

LISTENING IN ON TELEPHONE CONVERSATIONS

GENERAL Parties involved in legal disputes before the Labor Court frequently find it difficult to prove their case. For example, conversations that are relevant for the purposes of making a decision may take place over the phone without any witnesses. The situation becomes difficult if one of the parties – without the knowledge of the other – lets a third party listen in. The Federal Labor Court has recently issued an important decision covering this aspect (Judgment of 23 April 2009, Case Ref.: 6 AZR 189/08, presently only available as a press release).

HEADNOTE It is generally illegal to allow other parties to listen in on telephone conversations between an employee and an employer. This represents a violation of the right of personality of the respective other party. Evidence obtained in this manner may not be used.

Anyone who wants to let someone else listen in on such a conversation must first inform the other party.

This does not apply if someone happens to overhear the content of a conversation without the knowledge of one of the parties.

FACTS The plaintiff was employed by a temporary employment agency. She was dismissed before she had been employed for six months and enjoyed no protection against dismissal. She submitted to the Labor Court that the dismissal was unfair. She explained that the staffing manager told her on the telephone that she should come to work despite the fact that she was ill since she could expect to be dismissed otherwise. The plaintiff provided proof of the disputed statement by naming a friend as a witness. She claimed that her friend had surreptitiously overheard the conversation without her knowledge.

The Higher Labor Court chose not to hear the evidence, reasoning that listening in on telephone conversations is always illegal.

DECISION The plaintiff was successful before the Federal Labor Court. First of all, the Federal Labor Court stated that it is generally prohibited to allow a third party to listen in surreptitiously on telephone conversations. The Court further stated that this violates the right of personality of the other party. Accordingly, such a third party may not testify as a witness with respect to the content of such a telephone conversation. The only exception is if the party “on the other end of the line” knew that someone was listening in.

The Higher Labor Court will now have to clarify whether the friend actually did just happen to overhear the telephone conversation. If this is confirmed, it will be necessary to take into account the statement of the staffing manager, the reason being that it can be assumed that the testimony will not be rejected if the telephone conversations happened to be overheard without the knowledge of the person making the call.

COMMENT The judgment is likely to be of significant importance in legal practice. It can be expected that it will be more common in the future for third parties to be named as witnesses in regard to the content of telephone conversations. If in the course of the examination of a witness it is confirmed that a conversation was overheard by chance, the labor courts will in the future also have to take into account statements made over the phone. The opposing parties will of course hardly be able to refute the claim to the effect that the conversations were overheard by chance.

Human resource professionals are advised to inform employees accordingly, for example, if they turn up the volume of their telephone system. Their employers can then, if necessary, also rely on testimony from third parties without getting involved in any dispute as regards the problems mentioned above. No legitimate interests of the employee would then stand in the way of this.

In conclusion, note is to be taken of the following: It occasionally happens that an employee secretly makes tape recordings of conversations with personnel management that he or she conducts in person. In the event that such a recording is later (e.g. in the context of legal proceedings) used against the employer, this may under certain circumstances justify dismissal for cause since secretly making tape recordings is subject to prosecution (violation of the confidentiality of the spoken word – section 201 of the Criminal Code (Strafgesetzbuch – StGB)).

6 What made this decision so interesting was that the plaintiff also claimed to have not known that someone was secretly listening to the conversation. In view of this background, the Federal Labor Court remanded the case.