

Legal Update

Labour and employment

Federal Labor Court on the Permissibility of Covert Video Surveillance

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Covert video recordings may be admitted as evidence in actions for protection against dismissal in the case of concrete suspicion of criminal activity or other serious misconduct if less intrusive investigative measures were not possible (any longer) and the video surveillance as a whole not unreasonable (Federal Labor Court, judgment of 21 June 2012, 2 AZR 153/11).

Facts

The employer, a retail chain with outlets throughout the country, terminated the employment relationship with the plaintiff, who was at the time an assistant branch manager, due to the theft of several packages of cigarettes from the inventory of the employer. This allegation, which the plaintiff denied, was confirmed by a video recording that the employer had made surreptitiously. The covert video surveillance was carried out with the consent of the works council over a period of three weeks due to a suspicion of employee theft. The tapes showed the plaintiff taking several packages of cigarettes from the inventory. After consulting the

works council, the employer terminated the employment relationship with immediate effect for cause and, as an alternative, with notice.

Decision

The Cologne Higher Labor Court dismissed the action on the grounds that the theft of the cigarettes by the plaintiff had been proven by the content of the video recordings and that the employment relationship was therefore terminated by virtue of the normal notice given as an alternative (but not, however, for cause without notice). In this case, the Higher Labor Court considered the covert video recording to constitute admissible evidence and therefore found that the breach of duty on the part of the employee had been proven. The Federal Labor Court reversed the decision of the Cologne Higher Labor Court, arguing that the use of the video recordings was to be sure possible under certain conditions, but that the Higher Labor Court's assessment failed to adequately show that these conditions had been satis-

fied so that the matter had to be remanded for redecision.

According to the decision of the Federal Labor Court, covert video recordings may be admitted as evidence in judicial proceedings only if the employer's interest in obtaining information through the use of such measures outweighs the employee's right to "informational self-determination" and the acquisition of information in this manner is considered acceptable despite the associated "impairment of personality". The court argued that covert video surveillance of employees meets these conditions only

1. if a concrete suspicion exists of criminal activity or other serious misconduct on the part of an employee,
2. if less intrusive investigatory measures are not possible (any longer) and
3. video surveillance is on the whole not unreasonable.

If these stringent conditions are fulfilled, the provisions of the German Federal Data Protection Act (Bundesdatenschutzgesetz –BDSG) would also not stand in the way of covert video surveillance even in the case of workplaces that are freely accessible. According to the court, section 6b(2) of the Federal Data Protection Act, which does require that video recording of premises accessible to the public be made obvious, may not be construed to mean that video surveillance of freely accessible workplaces is always prohibited.

Comments

In the case of the decision at issue here, the Federal Labor Court formulated conditions for the admissibility of covert video recordings as evidence in judicial proceed-

ings that also apply to recordings of freely accessible workplaces. The decision of the Federal Labor Court is worth noting for two reasons. First of all, it makes it clear that covert video surveillance of workplaces does not violate section 6b(2) of the Federal Data Protection Act under certain conditions even if the workplace is freely accessible and video surveillance is not made obvious. On the other hand, the conditions under which such covert video surveillance is permissible are enumerated although the criteria call for careful balancing of interests, which means that it will still be possible to make a clear distinction between permissible and impermissible covert video surveillance of workplaces only with great difficulty. Whenever an employer contemplates covert video surveillance of a workplace, it will regularly be advisable to be able to adequately document compliance with the criteria set forth by the Federal Labor Court in the context of any subsequent judicial proceedings. In that regard, the reasons for suspicion of improper activity, the lack of other investigative possibilities and the reasons for considering the contemplated measures reasonable must be discussed with the works council in the context of the consultative procedure required by clause no. 6 of section 87(1) of the Works Constitution Act (Betriebsverfassungsgesetz – BetrVG). If no works council exists, it is nonetheless recommended that the reasons for resorting to the surveillance be documented beforehand. The criterion of reasonableness is especially likely to leave much room for discretionary judgment on the part of both employers and the deciding courts in the future. In that respect, it can be expected that actions involving surveillance will ultimately result in a certain body of case law.

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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: Felix Pott +49 221 33660-524 or fpott@goerg.de. For further information about the author visit our website www.goerg.com.

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