LOWER SAXONY REGIONAL LABOR COURT ON DISMISSAL DUE EXCESS E-MAIL USAGE DURING WORKING HOURS

HEADNOTE Excessive use of e-mail privileges to send or receive personal messages during working hours may constitute grounds for dismissal (Lower Saxony Regional Labor Court, judgment of 31 May 2010, 12 Sa 875/09).

FACTS The plaintiff had been employed by the municipality against which he filed the action for more than 30 years. At the time of his dismissal, he was employed as assistant office manager and received gross remuneration in the amount of Đ 4,800.00 per month. The municipality dismissed the plaintiff for cause with immediate effect, citing among other reasons excessive use of his e-mail account for personal purposes. The defendant justified this dismissal by arguing that the plaintiff had been using his work e-mail account so much that his work performance had suffered considerably. The plaintiff had in fact been "chatting" online to a considerable extent during working hours in connection an online dating service. Although the plaintiff deleted the e-mails he had sent, those that he received remained on the computer. His employer accessed the e-mails and based his dismissal on, among other things, the obvious volume of personal usage of the employee's e-mail account.

The data accessed by the defendant covered a period of seven consecutive weeks. The private e-mails received by the plaintiff during this period came to a total of 774 printed DIN A4 pages. On individual days the plaintiff received between 139 and 183 such e-mail messages. The plaintiff filed an action seeking protection against dismissal.

DECISION After the claim for protection against dismissal was granted in the first instance, the Lower Saxony Regional Labor Court reversed this decision upon the appeal of the defendant and dismissed the action (judgment of 31 May 2010, Case Ref.: 12 Sa 875/09). The Regional Labor Court confirmed the dismissal of the plaintiff without notice in this case since he had significantly neglected his obligations toward his employer through excessive use of his work e-mail account. The court reasoned that any employee would realize that the possibility of using a work account for private purposes did not constitute permission to grossly neglect performance of occupational duties. Depending on the nature and scope of the failure to perform occupational duties, an employee must even reckon with summary dismissal with no formal written warning beforehand. This would apply in particular in the case of excessive use of e-mail functionality that resulted in days on which an employee either failed to work at all or worked only sporadically. The Regional Labor Court based its opinion on the assumption that it takes approximately 3 minutes to "process" (reading and replying to) an e-mail message. As a result, it can be assumed that an employee would either not be able to work or would be able to work only to an insignificant extent on days on which 130 or more e-mails are "processed." Given the remuneration of the plaintiff, the defendant should also not have to accept such conduct on the part of the former. The court also ruled that the private e-mails found on the computer at the plaintiff's place of work were not privileged. Although the court accepted that permission to use the work e-mail account for private purposes had been granted, at least tacitly, it also found that access to the data by the defendant was not governed by the provisions of law pertaining to the privacy of correspondence, posts and telecommunications. The reasoning behind this was that the data were in this case not accessed by the defendant in connection with the process of communication itself but rather afterwards once the e-mails were stored in the system. The court reasoned that the relative merits must be weighed in such cases to determine whether an employer has the right to access and make use of data for evidentiary purposes. In the case at issue, the court concluded that the interest of the employer in clarification and assessment of the situation outweighed the right of personality of the employee, which meant that the use of the data for such purposes was permissible.

COMMENTS In everyday practice, the decision of the Lower Saxony Regional Labor Court is important for reasons that extend beyond the issue of protection of employees against dismissal since employers frequently have a (legitimate) interest in archiving the e-mails of their employees stored in their systems. In fact, they are even legally required to do so in cases covered by section 147 of the Fiscal Code (Abgabenordnung – AO) or section 257(1) of the German Commercial Code (Handelsgesetzbuch – HGB). At the same time, however, employers are considered service providers within the meaning of section 3 no. 6 of the Telecommunications Act (Telekommunikationsgesetz – TKG)

if and to the extent that they or their employees allow the use of work e-mail-accounts for private purposes. In that respect, however, such employers are subject to the restrictions pertaining to the privacy of correspondence, posts and telecommunications. The Lower Saxony Regional Labor Court resolved this conflict at least somewhat by ruling that access by employers to e-mails stored in a system (inbound, outbound and other files) is in any case allowed if the interests of the employer outweigh the rights of personality of an employee. Caution is nevertheless advised in such cases since the rights of personality of the employee may also be found to outweigh the interests of the employer.