European Employment Law Update

Judgments: Germany
Date: November 2017

Date	Development	Impact
18 July 2017	**BAG, decision dated 18/07/2017 – 9 AZR 259/16** Federal Labour Court ruled on a part-time employee's request for increased working hours	The Federal Labour Court had to rule on the request by a part-time employee to increase her working hours. The plaintiff was employed part time by the defendant as a nurse. The plaintiff informed the defendant that she was interested in a full-time position. In the subsequent period, the defendant hired five full-time nurses, without having informed the plaintiff about vacancies in advance. The Federal Labour Court ruled that the defendant is not obliged to accept the plaintiff's offer to work more hours. The conditions of § 9 of the **Part-time Work and Fixed-term Employment Act** ("Teilzeit- und Befristungsgesetz", TzBfG) are not met. § 9 TzBfG states that when filling a vacant position, in general an employer shall give preferential consideration to a part-time employee who wants to extend his or her working time. The Federal Labour Court ruled that the plaintiff's request to extend her working hours could not be met by the defendant due to the staffing of the vacancies. Due to this impossibility, the plaintiff's claim was extinguished. The plaintiff was also denied damages in the form of consent to the contract change. Even if there was a violation of the **General Equal Treatment Act** ("Allgemeines Gleichbehandlungsgesetz", AGG), § 15(4) AGG prevents any entitlement to employment. The decision of the Federal Labour Court fits with previous decisions on request by part-time employees to increase their working hours. The Federal Labour Court stated clearly that once the employer has filled a vacant position with another employee, the claim is extinguished.
27 July 2017	**BAG, decision dated 27/07/2017 – 2 AZR 681/16**	The Federal Labour Court had to rule on a dismissal based on conduct. The plaintiff was employed by the defendant as a web developer. The defendant installed software known as a keylogger on the business computer; this records all keyboard inputs and regularly produces

	Federal Labour Court ruled on the admissibility of evidence in labour law proceedings produced by keylogging	screenshots. The defendant had informed its employees in advance that all internet traffic and the use of their systems would be logged. After evaluating the files created by the key logger, the defendant terminated the employment contract with the plaintiff without notice. The Federal Labour Court ruled that the findings obtained by the key logger regarding the personal activities of the plaintiff are inadmissible in labour law proceedings. By using the key logger, the defendant violated the plaintiff's right to informational self-determination guaranteed as part of the general right of privacy which is protected by the German constitution. The mere fact that an employee does not object to the use of the key logger does not constitute a declaration of consent. Control measures which are comparable with (hidden) video surveillance with regard to the intensity of interference in the general right of privacy (such as the use of a key logger) are only allowed according to § 32(1) of the **Federal Data Protection Act** ("Bundesdatenschutzgesetz", BDSG) if justified by an initial suspicion of an offence or another serious breach of duty. If an employer takes such measures without cause, they are not proportional as required by the German constitution. However, the Federal Labour Court ruled that control measures which intervene less intensively in the general right of privacy may be permissible even without the existence of an initial suspicion. This applies in particular to open monitoring measures carried out according to abstract criteria without any suspicion about a particular employee. In this decision, the Federal Labour Court clarifies the requirements of the admissibility of evidence acquired by surveillance. Without initial suspicion, the use of a key logger constitutes a violation of the right to privacy, as it is not proportional. The data obtained may not be used as evidence in labour law proceedings. However, data acquired by control measures which intervene less intensively in the right of privacy may be used
22 September 2017	**BAG, decision dated 22/09/2017 – 2 AZR 848/15** Federal Labour Court ruled on the protection against dismissal of a candidate for the European Parliament.	The Federal Labour Court had to rule on the application of dismissal protection to a candidate for the European elections. The plaintiff was employed by the defendant as a tradesman. He stood for election to the European Parliament. A few weeks after the Federal Elections Committee had determined the final outcome of the European elections for Germany, in which the plaintiff received no mandate, the plaintiff was dismissed by the defendant. When dismissing an employee who is a candidate in the European elections, the German statute regarding Members of the European Parliament ("Europaabgeordnetengesetz"; Eu-

		AbgG) has to be observed. According to § 3 EuAbgG, termination or dismissal because of the acquisition, acceptance or exercise of a mandate in the European Parliament is inadmissible; protection against dismissal begins with the applicant's selection as a candidate and ends one year after termination of the candidacy. The Federal Labour Court ruled that the dismissal did not violate this provision. Firstly, there was no evidence that notice of dismissal was given due to reasons related to the candidacy. Secondly, there was no special protection against dismissal at the time the dismissal was received by the plaintiff. His protection ended with the end of the day that the Federal Elections Committee determined the final election outcome. An interpretation of the statute would show that the continuation of protection against dismissal only applies to employees who have actually obtained a mandate in the European Union. With this decision, the Federal Labour Court has clarified the scope of the protection against dismissal for candidates in the European Parliament elections. When the employee does not obtain a mandate, his or her protection ends at the end of the day on which the final election outcome is determined.