2016/16

'Too conspicuous' hairstyle was no reason for dismissal during parental part-time (AT)

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Summary

Austrian law permits the dismissal of an employee during parental leave only in cases where the employer cannot reasonably be expected to continue the contractual relationship. The colour of a hair ribbon does not justify the termination of a young father's employment as a bus driver.

Facts

The defendant in the proceedings at issue had been employed by the plaintiff, a limited company in charge of a town's public transport network, for more than five years before taking part-time parental leave as from 6 June 2014. About the same time he incurred the disapproval of his superiors by a change in his outer appearance: instead of tying up his long bushy hair with a plain black hairband, he started using a pink ribbon for that purpose. Asked to remove this accessory at several instances, he replied rudely that he wouldn't.

In response, the plaintiff sought a judicial order approving the dismissal of the defendant, as required under the special dismissal protection provisions established by Austrian law for employees on parental leave. The relevant provision instructs the courts to authorise the dismissal of such an employee, for example, where the employee is likely to compromise the legitimate interests of the employer, but only if the likely harm is significant enough that the employer could not reasonably be expected to continue the employment relationship.

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Both the Landesgericht Linz as court of first instance and the Oberlandesgericht Linz, to which the defendant appealed, considered the employee's refusal to comply with the order to remove the ribbon to be a sufficiently significant reason. The first instance court based its reasoning mainly on the employer's legitimate interest in staff having a uniform appearance, particularly as appearences were important in conveying authority in emergencies. The second instance court emphasised how important it was that passengers should have confidence that bus drivers were professional and trustworthy. Both courts acknowledged that the defendant had fully complied with the plaintiff's written order of March 2009 which set out the clothing rules for staff (though this did not make any provision about hairstyles or accessories). However, this did not prevent the plaintiff from giving additional oral instructions in line with its legitimate economic interests. By contrast, the defendant was found not to have any comprehensible interest in wearing his conspicuous ribbon while working.

With permission for his dismissal granted on 16 December 2014 and confirmed by the second instance court on 7 May 2015, the defendant's only remaining option was an extraordinary appeal to the Supreme Court.

Judgment

In its judgment delivered on 24 September 2015, the Supreme Court dismissed the argumentation of the lower instance courts, recalling that even the formulation of dismissal protection during parental leave – stricter than other standards for dismissal justification under Austrian law – implies the need for a particularly significant reason making a resumption of the contractual relationship manifestly unacceptable for the employer. In the case at hand, rather than satisfying itself with a one-sided consideration of the employer's economic interests, the courts should have taken into account the interference with personality rights that the employee suffered. The Supreme Court referred to Austrian and German literature highlighting the fundamental rights aspects of restricting free determination of one's outer appearance.[1]

1. Although Austria lacks specific provisions similar to the German Basic Law (*Grundgesetz*), the literature cited by the Court found a similar right to self-determination from the effect of Article 8 ECHR on civil law contracts in Austria.

doi: 10.5553/EELC/187791072016001001017

Although the plaintiff did not dispute the basic functionality of the pink ribbon in preventing the bus driver's sight being impaired by hair falling on his face, the Supreme Court considered it had failed to establish sufficiently significant grounds to justify its interference with the employee's personality rights. Moreover, the alleged impact on customer trust and the potential consequences of this for the use of public transport were not borne out by common sense and were therefore manifestly insufficient as a justification.

Commentary

The Supreme Court's decision was based on domestic Austrian law that predated Austria's membership of the EU. Given that, the court was able to find in favour of the employee based purely on domestic law, with no need to consider EU law.

However, it is worth exploring what might have happened had the Supreme Court agreed with the lower courts that domestic law warranted the dismissal of the bus driver. Clause 5(4) of Framework Agreement on parental leave (annexed to Directive 2010/18) provides that Member States:

> *"shall take the necessary measures to protect workers against less favourable treatment or dismissal on the grounds of an application for, or the taking of, parental leave […]".*

This formulation is less strict than that of Article 10 of Maternity Directive 92/85, which requires Members States to:

> *"take the necessary measures to prohibit the dismissal of workers […] during the period from the beginning of their pregnancy to the end of the maternity leave […], save in exceptional cases not connected with their condition […]".*

Considering this differing formulation, interpreting Austrian law in line with the Framework Agreement would not have benefitted the bus driver, seeing that his dismissal was not on the grounds of an application for, or the taking of, parental leave.

However, the defendant might perhaps have referred to the ECJ's 2014 ruling in *Lyreco* (C-588/12, reported in EELC 2014-1). In that case, the ECJ held (at § 36): *"Having regard to the objective pursued by the Framework Agreement […] to offer both men and women an opportunity to reconcile their work responsibilities with family obligations, clause 2.4 [the predecessor of what is now Clause 5(4), CH] must be interpreted as articulating a particularly important European Union social right and it may not, therefore, be interpreted restrictively".*

Whether or not an interpretation is too restrictive in this sense would probably need to be assessed with an eye to the principle of effectiveness, which, as a general principle of EU law, must be decisive also for the interpretation of the Framework Agreement. It could therefore be assumed that considering national law permitting termination without the employer having to state *any* reason (as is possible in other cases in Austria) would amount to interpreting Clause 5(4) too restrictively, because it would offer no *effective* protection against dismissal on grounds of taking parental leave. But then, might the same not be said about national legislation allowing the employer to rely on reasons that should not be of any relevance for the employment relationship and are therefore likely to be no more than a pretext? Should an effective implementation of Clause 5(4) therefore require, not an 'exceptional case' like the Maternity Directive, but at least a serious and relevant reason unrelated to the taking of parental leave to be established by the employer? And could a bus driver's hairstyle meet this threshold?

An interpretation as outlined in the preceding paragraph, departing from considerations of effectiveness, might also be supported by reference to the protection of fundamental rights. Article 30 of the EU Charter of Fundamental Rights reads, *"Every worker has the right to protection against unjustified dismissal, in accordance with Community law and national law and practices"*; Article 33 declares also the right *"to parental leave following the birth or adoption of a child"* a fundamental right of the Union. Article 51 of the Charter clarifies that its provisions are binding on Member States *"when they are implementing Union law"*. This would imply that the Austrian legislator, when implementing the Framework Agreement and its Clause 5(4), had to make sure that the national law thereby enacted was fully in line with the Charter. It could therefore be argued that all provisions which (materially) constitute a transposition of the Framework Agreement (even if they were not meant to because they actually predate the Directive) need to comply, notably, with the standard of Article 30 of the Charter and make sure that no 'unjustified' dismissal is permitted by the law. When following the reasoning of the Supreme Court set out above, it can be considered questionable whether disagreement about the appropriateness of a bus driver's hairstyle could suffice to make the dismissal 'justified'.

The ECJ's case law also shows that, when it comes to general principles such as the principle of effectiveness and fundamental rights, the Court requires their horizontal application in individual cases, so that an employee can rely on them directly against an employer, defying national law provisions to the contrary (see e.g. paragraph 45 *et seq.* of the judgment in *Kücükdeveci*, ECJ, 19 January 2010, Case C-555/07). Another aspect that might work to the benefit of the employee is the ECJ's approach to the burden of proof in discrimination cases. Although the Framework Agreement on parental leave does not deal with questions of proof, the provisions which at present require a conditional shift of the burden of prove in other directives (e.g. Article 19 of Directive 2006/54/EC on gender discrimination, or Article 8 of Directive 2000/43/EC on racial discrimination) are

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actually a mere codification of much older case law,[2] in which the Court has deduced such a shift in favour of the employee from the principle of effectiveness. This actually makes it likely that similar standards would apply in relation to the non-discrimination provisions of the Revised Framework Agreement. As a consequence, by analogy, the employee would only need to establish 'facts from which it may be presumed' that the dismissal amounted to discrimination on grounds of parental leave, thereby compelling the employer to prove the opposite.

Whether any of the described two lines of argumentation (effectiveness-based or fundamental rights-based) could have succeeded in a case such as the one at issue would ultimately depend on whether the employer is found to have any genuine and legitimate interest in a change to the employee's hairstyle, so that relying on the employee's refusal could be a reason preventing the dismissal from being unjustified or discriminatory. As the diverging reasoning of the Austrian courts shows, opinions on this question might differ greatly.

Importantly, the fundamental rights aspect invoked by the Austrian Supreme Court when referring to the defendant's 'personality rights' is equally relevant under EU law, in which Article 8 of the ECHR is given the status of a general principle by Article 6 TEU. The jurisdiction of the ECtHR leaves no doubt that Article 8 ECHR obliges the member states of the Convention to ensure the protection of the right to respect for private life also vis-à-vis a private employer (see ECtHR, 12 January 2016, *Bărbulescu v. Romania*, paragraph 35 *et seq.*), and that clothing regulations constitute an interference with that article and need to be justified as envisaged by its paragraph (2) (ECtHR, 1 July 2014, *S.A.S. v. France*, paragraph 106). Whether or not an order to remove a hair ribbon could actually amount to a violation of Article 8 ECHR, the fact that at the very least it touches on a 'human rights-sensitive' area indicates that strict standards should be applied where an employer intends to rely on it for justification of dismissal – be it in the context of Clause 5(4) of the Framework Agreement (as interpreted by standards of effectiveness) or Article 30 of the EU Charter.

At any rate, questions about the scope of dismissal protection during parental leave are almost certain to reappear in case law, most notably if we are to see an increased take-up by men – who can rely neither on the Maternity Directive nor on indirect discrimination on grounds of sex.

Comments from other jurisdictions

Germany (Nina Stephan): This case would likely have been decided the same way in Germany. A dismissal based on a 'too conspicuous' hairstyle without particularly serious reasons would have been invalid regardless of whether it is a dismissal during parental leave or a dismissal for reasons of conduct.

German law usually permits dismissals during parental leave only in cases where a business closes or where contractual obligations have been seriously violated. In addition, it is a requirement that continued employment cannot be reasonably expected from the employer. Dismissal based on an employee's outer appearance is only permissible under exceptional circumstances.

In principle, the employee is free in his decision on how to look or dress. This is an aspect of each employee's personal rights. As a result, German case-law places high demands on restrictions regarding the outer appearance of an employee. Therefore, a court must determine whether there are circumstances which, after careful consideration of the interests of both sides, justify giving the employer's interests priority over the employee's personal rights.

Please note that the employer - based on his right to give instructions regarding the performance of work - may instruct the employee to comply with a dress code. However, German case-law, for example, negates the employer's legitimate interests relating to the employee's outer appearance in the following cases: single-coloured fingernails, natural hair dress and the prohibition of wearing jewellery, watches and piercings. Any regulation to the contrary only apply if it is necessary to ensure compliance with the relevant national occupational health and safety regulations as well as accident prevention regulations.

Slovenia (Petra Smolnikar): Slovenian employees on parental leave receive similar protection prior to dismissal. Employers are prohibited to terminate the employment contract of a pregnant or breastfeeding worker or of parents during the uninterrupted use of their parental leave in the form of full absence from work, as well as during the period of one month after the end of such leave, unless grounds for extraordinary termination exist or due to the initiation of the winding-up of the employer. In both cases, preliminary consent of the labour inspector must be obtained. Under Slovenian law it is to assume that the colour of a hair ribbon would not, respectively should not, represent a just reason for the termination of an employee. Following the general principal of prohibition of unfounded dismissals, the employer has to thoroughly state the termination reason(s) in order to justifiably dismiss its employees. According to case-law, Slovenian courts have not yet dealt with a similar occasion. However, under national rules it seems unrealistic that the employee's refusal to remove his pink ribbon, bearing in mind the lack of internal clothing/outer appearance regulations by the employer, could constitute a sufficient termination ground. This would represent clear discrimination. Only if clear (strict) rules (and supporting clarifications)

2. Starting with the judgment in *Danfoss (*CJEU, 17 October 1989, Case 109/88).

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had been established regarding the outer appearance of the employee, which all employees should have abided by, a termination due to culpability reasons (ie. not fulfilling the obligations stemming from the employment relationship) could be seen as lawful. Nonetheless, such internal regulation of the employer would strongly prejudice the employee's fundamental personality rights, which would be weighed against employers' (legitimate) interests in case of judicial dispute.

Subject: parental leave – dismissal protection

Parties: L.GmbH (employer) – v – A.K. (employee)

Court: *Oberster Gerichtshof* (Supreme Court)

Date: 24 September 2015

Case Number: 9ObA82/15x

Publication: http://www.ris.bka.gv.at/Ergebnis.wxe?Abfrage=Justiz&Gericht=&Rechtssatznummer=&Rechtssatz=&Fundstelle=&AenderungenSeit=Undefined&SucheNachRechtssatz=True&SucheNachText=True&GZ=9ObA82%2f15x&VonDatum=24.09.2015&BisDatum=24.09.2015&Norm=&ImRisSeit=Undefined&ResultPageSize=100&Suchworte=&Position=1

doi: 10.5553/EELC/187791072016001001017