Legal Update
Labour Law

Federal Labour Court: Evidence From Keystroke Logging Is Inadmissible in Dismissal Proceedings

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Introduction

The judgment of the Federal Labour Court of 27 July 2017 (2 AZR 681/16, press release of the Federal Labour Court no. 31/2017) addresses the covert use of software-based keyloggers by employers. Such computer programs make it possible to monitor and create a record of keyboard activity of individual users. According to the Federal Labour Court, the use of such software is permissible only under very limited, exceptional circumstances. In the absence of such special circumstances, any evidence obtained will be considered to have been acquired illegally and will normally not be admitted in court.

Main Finding of the Federal Labour Court

The covert use of a software-based keylogger to monitor and control all keyboard entries on an employee's keyboard is prohibited by § 32(1) of the Federal Data Protection Act (Bundesdatenschutzgesetz – BDSG) in the absence of a tangible reason to suspect illegal activity or other serious breach of duty.

Decision

The plaintiff had been employed by the defendant as a web developer since 2011. In April 2015, the plaintiff's employer informed its employees that all internet traffic and the use of its systems would be "logged" from that time on. The employer also installed an application on the employee's computer that recorded all keyboard entries ("keylogger") and also captured screenshots at regular intervals. The employer met with the plaintiff after examination of the files created with the help of this keylogger, and the employee admitted to using his employer's computer for personal business during working hours. When questioned by his employer, the plaintiff said that he had used the computer to program a computer game and handle email correspondence for his father's company, but that this did not involve any significant use of the employer's IT resources and took place primarily during breaks.

The defendant, whose suspicion that the plaintiff had been conducting personal business while at work was confirmed by the data recorded with the keylogger, dismissed the employee without notice, or in the alternative, with effect as of the end of the regular period of notice.

The lower courts had already found in favour of the plaintiff in proceedings brought to seek protection against dismissal, and the defendant's appeal to the Federal Labour Court was unsuccessful. The Federal Labour Court ruled that information obtained on the plaintiff's personal business through the use of the keylogger was not admissible as evidence before the courts, reasoning that the defendant's use of the keylogger violated the plaintiff's right to informational self-determination guaranteed as part of the general right of personality (Art. 2(1) in conjunction with Art. 1(1) of the Basic Law). According to the court, the information was obtained in violation of § 32(1) of the Federal Data Protection Act since there was no suspicion of any wrongdoing or other serious breach of duty on the part of the plaintiff based on actual facts when the defendant deployed the software, which therefore made the "random" measure taken by the defendant unreasonable. As regards the private use admitted by the plaintiff, the assumption of the Higher Labour Court to the effect that it did not justify dismissal due to the lack of a previous notice of breach was legally sound.

Comments

The Federal Labour Court's decision is welcome in view of the rapid pace of digitisation and the resultant appearance of technologies that support new possibilities for covert observation of employees.
The Federal Labour Court has now applied the standards already in place for covert video surveillance of employees to personal employee data obtained through the use of spy software that records keyboard activity and captures screenshots.
In previous decisions (see, for example, Federal Labour Court of 21 November 2013 – 2 AZR 797/11, NZA 2014, 243), the Federal Labour Court had already ruled that breach of the right of employees to their own images through covert video surveillance and the use of the corresponding recordings is permissible only if grounds exist to suspect illegal activity or other serious wrongdoing to the detriment of their employer, less intrusive measures to investigate the suspicion have been exhausted to no avail and covert video surveillance is therefore the sole remaining practicable option and is not unreasonably intrusive.

The covert use of spy software by employers to acquire information must now meet similarly stringent requirements at the level of assessment of the legality of such acquisition and the subsequent use of the information.

This is only logical since general observation of employees that involves recording all computer activities of employees' activities on a permanent basis without resorting to covert means already represents a significant breach of basic rights since such observation puts employees under constant pressure. If, as is the case here, observation is covert, the resultant breach of the employee's basic right to informational self-determination becomes even more egregious.

In particular, since German civil law makes no provision for categorical disallowance of evidence that is obtained illegally and the courts must regularly weigh the circumstances in each individual case, this decision provides legal clarity in respect of the treatment of evidence obtained through the use of keyloggers to monitor employee workstations.

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 Daniel Grünewald on +49 221 33660-508 or by email to dgruenewald@goerg.de. For further information about the author visit our website www.goerg.com.

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