

Employee Observation by Private Detectives

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Decision

In its judgment of 29 June 2017 (Ref.:2 AZR 597/16), the Federal Labour Court ruled that monitoring of employees by private detectives is normally permissible if there is a concrete suspicion of a serious breach of duty on the part of the employee. The case at issue involved an employer who hired a private detective because it suspected an employee of working for the competition and feigning illness to avoid work.

Implications for Practice

If illegal activity on the part of an employee is suspected, it is not unusual for an employer to resort to covert observation through the use of methods such as hidden video cameras or the services of a private detective.

Whether or not such measures are permissible and whether information acquired through such measures can be used as evidence in dismissal proceedings are questions that must be examined against the background of relevant constitutional and data protection law. Employees may always rely on the right of personality – including in particular the right to informational self-determination pursuant to Art. 1 of the Basic Law – which is enshrined in provisions of the Federal Data Protection Act (Bundesdatenschutzgesetz – BDSG) and in particular in its § 32.

§ 32(1) sent. 2 of the Federal Data Protection Act allows the collection of data, which also includes the possibility of observation by a private detective to detect illegal activity by employees. The Federal Labour Court also permits covert monitoring pursuant to § 32(1) sent. 1 of the Federal Data Protection Act in cases where reason exists to suspect a serious breach of duty. That means, however, that the suspicion must be based on tangible evidence; “random” surveillance is prohibited. Furthermore, surveillance measures may not be unreasonable, i.e., employers may not choose to forgo less intrusive but equally effective investigatory measures such as, for example, the filing a request for information from the medical service of the employee’s health insurance provider in the event of doubt as to the medical necessity of the employee’s absence from work.

Conclusion

Observation of an employee by a private detective may represent a legitimate means of obtaining evidence to justify dismissal of an employee if there is a tangible reason to suspect wrongdoing or a serious breach of duty on the part of an employee.

Legal Update

Note

This overview is solely intended for general information purposes and may not replace legal advice on individual cases. Please contact the respective person in charge with GÖRG or respectively the author Pia Pracht on +49 221 33660-524 or by email to ppracht@goerg.de. For further information about the author visit our website www.goerg.com.

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