Newsletter
Labour Law

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PREFACE

Our third Newsletter in 2017 begins by examining a series of recent decisions on the issue of covert observation of employees. We consider the requirements for permissible observation of employees by private detectives and the use of keylogger software to record keyboard entries on employee workstations. It should be noted that the use of impermissible observation methods may result in claims for damages.

In addition, there have been legal developments in respect of co-determination and fixed-term contracts. According to the latest case law of the Federal Labour Court, the works council has a right to co-determination not just pursuant to § 99 of the Works Constitution Act, but also pursuant to § 87 of the same Act. This "double right of co-determination" carries with it the risk that, where temporary workers are only hired to cover increases in orders, the deployment of such workers could be blocked entirely. In fixed-term employment law, the Federal Labour Court recently confirmed that limited-term contracts with actors was justified on the basis of the artistic freedom to which employers are entitled.

Employee Observation by Private Detectives

Decision

In its judgment of 29 June 2017 (Ref.:2 AZR 597/16), the Federal Labour Court ruled that monitoring of employees by private detectives is normally permissible if there is a concrete suspicion of a serious breach of duty on the part of the employee. The case at issue involved an employer who hired a private detective because it suspected an employee of working for the competition and feigning illness to avoid work.

Implications for Practice

If illegal activity on the part of an employee is suspected, it is not unusual for an employer to resort to covert observation through the use of methods such as hidden video cameras or the services of a private detective.

Whether or not such measures are permissible and whether information acquired through such measures can be used as evidence in dismissal proceedings are questions that must be examined against the background of relevant constitutional and data protection law. Employees may always rely on the right of personality – including in particular the right to informational self-determination pursuant to Art. 1 of the Basic Law – which is enshrined in provisions of the Federal Data Protection Act (Bundesdatenschutzgesetz – BDSG) and in particular in its § 32.

§ 32(1) sent. 2 of the Federal Data Protection Act allows the collection of data, which also includes the possibility of observation by a private detective to detect illegal activity by employees. The Federal Labour Court also permits covert monitoring pursuant to § 32(1) sent. 1 of the Federal Data Protection Act in cases where reason exists to suspect a serious breach of duty. That means, however, that the suspicion must be based on tangible evidence; "random" surveillance is prohibited.

Furthermore, surveillance measures may not be unreasonable, i.e., employers may not choose to forgo less intrusive but equally effective investigatory measures such as, for example, the filing a request for information from the medical service of the employee's health insurance provider in the event of doubt as to the medical necessity of the employee's absence from work.

Conclusion

Observation of an employee by a private detective may represent a legitimate means of obtaining evidence to justify dismissal of an employee if there is a tangible reason to suspect wrongdoing or a serious breach of duty on the part of an employee.

Pia Pracht

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

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

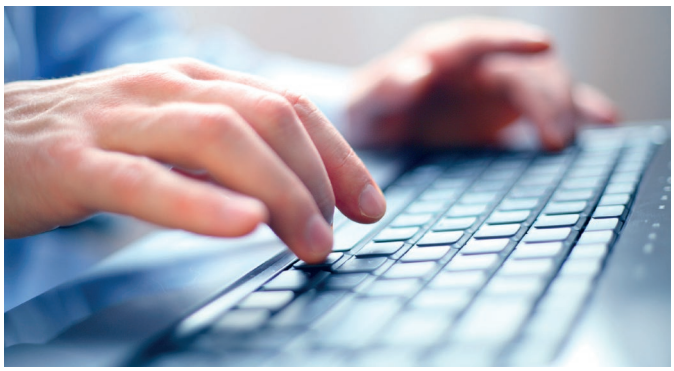
defendant deployed the software, which therefore made the "random" measure taken by the defendant unreasonable. As regards the private use admitted by the plaintiff, the assumption of the Higher Labour Court to the effect that it did not justify dismissal due to the lack of a previous notice of breach 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.

Daniel Grünewald

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

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.

Dr Hagen Strippelmann

Consultation of Works Council on Hiring – Assignments to Work Schedules

Headnote

Works councils must also be consulted in connection with assignments to work schedules pursuant to § 87(1) no. 2 of the Works Constitution Act (Betriebsverfassungsgesetz – BetrVG) in the case of new hires. Consultation pursuant to § 87 of the Works Constitution Act is independent of consultation pursuant to § 99 of the Works Constitution Act.

Factual Background

The employer regularly experiences a strong increase in orders at the end of the year. As in previous years, the employer obtained the necessary additional human resources by hiring temporary and contract personnel. The employer consulted the works council as required by § 99 of the Works Constitution Act. The works council refused to approve the hires, and the employer then deployed the workers on a temporary basis as an emergency measure pursuant to § 100 of the Works Council Act. At the same time, the works council invoked its co-determination rights pursuant to § 87(1) no. 2 of the Works Constitution Act and insisted upon the right to be consulted on assignments to work schedules.

In the course of the proceedings brought before the Federal Labour Court to obtain the approval that would otherwise have been obtained from the works council, the works council submitted a motion to the effect that the employer not be allowed to recruit new employees until an agreement was reached as regards working hours or the work schedule.

Decision

The Federal Labour Court sustained the works council's action in a series of last-instance decisions. (Note: The author was involved as attorney of record, inter alia, order of 22 August 2017, 1 ABR 3/16.) The written statement of the court's reasons has not yet been forthcoming. In the course of the proceedings, the court mentioned the fact that the right of co-determination called for in § 87(1) of the Works Constitution Act is independent of the right pursuant to § 99; consent to employment does not therefore release the employer from the duty to obtain consent to the working hours of such new employees (by including them in a work schedule).

The right of co-determination pursuant to § 87(1) no. 2 of the Works Constitution Act can prevent an employer from deploying new employees within the enterprise until an agreement is reached regarding working hours. As a result, the works council is entitled to injunctive relief. Failure to comply on the part of the employer can entail payment of an administrative fine.

Opinion

The decision of the Federal Labour Court is anxiously awaited. It will be particularly important for enterprises that operate on shifts. There has up to now been no case law from the highest courts on the interaction between § 87 and § 99 of the Works Constitution Act. Previously, the opinion to the effect that the right to co-determination pursuant to § 87(1) no. 2 of the Works Constitution Act does not apply in the case of initial employment

pursuant to § 99 of the Works Constitution Act was advanced only by the Nuremberg Higher Labour Court and in the scholarly literature. The Federal Labour Court has now abandoned that position.

In my opinion, the decision fails to convince, for § 87 of the Works Constitution Act can be used to defeat the purpose of the provisions of §§ 99 and 100 of the Works Constitution Act. This can effectively be used to block employment, especially in the case of temporary employees. It is questionable whether this was intended by the legislature. It will in any case be necessary to adapt to this new case law. In order to avoid disadvantageous implications at the level of employment, three possibilities come into question:

– Creation of a permanent mediation committee (§ 76(1) sent. 2 of the Works Constitution Act), which could meet on short notice in the case of any disagreement as regards assignment of a new hire to a work schedule.

– Works agreement on working hours: Such an agreement should accord the employer the right to assign new employees to a work schedule that has already been agreed to by the works council. Such a procedure would be ideal since it would eliminate the risk of any – possibly abusive (!) – refusal to consent to such deployment.

– "Combined involvement" of the works council pursuant to § 87 and § 99 of the Works Constitution Act at the time of hiring: The employment form should also provide information on the planned working hours (i.e., assignments to work schedules). This would, however, entail a risk that employment would be approved, but not the working hours (which would be tantamount to prohibition of temporary employment).

Jens Völksen

Limited-Term Contracts with Actors Are Permissible

Decision

In its judgment of 30 August 2017 (Ref.: 7 AZR 864/15), the Federal Labour Court ruled that a limited-term contract was permissible in order to preserve the artistic freedom of the production company in the case of an actor who had been playing the role of a police detective in the ZDF series "Der Alte" for 18 years.

Implications for Practice

Limited-term employment contracts are common in the film and television industry. However, terms of over two years are valid only if justified by a specific reason. That explains why stations and production companies prefer project-related terms (§ 14(1) sent. 2 no. 1 of the Act on Part-Time Employment and Fixed-Term Contracts (Teilzeit- und Befristungsgesetz – TzBfG), for example, for the duration of the production of a series.

In addition, whether or not a limited term is permissible may also depend upon the specific nature of the work involved (§ 14(1) sent. 2 no. 4 of the Act on Part-Time Employment and Fixed-Term Contracts). The broadcasting and artistic freedom of the employer and the employee's freedom to exercise the profession of his or her choice must be weighed against one another when testing the underlying reason for constitutional compliance. In the opinion of the Federal Labour Court, the employer's interest in artistic creativity ultimately outweighs the vested interests of the employee, in any case as regards the employment of actors who play a specific role.

This conclusion seems appropriate since production companies and the screenplay writers they employee would otherwise be permanently committed to characters and roles once they are introduced and therefore be deprived of any possibility for the further artistic development of a format. It must in fact be possible to let characters "die" and replace these with other characters.

Conclusion

With its judgment, the Federal Labour Court has now expressly confirmed, first of all, that the practice of using limited-term contracts that is acceptable in the film and television industry may also be adopted by production companies; previously, the case law focused on television stations, which could directly invoke broadcasting freedom. However, the argument of the Federal Labour Court cannot simply be applied to the employment relationships of other creative film and television personnel such as, for example, cameramen or make-up artists, since the argument based on the artistic freedom of a broadcaster or a production company will be less convincing in the case of personnel "behind the camera".

Pia Pracht

Content

Note

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