

‘The good ones in the pot, the bad ones in your crop*’:

The social selection process in Germany

By Dr. Henning Reitz

If personnel cutbacks are to be carried out on operational grounds, a company will nearly always have a vital interest in retaining the ‘right’ employees. This is of course decisive for the continued economic success of the company.

This understandable wish of a company to remain strong even after personnel cutbacks is often at odds with the principles of social selection as laid down by Germany’s Protection Against Unfair Dismissal Act (Kündigungsschutzgesetz, KSchG). Although in principle employers are indeed free under German labor law to make the business decision to downsize their business operation, if a number of different people from a group of comparable employees are possible candidates for dismissal, employers are not free to decide who is to be dismissed. Because the impact of job loss on a person can vary greatly depending on their situation, German labor law specifies that primarily social criteria must be taken into account when selecting candidates for dismissal.

Social selection under Sec. 1 (3) Protection Against Unfair Dismissal Act

The exact meaning can be found in section 1 (3) KSchG: Under this provision, a termination is socially unjustified and thus void if the employer does not sufficiently take into account the following social criteria when selecting an employee:

- (1) his or her seniority;
- (2) his or her age;
- (3) existing support payment obligations to dependents, and
- (4) any severe disability.

This means that a decision must take social aspects into account when selecting the person to be dismissed. For instance, if an employer is planning to have only five instead of ten employees in the future for a certain function in the business, they must first document and compare the social data of the ten relevant



Companies have a vital interest in keeping the “right” employees in the company..

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employees (and perhaps other comparable employees). Older employees who would generally have greater difficulties finding a new job deserve a greater level

of protection than younger employees. Employees who must support spouses and children deserve greater protection than those employees who only have →

* German saying from the Grimm brothers’ version of “Cinderella”

to provide for themselves, etc. In the case of difficult individual questions, the employer does have some discretionary leeway (for example if an older, childless employee is competing with a younger employee who must provide for a family).

In its purest form, social selection will always tend to result, however, in the termination of young employees with less seniority, while older employees, who often have more years of seniority, will keep their jobs. This can result in the loss of the more innovative and ‘hungry’ younger generation and may be in blatant contradiction to the interests of the company.

Opportunities to mold the social selection

Despite this, German labor law does offer some opportunities to influence the results of social selection to correspond with the wishes of the company or to at least make social selection as legally watertight as possible. Some of these opportunities will be briefly presented here.

Removal of top performers from social selection

Section 1 (3) KSchG specifies that top performers whose continued employment is in the justified interest of the company due to their know-how, abilities

and performance, can be removed from social selection. According to the German Federal Labor Court, the business interests of the employer in removing certain top performers from social selection must be weighed against the interests of employees who enjoy greater protection from keeping their employment. This will always require a review of the individual circumstances. It is generally not possible to exclude larger parts of the workforce from social selection because they are top performers. However, this rule does lend itself as a tool for saving individual employees who are important to the business.

Social selection according to age groups

Section 1 (3) KSchG also specifies that employees can be exempt from social selection if this is in the justified interests of the company to secure a balanced personnel structure. This can open up the possibility, for instance, of categorizing the employees to be included in the selection according to age groups and then making the personnel cutbacks proportionally within the individual age groups. It is thus possible to ensure that the overall workforce does not age and that the prior age structure is maintained. However, it must be clearly stated that a rejuvenation of the workforce as a result

of a cutback in personnel is not possible. When drawing up the age groups, one must bear in mind the controversial issue of age discrimination.

Volunteer programs

If the aforementioned opportunities are not sufficient to guard against the loss of key employees under the principles of social selection, one should consider conducting a volunteer program. This enables a company to directly offer a termination by separation agreement to employees who are deemed to have social protection but who are considered to be less important for the success of the business. One must clearly realize in this situation that economic incentives, particularly in the form of severance payments, must be offered to motivate these employees to voluntarily leave the company. If there is a works council, it must generally be involved in the modeling of the volunteer program.

The selection guideline (“Auswahlrichtlinie”)

As far as the reduction of risk in the event of subsequent legal action against a dismissal is concerned, it can make sense to negotiate a selection guideline with the works council. This guideline lays

down how the governing social aspects are to be evaluated in relationship to one another. Although this type of guideline will not make social selection obsolete, it will at least allow a labor court, in the event of legal action against a dismissal, to concentrate its review of the decision on possible gross errors. A selection guideline can thus at least result in a perceivable increase in legal certainty and a significantly reduced risk of litigation.

Reconciliation of interests with list of names (“Interessenausgleich mit Namensliste”)

In the event of broader measures to cut back personnel, for which the conclusion of a reconciliation of interests with the works council is required by law, there is the opportunity under section 1 (5) KSchG to designate the employees who will be terminated. A reconciliation of interests with list of names also offers the advantage that social selection will only be subject to a limited judicial review of gross errors in the event of litigation. The list of names will also make the selection more legally watertight. In practice, however, works councils often refuse to negotiate a list of names because they do not want to get their hands dirty. It will take some convincing and maybe

some compromises to persuade works councils to cooperate in drawing up a list of names.

Conclusion

The fact that social criteria have priority under German labor law when selecting employees to be terminated under job cutbacks is often at odds with the wish of the employer to keep the best employees. However, the law offers some scope to model and influence this selection process. If personnel cutbacks are imminent, employers should review in detail at an early stage what measures can be applied to ensure that the company will have an overall strong workforce following the cutbacks to guarantee its future success. ←



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