessary to clarify what specific close relationship must exist. It is also questionable whether and how these principles can be applied to the other characteristics protected by Directive 2000/78/EC (on establishing a general framework for equal treatment in employment and occupation). Furthermore, it remains unclear when an adjustment of working conditions is (un)reasonable.

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Ineffectiveness of a conciliation committee ruling due to an incomplete transmission

If the chairperson of a conciliation committee transmits an incomplete ruling to the parties in the company that does not meet the requirements of Sec. 76 (3) 4 BetrVG, this ruling is invalid. Subsequent correction is not an option.

BAG, decision of 20 May 2025 – 1 ABR 11/24

The case

The applicant is the works council of the employer, which is a member of the employers association METALL NRW. According to the collective pay-scale agreement "ERA NRW", either performance-related pay or time-based pay is provided for its employees. The decision on the remuneration principle, which is subject to co-determination, must be agreed between the parties at the workplace. If no agreement is reached, a collective bargaining arbitration board decides. When the employers terminated a long-standing works agreement that had previously provided for performance-related pay in the form of a bonus, they wanted to replace it with time-based pay with a performance allowance. However, no agreement was reached with the works council. In the subsequent proceedings before the arbitration board, the latter decided in Part I of its ruling that 31 cost centres should be subject to time-based remuneration and that three cost centres should continue to be subject to performance-related remuneration (Part II). However, in Part I, the version of the ruling sent to the parties by the chairperson did not mention one of the cost centres. The works council then filed an application with the Labour Court to have Part I of the ruling declared invalid, whereupon the chairperson subsequently corrected it. The

Labour Court rejected the application, as did the Higher Labour Court in its appeal.

The decision

The First Senate of the BAG classified Part I of the conciliation committee ruling as invalid. It constituted an independently contestable partial regulation. The collective bargaining conciliation committee was competent and its regulatory mandate was clearly defined. Furthermore, it was a matter subject to co-determination pursuant to Sec. 87 (1) No. 10 BetrVG, as the ERA NRW did not contain a conclusive collective bargaining agreement on remuneration. The allocation of individual activities to hourly pay was therefore at the discretion of the conciliation committee. Specifically, the invalidity of Part I of the ruling resulted from a failure to comply with the formal requirements of Sec. 76 (3) 4 BetrVG. According to this, the decisions of the conciliation committee must be recorded in writing, signed by the chairperson and forwarded to the employer and the works council. However, the version sent did not include a cost centre that had also been decided upon. A subsequent addition by the chairperson could not remedy the violation, as a correction was only possible by the conciliation committee as a whole and the proceedings had already been concluded with the transmission of the ruling.

Our comment

The ruling of the conciliation committee directly leads to binding regulations between the employer and the works council and must therefore be communicated in a complete and legally secure manner. The BAG has already rejected the retroactive correction of incomplete rulings in the past (see, for example, BAG, decision of 13 August 2019 – 1 ABR 6/18). However, a completely new conciliation committee procedure does not always lead to results that are in the interests of all parties (for cost reasons alone), as is the case here, since the cost centre at issue was only overlooked in the minutes of the ruling. In view of the clear line taken by the BAG and the prevailing opinion that the chair of the conciliation committee has privileged liability, which makes recourse in the event of damage more difficult, particular efforts should be made to ensure that all formal requirements are complied with throughout the conciliation process.

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No protection against discrimination for fixed-term contracts up to the standard retirement age

According to Section 4 (2) 1 TzBfG (Teilzeit- und Befristungsgesetz / German Part-Time and Fixed-Term Employment Act), fixed-term employees may not be treated less favourably than comparable permanent employees on the basis of the fixed term; however, this does not apply if the employment relationship is limited to the period until the standard retirement age is reached.

BAG, decision of 31 July 2025 – 6 AZR 18/25

The case

The plaintiff had been employed by the State of Berlin since November 2018 and had been working in an observation group of the intelligence service since December 2022. For certain assignments, a state regulation provides for a hardship allowance, which, however, is only granted to police officers. The plaintiff, who was employed under a collective agreement, did not receive this allowance and felt that she was disadvantaged compared to civil servants. Her employment contract also contained a provision stipulating that the employment relationship would automatically end when she reached the statutory age limit for the standard old-age pension. The plaintiff subsequently claimed payment of

the hardship allowance, citing, among other things, Sec. 4 (2) 1 TzBfG as grounds for her claim. The lower courts dismissed the action.

The decision

The plaintiff's appeal was also unsuccessful. The BAG ruled that employees whose employment relationship is limited to the statutory retirement age cannot invoke the protection against discrimination for fixed-term employees. In the court's opinion, such employment relationships are not atypical or particularly vulnerable, but rather consolidated normal employment relationships. These would hardly differ from permanent contracts, as they often exist for many years and only end when the employee reaches the regular retirement age. However, the purpose of Sec. 4 (2) 1 TzBfG is to compensate for the generally weaker bargaining position of fixed-term employees. The aim is to ensure that they are not deprived of any rights. However, this need for protection does not exist in the case of employment relationships that are limited exclusively to the date of reaching the standard retirement age.

Our comment

The BAG's assessment is valid. If an employment relationship is actually limited only to the standard retirement age, employees are generally in a much stronger negotiating position than is the case with fixed-term or objectively justified fixed-term contracts – at least within the scope of the KSchG (Kündigungsschutzgesetz / Protection Against Unfair Dismissal Act). Although it is common practice to limit employment relationships with a view to reaching retirement age, without a corresponding provision, they do not automatically end at that point in time. Otherwise, the employment relationship continues beyond the standard retirement age and, within the scope of the KSchG, can only be terminated by the employer if there is a corresponding reason for termination. If an employment relationship is to continue beyond the standard retirement age, the provision in Sec. 41 SGB VI allows the parties to the employment contract to postpone the termination date of the employment relationship – repeatedly – for a limited period. However, this option is only available if a corresponding agreement is reached while the employment relationship is still ongoing.

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No monetary compensation for bullying in conflict situations that are common in working life

Conflicts that are common in working life, even if they extend over a longer period of time, are generally not sufficient to constitute a breach of the employer's duty of care and thus give rise to a claim for damages by the employee concerned.

Higher Labour Court Mecklenburg-Vorpommern, decision of 24 June 2025 – 5 SLa 20/25

The case

The plaintiff had been employed as a ward secretary in a hospital since October 2021 and had repeatedly come into conflict with colleagues and ward management. For example, there were disagreements about the assignment of certain tasks, which sometimes led to heated discussions. In addition, the plaintiff's materials were sometimes hidden and her name was misspelled by colleagues. Other employees regularly ignored the plaintiff and did not greet her. The plaintiff stated that she suffered from health problems as a result. After the end of the employment relationship, she claimed monetary compensation in the amount of EUR 30,000.00 as damages. The Labour Court dismissed the claim.

The decision

The Higher Labour Court Mecklenburg-Vorpommern upheld the decision. Sec. 241 (2) BGB obliges the parties to an employment contract to show mutual consideration for the legal interests and interests of the other parties, which is why an employer is particularly obliged to protect its employees from physical and psychological health hazards. In this context, an employer is also responsible for the conduct of its employees under Sec. 278 Sentence 1 BGB. Nevertheless, a distinction must be made between conflict situations that are common in working life and unlawful, reprehensible breaches of duty. The latter are given if actions or statements are specifically aimed at violating the employee's personal rights, which must be assessed on the basis of an objective overall view. Accordingly, there was no breach of duty on the part of the defendant employer in this case. The incidents were merely workplace-related misunderstandings and differences of opinion that were intended to criticise the plaintiff's work behaviour rather than her as a person. Although deliberately and repeatedly misspelling her name could be considered

demeaning, this was not sufficiently demonstrated by the plaintiff.

Our comment

The Higher Labour Court correctly clarifies that the employer does not have to protect its employees from all conflict situations that are common in the workplace. The burden of proof and presentation lies entirely with the employee concerned to demonstrate that this is not such a situation, but rather systematic and persistent intimidation that fulfils the definition of bullying.

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Exclusion of a works council member due to a data protection violation

A works council member may be excluded from the works council for forwarding work-related e-mails to his private e-mail address.

Higher Labour Court Hessen, decision of 10 March 2025 – 16 TaBV 109/24

The case

According to the findings of the applicant employer, the works council chairman had set up automatic forwarding of all e-mails received in his works council account to his private e-mail address. The employer issued a warning, but the works council chairman responded by setting up a new private e-mail address and forwarding an Excel file containing a complete list of personnel, including all relevant remuneration details, to this address. He edited the file in its entirety on his private storage media and then sent it back to his e-mail account as a works council member. The employer considered this to be a gross violation of the works council's data protection obligations and applied to the Labour Court to have the chairman excluded from the committee. The court agreed.

The decision

The Higher Labour Court Hessen confirmed this decision and dismissed the appeal against it. The conduct of the works council chairman constituted a gross violation of data protection obligations. Data processing on a private computer was not necessary, even taking into account the reasons given for justification (urgency of processing the file in anticipation of the negotiation of a works agreement, better processing options for the file due to a larger screen). The chairman should have contacted the employer to request better technical equipment if necessary. Instead, by processing the data on private storage media, he had accepted a considerable risk to the data. Due to the very detailed remuneration information, the violation was also gross within the meaning of Sec. 23 (1) 1 BetrVG, as the chairman could have recognised that the handling of the data required the utmost sensitivity. Due to his overall behaviour – setting up and using a new private email address despite a previous warning – the works council chairman could also be described as incorrigible. This exacerbated the seriousness of the violation.

Our comment

The decision clearly illustrates the difference between a breach of duty under works constitution law – possible sanction: removal from office – and a breach of duty under employment contract law – possible termination of employment. Since the works council chairman committed the data protection breach in the exercise of his official duties, the employer (solely) requested his exclusion from the works council. The Higher Labour Court emphasised that the works council is responsible for compliance with data protection regulations in its area, even if the committee is part of the employer in terms of data protection law. In view of the chairman's previous conduct, it is clear that a "works constitution warning" can be entirely appropriate (see the article by Robert von Steinau-Steinrück and Hannes Raff above).

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■ CURRENT DEVELOPMENTS IN PENSIONS

The current status of the “Betriebsrentenstärkungsgesetz II”

The legislative process for the “Betriebsrentenstärkungsgesetz II” (Second Company Pension Strengthening Act) is well advanced. We provide information on the current status, content and points of criticism.

Legislative background

The (first) Company Pension Strengthening Act came into force in 2018. Among other things, it introduced the so-called social partner model (Sec. 21 et. al. BetrAVG (Betriebsrentengesetz / Company Pension Act), which allows employers to make pure defined contribution commitments on the basis of collective agreements. So far, this has been implemented in a few cases in the energy, chemical and banking sectors.

Last year, a draft of a second Occupational Pension Strengthening Act was presented (government draft of 18 September 2024). Among other things, this was intended to further develop the social partner model. However, the legislative process could not be completed in the last legislative period. The draft bill (government draft dated 29 September 2025, BT-Drs. 21/1859) has now been reintroduced in a slightly amended version as part of the 2025 pension package. The first reading in the German parliament took place on 16 October 2025.

Key content

Further development of the social partner model

As before, employers and employees can agree to apply a relevant social partner model. In future, it will also be possible to agree to apply a non-relevant social partner model if this is either provided for in a collective agreement relevant to the employment relationship or if the trade union supporting the social partner model is responsible for the employment relationship in accordance with its statutes. According to the explanatory memorandum to the law, this means that social partner models concluded by the ver.di trade union in the energy sector and in banks, for example, are in principle also open to other sectors for which ver.di is responsible under its statutes, such as retail, insurance or the IT sector.

Opt-out systems

The provision in Sec. 20 BetrAVG currently stipulates that automatic deferred compensation can be introduced on the basis of a collective agreement, to which the employee has a

right of objection (option system). Such systems will now also be possible in areas without collective agreements if the employer undertakes to pay a subsidy for deferred compensation amounting to 20 % of the deferred remuneration. Otherwise, the employer subsidy for deferred compensation is only 15 %.

Extension of the severance payment option

The settlement of entitlements and current benefits is generally prohibited. There are only a few exceptions, such as in the case of so-called minor pensions (monthly amount of current benefits does not exceed 1 % of the reference amount pursuant to Sec. 18 SGB IV), when taking up a new employment relationship in the EU or when reimbursing contributions to the statutory pension insurance scheme. In future, employers will be able to settle entitlements with the employee's consent if the monthly amount of the current benefit does not exceed 2 % of the reference amount pursuant to Sec. 18 SGB IV and the settlement amount is paid into the statutory pension insurance scheme.

Early company pension

In future, entitlement to early occupational pension payments (Sec. 6 BetrAVG) will also exist if the statutory pension is received as a partial pension (and no longer only as a full pension). The reason for this is that, since 2023, earned income is no longer taken into account when receiving an early old-age pension from the statutory pension insurance scheme, regardless of whether this is received as a full or partial pension.

Criticism

In view of the stagnating spread of occupational pension schemes and the insufficient security of living standards through statutory pensions alone, various voices are calling for far-reaching reforms and criticising the draft of the Second Company Pension Strengthening Act as insufficient. For example, the Eberbacher Kreis is calling for the abolition of the collective bargaining reservation with regard to the social partner model: "If there is no relevant regional collective agreement and no in-house collective agreement can be reached with the relevant trade union, a pure defined contribution scheme must also be possible on the legal basis of an individual or collective commitment or a works agreement."

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■ INTERNATIONAL NEWS FROM UNYER

France: Employee comments on social media – risk or opportunity?

Posts by employees on social media that are recognisable as coming from their employer oscillate between promoting the employer's reputation and causing public disputes between the parties to the employment contract – which then generate negative publicity. Especially in the context of controversial topics in politics and world affairs, the latter is becoming more and more of a problem in France as well.

Since the French Auroux Law of 1982, it is no longer the citizen-employee but the employee-citizen who exercises his freedom of expression, even within the company. This freedom, which has constitutional status, is protected by Art. 11 of the French Declaration of Human Rights of 1789 and Art. 10 of the ECHR. This freedom may only be limited by justified and proportionate restrictions.

According to high court rulings in France, abuses of freedom of expression – i.e. defamatory, offensive or exaggerated comments – can justify punishment. The courts take into account the context, visibility and reach of statements, as well as the specific activity of the employee. However, it also depends on the medium used. Facebook, which was long considered a private space, has been reclassified by the Cour de cassation: if a message is shared with a large number of contacts, its dissemination goes beyond the close circle (decision of 30 September 2020 – No. 19-12.058). Conversely, a closed Facebook group with 14 members was recognised as a private space (decision of 12 September 2018 – No. 16-11.690). Other platforms such as LinkedIn leave little room for doubt: due to their professional nature, they are public. Disparaging one's own company can therefore constitute an abuse of freedom of expression (see, for example, Cour d'appel de Douai, judgment of 31 May 2024 – No. 22/01378).

However, the line between professional and private life remains blurred. Even under a pseudonym, social media leaves traces. Managers may be called upon to take a stand in the name of ethics, even if this means swimming against the tide. Is this an opportunity or a risk? Probably both. Online comments can improve the company's image, promote transparency and even enrich the debate. But they require collective vigilance: employees must exercise their judgement and employers must exercise balance. The best safeguards remain confidentiality clauses in employment contracts to protect trade secrets, a social media charter, training for managers on fundamental freedoms and, last but not least, appropriate handling of excesses.

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■ GENERAL INFORMATIONS

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