Light in the "Compliance Jungle"? The BAG Heightens the Contours of the Lawfulness of Internal Investigations

INTRODUCTION

Internal investigations have become a standard element of corporate practice. In addition to the broad range of well-known misconduct by employees (larceny of company funds and materials, faking work incapacity, "preparing" for future activities at a competitor), this can be primarily attributed to the compliance movement insofar as the expansion of good conduct requirements for companies and employees has necessitated an increase in investigative efforts.

In the absence of clear legal requirements regulating the lawfulness of internal investigations, companies have often nevertheless been confronted with the question of whether individual investigative measures are permitted and how they can be coordinated overall with one another. This problem is enhanced by the numerous possible measures (e.g. CCTV, E-Mail monitoring, detective agencies) and, above all, by the legal consequences of unlawful investigations which can result in the inadmissibility of evidence in subsequent unfair dismissal or damage litigation or even in liability for crimes or misdemeanors or claims to pain and suffering by employees in addition to possible, significant damage to the reputation of the companies in question.

In this context, the most recent judgment of the Federal Labor Court ("BAG") from February 16, 2015 at least provides some clarification by particularly heightening the contours of lawful internal investigations for repressive purposes by defining the level of required probable cause.

THE FACTS
BAG, JUDGMENT OF FEBRUARY 19, 2015, 8 AZR 1007/13

The plaintiff had been employed by the defendant since May of 2011 and had been out sick as of December 27, 2011, initially due to bronchial infections. During that period, she submitted six doctors-certificates, the first four being issued by a general practitioner, and the two further certificates being issued by an orthopedist. The general manager of the defendant doubted that the most recent incident of a slipped disc alleged by the plaintiff was true and commissioned a private investigator who surveilled her on four days and made both photographs and video-tapes, amongst other things of her going to a laundromat. Upon receiving a notice of termination, the defendant filed for protection against dismissal and also moved that the defendant be ordered to pay her damages for pain and suffering in an amount to be determined at the discretion of the court, whereby she deemed EUR 10,500 to be appropriate.

DECISION OF THE BAG

The lower labor court had allowed the complaint against the dismissal but had dismissed the motion for damages for pain and suffering, whereas the LAG Hamm, as the first court of appeal, had ordered the defendant to pay EUR 1,000 for pain and suffering. The BAG confirmed this judgment. In its grounds it argued that an employer who delegates the monitoring of an employee who is suspected of faking illness acts illegally if his suspicions are not based on specific facts. This was the case here because the value of the doctors certificates as evidence was neither shattered by the fact that they originated from different physicians nor by the fact that there was a change in the illness or because the slipped disc was initially treated by the general practitioner. This type of illegal infringement of the general right to privacy can form the basis of a claim to damages for pain and suffering, whereby the amount of damages assumed by the first court of appeals was not to be criticized by the second appellate court.

PRACTICAL SIGNIFICANCE OF THE DECISION

In this decision, which as yet has merely been published as a press release, the BAG continues its case law on internal investigations, but expressly reviews for the first time using the standard of Sec. 32 (1) sentence 2 Federal Data Protection Act (BDSG). In the past, it had left the question of whether investigative measures in the form of a search in a locker are to be understood to be "the processing of data" which is relevant to data protection law unanswered (BAG judgment of June 20, 2013 – 2 AZR 546/12). However, it had already indicated there that investigative measures - which regularly involve the procurement and utilization of personal data within the meaning of Sec. 3 (1) sentence 1 BDSG – are to be deemed, in principle, to be a relevant processing of data and thus subject to an evaluation under data protection law. The BAG also clearly stated here that, due to Sec. 32 (2) BDSG, this also would apply irrespective of whether the investigations concerns physical actions (e.g. surveillance by a private investigator) or automated data processing (e.g. where photographs or videotapes are created) (ibid).

On the first level, the governing provision of Sec. 32 (1) sentence 2 BDSG requires that real indicators are to be documented to form the basis for the probable cause of a criminal offence by the employee. According to the generally held view, real indicators in the sense of an initial suspicion are required. In arguing in the present case that the investigations were unlawful due to the absence of a suspicion, the BAG makes it clear that it takes this initial hurdle very seriously and that it also

applies relatively strict requirements to the grounds for probable cause. However, this will depend on the individual case, for the facts on which the present judgment is based are unique to the extent that a doctors-certificate which attests to the evidence to the contrary has been issued, and this must first be invalidated on the basis of specific indicators. This can succeed if the employee makes contradictory statements concerning his or her work incapacity or he or she does not comply with a request to be examined by the medical services of the health insurance providers (Medizinischer Dienst der Krankenkassen) (LAG Hamm judgment of July 11, 2013 – 11 Sa 312/13), but it will be necessary to satisfy stricter requirements for the justification of the action in comparison to other types of cases. In any event, it is necessary in actual practice in each individual case that, prior to initiating any investigative measures, the existing grounds for suspected misconduct be carefully analyzed and documented pursuant to the further legal requirements of Sec. 32 (1) sentence 2 BDSG with a view to the stated standards.

On a second level the investigative measures must be, briefly stated, necessary and proportionate, and the interests of the employee must be taken into sufficient account. Even if the BAG did not have to engage in a weighing of interests when handing down its judgment, in some of its earlier decisions it had exercised extreme restraint at this specific point, even when the weighing of interests exclusively involved constitutional rights. Covert surveillance is only deemed to be lawful if "less onerous means for investigating suspicions have been exhausted with no result, so that covert video surveillance is thus practically the single remaining means and it is ultimately not excessive" (BAG judgment of June 21, 2012 – 2 AZR 153/11). With reference to that judgment, the BAG has also declared covert locker controls to be unlawful because "less onerous means" in the form of conducting the controls in the presence of the employee were possible (BAG judgment of June 20, 2013 – 2 AZR 546/12).

In actual practice this translates, for further action, into a type of "ladder" with respect to the intensity of the interventions by the available investigative means. E-mail controls, CCTV or broad surveillance by private investigators are generally located on higher "rungs", whereby the level of intensity of an intervention can be increased within individual measures (e.g. E-mail controls; initial exclusion of E-mails, then limitation to subject headings, etc.). With respect to the cited BAG judgments, one could consider a gradual approach to the extent that investigative measures must be limited initially to certain suspects (BAG judgment of June 21, 2012, op. cit), or, if less intensive investigative steps are not possible on the first rungs, the open conduction of the measure in relation to the person in question (BAG judgment of June 20, 2013, op. cit). In addition, it may be required that broader, special regulations must be observed in individual measures, i.e. particular constitutional rights such as the inviolability of the home under Art. 13 German Constitution (ibid). Ultimately, one must consider, keeping in mind the weighing of interests, that the works council, if present, or the data protection officer must also be involved even if the failure to involve the works council is not alone capable of leading to the inadmissibility of the evidence (BAG judgment of December 13, 2007 – 2 AZR 537/06). However, it is also to be recommended in this context that the procedure be documented in writing for evidentiary purposes even if there is no statutory obligation to do so.

In summary, it can be said with a view to the stated legal requirements that all rote solutions in preparing and conducting investigation measures are unacceptable. It is decisive in each individual case that, depending on the specific suspicion, the goal of the investigation and the available means, a customized plan of action be drafted. Otherwise, there is the not only the danger, in light of the new judgments, that one is robbed of the "costly" findings of the investigations in subsequent litigation concerning unfair dismissals or damages, but that the employee may claim damages for pain and suffering or there may be an exposure to criminal liability, for, parallel to the BAG, the Federal Court of Justice (BGH) has recently stated in all clarity with respect to GPS-supported movement profiles by a private investigator that such investigative measures can be subject in the individual case to criminal liability as illegal measures under data protection law (BGH judgment of June 4, 2013 – 1 StR 32/13).

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