

## LEGAL UPDATE LABOUR AND EMPLOYMENT LAW

Munich, 28. August 2023

# Dismissal due to degrading statements made in private chat groups

Ulrike Schmitt

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The employer was informed by one employee that in a private group chat some other employees had made statements that were highly offensive, racist, sexist and incited violence towards management and other employees. The Federal Labour Court (Bundesarbeitsgericht, BAG) was responsible for deciding whether these statements could be considered the basis for dismissal on grounds of conduct or rather they were to be viewed as private statements from a "protected environment" so that they were unable to support any HR measures taken by the employer.

### Justified expectation of confidentiality only applicable in exceptional cases

In circumstances of this type, the question has always arisen whether statements not made on the employer's premises, but rather in a private environment and, if applicable, to friends or even family members are to be considered to be "confidential" and thus cannot necessarily form the basis for sanctions under employment law.

After a recent [decision of the BAG dated 24 August 2023 \(case no.: 2 AZR 17/23\)](#) employees could not, however, automatically assume that statements made in a private chat group would not have consequences under employment law.

In the case before the BAG, seven employees, who had already been friends with each other for many years, two of them even being brothers, formed a chat group on their private smartphones. There they made statements that were highly offensive, racist, sexist and incited violence towards management and colleagues. While the lower court accepted that the statements were a component of confidential communication and did so to protect the reputation of the affected persons, the BAG came to the conclusion that the dismissed employees may only rely on a justified expectation of confidentiality in exceptional circumstances.

### Special explanation required by the employee

The BAG held that only when the employees in the chat group *"are able to benefit from special personality rights protection of a sphere of confidential communication"*, would the expectation be justified that statements made in the chat group are confidential and remain so. Whether such a "sphere of confidential communication" can be accepted depends on the content of the messages exchanged as well as the size and the employee composition of the chat group, said the court. The court further stated that if racist, offensive or sexist statements are made in chat group about colleagues, the dismissed

employee must provide a special explanation of why they are justified in expecting that the content of the chat messages would not leave the group of employees.

## Comments

That the BAG easily accepted that there was a justified expectation of confidentiality here may not at least have had anything to do with the quality of the actual statements made, meaning the decision of the BAG can also be recognised as making a statement against inhuman and derogative comments in social media. This does not constitute a legal vacuum. On the contrary, the BAG made it clear that degrading statements themselves then are of relevance to (employment) law if they are rather made in a private environment, to the extent that the

employees cannot expect confidentiality there. It is then up to the employees to demonstrate why they have assumed that they are specifically able to expect confidentiality.

The employees must, therefore, deal with the fact that offensive, defamatory, and in particular degrading statements in relation to people in their professional environment may even lead to the loss of their job. As these ultimately have an effect inside the operational sphere and therefore affect the protected interests of the employer in a significant manner, who does not have to tolerate such statements, as soon as they become aware of them. In fact, the employer may take this into account when giving notice to ordinarily or extraordinarily terminate the employment contract.

### 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 Ulrike Schmitt by email to [uschmitt@goerg.de](mailto:uschmitt@goerg.de) or by phone +49 89 3090667-574. For further information about the author visit our website [www.goerg.com](http://www.goerg.com).

## Our Offices

GÖRG Partnerschaft von Rechtsanwälten mbB

### BERLIN

Kantstr. 164, 10623 Berlin  
Phone +49 30 884503-0  
Fax +49 30 882715-0

### HAMBURG

Alter Wall 20 - 22, 20457 Hamburg  
Phone +49 40 500360-0  
Fax +49 40 500360-99

### FRANKFURT AM MAIN

Ulmenstr. 30, 60325 Frankfurt am Main  
Phone +49 69 170000-17  
Fax +49 69 170000-27

### COLOGNE

Kennedyplatz 2, 50679 Cologne  
Phone +49 221 33660-0  
Fax +49 221 33660-80

### MUNICH

Prinzregentenstr. 22, 80538 Munich  
Phone +49 89 3090667-0  
Fax +49 89 3090667-90