



Workplace surveillance in the light of employee data protection

Expert opinion for the Center for Interdisciplinary Labour Law Studies, Law Faculty, Europa-Universität Viadrina, Frankfurt (Oder), Germany¹

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German law on the protection of an employee’s personal data has been hallmarked and shaped for decades by the case-law of the Federal Labour Court (*Bundesarbeitsgericht, BAG*). Legislative codification in this area has done nothing to change this, as case-law has always been ahead of the legislature. The latter has simply attempted to reproduce the principles developed in case-law. Consequently, for a proper understanding of employee data protection, what is needed is a systematic analysis of the case-law and the subsequent legislative reaction. This means that, contrary to established principles of interpretation, the legislation must always be viewed in the light of the case-law of the highest courts.

This expert opinion is therefore structured as follows. Section A sets out the sometimes arduous route to establishing the core legislative provision of section 32 of the Federal Data Protection Act (*Bundesdatenschutzgesetz*) (referred to as the ‘2009 Act’) and its successor, section 26 of the new Federal Data Protection Act (referred to as the ‘2017 Act’) and places it in the context of the relevant case-law. This is followed in Section B with an examination of individual rulings, to identify the scope of employee data protection as it currently stands. Finally, Section C addresses how data protection and procedural law interact – an issue of considerable practical importance.

A – The framework of employee data protection in Germany

Employee data protection has grown in importance since the mid-1980s. However, it was over 30 years later before the core legislative provision, section 32 of the 2009 Act, was adopted. In other words, employee data protection in Germany has been characterised from the outset by legislative inactivity. The Federal Data Protection Act of 1977² contained no specific provisions on the processing of data in the employment context; likewise the Federal Data Protection Act of 1991.³ Nor was employee data protection addressed by any of the 2001 amendments⁴ to the Federal Data Protection Act.

² Federal Law Gazette (*Bundesgesetzblatt = BGBl.*) I 1977, 201.

³ Federal Law Gazette I 1990, 2954.

⁴ Federal Law Gazette I 2001, 904.

I. The codification of employee data protection – a genesis

1. The long road to section 32 of the Federal Data Protection Act (the 2009 Act)

The provision which for many years governed employee data protection, section 32 of the 2009 Act, entered into force on 1 September 2009.⁵

Section 32 made rudimentary provision on the purposes and conditions under which personal data could be collected, processed and used before, during and following an employment relationship.

Prior to the adoption of the provision, the Bundesrat (Federal Council = upper house of the German legislature) had called upon the Federal Government in 2008 to develop specific legislative rules on employee data protection in light of various incidents of employee surveillance at the rail operator Deutsche Bahn AG. The Bundesrat called for rules to provide a clear definition of the boundaries of permissible data collection, processing and use, to ensure workplace controls on data protection and to create legal certainty for all parties. According to the Bundesrat resolution,⁶ employees and employers needed to be aware of their rights and of the limits to the scope and use of employee data. In its view, this could only be achieved with 'clear legislative provisions', as existing rules on data protection in the employment context did not meet those standards. What were needed were 'practical and comprehensible legislative rules on employee data protection that took account of the principles of transparency, necessity and proportionality, purpose limitation and of data minimisation and data security'. The core element of an effective system of employee data protection had to be a proper limitation on the processing of employee data with strict rules governing purpose limitation and data use.

The federal legislature did not satisfy that request. On the contrary, the text of the explanatory memorandum concerning section 32 forthrightly denies any creative intent. It states that section 32 comprises 'a general provision on the protection of employees' personal data that does not amend but merely summarises the principles developed in case-law governing data protection in the context of employment and which is not intended to make a separate enactment on employee data protection unnecessary nor to prejudice the content of such an instrument'.⁷

And as justification for the much needed legislative specification of the necessity requirement in the context of processing personal data for the purposes of carrying out or terminating an employment contract, reference was simply made to the rulings of the Federal Labour Court of 22 October 1986⁸ and 7 September 1995.⁹ According to those judgments, employers are entitled to identify circumstances or make use of data relating to their employees not only for the purposes of fulfilling their contractual obligations owed to employees, for example, obligations in connection with staff management and the payment of wages and salaries, but also for the purposes of exercising their rights in connection with the performance of the employment contract, for example, in exercising their power to direct or in monitoring employee performance or behaviour.¹⁰

In other words, from the outset, section 32 of the 2009 Act was intended only as an interim solution.

⁵ Act to Amend Data Protection Provisions (*Gesetz zur Änderung datenschutzrechtlicher Vorschriften*).

⁶ Bundesrat (Federal Council) Printed Paper (*Drucksache*) 665/08 Annex.

⁷ Bundestag (Federal Parliament) Printed Paper 16/13657, p. 20.

⁸ Federal Labour Court, judgment of 22 October 1986, 5 AZR 660/85.

⁹ Federal Labour Court, judgment of 7 September 1995, 8 AZR 828/93.

¹⁰ Bundestag Printed Paper 16/13657, p. 21.

2. The failed attempt to introduce more detailed rules

It was only logical, therefore, that, in the following legislative period (2009-2013), the Social Democrats (SPD), then one of the opposition parties, brought forward draft legislation on data protection in employment (*Entwurf eines Beschäftigtendatenschutzgesetzes* = Draft Employee Data Protection Act).¹¹ The ministry responsible for this area of law, the Federal Ministry of the Interior, amended the draft to the point it became unrecognisable. It presented instead its own draft law to regulate employee data protection, which proposed the replacement of the existing section 32 with new sections 32 to 32l.¹² The dilemma facing the legislature was neatly captured in the preamble to the government draft.

It stated: ‘For numerous issues of employee data protection that arise in [employment] practice, no specific legislative rules exist. The legal framework for the protection of employee data results in part from general legislation such as the Federal Data Protection Act (*Bundesdatenschutzgesetz*) and the Works Constitution Act (*Betriebsverfassungsgesetz*). In parallel, numerous court rulings arising from individual cases exist, on the basis of which important principles for employee data protection have been developed. However, for employees, the court rulings, in particular, are in part very difficult to understand.’¹³ The situation could not have been summarised more aptly.

Given that the draft produced by the Federal Ministry of the Interior differed substantially from the legislative proposal introduced by the Social Democrats, considerable dispute ensued and the legislative project was never realised. At the end of the legislative period, the legislative proposal lapsed, in accordance with the principle of legislative discontinuity.¹⁴

Not until the European Union’s General Data Protection Regulation (GDPR) entered into force in 2016¹⁵ was any movement registered in the deadlocked process. Member States had to make the necessary amendments to their domestic legislation by 25 May 2018, leading the German legislature to revisit the agenda, bringing together all the essential rules on employee data protection in section 26 of the new Federal Data Protection Act (the 2017 Act).

II. Works Council co-determination rights (section 87(1) No 6 of the Works Constitution Act)

Under existing law, collective agreements in the form of workplace agreements are important instruments that operate in the area of employee data protection, in addition to legislation. These agreements between the employer and the Works Council are known as *Betriebsvereinbarung* in the private sector, where the Works Council is the *Betriebsrat*, and as *Dienstvereinbarung* in the public sector, where the Works Council is the *Personalrat*.

In the private sector, these agreements find their legal basis in section 87(1) No 6 of the Works Constitution Act, according to which Works Councils have a **right of co-determination** in “the introduction and use of technical devices designed to monitor the behaviour or performance of the employees” (i.e.: in case the employer uses or plans to use such technical devices; the Works Council

¹¹ Bundestag Printed Paper 17/69.

¹² Draft of 28 May 2010.

¹³ Bundestag Printed Paper 17/4230.

¹⁴ Under this principle, legislative proposals not adopted by the old legislature have to be reintroduced and presented for new debate.

¹⁵ Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation). Article 99(2) provides that it shall apply from 25 May 2018.

has not a legal rights to the initiative of proposing techniques). As a consequence, if no agreement can be reached on a matter of co-determination, an arbitration board (the so-called conciliation committee, *Einigungsstelle*) can be called upon to make a decision; the award of the conciliation committee shall take the place of an agreement between the employer and the works council. Similar rules apply to Works Councils in the public sector, where specific federal and regional legislation of the “Länder” are in place, regulating codetermination in federal and regional public administration and bodies.

III. Section 26 of the new Federal Data Protection Act (the 2017 Act)

Given that EU law is crucial to the very existence of section 26 of the 2017 Act, a short account of the EU context is needed.

1. EU law context

The GDPR is binding in its entirety and directly applicable in all Member States, in accordance with the second paragraph of Article 288 of the Treaty on the Functioning of the European Union (TFEU). Numerous derogations allow the Member States considerable legislative discretion such that the GDPR appears sometimes ‘a directive disguised as a regulation’.¹⁶ The regulation does not establish simply a series of derogations for national legislatures. It also contains specific mandates addressed to the Member States, which require the updating of national data protection law.¹⁷

The derogation applicable in the context of employment, Article 88 of the GDPR, allows for national rules on data processing in the context of employment. According to that provision, Member States may, by law or by collective agreements, provide for **more specific** rules to ensure the protection of the rights and freedoms in respect of the processing of employees' personal data in the employment context.

The German legislature made use of that option in adopting section 26 of the 2017 Act. The new provision carries forward the special rules previously provided for in section 32 of the 2009 Act, with changes to the wording to reflect the terminology of the GDPR. The legislature reserves the right, unsurprisingly, to adopt rules governing data protection in relation to employment, either within the scope of section 26 or in the framework of separate legislation, giving specific expression to certain principles which, **by reason of case-law**, are already applicable.¹⁸ A more accurate analysis is that section 26 of the 2017 Act not only carries forward the predecessor provision, but incorporates its key passages. In other words, once again, this was not a great step forward by the legislature.

The coalition agreement for the current legislative period (2017-2021) supports this view. Namely, it states that the issue of whether a right of ownership to data can be established and, if so, how should it be structured needs to be addressed without delay. The coalition parties indicate that they wish to make use of the derogation provided for in Article 88 of the GDPR and examine the ‘establishment of a separate law on employee data protection, which protects employees personal rights at work and establishes legal certainty for employers’.

¹⁶ J. Kühling and M. Martini et al., *Die DSGVO und das nationale Recht*, 2016, 298.

¹⁷ Bundesrat Printed Paper 110/17, p. 1 .

¹⁸ Bundesrat Printed Paper 110/17, p. 96.

2. Constitutional law context

Notwithstanding the EU law superstructure set out above, employee data protection in German law is characterised by assessments under constitutional law made for the purposes of establishing a proper balance.

Namely, employee data protection cannot be conceived of separately from the ‘right to informational self-determination’ which originated in the Federal Constitutional Court's judgment on the planned 1983 census.¹⁹

According to the Federal Constitutional Court, in the context of modern data processing, the general right of personality under Article 2(1) in conjunction with Article 1(1) of the German Constitution (“Basic Law”, *Grundgesetz, GG*) encompasses the protection of the individual against unlimited collection, storage, use and sharing of personal data. The fundamental right guarantees the authority conferred on the individual to, in principle, decide themselves on the disclosure and use of their personal data (‘right to informational self-determination’).

The Federal Constitutional Court has further held that the right to informational self-determination accounts for threats to and violations of one’s personality that individuals face due to information-related measures, in particular in the context of modern data processing. This right supports and extends the fundamental rights protection afforded to behavioural freedom and privacy; it ensures that protection begins at the level at which an individual's personality is at risk.²⁰

The highest courts have held that the general right of personality guaranteed by Article 2(1) in conjunction with Article 1(1) of the Constitution must be respected in private law transactions and in particular in the employment relationship.²¹

In reaching that conclusion, the reasoning of the Federal Constitutional Court, on which the Federal Labour Court essentially relies, was relatively brief. According to the Federal Constitutional Court, it sufficed to note that the general right of personality – whose existence was still denied by the legislature at the time the Civil Code (*Bürgerliches Gesetzbuch, BGB*) was adopted – had established itself in the course of decades of debate in the academic literature and, following its recognition by the Federal Court of Justice, had become an integral part of the private law system.²²

Before the concept of necessity entered legislation in section 32(1) of the 2009 Act, now section 26(1) of the 2017 Act, the Federal Labour Court thus also derived the requirement of necessity directly from constitutional law principles.

It held that the storage of protected data falls within the scope of the intended purpose [of the contractual relationship] if a direct connection exists between the intended storage and the specific purpose of use, in other words, if the data are necessary to satisfy the specific contractual purpose.²³

In that ruling, the Federal Labour Court emphasised the need for the legislature to establish the necessary framework, holding that it is primarily *the duty of the legislature* to ensure that in private

¹⁹ Federal Constitutional Court, judgment of 15 December 1983 - 1 BvR 209/83.

²⁰ Federal Constitutional Court, judgment of 11 March 2008 - 1 BvR 2074/05.

²¹ Federal Labour Court, judgment of 19 February 2015 - 8 AZR 1007/13; Federal Labour Court, judgment of 1 June 2012 - 2 AZR 153/11; Federal Labour Court, judgment of 16 November 2010 - 9 AZR 573/09; Federal Court of Justice, judgment of 8 February 2011 - VI ZR 311/09; Federal Constitutional Court, decision of 14 February 1973 - 1 BvR 112/65.

²² Federal Constitutional Court, decision of 14 February 1973 - 1 BvR 112/65.

²³ Federal Labour Court, judgment of 22 October 1986 – 5 AZR 660/85.

law relationships the fundamental rights of the parties are balanced. However, in the interpretation of private law provisions, the courts are required to take into consideration the objective content of the system of fundamental rights. That is satisfied, according to the Federal Labour Court, if any incursion into an employee's private sphere is prohibited from going further than is **absolutely necessary** for the purposes of the employment relationship. In the balancing of interests concerning the storage of data in the context of the intended purpose of the employment relationship what is decisive, the Federal Labour Court stresses, is the principle of **proportionality**.²⁴

It is in this context that the Federal Labour Court's present-day emphasis – even after the introduction of section 32(1) of the 2009 Act (and section 26(1) of the 2017 Act) – on the constitutional content of these provisions must be understood.

According to the Federal Labour Court, the provisions of the Federal Data Protection Act setting out the conditions under which the processing of data is permissible give specific expression to and update the protection provided by the right to informational self-determination. They govern the extent to which, within the material scope of the legislation, interferences by public or private bodies in these legal rights are permissible.²⁵

Ultimately, this was also reflected in the explanatory memorandum to the 2017 Act, which states that in the framework of the necessity assessment the opposing fundamental rights positions must be weighed in order to establish a proper balance. The interests of an employer in the processing of the data and the personality rights of an employee must be carefully balanced, ensuring as great as possible consideration for both interests.²⁶

3. Structure

Section 26(1) of the 2017 Act governs – as was previously set out in section 32(1) of the 2009 Act – the purposes for which and under which conditions personal data may be processed before, during and after an employment relationship where this is necessary for the purposes of the employment relationship.

Section 26(2) of the 2017 Act concerns consent given during the employment relationship.

Section 26(3) of the 2017 Act implements Article 9(2)(b) of the GDPR. In accordance with the GDPR, the processing of special categories of personal data for employment-related purposes shall be lawful if it is necessary to exercise rights or comply with legal obligations derived from labour law, social security and social protection law and there is no reason to believe that the data subject has an overriding legitimate interest in not processing the data.

Section 26(4) of the 2017 Act provides that the processing of personal data shall be permitted on the basis of collective agreements and makes reference to Article 88(1) of the GDPR, according to which more specific rules on data protection in the employment context may be provided for in collective agreements. As a consequence, workplace agreements in the sense of collective agreements between employer and Works Councils as mentioned above, may continue to be the basis for rules on employee data protection.

Under section 26(5) of the 2017 Act, the controller (often the employer) must take appropriate measures to ensure that the fundamental rights and interests of employees are respected. For

²⁴ Federal Labour Court, *op. cit.*

²⁵ Federal Labour Court, judgment of 17 November 2016 – 2 AZR 730/15.

²⁶ Bundestag Printed Paper 18/11325, p. 97.

example, it must be ensured that data is processed lawfully, fairly and in a transparent manner in relation to the employee.

Section 26(6) of the 2017 Act corresponds to section 32(3) of the 2009 Act and clarifies that the participation rights of Works Councils shall remain unaffected.

Section 26(7) of the 2017 Act specifies that subsections 1 to 6 shall also apply when personal data, including special categories of personal data, of employees are processed without forming or being intended to form part of a filing system.

In this connection, in an earlier ruling²⁷ – that attracted considerable attention – on whether, under the 2009 Act, the search of an employee’s workplace locker was permissible, the Federal Labour Court held as follows: ‘There is much to support the view that the search of the locker at issue in this case constitutes a collection of data within the meaning of section 32(1) of [the 2009 Act]. Section 32 [of the 2009 Act] does not presuppose that the data is collected in order to be used and processed in automated files. Section 32(2) [of the 2009 Act] sets aside the general limitation under the Act to file-related and automated processing. Consequently, both by its wording and its regulatory content, [section 32 of the 2009 Act] includes the collection of data by means of actions as such.’

B – Section 26 of the 2017 Act in the context of the relevant case-law

There cannot be any doubt that the two most important legislative rules permitting the collection and processing of employee personal data in the German context are set out in the first and second sentences of section 26(1) of the 2017 Act. These two rules must be strictly distinguished. In simple terms, whereas the first sentence concerns preventive measures (discussed below in section I), the second sentence addresses repressive measures (discussed in section II).

I. The first sentence of section 26(1) (prevention and monitoring of performance and behaviour)

The first sentence of section 26(1) of the 2017 Act provides: ‘Personal data of employees may be processed for employment-related purposes where necessary for hiring decisions or, after hiring, for carrying out or terminating the employment contract or to exercise or satisfy rights and obligations of employees’ representation laid down by law or by collective agreements or other agreements between the employer and staff council’.

For example, after hiring, an employer is entitled to identify circumstances or make use of data relating to their employees for the purposes of fulfilling their contractual obligations owed to employees, for example, obligations in connection with personnel management and the payment of wages and salaries. The same applies when an employer exercises their rights in connection with the performance of the employment contract, for example, in exercising their power to direct or in monitoring employee performance or behaviour.²⁸

1. Prevention

It is generally recognised today that the first sentence of section 26(1) of the 2017 Act may be used as the basis for preventive measures (see section (a)). However, the extent and degree of permissible surveillance depends always on the circumstances of the individual case (see section (b)).

²⁷ Federal Labour Court, judgment of 20 June 2013 - 2 AZR 546/12.

²⁸ Bundestag Printed Paper 16/13657, p. 21.

(a) General rule

The first sentence of section 26(1) establishes the test by which to assess whether measures necessary for the *prevention* of crimes and other offences connected with the employment relationship are permissible. However, the scope of the test established by the first sentence goes much further. It applies also in the assessment of whether measures connected with the termination of the employment relationship (i.e. warnings and dismissal) are permissible. Namely, the notion of termination also includes the process by which an employment relationship is wound up.²⁹

Forms of data collection that interfere to a lesser extent³⁰ in an employee's general right of personality may be permissible under the first sentence of section 26(1) of the 2017 Act *even in the absence of an initial suspicion based on facts*, whether of a criminal offence or other serious infringement of an obligation. According to the Federal Labour Court, that applies in particular **to forms of surveillance that are overt, carried out in accordance with abstract criteria, not placing any particular employee under suspicion and which are intended to prevent the infringement of obligations**. Such preventive measures may be considered proportionate merely where an **abstract risk** exists provided that they do not cause psychological pressure of a kind such as to seriously inhibit, from an objective perspective, the freedom of the persons monitored to plan and shape their actions on a self-determined basis.³¹

Consequently, for example, the storage on a temporary basis and the carrying out of spot checks on a user's browser history may be permitted in order to monitor compliance with an outright prohibition or a limitation placed by the employer on the private use of IT facilities at work.³² In that situation, only the addresses and titles and the time at which the websites are accessed is recorded and, thus, the data stored is no more than is necessary to determine a possible breach, in terms of content or time, of the rules on internet use. If there were not at least spot checks on the stored version of the browser history, infringements of the prohibition or limitation on the private use of the employer's IT facilities could not be penalised and the data collection would not have the desired impact on behaviour.

As the first sentence of section 26(1) of the 2017 Act permits the processing of the personal data of employees for employment-related purposes, *inter alia*, where this is necessary for carrying out or terminating the employment contract, this justifies, according to the Federal Labour Court, 'the monitoring of whether an employee fulfils their obligations' (carrying out the contract) and 'the uncovering of a breach of an obligation that may justify the termination of employment' (terminating the contract).³³

This authority, in principle, to carry out surveillance activities is naturally limited by the principle of proportionality, which protects employees against total surveillance. The Federal Labour Court has emphasised this throughout, using the example of video surveillance.

It has held that the general right of personality protects employees against 'continuous technical surveillance at work' by means of covert video recordings. Monitoring of that kind does not simply replace the presence of a supervisor. Rather, employees who must assume that, in certain

²⁹ Bundestag Printed Paper 16/13657, p. 21.

³⁰ On the distinction between less serious and more serious interferences in an employee's rights, see section II. 1.

³¹ Federal Labour Court, judgment of 27 July 2017, 2 AZR 681/16.

³² Federal Labour Court, *op. cit.*, referring to the judgment of the Higher Labour Court Berlin-Brandenburg of 14 January 2016 - 5 Sa 657/15.

³³ Federal Labour Court, judgment of 29 June 2017 - 2 AZR 597/16.

circumstances, their employer will make use of covert video recording are 'subject to a constant pressure of surveillance from which they cannot escape when working'.³⁴

The Federal Labour Court already hinted at this direction in the 1980s, holding an infringement of an employee's personality rights likely if the employee is subjected to a constant and uninterrupted pressure of surveillance resulting from the employer's commitment to monitor the workplace at any time, in the absence of any specific indication, by means of covert video cameras.³⁵

The principle of proportionality ultimately also prevents intrusive preventive measures from finding their basis in the first sentence of section 26(1) of the 2017 Act if these lack any clear purpose or direction.³⁶

(b) Examples from case-law

The question whether in a specific case surveillance may be regarded as impermissible because it is constant and uninterrupted must always be determined in accordance with the circumstances of the individual case. For that reason, it is essential to examine more closely the rulings of the Federal Labour Court in this area.

RIBAS ruling³⁷

The employer was a public transport operator. The employee in question was employed as a bus driver.

A workplace agreement had been entered into by the employer and the Works Council on the use of a monitoring system, known as the RIBAS system, in the employer's vehicles. The electronic system analysed how the bus was being driven and by means of a warning light notified the bus driver in the event of being driven at high speed, excessive idling times, sharp braking, excessive acceleration and breaking speed limits. The data were recorded and stored. Under the terms of the workplace agreement, all drivers were required to participate in the RIBAS system. Drivers who did not want to participate in the personalised reporting system received an anonymised system code. However, the protection of anonymity could be circumvented without much effort by consulting the driver schedules. The possibility of accessing the data in this personalised form was envisaged – in agreement with the Works Council – for the purposes of establishing training needs should it be clear from the anonymised driver data that, in comparison with the average, certain thresholds had been substantially exceeded.

The employee in question persistently refused to participate in the RIBAS system and, as a consequence, following several formal warnings, was ultimately dismissed. The applicant challenged his dismissal, arguing that the workplace agreement requiring his participation in the RIBAS system was void.

The Federal Labour Court examined in detail whether the workplace agreement satisfied the principle of proportionality. It held that the principle of proportionality requires the interference to be appropriate, necessary and, taking account of the freedoms protected, reasonable in order to achieve the purpose sought. There must be no other means available that are equally effective for achieving the aim but less intrusive in employees' personal rights. Proportionality in the strict sense is ensured

³⁴ Federal Labour Court, judgment of 27 March 2003 - 2 AZR 51/02.

³⁵ Federal Labour Court, judgment of 7 October 1987 - 5 AZR 116/86.

³⁶ Federal Labour Court, judgment of 29 June 2017 - 2 AZR 597/16.

³⁷ Federal Labour Court, judgment of 17 November 2016 - 2 AZR 730/15.

if, on a global assessment, the severity of the interference is not disproportionate to the weight of the grounds on which it is justified.

The Federal Labour Court found the employer to have a legitimate interest in the use of the RIBAS system given its objective of encouraging its drivers to adopt an anticipatory and economical driving style. That related directly to the work that its employees are obliged to perform and, therefore, to the carrying out of the employment contract. The objectives pursued, namely to reduce fuel consumption and to increase customer satisfaction, were not unreasonable or unlawful but were economically sensible and, in addition, were in the environmental interest of society at large.

The Federal Labour Court then examined potentially less intrusive means but which it concluded were not as effective. For example, participation on a purely voluntary basis or limiting the system to the provision of an electronic signal immediately following a driving manoeuvre without any further recording of the data to establish training needs was held not to suffice. Although the presence of driving instructors on board allowed for training needs to be identified it could not substitute for the insights gained through calculating average values for all drivers nor did it encourage drivers to self monitor their driving style in the same way as the RIBAS system. Training provided purely on a precautionary basis was similarly ineffective in that respect.

The Federal Labour Court also held that proportionality in the strict sense was maintained. The interference with the applicant's right to informational self-determination was not disproportionate to the legitimate interests pursued by the defendant. The court held that there was **no permanent surveillance** in the sense of monitoring every aspect of bus drivers' behaviour during working hours – as would be the case with video surveillance. Only the data concerning the driving manoeuvres in question were stored and these in principle only for the purpose of calculating average values. The data were only matched to an individual driver if the driver had consented to this or an individual's driving behaviour was at considerable variance from the average. As a result, the system primarily ensured self-monitoring by the bus drivers. The personalised monitoring of performance was, in contrast, in cases where the driver had not consented to this through participation in the bonus system, permissible only where good reason existed and then only for the purposes of establishing training needs.

The Federal Labour Court's ruling on the RIBAS system is a good example of a thorough assessment of proportionality. The outcome reached is unquestionably open to dispute since, having regard to the typical duties and activities of a bus driver, the monitoring could certainly have been regarded as a form of permanent surveillance. The Federal Labour Court was, however, evidently guided by the fact that the evaluation was only carried out if indicators exceeded/fell below certain thresholds and consequently there was at least a possibility to influence the likelihood of evaluation. In later decisions, this aspect was somewhat qualified.³⁸

Keylogger ruling³⁹

An employer made their computer network available to their employees, notifying them that the entire 'internet traffic' and use of the system would be 'logged'. They installed a software program on the employee's work computer which recorded every keystroke and took regular screenshots. The employee in question was employed as a web developer. Confronted with the employer's analysis of the files generated by the keylogger, the employee conceded that he had used his work computer for

³⁸ See below section B. I. 2 (direct monitoring of performance).

³⁹ Federal Labour Court, judgment of 27 July 2017 - 2 AZR 681/16.

private matters. However, the times at which this occurred were disputed. Analysis produced by the keylogger was offered as evidence in court.

The Federal Labour Court was called upon to rule, as court of last resort, on the lawfulness of the employee's conduct-related dismissal. In this connection, the primary issue was whether the data captured by means of the keylogger could be used as evidence. The Federal Labour Court drew parallels with video surveillance at work.

It held that the covert use (for an unlimited time) of a keylogger on a workplace computer constitutes a form of data collection that, having regard to the intensity of the interference in the employee's general right of personality associated with that use, is comparable to covert video surveillance of the workplace. Admittedly, the use of a keylogger did not, in principle, affect the right to one's own image, in particular, it was generally unsuited to capturing in a visual form behaviours regarded by the employee as embarrassing. However, the collection of data by means of keylogger constitutes a grave interference in the employee's right to informational self-determination. It records and stores – in a manner that the user cannot reverse – every entry made via a computer keyboard including the time of the keystroke and the duration of the period between two keystrokes. The data obtained on this basis permit the compilation of an essentially **comprehensive and seamless profile** of both the private and professional use of the computer by the employee. This renders visible not only the saved final versions and earlier drafts, if any, of certain documents but allows every single step of the employee's work process to be traced. In addition, special kinds of personal data within the meaning of section 3(9) of the 2009 Act [see now Article 9(1) of the GDPR] or – as in the case at hand – other highly sensitive data such as user names, passwords for protected areas, credit card data, PIN numbers can be recorded without this being necessary for the monitoring and surveillance purposes pursued. Similarly, the employee concerned has neither the grounds nor the opportunity to designate certain content as private or even highly personal and, accordingly, to prevent the employer from accessing it. This already **highly excessive interference** in the employee's right to informational self-determination is further exacerbated if – as was the case here – screenshots are regularly taken.

The keylogger ruling may be understood – in particular as it was delivered by the same senate of the court – as the counterpart to the RIBAS ruling. However, in comparison with the RIBAS ruling, the interference at issue in the keylogger ruling was of unparalleled severity. For that reason, it would not be justified to describe this as a correction or abandonment of the earlier ruling. What is certain however is that the keylogger ruling placed clear and, above all, effective limits⁴⁰ on employee surveillance, causing practitioners to take note and attracting coverage in the broader media.

2. Direct monitoring of performance

In addition to the preventive measures discussed above, measures involving the direct monitoring of employee performance, in the sense of performance comparisons, can be based on the first sentence of section 26(1) of the 2017 Act. In those circumstances, employers are faced, in any event, with the challenge that they cannot require an employee to work to a standard that is determined purely objectively. Rather, the Federal Labour Court has insisted on a test involving subjective elements. According to the Federal Labour Court, if, as is usually the case, the employment contract does not specify or does not specify in detail the volume and the quality of the work to be performed, the content of the promise to work must be determined, in part, in accordance with the nature of the work required by the employer in exercise of their power to direct and, in part, in accordance with the personal and subjective capabilities of the employee. "The employee must do what they should and

⁴⁰ See Section C on the prohibition on using material as evidence.

do this as well as they can.”⁴¹ In other words, the Federal Labour Court continues, the work obligation is not rigid but dynamic in nature and reflects the capacity of the employee. An objective standard may not be applied.

Nonetheless, the attempt to capture and evaluate performance indicators naturally plays an important role in practice. Even if the dismissal of a low performer is a challenging process,⁴² the employer has an interest in at least identifying an employee as such.

Workload statistics scheme ruling⁴³

The employer was an insurance company with 38 claims handling offices. Within a claims handling office, each headed by a claims handling office manager, the individual claim handlers were grouped in teams, each headed by a team leader. The claims handling offices were assigned to different divisions, each headed by a senior executive manager. The workload of the claims handlers in the claims handling offices resulted primarily from telephone calls, incoming mail and the resulting claims management activities. In accordance with the award made by an arbitration board (*Einigungsstelle*, conciliation committee), called upon to resolve differences between an employer and the Works Council, a company agreement was established on a workload statistics scheme for the claims handling offices. In the case at hand, the Federal Labour Court was called upon to determine the validity of the award.

The purpose of compiling the workload statistics was ‘to identify and analyse disparities in the workload situations of the claims handling offices, teams and staff and to be capable intervening in this regard’ and to permit a comparative analysis as between the claims handling offices in order to identify productivity differences.

In order to implement those objectives, ‘transaction data’ was captured and stored, for which an analysis providing views over a different number of weeks was produced, which in turn were updated on a weekly basis at the level of each individual claims handler. However, performance indicators were not reported at the individual claims handler level unless there were considerable divergences. However, in those circumstances, the analysis indicators associated with the core indicator were also analysed. Those indicators measured, as a quantitative result, the work performed by the individual claims handler by reference to certain thresholds fixed in accordance with the average work results of the superior work unit, in other words, the team to which the claims handler was assigned.

Consequently, the company agreement governed the uninterrupted, permanent and very detailed automated recording of the fundamental areas of work of the claims handlers on the basis of core and analysis indicators.⁴⁴ By reason of the indicators, therefore, the material conduct and performance of

⁴¹ Federal Labour Court, judgment of 11 December 2003 – 2 AZR 667/02.

⁴² See P. Gland, ‘Kündigung von leistungsschwachen Mitarbeitern („Low Performer“), *Neue Juristische Wochenschrift – Spezial* 2008, 82.

⁴³ Federal Labour Court, decision of 25 April 2017 - 1 ABR 46/15.

⁴⁴ The system recorded every written item for processing, i.e. scanned documents allocated to a claim handler’s ‘work basket’, and the handler’s processing of those items. In addition, the number of ‘overdue items’, i.e. the items allocated to the individual claims handler overdue on a particular date, was recorded as was their age distribution (i.e. the number that were more than two weeks overdue). In the case of telephone calls that generated items for processing, the data recording was even more detailed. The data collection and analysis recorded the number of telephone calls answered, distinguishing between service calls and non-service related external calls. In addition, the system recorded availability to take telephone calls, the duration of the calls answered, the number of outgoing calls, their duration, the time taken to follow up on each call, the number of calls automatically diverted because of no response and the number of occasions on which the employee was released from duties.

each individual claims handler was subject to detailed qualitative observation with a re-evaluation, in comparison with the group, carried out at the end of each working week in light of the newly compiled 1-week view of performance.

The Federal Labour Court concluded, as a consequence, that the claims handlers were subject to permanent observation. That created a serious and, in addition, constant pressure on employees to carry out their work in all areas in line as closely possible with the indicators so as not to risk appraisal meetings with managers or disciplinary measures by reason of 'considerable variance' from the indicators. It held that a workload statistics scheme of that kind, which, by way of a technical monitoring facility within the meaning of section 87(1)(6) of the Works Constitution Act, provides on a permanent basis for the recording, storage and analysis of individual work steps and thus of the material conduct of employees by reference to quantitative criteria through the whole of their working time, constitutes a serious interference in their personality rights, which is further not justified by overriding interests of the employer.⁴⁵

In other words, the award of the conciliation committee was not upheld. This is a ruling with far-reaching implications for employment practice, as schemes of workload analysis involving comparable degrees of monitoring are today commonplace in many call centres. However, in these situations, they are often, at any rate, tolerated by all parties (including Works Councils).⁴⁶

Dead man's button ruling⁴⁷

The employee in question was employed as a taxi driver with a Berlin taxi company.

The taximeter in the vehicles was fitted with a time logging module. It recorded when the taximeter was switched on at the start of work and when it was switched off at the end of work. In addition, after three minutes of waiting time, an audible and visible signal was issued. The employee then had 10 seconds in which to press a button (dead man's button) so that the waiting time would be recorded as working time. Otherwise the waiting time would be recorded as a break. In other words, it was recorded at three-minute intervals whether the employee was in the vehicle.

The Higher Labour Court (*Landesarbeitsgericht, LAG*) Berlin-Brandenburg upheld the ruling by Berlin Labour Court, which had concluded that the obligation on the employee to participate in the time logging system used in the case at hand constituted a disproportionate interference in his right of informational self-determination.

It held that the employer had an interest in being able to monitor taxi drivers closely. If in so doing the objective of the employer's action was to record and verify the hours worked, such objective was, admittedly, legitimate. However, for many reasons, the measure could not be considered necessary. For example, other less intrusive measures were conceivable. At any rate, the collection, recording and processing of the data in the form practised was disproportionate and unreasonable. Monitoring in such a comprehensive manner by means of permanent surveillance was unreasonable. It was also disproportionate to the interests pursued by the defendant. Although the measures did not constitute a monitoring of every aspect (i.e. complete monitoring), as is the case with video surveillance, the

⁴⁵ Federal Labour Court, decision of 25 April 2017 - 1 ABR 46/15.

⁴⁶ See the article in the German weekly newspaper *Die Zeit*, 2 February 2017 <<https://www.zeit.de/karriere/2017-01/callcenter-mitarbeiter-arbeitsbedingungen-lohn>>, last accessed on 18 February 2019.

⁴⁷ Higher Labour Court Berlin-Brandenburg, judgment of 30 August 2018 - 26 Sa 1151/17.

permanent monitoring concerned the applicant in a personal sense and hence was subject to strict conditions, which were not satisfied in the case at hand.

The ruling is important for two reasons. First, the Higher Labour Court Berlin-Brandenburg distinguishes clearly between complete monitoring and permanent monitoring. Second, in deeming the monitoring permanent, it makes no reference to it being *uninterrupted*. Consequently, monitoring that takes place at intervals may also constitute impermissible permanent surveillance.

II. The second sentence of section 26(1) of the 2017 Act (in particular repressive measures)

The legislature has established a separate provision that authorises the collection of data for the purposes of investigating crimes committed while employed.

Under the second sentence of section 26(1) of the 2017 Act, employees' personal data may be processed to investigate crimes only if there are documented grounds to suspect that the employee has committed a crime while employed, the processing of such data is necessary to investigate the crime and is not outweighed by the employee's legitimate interest in not processing the data, and in particular the type and extent of processing are not disproportionate to the reason.

The second sentence of section 26(1), in essence, a description of repressive measures, is characterised by the **increased severity of interference** involved.

The inclusion of a balancing test in the second sentence is thus a recognition of the fact that measures to investigate crimes, as a rule, constitute a particularly serious interference in the general right of personality. By including a reference in the balancing test to the reason for the data processing the legislature intended to address both the nature and severity of the crime and the strength of the suspicion.⁴⁸

1. Distinguishing the two different authorities (the first and second sentences of section 26(1))

As the first sentence of section 26(1) of the 2017 Act also permits investigative measures (at least on a spot-check basis), the issue arises of how to distinguish these two different authorities. The legislature did not address this and thus once again it was for the Federal Labour Court to step in.

Unlike the position under the first sentence, for the purposes of the second sentence, the suspicion that a specific crime or other serious misconduct to the detriment of the employer has been committed must be 'directed against a group of employees that is identifiable at least in terms of their location and function'. On the one hand, the suspicion must be more than a general speculation that crimes might have been committed. On the other hand, it must not necessarily be directed against a specific individual employee.⁴⁹ Also with a view to limiting the size of the group under suspicion, less intrusive measures must already have been exhausted.⁵⁰

The Federal Labour Court applies this test beyond the strict wording of the legislation also to other serious misconduct.⁵¹

According to the Federal Labour Court, neither from the wording of section 26(1) of the 2017 Act, nor from its scheme, spirit and purpose or legislative history can it be concluded that the second sentence of the subsection operates as a bar preventing reliance on the authority set out in the first sentence in

⁴⁸ Bundestag Printed Paper 16/13657, p. 21.

⁴⁹ Federal Labour Court, judgment of 20 October 2016 - 2 AZR 395/15.

⁵⁰ Federal Labour Court, judgment of 22 September 2016 - 2 AZR 848/15.

⁵¹ A prime example is breach of a non-competition clause.

cases in which the employer harbours sufficiently specific suspicions, supported by facts, of ‘only’ **serious misconduct** on the part of the employee, but not of a crime committed while employed.⁵²

However, the covert surveillance of an employee suspected of serious misconduct is only permissible under **conditions comparable** to those applicable when investigating a crime. That requires and permits recourse to be had to the primary rule set out in the first sentence of section 26(1) except where the surveillance concerns the investigation of a crime committed while employed within the meaning of the second sentence. As the principle of proportionality is embedded also in the first sentence of section 26(1), the case-law principles on whether covert surveillance is permitted with a view to investigating specific suspicions of serious misconduct must be applied also in the context of that provision.⁵³ The Federal Labour Court evidently considers itself precluded, given the wording of the second sentence of section 26(1), from applying that provision directly and has instead reinforced the first sentence of section 26(1) with the enhanced requirements of the second sentence.⁵⁴ However, the outcome – and that is the crucial issue – is that the investigation of crime and the investigation of serious misconduct are treated equally.

2. Documented grounds for suspicion – what is required?

For investigative measures involving a serious interference in personal rights, the legislature requires documented grounds that justify a suspicion of a crime. Given this wording, it is logical that the Federal Labour Court considers an ‘initial suspicion’ to suffice.

It has held a ‘simple’ suspicion of that kind based on specific facts to be sufficient for the purposes of the second sentence of section 26(1) of the 2017 Act.⁵⁵ A ‘strong’ suspicion, which presupposes a high degree of probability of the commission of a crime, is not necessary, having regard to the provision’s wording. Also its spirit and purpose are consistent with that approach. The Federal Labour Court makes reference to the interpretation developed by the Federal Court of Justice (*Bundesgerichtshof, BGH*), which identifies the nature of a simple suspicion in criminal law as follows: It holds that having regard to the weight of the fundamental rights interference at issue, reasons for the suspicion are necessary that go beyond vague indicia and mere conjecture; the suspicion must be based on sufficient facts and more than simply negligible. Circumstances must exist which, in accordance with experience, also experience in criminal investigations, suggest to a considerable degree that someone whether as a perpetrator or participant has committed a listed crime; what is necessary is that, by reason of coherent elements of a factual nature, the suspicion already has some detail and substance.⁵⁶

Ultimately, however, the Federal Labour Court is not quite so strict. Despite the clear wording of the provision, it allows employers considerable flexibility concerning the timing of the documentation.

Consequently, an interference in the general right of personality must be excluded even if the employer ‘has not fully discharged their documentation obligations, which, as a rule, must be satisfied

⁵² Federal Labour Court, judgment of 29 June 2017 - 2 AZR 597/16.

⁵³ Federal Labour Court, op. cit.

⁵⁴ The lower court whose judgment was under appeal in this case (Higher Labour Court Baden-Württemberg: judgment of 20 July 2016 - 4 Sa 61/15) saw the issue differently. It held that the first sentence of section 26(1) of the 2017 Act covered only such measures as were not directed towards the detection of specific suspects. However, in the present case, the observations were targeted against the employee in question only on the basis of existing specific suspicions. For that reason, the measure had to satisfy the requirements of the second sentence of section 26(1). However, those were not met. The data collection was not carried out on grounds that justified the suspicion of a crime committed while employed. (...) An unauthorised act of competition does not constitute in itself the elements of a criminal offence.

⁵⁵ Federal Labour Court, judgment of 20 October 2016 - 2 AZR 395/15.

⁵⁶ Federal Court of Justice, decision of 11 August 2016 – StB 12/16.

before the data is collected'. The purpose of the documentation requirement, as the Federal Labour Court correctly emphasises at this point, is to facilitate a subsequent review of legality on the part of those individuals whose data was collected. However, no procedural prohibition on using the evidence obtained derives from that rule, at any rate, if, by way of specific facts advanced, at the latest, in subsequent legal proceedings, the employer can substantiate the suspicion of crimes and, as a result, a review of legality is ensured.⁵⁷ It hardly needs stating that to collate the suspicious facts is a simple exercise if the crime has already been resolved. In this way, both the intended purpose of the documentation obligation and the legality requirements established by the Federal Court of Justice are circumvented and this in spite of the Federal Labour Court's very own observation that the documentation obligations must, in principle, be satisfied before the data are collected. Given that the account of the facts set out in the judgment of the lower court (Higher Labour Court Cologne⁵⁸) did not indicate the existence of specific documentation of any particular kind whatsoever, it has to be presumed that an account of the suspicious facts set out in the pleadings is regarded as satisfying the documentation requirements.

3. Proportionality in the context of covert surveillance measures

Recourse to a measure processing employee personal data for the purposes of crime detection also presupposes, as set out in the second sentence of section 26(1) of the 2017 Act, that the processing of such data is necessary to investigate the crime and is not outweighed by the employee's legitimate interest in not processing the data, and in particular that the type and extent of the processing are not disproportionate to the reason. Here, too, the principle of proportionality – intrinsic to every interference in a fundamental right – features. The importance of this parallel relationship is regularly emphasised by the Federal Labour Court, also in the area of crime detection.

According to the Federal Labour Court, it is, in many cases, unnecessary to determine whether section 26 of the 2017 Act applies. When reviewing the proportionality of a search (in the case at hand of an employee's locker), the requirements derived from the second sentence of section 26(1) of the 2017 Act are no different to those derived directly from Article 2(1) of the Constitution for the purposes of reviewing the legality of an interference in the applicant's personality rights.⁵⁹

Given that, in the employment context, the right of personality, at any rate outside of the inviolable core of personal life, is not absolute, interferences may be justified by overriding interests of the employer. Whether an interference is justified in a particular case must be determined by a weighing of interests. Therefore, a monitoring measure can only be regarded as necessary, or a proportionate restriction on the general right of personality, if it is appropriate, necessary and reasonable. There must be no other options available to the employer that are equally effective for investigating the facts but less intrusive for the employees. In addition, the means of *monitoring* itself must satisfy the proportionality principle.

(a) Last resort principle

The principle of proportionality thus plays an important role in the context of particularly intrusive and repressive monitoring measures. That applies especially in the case of covert video surveillance, a measure that is particularly relevant in practice.

⁵⁷ Federal Labour Court, judgment of 20 October 2016 - 2 AZR 395/15.

⁵⁸ Higher Labour Court Cologne, judgment of 8 May 2015 - 4 Sa 1198/14.

⁵⁹ Federal Labour Court, judgment of 20 June 2013 - 2 AZR 546/12.

In its leading ruling,⁶⁰ the Federal Labour Court clearly identified the last resort nature of covert video surveillance. It held that the covert video surveillance of an employee is permissible if a definite suspicion of a crime or other serious misconduct to the detriment of the employer exists, less intrusive means of investigating the suspicion have been exhausted, covert video surveillance constitutes the only practical means remaining and, all things considered, is not disproportionate.

In the underlying legal dispute, in the light of considerable differences in the cash tills, there were suspicions of embezzlement directed against the checkout employees of a drinks store, which included the applicant. The fact that at the start of the surveillance operations suspicions were directed not exclusively towards the applicant did not make the surveillance disproportionate. Rather the purpose of the surveillance was to reduce the suspicion that already had been localised to a particular place and function to a single person. In addition, it was also the only possibility to exclude the remaining employees from the group of suspects. It was impossible to resolve the matter in a different way. The employer had already attempted, without success, to clarify the inventory differences by carrying out internal audit measures and checks in the stock management system. In addition, the work processes had been examined for errors. Following that, the only possible cause was misconduct by a member of the checkout staff. An effective form of surveillance using superiors or colleagues was not conceivable. In those circumstances, surveillance using overt cameras could not have clarified the cause of the differences. Overt video surveillance was not capable of confirming or dispelling the suspicions against the applicant. The suspicions concerned a crime committed by stealth. Conduct of such a furtive kind could, by its very nature, not be detected by surveillance that was openly publicised.

The second senate of the Federal Labour Court has confirmed this requirement many times,⁶¹ also overruling the objection that surveillance carried out secretly is not suited to resolving *crimes committed in the past*. According to the court, that objection overlooks, first, the potential indicative value that the repetition of certain conduct may have for the assessment of circumstances completed in the past. Second, the second sentence of section 26(1) of the 2017 Act refers in a general sense to the 'detection of crimes' which includes obtaining information – on the basis of specific factual elements – on suspected future criminal acts while employed.

(b) Chance discoveries

The principle of proportionality is also relevant when it comes to the question of following up on chance discoveries. The Federal Labour Court has been both clear and succinct in its dismissal of constitutional concerns in this context.⁶²

It held that covert video surveillance may be carried out to detect crimes committed by employees not only in the situation where it can be ensured that the surveillance covers only employees in respect of whom a detailed suspicion exists. Nor can a different conclusion be derived from the legislative wording. To the extent that the provision's wording 'might suggest a different interpretation' it is 'unsuccessful'. Although the group of suspects must be as narrow as possible, it is not absolutely necessary that a surveillance measure is restricted only to cover individuals in respect of whom a detailed suspicion exists.

The fact that in relation to some of the employees the monitoring measure is 'groundless' does not make it unlawful. If there are no means of investigating an existing suspicion against other employees less intrusive than the specific form of surveillance carried out, the interference – also – in the general

⁶⁰ Federal Labour Court, judgment of 27 March 2003 - 2 AZR 51/02.

⁶¹ Most recently, Federal Labour Court, judgment of 20 October 2016 - 2 AZR 395/15.

⁶² Federal Labour Court, judgment of 22 September 2016 - 2 AZR 848/15.

right of personality of the employees not under suspicion is justified.⁶³ In the underlying legal dispute, the employer had recorded an inventory loss in relation to merchandise from the areas of tobacco/cigarettes and non-food. The employer notified the Works Council that the reason for the resulting (covert) video surveillance was ‘theft of cigarettes/non-food’ and that the video surveillance was to be directed against employees D and M. The Works Council approved the video surveillance proposed. However, on analysing the video recording, it was clear that a third employee (neither D nor M) had scanned a ‘specimen deposit bottle’ kept in the checkout area, registered the return of an empty bottle, opened the till drawer and taken money from the till. The dispute now related to a completely different (and previously entirely irrelevant) act, not a theft in the area of cigarettes and non-food but a ‘fraudulent manipulation of the deposit system’ committed by an employee previously not under suspicion.

Ultimately, here, an interference in the fundamental rights of an initially uninvolved person was permitted on the basis that it (the interference) appeared justified in relation to third parties. That is not only problematic but also inconsistent from a constitutional perspective, because in other circumstances the Federal Labour Court considers the fact that a third party is concerned not to suffice.⁶⁴ It held that a prohibition on using data as evidence in court proceedings may only be considered if such use is associated with an interference in the general right of personality of the other party to the proceedings. However, an interference of that kind is said to be excluded if the impermissibility of the monitoring measure (in this case video surveillance) results simply from the fact that it concerns other employees (as third parties).

In other words, the fact that a third party is concerned is said, on the one hand, to be insufficient to prohibit reliance on data that has been processed and, on the other, to be capable of justifying data processing that affects individuals who are uninvolved. This flaw in the logic is neither intelligible nor justified.

C – Legal consequences of impermissible (further) processing of data

The legal consequences of impermissible data processing can be divided into two categories. First, it can result in prohibitions – of considerable practical importance – on the use of material both as a statement of fact and as evidence (section I). Second, it may give rise to compensation claims (section II).

I. Prohibitions on the use of material as a statement of fact and as evidence

The Federal Labour Court distinguishes between a prohibition on the use of material as a statement of fact and a prohibition on its use as evidence.⁶⁵ A prohibition on using material as a statement of fact is irrelevant if the employee sufficiently contests the corresponding facts stated by the employer. In those circumstances, the rule of section 138(3) of the Civil Procedure Code (*Zivilprozessordnung, ZPO*), which provides that facts that a party does not deny must be regarded as admitted, cannot operate. It does not have to be ‘deactivated’ by way of interpretation in accordance with the constitution. If, however, an employee abstains from contesting the employer’s account of the facts, possibly on the basis that this would involve an untruth, a prohibition on using the material as a statement of fact means that the employer’s ‘tainted’ account must be treated in procedural terms as denied. Hence, issues of evidence become relevant. In that situation, a corresponding prohibition on the employer using the material as evidence may apply, meaning that their account of the facts – treated as denied

⁶³ Federal Labour Court, op. cit.

⁶⁴ Federal Labour Court, judgment of 20 October 2016 - 2 AZR 395/15.

⁶⁵ Federal Labour Court, judgment of 23 August 2018 - 2 AZR 133/18.

– also remains unproven. Thus, a prohibition on using the material means that for the purposes of its ruling the court may not treat the facts in question as undisputed (prohibition on use of the material as a statement of fact) nor as proven by reason of the tainted evidence (prohibition on use of the material as evidence).⁶⁶

It must be noted, however, that a prohibition on using material as a statement of fact or as evidence, resulting from an infringement of the general right of personality of one of the parties, may arise in labour court proceedings only where it is necessary to interpret procedural law in accordance with constitutional principles. Neither the Civil Procedure Code nor the Labour Courts Act (*Arbeitsgerichtsgesetz, ArbGG*) contain provisions governing the procedural use of information or evidence unlawfully obtained. Rather the right to a hearing in accordance with the law, provided for in Article 103(1) of the Constitution, and the principle that the court must evaluate evidence in accordance with its own conviction (section 286 of the Civil Procedure Code) require, in principle, that the statements of facts made by the parties and the evidence they have offered is taken into consideration.⁶⁷ Consequently, in order to apply a prohibition on using material as evidence, special justification and a statutory basis are needed.⁶⁸ The same applies for a prohibition on the use of material as a statement of facts.

The provisions of the Federal Data Protection Act setting out the conditions under which the processing of data is permissible do not limit the admissibility of facts and arguments by the parties and reliance on them in proceedings before labour courts. Admittedly, the provisions of the Federal Data Protection Act give specific expression to and update the protection provided by the right to informational self-determination. They govern the extent to which, within the material scope of the legislation, interferences in these legal rights are permissible. However, they do not specify as such that courts may not take account of information or evidence obtained in violation of their requirements when determining the facts in labour court proceedings.

For that reason, a prohibition on the use of material as evidence or a prohibition on relying on facts not even denied can only be considered where this is absolutely necessary because of a constitutionally protected position of one of the parties. A court exercises state authority when facing the parties. Consequently, under Article 1(3) of the Constitution, it is bound by relevant fundamental rights and obliged to hold proceedings in accordance with the rule of law.⁶⁹ Substantive fundamental rights such as Article 2(1) of the Constitution can also impose demands on court proceedings if the disclosure and use of personal data are at issue, which are constitutionally protected against third parties learning of them. For that reason, a court must examine whether the use of personal data obtained in secret and information resulting from the data is compatible with the data subject's general right of personality. According to the Federal Labour Court, a court may not **maintain or extend** an existing infringement of fundamental rights.⁷⁰ If the procedural use of an element of evidence interferes with the general right of personality of a party, the interest in using the evidence and in the functioning of the administration of justice is outweighed by the interest in protecting that fundamental right **unless** additional aspects, going beyond the simple interest in evidence, are also involved. The mere interest in obtaining evidence does not in itself suffice. Rather, this specific form of obtaining information and evidence must prove justified.⁷¹

⁶⁶ Federal Labour Court, op. cit.

⁶⁷ Federal Labour Court, judgment of 22 September 2016 - 2 AZR 848/15.

⁶⁸ Federal Labour Court, judgment of 21 November 2013 - 2 AZR 797/11.

⁶⁹ Federal Constitutional Court, judgment of 13 February 2007 - 1 BvR 421/05.

⁷⁰ Federal Labour Court, judgment of 27 July 2017 - 2 AZR 681/16.

⁷¹ Federal Labour Court, judgment of 22 September 2016 - 2 AZR 848/15.

Michael Fuhlrott and Thomas Schröder⁷² conveniently summarise this somewhat convoluted case-law as follows:

‘If the balancing test in the second sentence of section 32(1) [of the 2009 Act] – or the similarly structured case-law of the Federal Labour Court – can already incorporate the special circumstances [...] arguing against a prohibition on the use of the material as evidence and thus take full account of them in the question of whether the relevant surveillance measure is permissible under data protection law, there remains little scope in fact for a judicial reappraisal; hence, no room exists for a separate decision on the use of the material if the interests of the parties have not changed. The comprehensive weighing of interests, in line with the principle of proportionality, provided for in the structure of the authority established in the second sentence of section 32(1) [of the 2009 Act] (or the principles of case-law developed by the Federal Labour Court to essentially the same effect) incorporates in other words already the question whether, notwithstanding the interference in the personal rights of the data subject, exceptionally, special aspects may justify the use of the material as evidence.’

The Federal Labour Court recently confirmed this approach.⁷³

A prohibition on using the material is excluded if the comprehensive weighing of the competing interests and fundamental rights carried out under the general clause of section 32(1) of the 2009 Act favours the employer. Only if the measure in question was not permitted under the 2009 Act does it have to be separately examined whether the court's use of the information or evidence obtained by way of that measure would constitute an infringement of fundamental rights. An infringement of that kind may not exist if the measure carried out by the employer was impermissible simply because the data collection breached the (fundamental) rights of other employees or the provision of ordinary legislation infringed did not include a ‘fundamental rights element’ of its own.

Nothing in this test has changed following the entry into force of the GDPR. As yet, the Federal Labour Court has avoided the need to address⁷⁴ whether the admissibility of facts and offers of evidence and reliance on such by labour courts falls within the scope of the GDPR⁷⁵ and whether the decision by the legislature that even after the entry into force of the 2017 Act such matters continue to be determined solely on the basis of the Labour Courts Act and the Civil Procedure Code is covered by the derogation provided for in Article 88 of the GDPR. At any rate, the courts’ reliance on *permissible* statements of fact and evidence (Article 6(1)(e) in conjunction with Article 6(3) of the GDPR in conjunction with section 3 of the 2017 Act) constitutes proportionate and, thus, permissible data processing under the GDPR and the 2017 Act.

II. Compensation

Neither the 2017 Act nor the GDPR oust the right to compensation based on section 823(1) of the Civil Code (*Bürgerliches Gesetzbuch, BGB*) for a **serious** infringement of personality rights. Whether an infringement of personality rights is sufficiently serious to justify the payment of compensation can only be determined in light of the circumstances of the individual case. In carrying out that overall assessment, particular consideration must be given to the significance and scope of the infringement,

⁷² M. Fuhlrott and T. Schröder, ‘Beschäftigtendatenschutz und arbeitsgerichtliche Beweisverwertung’, *Neue Zeitschrift für Arbeitsrecht* 2017, 278.

⁷³ Federal Labour Court, judgment of 23 August 2018 - 2 AZR 133/18.

⁷⁴ Federal Labour Court, judgment of 23 August 2018 - 2 AZR 133/18.

⁷⁵ See Articles 2, 9(2)(f) and 55(3) and recital 20 of the GDPR.

the reason and motive of the wrongdoer and the degree of fault involved.⁷⁶ In line with the case-law of the Federal Court of Justice,⁷⁷ an award of compensation is not dependent on an injury requiring psychological treatment that is causally related to the infringement of personality rights. This is because compensation for infringement of the general right of personality does not constitute compensation for pain and suffering (i.e. non-pecuniary loss) within the meaning of section 253(2) of the Civil Code but a payment stemming from the mandate to provide protection under Article 1 and Article 2(1) of the Constitution.⁷⁸

In parallel with this right to compensation, which is dependent on a serious interference in rights of personality, Article 82 GDPR provides in addition that any person who has suffered material or non-material damage as a result of an infringement of the GDPR shall have the right to receive compensation from the controller or processor for the damage suffered. There are indications in recital 146 that compensation may be claimed for infringements not entailing a “serious” infringement of rights of personality. According to the sixth sentence of that recital, data subjects should receive full and effective compensation for the damage they have suffered. Leading academic commentators conclude, as a result, that the right to compensation cannot be restricted to instances of a serious infringement of rights of personality, as provided for in the abovementioned case-law of the Federal Labour Court and Federal Court of Justice.⁷⁹

D - Outlook for the future

The numerous Federal Labour Court rulings on employee data protection have given *adequate* shape to this area of law, but nothing more. The rulings appear – despite the necessary criticism – balanced and are characterised by a considerable sensitivity for the fundamental rights at issue. This case-law that has developed over decades is no substitute, however, for comprehensive and long-overdue legislation to regulate employee data protection. Practitioners must continue to make do with rulings given in individual cases, where results often vary depending on the sector involved.⁸⁰

However, the legislature is likely to have no choice but to adopt more precise foundations for employee data protection, as it appears reasonable to harbour certain doubts whether section 26 of the 2017 Act is compatible with the derogation provided for in Article 88(1) of the GDPR. Namely, it is more than questionable whether the general balancing test that lies behind the necessity requirement of section 26 of the 2017 Act sets out *specific* rules for the employment context.

⁷⁶ Federal Labour Court, judgment of 19 February 2015 - 8 AZR 1007/13.

⁷⁷ Federal Court of Justice, judgment of 17 December 2013 - VI ZR 211/12.

⁷⁸ Federal Labour Court, *op. cit.*

⁷⁹ C. Piltz, Article 82 GDPR, paragraph 13, in P. Gola (ed.) *Datenschutz-Grundverordnung Kommentar*, 2nd edn, 2018.

⁸⁰ For example, a different outcome might have been reached in the ruling on the workload statistics scheme in the context of a firm operating simply as a call centre, as a greater degree of surveillance appears generally accepted in call centres.