

Criticism of Hadsund Apotek's use of photos of a former employee

Date: 01-12-2021

Decision

Private companies

Criticism

Injunction

Complaint

Pictures and video

Basis of treatment

The right to erasure

On the basis of a complaint, the Danish Data Protection Authority criticized the fact that Hadsund Apotek used images of a former employee in a marketing video that was published on Facebook.

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Summary

The Danish Data Protection Authority has made a decision in a complaint where Hadsund Pharmacy, in connection with the pharmacy's recruitment of new pharmacology students, used images of a former employee in a marketing video that was published on Facebook.

The complainant stated in the case that she had not consented to photos of her being used for marketing purposes by her former employer – Hadsund Pharmacy. Conversely, Hadsund Apotek stated that Hadsund Apotek could use the images without the complainant's consent, as Hadsund Apotek's legitimate interest in this exceeded the complainant's interests.

The Danish Data Protection Authority found in the case that Hadsund Apotek had not used the photos of the former employee in accordance with the data protection rules. The Danish Data Protection Authority's reasoning for this was:

that the use of images of former or current employees for marketing purposes basically requires the employee's consent;

that Hadsund Pharmacy had not obtained the complainant's consent;

and that the balancing of interests rule did not apply in the situation.

As a result, the Danish Data Protection Authority criticized Hadsund Apotek's use of the images in question. Furthermore, the

Danish Data Protection Authority notified Hadsund Apotek of an order to delete the images in question from the marketing video.

1. Decision

After a review of the case, the Danish Data Protection Authority finds that there are grounds for expressing criticism that Hadsund Apotek's processing of personal data has not taken place in accordance with the rules in Article 6 of the Data Protection Regulation[1].

The Norwegian Data Protection Authority also finds grounds to notify Hadsund Apotek of an order for:

to delete the images from which complaints appear from the video that Hadsund Apotek has published on Facebook.

The order must be complied with as soon as possible and no later than 4 weeks from today's date.

The order is announced in accordance with the data protection regulation, article 58, subsection 2, letter g.

According to the Data Protection Act § 41, subsection 2, no. 5, anyone who fails to comply with an order issued by the Danish Data Protection Authority pursuant to Article 58, subsection of the Data Protection Regulation shall be punished with a fine or imprisonment for up to 6 months. 2.

Below follows a closer review of the case and a rationale for the Data Protection Authority's decision.

2. Case presentation

It appears from the case that the complainant was previously employed by Hadsund Pharmacy.

The complainant discovered on 23 March 2021, after she was no longer employed by Hadsund Apotek, that Hadsund Apotek had published a marketing video on the pharmacy's Facebook page, which featured images of complaints.

As a result, the complainant requested on 23 and 24 March 2021 – via Facebook and e-mail – that the images of her be deleted, as she did not believe that she had given permission for Hadsund Apotek to use images of her.

On 24 March 2021, the complainant received a reply from Hadsund Apotek, from which the following appeared:

"I have to answer your inquiries here.

We have used the pharmacy's photos for marketing our company. The pictures are situation pictures and not portrait pictures.

The images have been used for marketing via the pharmacy's Facebook profile for several years. This is therefore not a new practice. You were aware that the picture was taken and it has been on the pharmacy's site for more than three years. This is not a new practice.

The picture is not yours. It's the pharmacy's. It can be used similarly in the future.

If you want to contact us in the future, you can write directly to my email.

You are also welcome to have your lawyer write to my email.”

On 4 May 2021, the Danish Data Protection Authority sent the complainant's request for consultation and requested Hadsund Apotek for an opinion on the matter.

On 15 June 2021, Hadsund Apotek sent a statement to the case, which was sent to the complainant on 1 July 2021.

Complaints then arose respectively on 5 and 12 July 2021 with comments on the opinion.

2.1. Complainant's comments

The complainant has generally stated that she has not given any kind of permission for pictures of her to be used by Hadsund Pharmacy for marketing purposes, and that she therefore wants all pictures of herself deleted.

2.2. Hadsund Pharmacy's comments

Hadsund Apotek has generally stated that Hadsund Apotek is of the opinion that the images of complaints can be used by Hadsund Apotek in accordance with Article 6, paragraph 1 of the data protection regulation. 1, letter f (the balancing of interests rule).

Hadsund Pharmacy has additionally explained that the complainant's complaint concerns the use of two images which are used in a video in connection with the pharmacy's recruitment of new pharmacology students. The video is a total of 1 minute and 19 seconds long, and the images from which complaints appear are shown only in 2 and 5 seconds.

The images are part of a series of images – ten in total – which show situations from the pharmacy's daily life or from social events such as exercise runs and summer activities. Each image is only visible for a few seconds. The rest of the video primarily consists of text that describes the pharmacology education.

Both images, which show complaints, have been on the Internet for years, along with other images, which is why it was deemed safe to use them for the video.

One picture shows a larger group of people at a social event for the pharmacy's employees and their families. The quality of the picture, the lighting conditions and the number of people means that you would not be able to recognize the complainant or her daughter if you do not know in advance that it is them. Several former colleagues who attended the event in question have thus been unable to identify complaints about the photo and others have had to use the exclusion method to do so. Hadsund

Pharmacy therefore does not believe that the complainant or her daughter can be said to be recognizable in the photo.

The second photo was taken at the pharmacy a few days before the New Year and shows complaints together with four colleagues in the counter area at the branch pharmacy in Mariager. All five people are wearing New Year's hats, and is thus a standard image where the pharmacy's employees wish the customers a happy New Year.

In connection with this case, Hadsund Apotek has itself introduced us to the rules for publishing images on the web, and has therefore exclusively chosen the pharmacy's own images that were already published on the web or where permission could be obtained.

Hadsund Apotek has made particular use of the following part of the Norwegian Data Protection Authority's guidance:

However, ordinary personal data (in the form of a completely ordinary image) can also be processed if the data controller has a legitimate interest in publishing the image, and this interest exceeds the interests or rights of the data subject (the balancing of interests rule).

When assessing whether an image can be published on the basis of a balancing of interests, it comes, among other things, depending on the nature of the image, including where and why the image was taken, the context in which the image is included and the purpose of the publication. It is crucial that the people in the picture cannot reasonably feel exposed, exploited or violated, e.g. in connection with marketing or other commercial purposes. The age of the person in the photo must also be taken into account in this connection. Therefore, always consider what possible effects or consequences publishing the image may have on the people in the image

Hadsund Apotek believes that the one picture where complaints can be recognized is a completely ordinary picture that thousands of shops take every year when they wish customers a Merry Christmas or a Happy New Year. Hadsund Pharmacy clearly has a legitimate interest in the publication, as there is a need for pharmacology students, and the private pharmacies are the only ones that, according to the law, can recruit pharmacology students. Hadsund Apotek cannot see that the complainant's interests or rights in this case should exceed this need for recruitment.

The nature of the image is in no way problematic. The context in which the picture is taken is also unproblematic, as it is a purely work-related situation, and the purpose of the publication is to recruit students for a course that the complainant has completed himself, and therefore cannot reasonably feel offended that be associated with. There is of course no condescending, ridiculing, exhibitionist or offensive material in the video.

The only reason for the complaint is that the complainant is again trying to throw gravel into the machinery of his former employer.

In conclusion, in order to conclude the case, Hadsund Pharmacy has proposed that in the future a "smiley" is placed over the complainant's face when the pharmacy uses pictures in which the complainant can be recognised.

3. Reason for the Data Protection Authority's decision

3.1.

It appears from the data protection regulation's article 4, no. 1, that personal data means any type of information about an identified or identifiable natural person ('the data subject'); identifiable natural person means a natural person who can be directly or indirectly identified, in particular by an identifier such as e.g. a name, an identification number, location data, an online identifier or one or more elements specific to the physical, physiological, genetic, psychological, economic, cultural or social identity of that natural person.

According to the data protection regulation, article 6, subsection 1, processing of personal data is only lawful if and to the extent that at least one of the conditions in letter a-f applies.

According to Article 6, paragraph 1, letter a, personal data can be processed if the data subject has given consent to the processing of his personal data for one or more specific purposes.

Furthermore, personal data may be processed if the processing is necessary for the data controller or a third party to pursue a legitimate interest, unless the interests of the data subject or fundamental rights and freedoms that require the protection of personal data take precedence.

From the Danish Data Protection Authority's guidance on data protection in connection with employment, section 5.4.2

Employee photos on the workplace's website, the following appears:

"As a rule, pictures of the employees at work will not be published without the employee's consent. The consent must meet the conditions in Article 7 of the regulation for a valid consent. The employer therefore has, among other things, duty to ensure that consent is given voluntarily. Reference is made to the Norwegian Data Protection Authority's guidance on consent, which is available on the Norwegian Data Protection Authority's website.

The same applies if an employer uses images of employees in material that, e.g. used for marketing.

If the employee chooses to withdraw their consent, this does not affect the lawfulness of the processing based on consent prior

to the withdrawal. Withdrawal of consent only concerns the future use of images.

If a consent is withdrawn, it means that photos of the person concerned, which the employer has published on the Internet, must be removed. This also applies, even if the image e.g. appears from a pamphlet which is published as a pdf file. In the case of printed material, a recall of material that has already been distributed cannot be requested. The Danish Data Protection Authority has not taken a position on questions regarding printed material that has not yet been distributed. It will depend on the specific circumstances, whether in such cases it can be required that the material be destroyed.

It cannot be ruled out that in specific cases – especially taking into account the functions that an employee must perform – it will be possible to publish photos of the person in question on the internet in accordance with the regulation's Article 6, subsection 1, letter e or letter f."

It appears from Article 17 of the Data Protection Regulation that the data subject has the right to have personal data about him/her deleted by the data controller without undue delay, and the data controller has a duty to delete personal data without undue delay if one of the conditions in subsection 1, letter a-f, applies. It appears, among other things, of letter a-c, that personal data must be deleted if:

The personal information is no longer necessary to fulfill the purposes for which it was collected or otherwise processed.

The data subject withdraws the consent that is the basis for the processing, cf. Article 6, subsection 1, letter a), or Article 9, subsection 2, letter a), remains, and there is no other legal basis for the processing.

The data subject objects to the processing in accordance with Article 21, subsection 1, and there are no legitimate reasons for the processing that precede the objection, or the data subject objects to the processing pursuant to Article 21, subsection 2.

3.2.

On the basis of the information provided in the case, the Danish Data Protection Authority assumes that both images from which complaints appear constitute personal data which must be processed in accordance with the data protection rules.

The Danish Data Protection Authority finds that Hadsund Apotek's processing of information about complaints in connection with the publication of the relevant video on Facebook, from which images of complaints appear, did not take place within the data protection rules.

The Danish Data Protection Authority has emphasized that the purpose of the video is to market Hadsund Pharmacy, and thereby recruit pharmacology students to the pharmacy.

The use of images for the purpose in question, from which employees, including former employees in particular, appear, presupposes, as appears from the Danish Data Protection Authority's guidance above, the consent of the data subject – the person to whom the information relates – as a starting point.

According to the information, the complainant has not given consent to Hadsund Apotek being able to use images of her, and to the extent that she may have done so, the complainant withdrew any consent on 23 March 2021.

In addition, it is the Danish Data Protection Authority's assessment that the use of the images in question, from which complaints appear, cannot be made on the basis of Article 6, paragraph 1 of the Data Protection Regulation. 1, letter f, since the complainant's interest in the images not being used for marketing by Hadsund Apotek exceeds Hadsund Apotek's interest in using the images in question for marketing purposes.

Based on this, the Danish Data Protection Authority finds reason to express criticism that Hadsund Apotek has not had the necessary authority in Article 6 of the Data Protection Regulation to publish the images of complaints in connection with the marketing of Hadsund Apotek.

The Norwegian Data Protection Authority also finds grounds to notify Hadsund Apotek of an order for:

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[1] Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons in connection with the processing of personal data and on the free exchange of such data and on the repeal of Directive 95/46/EC (general regulation on data protection).