

Suspicion of Misrepresentation of Time Worked: Damages Awarded Member of Works Council for Covert Observation

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If, for example, an employer suspects an employee of calling in sick to simply take time off or suspects that a member of a works council is not devoting working hours to activities called for under co-determination law as agreed, the only practical way to investigate this suspicion is often to hire a private detective. However, any decision to engage a private detective to observe an employee must be weighed carefully, as is shown by a recent judgment of the Rhineland-Palatinate Higher Labour Court of 27 April 2017 (Ref.: 5 Sa 449/16).

Decision

The plaintiff, who was the chairman of both an individual and a general works council, but not officially released from his work duties, represented to the defendant, his employer, that his activities on behalf of the works council took up so much time that he should be completely released from his work duties in order to be able to properly carry out his activities for the works council. As a result, he refused to perform any of his normal work. However, the defendant suspected that the plaintiff was actually involved in other employment during the time reserved for works council activities and therefore had the defendant observed by several private detectives during regular working hours for a total of 20 days. The plaintiff was anonymously informed of the observation. He felt that his general right of personality had been breached by the covert observation and brought an action for payment of damages.

The Kaiserslautern Labour Court dismissed the action, reasoning that the private sphere of the employee had not been affected since the observation had taken place only during the plaintiff's working hours. In addition, the court argued that the detective agency did not make any film or video recordings, which the plaintiff, however, disputed. The Higher Labour Court did not follow the

argument of the Labour Court and awarded the plaintiff damages in the amount of EUR 10,000.

According to the Higher Labour Court, observation of the plaintiff for a period of 20 working days by several detectives at the same time without any concrete reason to suspect improper use of time during working hours already constituted a serious breach of the right of personality. The court added that this is supported in particular by the legal assessment of § 163f of the Code of Criminal Procedure (Strafprozessordnung – StPO), according to which covert observation by criminal prosecution authorities over a longer period must be approved by a judge even if there is sufficient concrete evidence of serious wrongdoing.

Comments

To avoid claims for damages, any employer who contemplates covert observation of an employee due to suspicion of illegal activity or other serious breach of duty will regularly be well advised to make sure – even if no plans exist to collect film or photographic evidence – that such suspicion is based on concrete evidence.

The judgment of the Rhineland-Palatinate Higher Labour Court is especially important in terms of the impact it can have in practice due to the fact that the damages awarded the plaintiff by the court were relatively high. In a judgment of 19 February 2015 (Ref.: 8 AZR 1007/13), the Federal Labour Court considered damages in the amount of EUR 1,000 appropriate although the plaintiff in that case was filmed and photographed over a period of four days both during and outside working hours. This shows that the labour courts have significant discretionary authority when it comes to awarding damages.

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 Dr Hagen Strippelmann on +49 221 33660-504 or by email to hstrippelmann@goerg.de. For further information about the author visit our website www.goerg.com.

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