

December 20 2023

# Supreme Court on breach of trust

GRAF ISOLA Rechtsanwälte GmbH | Employment & Immigration - Austria

> [Secret recording with mobile phone](#)

> [Celebrations during sick leave](#)

> [Comment](#)

In two recent decisions,<sup>(1)</sup> the Supreme Court dealt with dismissal due to lack of trustworthiness.

One case concerned secret recordings made by an employee on her mobile phone. The other case concerned attending a party while on sick leave. Both cases are incomprehensible from the employer's point of view, but the Supreme Court ruled in favour of the employer in only one of the two cases.

## Secret recording with mobile phone

### Facts

An employee of the board secretary's office left her room for a short time on a Friday, but placed her mobile phone next to her PC and activated the audio recording function to eavesdrop on a board member and her superior. She wanted to know what was being said about her in her absence.

The mobile phone was discovered. The board member said that there had been a massive breach of trust and that he would have to think about it over the weekend. In passing, he wanted to know from the employee whether she could conceptualise a reorganisation of the board secretariat, as that was her area of responsibility. Irrespective of this, he wished the employee a good weekend.

On Monday, the employee was dismissed.

The employee sued, arguing that she had not recorded her own conversation, but someone else's, and that there was no case law on the matter. Furthermore, the employer had waived the right to dismiss. After all, he had offered her the prospect of a reorganisation of her area of responsibility and said goodbye to her at the weekend with kind words.

### Decision

Like the previous instances, the Supreme Court could not accept these attempts at justification.

The secret recording of a conversation with the employer constitutes a breach of trust that justified dismissal. There has been relevant case law on this kind of instance for 30 years. In this case, however, the conversation recorded was not between the employee and her employer but another party (her superior) and the employer (represented by the board member). However, this does only make the situation worse. While recording a personal conversation is not a crime, recording another person's conversation is.

Regarding the alleged (implied) waiver, the Supreme Court only briefly stated that the employee could not conclude from a polite greeting, or a possible organisational change offered to her that the employer would not further pursue the matter.

## Celebrations during sick leave

### Facts

An employee called in sick in July. He had depression. The doctor treating him did not impose any restrictions on going out or bed rest. She recommended walks with the dog and meetings with friends. In August, the plaintiff employee took part in the 35th anniversary celebration of his motorbike club, and the exuberant celebration was posted on various social media channels.

The plaintiff was dismissed. In the proceedings, this step was justified on the grounds that the plaintiff had negatively influenced the course of the illness by taking part in the party, thereby delaying the healing process.

### Decision

The Supreme Court confirmed that sick employees are obliged to return to work as quickly as possible. Medical instructions may, therefore, not be seriously violated. The same applies to common-sensical behaviour during sick leave according to general life experience. If these principles are disregarded, an employee violates their fiduciary duties.

However, according to the Supreme Court, there is no general rule that sick persons require special rest at night and that a disturbance of the night's rest in any case jeopardises the healing process.

Apart from this, a long party does not mean that the plaintiff had not slept enough.

The employer also failed to prove how an all-night party in the specific case could have prolonged the plaintiff's mental illness or delayed the recovery of his ability to work.

The defendant employer had not denied that the plaintiff employee suffered from depression.

The only legally decisive factor in such constellations is whether, based on an objective standard, there is behaviour during sick leave that delays the healing process. The defendant employer failed to provide this evidence.

## Comment

In the era of smartphones and social media, the right to one's own word and image is less and less respected and regularly violated by postings. The Supreme Court has once again put a stop to this type of nuisance in an employment context and made it clear that recordings of conversations are inadmissible even if a perceived disadvantage is to be averted.

However, the Supreme Court is far more generous when it comes to a further grievance. Cases of "burn-out" and similar depressive moods are increasing at an almost epidemic rate. Treating doctors often recommend staying away from work for as long as possible and enjoying life – without investigating the cause of the ailment in detail. Employees are often only too happy to follow this advice. If an employer then wants to stop these cases, it is key that ensuing litigation is well prepared and evidence at hand. Otherwise, the employer is deemed not to have done their "homework" and to have disregarded their own burden of proof.

*For further information on this topic please contact [Jakob Widner](mailto:j.widner@grafisola.at) at GRAF ISOLA by telephone (+43 1 401 170) or email ([j.widner@grafisola.at](mailto:j.widner@grafisola.at)). The GRAF ISOLA website can be accessed at [www.grafisola.at](http://www.grafisola.at).*

#### **Endnotes**

(1) OGH 21 April 2023, 8 ObA 18/23i and OGH 27 September 2023, 9 ObA 67/23b.