GZ: DSB-D122.944/0007-DSB/2018 from 15.11.2018

[Note editor: Names and companies, legal forms and product names,

Addresses (incl. URLs, IP and email addresses), file numbers (and the like), etc., as well as

their initials and abbreviations may be abbreviated for reasons of pseudonymization

and/or changed. Obvious spelling, grammar and punctuation errors

have been corrected.]

NOTICE

S P R U C H

The data protection authority decides on the data protection complaint of Ludwig A***

(Appellant) of May 28, 2018 against the Vienna City Administration

(Respondent) for violation of the right to erasure as follows:

- The complaint is rejected.

Legal basis: Section 42 of the General Social Security Act – ASVG, Federal Law Gazette I

No. 189/1955 as amended; Section 132 of the Federal Fiscal Code - BAO, Federal Law Gazette I No. 194/1961 as amended;

Article 6 Paragraph 1 Letter f and Article 17 Paragraph 1 Letter a, d and Paragraph 3 Letter b, e of the Regulation (EU)

2016/679 (General Data Protection Regulation - GDPR), OJ No. L 119 p. 1; § 24 of

Data Protection Act (DSG), Federal Law Gazette I No. 165/1999 as amended.

REASON

A. Submissions of the parties and course of the proceedings

In his submission of May 28, 2018, the complainant submitted to the

The data protection authority essentially submits that the respondent refuses to grant the

Deletion of his personal data, although their storage is no longer

is necessary. Specifically, the deletion of sick days, which during

of his employment relationship with the Respondent were incurred, as well as the

Deletion of a file note that reinstatement in the MA ** under no circumstances

be agreed again, denied.

The Respondent replied with statements dated June 28, 2018 and

September 3, 2018 summarized that the deletion of sick days

due to social security and tax law retention requirements

be possible. So stands both the complainant and the respondent

even according to § 10 BO 1994, within three years after the end of the

to assert claims arising from the employment relationship. Beyond that

both standardized according to § 132 BAO retention periods of seven years, as well

the storage of the sick leave data according to § 42 Abs. 1 ASVG mandatory, since

this for payroll tax and social security as data relevant to payroll

be recorded.

As to the memorandum that the complainant was reinstated

If consent is not given, the employer should not be prevented from doing so for himself

determine whether or not to enter into an employment relationship with a person and

this therefore represents an overriding legitimate interest in processing

the file note is part of the personal file and is therefore not unlimited

kept, but with the entire personnel file three years after leaving

of the complainant, therefore deleted on May 2, 2020.

The complainant replied with comments dated July 10, 2018 as well

October 18, 2018 summarized that he had no intention of making claims under Section 10

BO 1994 to assert, especially since any claims have already been paid to him

be. He also already has his employee tax assessment for the years of

Employed at the tax office and therefore attack § 132 BAO

just like § 42 ASVG does not.

B. Subject of Complaint

Based on the submissions of the appellant, it follows that

The subject of the complaint is whether the respondent, by refusing to

Deletion of sick days and a note in the file that one

resumption of the complainant would not be approved, against the right of the

Complainant has violated deletion.

C. Findings of Facts

The complainant was until April 30, 2017 as **** with the respondent in the

Municipal department ** employed in a contract service relationship.

The Respondent also stores the

Number of sick days taken by the complainant during said

employment.

The personal file of the complainant also contains, among other things,

File note of February 16, 2017 with the content that on the part of

Magistrate's Department ** of a possible reinstatement of the complainant

be apart.

After resigning on April 30, 2017, the complainant also filed a request

Request of April 6, 2018 the deletion of this personal data.

To date, the Respondent has refused to delete the sick days and

of the memorandum in question.

The complainant's personal file also contains a memo dated 8 July

2015, which reads in part as follows (formatting not reproduced 1:1):

[…]

As is often the case before or after difficult situations, Mr. A*** called in sick

and was ill that week and the next, knowing that he was in the

is on vacation for 2 weeks the following week. The representation was therefore not

regulated and also not informed. Only on the initiative of his small team could

information is obtained. In addition, in the 2nd week of sick leave there was a

Delivery date with the *** Graz, to which 3 people appear, with the topic

[Note: Text passage deleted for reasons of pseudonymization in order to draw conclusions

to be able to be excluded from the complainant's workplace.] agreed.

One gets the impression that Mr. A*** cares neither for the team nor for his

case histories particularly endeavored.

It should be emphasized that such situations repeat themselves again and again and in the future

each time a memorandum is written

[...]"

Personnel files and their content are billed by the respondent after three years

Termination of employment, deleted.

Evidence assessment: The statements made are based on that

concurring arguments of the parties in the comments of June 28, July 10,

September 3 and October 18, 2018.

D. In legal terms it follows that:

D.1 Legal situation:

The legal situation at the time of the decision of the data protection authority is decisive,

unless it is a matter of judging a behavior towards a particular

Time.

However, the object of the complaint is not a specific date or

Period turned off (rather the deletion of data is requested, which according to § 24

Para. 6 DSG until the end of the procedure before the data protection authority

can), which is why the legal situation according to the GDPR or the DSG is to be assumed.

D.2 In the matter itself:

Article 17 para. 1 and 3 GDPR reads including the title (emphasis added by the

Data Protection Authority):

Article 17

Right to Erasure (“Right to be Forgotten”)

(1) The data subject has the right to demand that the person responsible

relevant personal data will be deleted immediately, and the

The person responsible is obliged to delete personal data immediately if

one of the following reasons applies:

a) The personal data are necessary for the purposes for which they were collected or otherwise

way were processed, no longer necessary.

b) The data subject withdraws their consent on which the processing is based

Article 6(1)(a) or Article 9(2)(a) and lack of

another legal basis for the processing.

c) The data subject objects to the

processing and there are no overriding legitimate grounds for the processing

or the data subject objects to the

processing on.

d) The personal data have been processed unlawfully.

e) The deletion of the personal data is necessary to fulfill a legal obligation

Obligation required by Union law or the law of the Member States, the

the person responsible is subject.

f) The personal data was collected in relation to the services offered by

Information Society collected in accordance with Article 8(1).

(2) […]

(3) Paragraphs 1 and 2 do not apply if processing is necessary

a) to exercise the right to freedom of expression and information;

b) to fulfill a legal obligation that requires processing under the law of

Union or the Member States to which the person responsible is subject, or for

Performance of a task that is in the public interest or in exercise

public authority delegated to the controller;

c) for reasons of public interest in the field of public health pursuant

Article 9 paragraph 2 letters h and i and Article 9 paragraph 3;

d) for archival purposes in the public interest, scientific or historical

research purposes or for statistical purposes in accordance with Article 89 paragraph 1, to the extent that

Paragraph 1 of the law is likely to achieve the objectives of this processing

renders impossible or seriously impairs, or

e) to assert, exercise or defend legal claims.

D.2.a To delete sick leave days:

As the data subject, the complainant has the right to have the person responsible

to request the deletion of his personal data, provided that one of the reasons

Art. 17 Para. 1 GDPR exists. The right to erasure according to Art. 17 Para. 1 and 2

However, GDPR is out of the question if processing according to Art. 17

Para. 3 lit. a to e DSGVO standardized cases is required.

In the case at hand, the facts of Article 17 (3) lit. b and e

check GDPR.

Article 17 paragraph 3 lit. b GDPR stipulates that processing within the meaning of paragraph 3 leg. cit. then

is necessary when it is necessary for compliance with a legal obligation that requires the processing

according to Union or Member State law to which the controller is subject,

necessary is.

If the complainant submits that he submitted his tax return for the years of

employment relationship with the tax office and therefore § 132

Para. 1 BAO is not applicable, he fails to recognize that the obligation according to § 132

BAO exists independently of this. For the calculation of income tax and the

Respondent's burden of proof to what extent he is a tax debtor with regard to

wage tax payments are the complainant's sick leave days

to be kept for seven years in any case in accordance with § 132 Para. 1 BAO. In this

Related is also § 42 para. 1 ASVG, which the respondent as

Employer imposed the obligation to inspect the insurance relationship

grant important documents. The duration of storage depends

In doing so, we are bound by corporate and tax law obligations, such as Section 132 (1) BAO

and is therefore also seven years (cf. VwGH 2005/73 of September 11, 1975).

There is therefore a legal obligation on the part of the respondent pursuant to Art. 17 (3).

lit. b GDPR and is the storage of the sick leave days of the complainant,

as stated, to fulfill these requirements (cf. also the notice of

Data Protection Authority of May 28, 2018, GZ DSB-D216.471/0001-DSB/2018).

Since the requirements according to Art. 17 Para. 3 lit. b GDPR already exist, it was on those

according to paragraph 3 lit. e not go into further detail.

D.2.b To delete the file note:

With regard to the subject file note, there is unlawful processing

under Article 17 (1) (d) GDPR.

According to Art. 6 Para. 1 DSGVO, the processing is only lawful if at least one

the conditions set out in Art. 6 Para. 1 GDPR are met.

Art. 6 para. 1 GDPR reads including the title (emphasis added by the

Data Protection Authority):

Article 6

lawfulness of processing

(1) The processing is only lawful if at least one of the following

conditions are met:

a) The data subject has given their consent to the processing of data relating to them

personal data given for one or more specific purposes;

b) the processing is for the performance of a contract to which the data subject is party

Person is required or to carry out pre-contractual measures that are based on

request of the data subject;

c) the processing is necessary for compliance with a legal obligation imposed by the

Controller is subject to;

d) the processing is necessary to protect the vital interests of the data subject

or to protect another natural person;

e) the processing is necessary for the performance of a task carried out in the public domain

interest or in the exercise of official authority, which the person responsible

was transferred;

f) the processing is to protect the legitimate interests of the person responsible or

of a third party required, unless the interests or fundamental rights and freedoms

of the data subject, which require the protection of personal data, prevail,

especially when the data subject is a child.

Point (f) of the first subparagraph shall not apply to public authorities in the performance of their duties

processing carried out.

In the case at hand, it must be examined whether processing is permissible according to

Article 6 paragraph 1 lit. f GDPR is present.

It should be noted here that authorities, in fulfilling their tasks, fundamentally

not to processing according to lit. f leg. cit. can support (Art. 6 para. 1 lit. f last

sentence GDPR). In this case, however, the processing does not take place in fulfillment of the

Tasks of the respondent, but due to a private law

Employment relationship, so that this action can be assigned to private sector administration

is. The respondent can therefore also appeal to the subject of the proceedings

Processing in connection with the employment of the

Complainant is based on Art. 6 (1) lit. f GDPR.

The Respondent processes the file note in the course of his

Documentation interest, specifically about a possible renewed employment relationship with the

to avoid complainers. As can be seen from the findings, this is done

not without reason, but because of the complainant's past conduct. the

The data protection authority agrees with the statements of the respondent,

that an employer may not be denied the right to determine with whom

(in the future) would like to enter into an employment relationship, especially if already

experience with a person.

In addition, the file note, as stated, is included as part of the personnel file

three years after termination of employment. This

Storage period is based on the general three-year limitation period of the ABGB

Assertion of claims from the employment contract. for the complainant

therefore given a clearly recognizable point in time as of when his data will be deleted.

As a result, the respondent has legitimate interests in

Processing of personal data in connection with the

procedural memorandum in accordance with Article 6 (1) (f) GDPR.

As a further step, it must be examined whether the interests of the complainant are those of the

Respondent prevail.

The DPA considered the following points:

The Respondent is an important, but not the only employer for

**** in the Vienna area, so that the complainant is certainly with others

Employers can apply. There is also for the complainant, considering

the storage period of the personnel file of three years after the end of the

employment relationship, after this period also the possibility to apply again

to apply to the complainant. This period is not considered disproportionate

to watch. Finally, the complainant's personal file is not public either

accessible and, as discussed, definitely suits the Respondent

Interest in documentation in matters related to employment relationships

to.

The complainant's interest in the deletion of the file note prevails

therefore not those of the Respondent.

It should also be mentioned at this point that personal data is only to that extent

may be processed, which is necessary to fulfill the purposes for which they are used

collected or otherwise processed. The personal data of

Complainant in connection with the memorandum were made in the course of the

employment relationship and for the purpose of documentation interest

processed. This purpose continues to exist and therefore applies to Art. 17 Para. 1 lit a

Neither does GDPR.

D.3. Result:

From the point of view of the data protection authority, the result is therefore not a justified complaint

of the complainant to have his personal data deleted in accordance with Art. 17

Para. 1 GDPR and the complaint was in accordance with the reasons discussed above

§ 24 para. 5 DSG to be rejected according to the verdict.

The complainant also has the right to information under Art. 15

DSGVO an instrument available to check whether the respondent according to

has actually deleted his personal data before the stated deadlines have expired.