Legal Update
Labour and Employment

Employees who line their own pockets risk dismissal

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Headnote

Employees who compete with their employers without permission are subject to summary dismissal (Hessian Higher Labour Court, judgment of 28 January 2013, – 16 Sa 593/12).

Facts

The plumber who brought the action was employed by a company that repairs drainpipes. After inspecting the drainpipes in the kitchen and basement of a customer with a special-purpose camera for his employer, the employee told the customer that it would be necessary to install new drainpipes. He then carried out the necessary work himself a few days later and charged the customer € 900.00, which he asked for in cash. No invoice was issued. The plumber kept the money without informing his employer.

When the employer happened to find out about the incident during a service call to the same customer four years later, he dismissed the plumber with immediate effect for cause.

Decision

The action brought for protection against dismissal before the Wiesbaden Labour Court was successful in the first instance, but the Hessian Higher Labour Court dismissed the action on appeal. The Higher Labour Court considered the plaintiff's activity to constitute competition with his employer, which was not very surprising. The court ruled that employees are not allowed to offer services that compete with those of their employers and that employers must retain unrestricted access to their markets without being exposed to the risk of any disadvantages due to the activities of their own employees. According to the court, the employee committed an egregious breach of his duties as an employee by performing services in competition with his employer for his own benefit, which meant that the employer

could not be expected to maintain the employment relationship and that the summary dismissal was an appropriate reaction.

Comments

The decision of the Hessian Higher Labour Court, which has up to now been made public only in the form of a press release, is to be welcomed. It came as no surprise that the Higher Labour Court considered the conduct of the plaintiff to constitute cause for summary dismissal. After all, the plaintiff did deprive his employer of a concrete business opportunity, which he took advantage of for his own benefit and – to make matters worse – did so without declaring the income. What is surprising, however, is that the Wiesbaden Labour Court granted the action for protection against dismissal in its judgment in the first instance, which was unfortunately not published.

Apart from the diverging opinions of the two instances, this case is also unusual in that the employer did not acquire knowledge of the incident until four years after it occurred. Summary dismissal must take place within 2 weeks of discovery of the breach warranting dismissal by the employer. If such a breach remains unknown to an employer for a longer period of time, summary dismissal is still possible – as in the present case – even years later. However, when the interests of the parties are weighed against one another for the purposes of determining whether the employer can be reasonably expected to maintain the employment relationship in the individual case, the elapsed time is likely to work in favour of the employee.

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 himself: Dr. Frank Wilke on +49 221 33660-534 or by email to fwilke@goerg.de. For further information about the author visit our website www.goerg.com.

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