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German Tax and Legal News

Dismissal due to Excessive Private Use of Internet

Evaluation of Browser History without Consent of Employee

Employers might be entitled to evaluate employees' browser histories to substantiate circumstances justifying a dismissal.

By judgement dated January 14, 2016 (file no. 5 Sa 657/15), the Higher Labor Court of Berlin-Brandenburg ruled that employers might under certain circumstances be allowed to evaluate their employees' browser history in order to substantiate circumstances justifying a dismissal without consent of the respective employee.

Circumstances of the Case
In the case presented to the Court, the employee has been allowed to use the internet for private purposes in exceptional cases and during his breaks. However, the employer got a hint that there was excessive private use by the employee in practice. Upon finding enormous data volume, the employer issued a dismissal for cause. Following the dismissal, the employer evaluated the employee's browser history without his consent and found that the employee has used the internet for private purposes for approx. 40 hours within only 30 working days by opening websites more than 16.000 times.

Position of the Higher Labor Court
Quite unsurprising, the Higher Labor Court ruled that the extraordinary termination was legally effective given the extreme violation of the employee's duties. Far more interesting are the Court's explanations with respect to a potential inadmissibility of improperly obtained evidence (Beweisverwertungsverbot) as claimed by the employee.

The Court refused such inadmissibility of evidence. Though the employee did not give his consent to evaluate the browser history as personal data in the meaning of the Federal Data Protection Act (Bundesdatenschutzgesetz), the evidence could be used in the case at hand. The Act basically allows storing and evaluating of browser histories to control any abusive conduct also without consent of the employee.

The concrete justification shall be given by sec. 32 of the Federal Data Protection Act. According to sec. 32, personal employee data might be collected, processed and used for purposes of the employment relationship inter alia if this is necessary for the decision to terminate the employment relationship.

Though the employment relationship had already been terminated when the employer evaluated the browser history, this justification applied. It shall – according to the Court – also cover collecting, processing and using of personal data the employer needs to fulfill his burden of demonstration and prove during dismissal protection proceedings.

The employer's approach at hand has been necessary to clear up the employee's abusive private internet use because there have not been any equally effective milder means. In the case at hand, the employer did not have any other option to prove the forbidden extent of private internet use.

Practical Advice
The judgement might not be interpreted in a way that any monitoring of employees' browser histories without the individual employee's consent is permitted. Such monitoring is still allowed only in exceptional cases and within very strict limits. However, the Court clarifies that the employee's consent for controlling his private internet use is not necessary in any case and gained prove might be used during court proceedings. An appeal is pending at the Federal Labor Court (Bundesarbeitsgericht).

In order to ensure legal certainty, it is highly advisable regulating private internet use of employees and its extent in written form. This might not only be regulated in the initial employment contract but also be subject to works agreements.

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