LEGAL UPDATE LABOUR AND EMPLOYMENT LAW

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Data protection in operational integration management

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Operational integration management (OIM) has been set up as a tool to manage employee integration after periods of illness. OIM – or rather the lack thereof – is especially important in the event of dismissal due to ill health. This is where things get complicated, as the official requirements for initiating the OIM process have continued to increase in recent years. Invitations and information letters sent to employees play a central role here. If employees reject an offer for OIM, it is only later verified whether the invitation letter was correctly drafted once the employee has been dismissed due to ill health. Even small inaccuracies here may lead to the dismissal being void and unenforceable. A new decision of the Federal Labour Court (Bundesarbeitsgericht, BAG) (judgment dated 15 December 2022, 2 AZR 162/22) which examines the relationship between OIM and data protection is therefore of great importance in this regard.

Decision of the BAG

In May 2019, the claimant had been unfit for work due to illness for around five years. The employer offered the employee OIM and a corresponding invitation and information letter was sent to her. Part of the documentation was a pre-formulated data protection consent declaration. The claimant stated that she wanted to participate in OIM, however she did not sign the data protection consent form. Then the employer told the employee that OIM could not be carried out as it would be necessary to collect personal data. The employer subsequently contacted the Integration Office for permission to terminate the employment contract, which was granted.

The BAG ruled that the termination was unlawful, despite the consent of the Integration Office. The judgment stated that errors had occurred during the invitation process. The court held that the employer had incorrectly interpreted the relationship between OIM and data protection. In accordance with Section 167 (2) sentence 4 of the German Social Code, Volume IX (SGB IX) it is the employer's responsibility to clarify the aims of OIM with the employee, as well as the type and scope of the data used. The court stated that the Social Code did not contain the obligation to demand that a consent declaration for the processing of personal data (concerning health) be signed.

In other words: if an ill employee wishes to participate in OIM, the OIM process must also be then commenced even if consent for data processing has not been granted. The BAG held that even without consent, OIM could have been

initially commenced without bias. The aims and options in terms of OIM should have been initially discussed together. It could have been later clarified whether data would need to be collected. As the claimant would have availed herself of the opportunity, the court ruled that the dismissal due to the lack of OIM was disproportionate.

Comments

The extensive case law on OIM has been further enriched and consequently the correct drafting of an OIM invitation has become a challenge with potentially wide-reaching consequences for employers. Even with the greatest care there is the risk that the courts will identify a (previously unknown) formal error. The employer in the above proceedings had intended to do everything correctly, even regarding data protection. This caution was, however, their downfall. This judgment gives employers a reason to once again critically review the documents they use to invite an employee to OIM. A proper OIM invitation must contain the following:

- Reference to the fact that taking part in OIM is voluntary for the employee (whereas it is obligatory for the employer)
- Reference to the fact that it is a non-biased process (the law does not regulate the arrangement/configuration of OIM)
- Reference to the persons that could potentially take part (this reference must state that the employee can choose)
- Reference to the aims of OIM as well as the type and scope of the data (concerning health) that is to be collected.
- A statement that it is not mandatory to give consent under data protection law.

Consent under data protection law should no longer be requested with the invitation letter. This should take place after the first meeting at the earliest. However, an OIM invitation must still state that it is not mandatory to give consent under data protection law.

Note
This overview is solely intended for general information purposes and may not replace legal advice on individual cases. Please contact the respective person in charge with GÖRG or respectively the author Jens Völksen on +49 221 33660-504 or by email to jvoelksen@goerg.de. For further information about the author visit our website www.goerg.com.

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