

## Employment & Benefits - Austria

### Who pays for employee surveillance by detective?

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#### Introduction

In divorce cases, it is settled case law that the divorcee suspected of breaching his or her marital duties will be liable for the costs incurred to hire a detective to gather evidence that substantiates the plaintiff's case. The same principle applies to 'unfaithful' employees – for instance, where an employer wishes to collect evidence corroborating potential grounds for dismissal or a breach of restrictive covenants. One crucial prerequisite for an employee to be considered liable for surveillance costs incurred by an employer is a well-founded suspicion of specific misconduct on the part of the employee.

In a recent decision<sup>(1)</sup> the Supreme Court dealt with a fact pattern that prompted different decisions from the lower courts.

#### Facts

The employer was in the heating system and chimney business. As chimney business was declining, the employer signed a franchise agreement with a tiled stove producer, which also promoted the employer's products. However, the employer's business did not develop as planned: the franchisor had continued to contact potential customers directly, thereby breaching the franchise contract. The franchisor then terminated the franchise contract. Several months later, an employee of the heating business terminated his employment contract, claiming that he wanted to start his own business. Rumours spread that employee had close contact with the chief executive officer (CEO) of the former franchisor.

These actions took place during the former employee's notice term (ie, during an ongoing employment relationship), when the employee was prohibited from competing with his employer. The employer believed that the situation was suspicious and hired a detective to investigate. Surveillance revealed that the employee was seen on the former franchisor's business premises on eight days in one given month. He even accompanied the former franchisor's CEO to several business meetings. The CEO and the employee also knew each other from hunting expeditions. The employee justified his conduct by claiming that he went to the former franchisor's premises for private purposes only and during his leisure time. He also claimed that he wished to learn about the production process of tiled stoves, which was not a competing activity since the franchise contract between his employer and the former franchisor had already been terminated.

#### Decisions

The district court held that the employee should be liable for the detective costs, amounting to €14,500, since the surveillance was necessary to prove a breach of contract. The appellate court reversed, arguing that the surveillance could not have been triggered by the employee's misconduct because the franchise contract had already been terminated when the employer had hired the detective to investigate the employee. As the employer and former franchisor were no longer competitors, the detective costs were not adequately incurred by the employee's misconduct.

In order for the employee to be liable for the detective costs, he would have had to have breached his contract, or the circumstances would have had to be such that this conclusion could reasonably be drawn. However, in the case at hand, it should have been clear to the employer that without a franchise contract, the employee could not have been in breach of the contractual non-compete clause.

The Supreme Court confirmed this decision, citing previous case law according to which a defendant cannot be liable for detective costs where surveillance was apparently unnecessary or unreasonable.

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The Supreme Court also offered another argument for the lack of reasonableness. The facts showed that the employer could not have claimed damages for breach of the non-compete clause because it did not contest that the tiled oven business it started generated no profits. Thus, surveillance of the employee substantiated no claim.

### Comment

Employers should think twice before incurring costs for detective surveillance. They can claim those costs from employees only where surveillance confirms misconduct and such misconduct warrants a valid, actionable claim.

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### Endnotes

(1) 8 ObA 88/13v.

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