Dismissal Due to Illness: Sense and Senselessness of Occupational Integration Management

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Problem

The standards that must be met in order to dismiss an employee on grounds of illness are high. In order to make a good case for the dismissal of an employee due to illness in the case of a dispute over protection against dismissal, Occupational Integration Management must precede the dismissal. If an employee is incapacitated and absent from work for more than six weeks at a time or for more than a total of six weeks in the course of a year, the employer must – on condition that the respective employee is willing – meet with the employee to discuss the possibilities for overcoming the incapacity and services or help that would be required to prevent reoccurrence and maintain the employment relationship. Since this essentially sums up everything the law has to say on Occupational Integration Management, the remaining requirements as regards implementation must be inferred from the extensive case law on Occupational Integration Management. To some extent, the requirements found in the case law are so exaggerated as to de facto preclude the possibility of dismissal on the grounds of illness.

Implications for practice

Due to the fact that the requirements reflected in the case law are to some extent exaggerated, an employer cannot afford to commit any errors in the context of Occupational Integration Management.

Procedure

The initial interview to which the employee must be invited in writing provides the basis for Occupational Integration Management. The invitation should be carefully prepared. Among other things, the employee must be informed of his or her rights as regards data protection. Employers will find that they have to pay dearly for even the most minor of errors.

Occupational Integration Management must be carried out as an “open-ended search process”. This procedure is more than a mere formality to be settled in order to make it possible to dismiss an employee on the grounds of illness; it is in fact necessary to make a serious effort to find possible solutions.

A detailed record should be made of the content of the Occupational Integration Management interviews and, ideally, also signed by the employee.

Depending on the circumstances of the individual case – for example, whether or not a rehabilitation measure is carried out following the interview or whether considerable time has elapsed between the initial interview and the decision to dismiss the employee – the labour courts may even require that the Occupational Integration Management process be repeated several times.

Parties involved

In addition to the employee (and perhaps legal counsel), representatives of the works council must also be involved in Occupational Integration Management. It is also advisable to involve the company physician. In the case of an employee with a severe disability, the severely handicapped employee representative and the responsible Integration Office must also be consulted. Providers of integration-related services (*Integrationsfachdienste*), medical services of health insurers, local common service points (*örtliche Gemeinsame Servicestellen*) and the employers’ liability insurers may also be involved in the Occupational Integration Management process.

Implications of improper Occupational Integration Management

A dismissal due to illness will not automatically be considered invalid in the case of the absence of Occupa-

tional Integration Management or failure to carry out the procedure properly. The labour courts will, however, regularly impose a higher burden of evidence and proof upon the employer in such cases, for example, as regards possibilities for modifying the employee's employment environment or alternative employment in a different position. An employer will rarely be able to satisfy this higher standard of evidence and proof. In the absence of Occupational Integration Management, it will normally not be possible to rely on general statements by claiming, for example, that no alternative employment possibilities exist.

Conclusions

Even if an employer has already exhaustively examined all conceivable feasible solutions and comes to the conclusion that Occupational Integration Management is likely to prove superfluous, the procedure should be carried out anyway prior to issuance of a notice of dismissal due to illness. In view of the partly exaggerated requirements found in the case law, more is better than less.

Note

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