

Legal Update

Labour and Employment

Lying as a reason for dismissing an employee

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Cologne, 09.02.2012

Headnote

If an employee pretends that he has performed work tasks that he has not in fact performed, his employer will normally be justified in dismissing him with notice. However, where the unperformed task only constitutes a part of the total work that has to be performed, and if such work only has to be performed occasionally, a dismissal without notice will as a rule be invalid (Federal Labor Court, Judgment of 9 June 2011 – 2 AZR 284/10).

Facts

The plaintiff was a clerk employed by the county authority. His duties included annually checking the roadworthiness of the emergency vehicles used by the German Red Cross. He was required to personally inspect the vehicles and prepare a report. However, in 2004 he did not inspect a single vehicle and in 2005 he only inspected a few vehicles. Instead he left the inspections to the respective Red Cross branch. For these purposes, he sent the branches reports

which he had already filled out and stamped in advance. The reports confirmed that the vehicles were adequately equipped and that they were roadworthy and in good condition. The forms had already been signed in blank by him. The employees at the Red Cross branches simply had to complete the forms and return them to the plaintiff. Once the county authority became aware of this practice, it issued a notice of termination for cause and, as a precaution, a notice of termination without cause.

Decision

The Federal Labor Court held that the termination for cause was invalid but that the termination without cause was valid (Judgment of 9 June 2011 – 2 AZR 284/10). The court made it clear that a „lie at work“ was not in and of itself a reason for dismissal. It conceded that pretending to perform a task and the associated lie to the employer could in specific circumstances constitute good cause justifying a termination for cause. However, in its view, it would be necessary to draw a distinction on the basis of

whether the plaintiff had deceived his employer in respect of essential tasks or in respect of ancillary tasks that „only“ had to be performed occasionally. Since the plaintiff had properly performed his other work tasks, his employer could be expected to employ him for the duration of the notice period and entrust him with his main tasks. Thus the plaintiff's conduct did not justify a termination for cause.

On the other hand, his systematic deception of his employer in respect of the work not actually performed justified its termination of his employment, without cause, with notice.

Comment

The Federal Labor Court's decision shows clearly that an employee may not be dismissed for one transgression, but that what has to be considered is whether the employer can be reasonably expected to continue to employ him – at least for the duration of his notice period – in spite of his breach of duty. The Federal Labor Court's judgment does

indeed state unambiguously that the plaintiff's conduct did not on any account have to be tolerated by the employer. However, since the plaintiff had misled his employer only in respect of one part of his work, the employer could reasonably be expected to continue to employ him until the expiry of the notice period. In the court's view the employer should simply have him perform his other work up to such date.

This result may be justified in terms of legal methodology, but it is nonetheless extremely disconcerting in view of the considerable loss of trust resulting from a systematic deception. According to this decision, employees who systematically deceive their employers – even in an area involving safety as was the case here – cannot be terminated for cause as long as they have fulfilled their other tasks properly. In light of this employers should under no circumstances neglect to issue, as a matter of precaution, a notice of termination without cause at the same time as they issue a notice of termination for cause. At least the Federal Labor Court did not question the validity of a notice of termination without cause in the present case.



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