

Procedural obstacles for employees when bringing a claim to receive data related to their behaviour and performance

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Can employees demand to receive all data their company processes about their behaviour and performance? The Federal Labour Court (Bundesarbeitsgericht, BAG) recently ruled on this matter once again in proceedings against Daimler Benz AG (16/12/2021 – [2 AZR 235/21](#)).

As part of the unfair dismissal proceedings the claimant, a former senior manager, requested a copy of the behavioural and performance-related data held by the company about them from their former employer. The employer refused to provide this as it included data related to internal compliance investigations and they argued that the identity of the whistleblower must remain confidential. The Stuttgart Labour Court (Arbeitsgericht) (5/6/2019 – [3 Ca 4960/18](#)) and the Baden-Württemberg Regional Labour Court (Landarbeitsgericht, LAG) (17/3/2021 – [21 Sa 43/20](#)) by and large upheld the complaint in both cases. However, the BAG overturned the decisions of both lower courts.

Even if the written opinions of the BAG were not yet available, the BAG would most likely have abided by its previous decision from 2021 (27/4/2021 - [2 AZR 342/20](#)). The BAG dismissed the claim of the former employee who requested a copy of emails be handed over as inadmissible on the grounds that the details of the claim lacked certainty. The high requirements for the specific description of the data that is requested to be disclosed can be inferred from this decision. Merely repeating

the wording of [Art. 15 \(3\) of the General Data Protection Regulation \(GDPR\)](#) in the claim, for example, would not be sufficient. The wording of the appeal before the BAG, in which the claimant requested to be provided with a copy of all emails that underwent processing by the defendant and which were sent to or from the claimant's work email address, or in which the claimant was named, likewise did not satisfy the certainty criteria. According to the decision by the BAG, the details of the claim requesting access to data must be much more precise, so that in enforcement proceedings there is no doubt to which specific emails (or data) the judgment relates.

Employees usually do not know what data their employer has stored about them and a precise description is virtually impossible without access to this data. Effective legal protection is therefore almost exclusively impossible without action by stages (where issues arising at various stages of action are tried separately). Action by stages is initially about discovery. Specific data can then be subsequently requested to be handed over. Such proceedings are, however, very time intensive and thus frequently not in the interests of the claimant.

The decision of the BAG may provide relief for employers but increasingly there is a tendency for terminated employees to file a claim demanding that their employer handover data in unfair dismissal proceedings in order to gain procedural leverage. The procedural obstacles that employees must successfully overcome to gain access to their data remain high.

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 Lena Klever on +49 221 33660-544 or by e-mail lklever@goerg.de. For further information about the author visit our website www.goerg.com.

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