European Employment Law Update

Judgments: Germany
Date: April 2017

Date	Development	Impact
22 September 2016	*BAG, decision dated 22/09/2016 – 2 AZR 848/15* Federal Labour Court ruled on the admissibility of evidence in labour law proceedings produced by concealed video surveillance	The Federal Labour Court had to rule on a dismissal for theft. The plaintiff's theft was discovered because of concealed video surveillance. The reason for the concealed video surveillance was the employer's suspicion of theft by two other employees. However, the video recording showed that the plaintiff had committed the theft. The German constitution protects rights regarding one's own image as part of the general right of privacy. This right is violated in case of concealed video surveillance. The Federal Labour Court decided that the video recording could be used in court although it violated the plaintiff's general right of privacy. The violation was justified because of the prevailing interests of the employer. Concealed video surveillance of an employee is permitted as an exception when a criminal offence or other severe breach to the detriment of the employer is specifically suspected, all less drastic means of allaying the suspicion have been exhausted, concealed video surveillance is practically the only remaining means of clarifying the matter and the measure is not otherwise considered excessive. The suspicion must be in respect of a specific criminal offence and be directed at specific employees. The Federal Labour Court has now decided that video recordings of employees other than the prime suspect can also be used in court. However, a specific suspicion of a criminal offence of a specific (other) employee is still necessary to justify concealed video surveillance in the first place. With this decision, the Federal Labour court has clarified and extended the limits of admissibility of evidence produced by concealed video surveillance.
13 December 2016	*BAG, decision dated 13/12/2016 – 1 ABR 7/15* Federal Labour Court ruled on the works council's right of co-determination for Facebook	The Federal Labour Court had to decide on the works council's right of co-determination in the case of an employer setting up a public Facebook page for the company. Facebook users were able to post comments on the company Facebook page. After some users commented on the behaviour of certain employees, the works council claimed that the employer could not set up a Facebook page without the prior consent of the works council.

	pages	Under German law the works council has a right of co-determination regarding the introduction and use of technical devices designed to monitor or capable of monitoring the behaviour or performance of employees. The Federal Labour Court ruled that Facebook pages are not automatically capable of monitoring the behaviour or performance of employees. However, the works council has a right of co-determination regarding the employer's decision to publish postings of Facebook users. Insofar as posts refer to the behaviour or performance of certain employees, the employer can monitor employees by using a technical device. This decision extends the rights of the works council in an important potential marketing field for companies.
26 January 2017	*BAG, decision dated 26/01/2017 – 6 AZR 442/16* Federal Labour Court ruled that mass dismissal protection also applies to dismissals of employees with special protection against dismissal if the application for consent to the dismissal is made within 30 days	Germany has implemented the European Directive regarding mass dismissals. In the case of mass dismissals, the employer must consult with the works council and notify the government employment agency. If this procedure is not observed, the dismissals are invalid. Mass redundancies apply when certain thresholds are exceeded within a period of 30 days (e.g. if more than 5 employees are dismissed from plants with more than 20 and fewer than 60 employees). For the 30-day period, the employee's receipt of the notice of termination is crucial, not the actual termination date. Employees with special protection against dismissal (e.g. parental leave, severe disabilities) can only be dismissed after obtaining the authorities' consent to the dismissal. As the process for consent to the dismissal takes some time, specially protected employees usually receive their notice of termination much later than other employees. In the past, therefore, dismissals of specially protected employees were often not included in the mass dismissal procedure as notice of termination was not given within 30 days. This was in accordance with the judgements of the German labour courts. After the Federal Constitutional Court decided in the case of an employee on parental leave that this treatment discriminated against the employee, the Federal Labour Court has now decided that an application to the authorities for consent to the dismissal which is made within the 30-day period has to be included in the mass dismissal procedure. The "application" to the authorities for consent to the dismissal can now be defined as "dismissal" in the sense of the rules regarding mass dismissal. This decision was made with regard to an employee on parental leave. However, the reasoning can also be applied to other employees with special protection against dismissal.