Right to evidence – the German Perspective

Sebastian Kolbe

The Problem

From time-to-time employees violate their employment contracts. They steal at their workplace, threaten colleagues or disturb the cooperation based on mutual trust in other ways. If a German employer wants to dismiss those employees, he regularly needs proof of the violation to uphold the termination in court: The German Protection against Dismissal Act (Kündigungsschutzgesetz) is strict, strongly implemented by the labour courts and provides comprehensive protection for employees. Especially in cases of theft the necessary proof nowadays often comes from videos that the employer recorded – openly or clandestinely.

In both cases German law requires consent from the workers' council (Betriebsrat) to the video-surveillance, § 87 Abs. 1 Nr. 6 Works Constitution Act (Betriebsverfassungsgesetz). If the employer could not convince the workers' council or chose to ignore its rights, the labour courts have to decide whether to allow or dismiss a recording that shows an employee stealing.

The Decision

That was exactly the case which the German Federal Labour Court (Bundesarbeitsgericht or BAG) had to decide in 2016[1]: a motor mechanic stole spare parts from the stocks of his employer's garage. The BAG upheld its (heavily contested, but still) constant line of rulings and stated (once again) that the violation of the workers' council's rights does not per se prevent the use of the video recordings in court. Nonetheless, the BAG could not admit the recordings as evidence itself, but sent the case back to the regional labour court (Landesarbeitsgericht or LAG) for further examination: The LAG had to clarify whether or not the recording violated the individual rights of the mechanic himself, especially his rights to data protection grounded not only in statute law but also in the German Fundamental Law (Grundgesetz).

Background in German law

Although German labour proceedings are governed by a special statute, the Labour Courts Act (Arbeitsgerichtsgesetz), this statute refers in many essential questions to the general rules for civil proceedings, laid out in the Code of Civil Procedure (Zivilprozessordnung or ZPO). This concerns the main body of the law of evidence including the question in point. Although there is no (clearly) written right to evidence for either party to be found in the ZPO, such a right is recognised by the courts and is held to be a highly important element of German procedural law[2]. This is grounded not

1 BAG 20.10.2016 – 2 AZR 395/15, Neue Zeitschrift für Arbeitsrecht 2017, 443.
2 S. Habscheid, Das Recht auf Beweis, Zeitschrift für Zivilprozess 1996, 306 ff.

only in the rights of plaintiffs and defendants, but also seen as a value for the justice system itself: every time a relevant evidence is dismissed, the court has to decide on incomplete facts and thus cannot reach a "fair" judgement.

For that reason, even evidence acquired under violation of the law can be allowed by courts. In such cases, the court will weigh up the addressed interests of the respective party and the justice system against the violated rights of the opposing party[3]. An interesting example outside the scope of labour law is the recording of a so called dashcam, mounted on the dashboard of a car. Such a recording necessarily violates the rights of other people to data protection, which are today governed by the GDPR. On the other hand, this violation is minimal and lasts only for a short moment – while the driver has a vital interest in gaining evidence of a possible car crash. Thus, the Federal Court of Justice (Bundesgerichtshof or BGH) has ruled the evidence admissible[4].

Conclusion

The German law on civil procedure acknowledges a right to evidence. Even evidence acquired unlawfully can be admissible. Nonetheless, the decision to admit evidence acquired under violation of the law in general and especially rights of the opposing party depends on the merits of every single case. This dependence can lead to a high degree of uncertainty for a plaintiff who has to decide whether or not to sue.

Moreover, it encourages strategies of avoidance. E.g.: German worker's councils can react (and many have reacted) on the referenced rulings of the BAG by stipulating collective agreements with the employer (Betriebsvereinbarungen), that prohibit the use of videos in court which the employer recorded under violation of the rights of the worker's council[5]. Whether these collective agreements can overrule civil procedural law – and thus an element of the public law – is up to debate: so far, the BAG did not need to decide this question[6].

Sebastian Kolbe
Professor for Civil Law and Labour Law at Bremen University,
Director of bigas (Bremen Institute for Gender, Labour und Social Law)

3 Prütting, in: Münchener Kommentar zur ZPO, 6th Ed. (2020), § 284 recitals 64 ff.
4 BGH 15.5.2018 – VI ZR 233/17, Neue Juristische Wochenschrift 2018, 2883.
5 Maschmann, in: Richardi, Betriebsverfassungsgesetz, 17th Ed. (2022), § 87 recital 546.
6 S. BAG 31.1.2019 – 2 AZR 426/18, Neue Zeitschrift für Arbeitsrecht 2019, 893.