# When the end does not justify the means – Inadmissibility of evidence procured through unreasonable investigative methods

## INTRODUCTION

Whether there are shortfalls in the cash register, inventory discrepancies or a loss of goods – it is not unusual to speak of the workplace as a "crime scene". This usually results in a significant loss of the employer's trust in an employee, which may also have consequences for the employment relationship, no matter how small the financial loss may be.

The (alleged) perpetrator is not always caught "red-handed". Rather, there may only be circumstantial evidence indicating his involvement. To make a termination stand up in court, employers thus often avail themselves of aids such as cameras and body and bag searches to be able to prove the crime or the strong suspicion, based on the facts, that a crime has been committed. In doing this, the employer usually enters into totally unknown waters which, in some cases, may take away his opportunity to terminate the employment. The judgment of the Federal Labor Court (*Bundesarbeitsgericht* = BAG) discussed here deals with the issues concerning the extent to which the information received by the employer through such investigative action is deemed to be inadmissible evidence, how broad the interest in submitting evidence may be and where admissibility is prevented by constitutional rights protecting personal data from disclosure.

## THE FACTS

### BAG, JUDGMENT OF JUNE 20, 2013 – 2 AZR 546/12 - (PRECEDING COURT INSTANCE: SUPERIOR LABOR COURT HESSEN, JUDGMENT OF APRIL 18,2012 – 18 SA 1474/11-)

The employee in question was employed as a salesperson in the beverage department of a wholesaler. Due to several incidents and the statements of other employees, the suspicion arose that the employee was stealing, whereupon the head manager of the market searched the locked locker of the employee in the presence of a works council member. The employee himself was not present. The employer claims that women's underwear taken from the market was found in the locker. The alleged stolen goods were left in the locker after the search. It was the intention of the head manager to conduct a bag and body search of the suspected employee when he left the store. This was to cut off the defense that the goods were still going to be paid for. The employee in question was able, however, to leave the store after finishing work without being searched. A further search of the locker and a police search in the employee's home did not find any stolen goods. The employer terminated the employment contract without notice, alternatively with notice. With the complaint against the lawfulness of his dismissal, the employee argued that the termination of his employment was void. The findings of the locker search could not be used in the proceedings. The preceding courts of instance both ruled in favor of the employee.

## DECISION OF THE BAG

The BAG set aside the judgment of the Superior Labor Court and instructed it to again review whether the termination for suspected misconduct is valid even without the findings of the locker search. On the other hand, the BAG holds the termination for the act to be void.

In its reasoning, the BAG stated that proof of the deed was only possible with the findings of the locker search (discovery of the underwear). This finding, however, was not admissible as evidence in the proceedings. It is true that the civil procedure as such does not have any general rule that evidence obtained illegally is inadmissible. Rather, a finding of inadmissibility requires a statutory basis. Judges, however, are bound by the relevant constitutional rights and the duty to conduct proceedings in accordance with the principle of the rule of law. When the issues concern the disclosure and use of personal data, which is generally protected by the Constitution (Art. 2 (1) German Constitution) from disclosure to third parties, the court must review whether a use of such (surreptitiously) procured information is reconcilable with the general right to privacy and self-determination of the party in question. In addition, the inadmissibility of evidence may arise from Sec. 32 (1) Federal Data Protection Act (BDSG), which also deals with the collection of data to uncover criminal acts within the employment relationship. In the present case, this did not have to be addressed. The legal test is thus overlapping. However, one could argue that the locker search constitutes a collection of data within the meaning of Sec. 32 BDSG because that regulation also includes the collection of data through purely physical actions. A weighing of interests or affected rights must be conducted in each case.

A locker search could only be reasonable within the meaning of Sec. 32 (1) sentence 2 BDSG or in the sense of a limitation on the general right to privacy and self-determination if it was appropriate, necessary, and fair. Other, equally effective opportunities to determine the facts which are less onerous for the employee must not be available. Furthermore, the nature and manner of the search/control must honor the principle of reasonableness. Proclaiming evidence to be inadmissible would only be possible if, upon weighing

the legal rights, the right of the employee to determine what happens with his personal information prevails over the interests of the employer despite specific indications that a crime has been committed, that is, that the action was unreasonable.

Neither the interests of a fully functional judicial system nor the intention of securing evidence for civil-law claims are sufficient to favor the interests in admitting the evidence precedence. Rather, there must be additional special circumstances to justify this manner of procuring information and collecting evidence; this is specifically the test for measuring the intensity of the infringement. Although employees are obliged under their employment contracts in conjunction with the principle of good faith to tolerate investigative action, an employee may generally trust that his locker will not be opened in the normal case without his consent. A locker search in the presence of the employee will generally be less severe than a search conducted surreptitiously. The presence of other people during the surreptitious searches, even if they are "neutral" works council members, makes the infringement even more grievous. When the surreptitious locker search merely serves to prepare for a planned bag search, the surreptitious search is not necessary and thus is completely unjustified. Because the use of evidence procured in this manner would continue the serious violation of the general right to privacy and self-determination, it is not permitted.

The BAG did not address the issue of whether personnel lounges could also fall under the definition of a "home" protected by the scope of application of Art. 13 German Constitution. This could result in a further inadmissibility of evidence (Art. 13 (2) German Constitution, Sec. 105 Code of Criminal Procedure).

## PRACTICAL SIGNIFICANCE OF THE JUDGMENT

As this judgment and a later judgment of the BAG (judgment of November 21, 2013 – 2 AZR 797/11) show, one should apply extreme restraint in using surreptitious investigations. They are only to be considered as the absolute last resort. No employer should recklessly subject himself to the risk that a possibly strong piece of evidence is not admitted. This is documented by the arguments of the BAG in the latter judgment. In that case, a possible breach of duties different from the one expected to have been committed on the basis of the circumstantial evidence leading to the surveillance was incidentally filmed by a video surveillance camera. This additional breach of duties was found to be considerably less serious. In weighing the interests of the parties, the BAG thus held that the hidden surveillance camera was unreasonable in relation to that uncovered breach of duties so that the findings were inadmissible.

One must also bear in mind that not only crimes that have been committed and are proven, but also the strong suspicion of a serious breach of duties based on objective facts can constitute its own ground for a termination.

One must consider the following here: Under the case law of the BAG, the seriousness of the elements of the suspicion and their evaluation and the weighing of interests must have become so overwhelming that the notice of termination which is given would always justify a termination without notice. Irrespective of whether or not a termination is given with or without notice, the suspicion must be similarly overwhelming. When conducting an investigation, one must also consider whether less onerous investigative methods would possibly not deliver the same evidence of the crime, but could unearth sufficient indications for a dismissal on the grounds of suspected misconduct. One must also consider undertaking several investigative steps of differing intensity to get as much admissible evidence as possible. It is also important to remember to involve the works council, particularly where technical aids are used to conduct the investigations.

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