

BAG: No personal talk with sick employee - No written warning for sick employee

The employer cannot insist on a personnel talk with a sick employee

With a court decision as of November 2, 2016 (10 AZR 596/15) the Federal Labour Court has ruled, that a sick employee only has to appear for a personal talk in exceptional cases. The employer has to argue and prove such specific reasons.

Facts of the case

The employee – a medical assistant – was absent of work for several weeks due to an attested inability to work. The employer requested the employee to attend a personnel talk regarding his return during this time of sickness. The employee did not follow this request. The employer thereupon asked the employee for a medical certificate, especially stating his inability to take part in a personnel talk. The employer did not follow this request either, whereupon the employer gave him a written warning. The employee objected to this written warning successfully before the Federal Labor Court.

Judgement of the Federal Labor Court

According to the press release of the Federal Labor Court the employer can only request an employee to attend a personnel talk on the grounds of his authority to give directives as stated in sec. 106 Code of Trade and Commerce (GewO), if this authority is used in a “fair” way. This only applies in exceptional cases and was not the case here. According to the Federal Labour Court the employee’s obligation to work as primary obligation ceases due to his inability to work. In this case his primary as well as his secondary obligations, including his obligation to take part in a personnel talk, cease.

Therefore an employee is not obligated to attend a personnel talk during his inability to work. According to the Court there might only be an exception, if the attendance of the employee is indispensable due to operational reasons and if the sickness of the employee allows him to take part. Those indispensable operational reasons have to be stated and proven by the employer. Something the employer in this case did not succeed in.

Judgement of the Federal Labor Court

According to the press release of the Federal Labor Court the employer can only request an employee to attend a personnel talk on the grounds of his authority to give directives as stated in sec. 106 Code of Trade and Commerce (GewO), if this authority is used in a “fair” way. This only applies in exceptional cases and was not the case here. According to the Federal Labour Court the employee’s obligation to work as primary obligation ceases due to his inability to work. In this case his primary as well as his secondary obligations, including his obligation to take part in a personnel talk, cease.

Therefore an employee is not obligated to attend a personnel talk during his inability to work. According to the Court there might only be an exception, if the attendance of the employee is indispensable due to operational reasons and if the sickness of the employee allows him to take part. Those indispensable operational reasons have to be stated and proven by the employer. Something the employer in this case did not succeed in.

Practical advice

Therefore there is no general obligation for a sick employee to attend a personnel talk regarding his sickness in the employer’s office. Such request is not covered by the employer’s authority to give directives. However, the employer may consider calling the employee as contacting the employee is not in principle prohibited.

The press release of the Court contains no information regarding the company integration management (BEM). According to the rules of the Code of Social Law IX (SGB IX) the employer is obligated to organize a BEM in the case of an ongoing sickness in order to discuss possibilities of support and continuing the employment. An orderly conducted BEM is decisive for a dismissal due to sickness of an employee. Regarding the obligation to participate in a BEM-meeting it has to be differentiated between the employee’s sickness

and his ability to attend an interview. If the employee is able to but nonetheless does not attend the interview, the employer might not be able to give a warning but the BEM might be considered to be concluded in an orderly manner which might have an impact on the prospects of success of an action for protection against dismissal.

www.deloitte-tax-news.de

Diese Mandanteninformation enthält ausschließlich allgemeine Informationen, die nicht geeignet sind, den besonderen Umständen eines Einzelfalles gerecht zu werden. Sie hat nicht den Sinn, Grundlage für wirtschaftliche oder sonstige Entscheidungen jedweder Art zu sein. Sie stellt keine Beratung, Auskunft oder ein rechtsverbindliches Angebot dar und ist auch nicht geeignet, eine persönliche Beratung zu ersetzen. Sollte jemand Entscheidungen jedweder Art auf Inhalte dieser Mandanteninformation oder Teile davon stützen, handelt dieser ausschließlich auf eigenes Risiko. Deloitte GmbH übernimmt keinerlei Garantie oder Gewährleistung noch haftet sie in irgendeiner anderen Weise für den Inhalt dieser Mandanteninformation. Aus diesem Grunde empfehlen wir stets, eine persönliche Beratung einzuholen.

This client information exclusively contains general information not suitable for addressing the particular circumstances of any individual case. Its purpose is not to be used as a basis for commercial decisions or decisions of any other kind. This client information does neither constitute any advice nor any legally binding information or offer and shall not be deemed suitable for substituting personal advice under any circumstances. Should you base decisions of any kind on the contents of this client information or extracts therefrom, you act solely at your own risk. Deloitte GmbH will not assume any guarantee nor warranty and will not be liable in any other form for the content of this client information. Therefore, we always recommend to obtain personal advice.