SUMMARY

2015/50 Alcohol tests require approval by works council (AT)

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Facts

In July 2013, the Austrian federal railways (ÖBB) sent a circular letter to all employees informing them that drinking alcohol was forbidden for all employees on duty. The letter specified that the new standard to be complied with was zero alcohol in the blood. Only a few months later a train driver was found to be seriously intoxicated during working time. The employee was subjected to disciplinary proceedings.

In April 2014, the ÖBB conducted alcohol tests on all employees present on that day on two different sites, including clerical staff. The test was conducted using a breathalyser (Alkomat). No alcohol was detected. The employees had not been informed in advance. The chairman of

the works council had been informed the day before and had objected to the alcohol testing.

Some days later, the works council asked the ÖBB to formally declare that they would not continue conducting alcohol tests on employees. Since the company refused to issue such a declaration, the works council sued the ÖBB. They sought an order, in the form of an interim injunction, on ÖBB to refrain from conducting general alcohol testing unless there was a specific suspicion that an employee had consumed alcohol. The works council based its request for an interim injunction on two arguments. The first was that random alcohol tests infringe employees' rights as human beings and therefore are unlawful. The second argument referred to the works council's statutory right to be asked permission by the employer before it takes any employee monitoring measures that have the potential to infringe the employees' human dignity (Menschenwürde).

The court of first instance rejected the claim, ruling that alcohol monitoring was a legitimate and proportionate means to implement the ban on alcohol in the workplace. The Court of Appeal (Oberlandesgericht Wien) confirmed the ruling. The plaintiff appealed this decision to the Supreme Court (Oberster Gerichtshof).

Judgment

The Supreme Court overturned the Court of Appeal's judgment and found in favour of the works council. First, the Court set out the legal basis for the works council's right. Article 96(1)(3) of the Collective Regulatory Act (Arbeitsverfassungsgesetz, ArbVG) provides that the introduction of technical systems or measures to monitor employees requires the prior approval of the works council if they impact on employees' human dignity. In the case at hand, it was common ground that the alcohol tests were a measure used to monitor the employees.

Turning to the issue of whether the alcohol tests affected the employees' 'human dignity', the Supreme Court held that Article 96(1)(3) ArbVG is primarily aimed at the employees' physical integrity and their right to privacy. An individual's private life is protected by Section 16 of the Austrian Civil Code and by fundamental human rights, such as the right to respect for private and family life (Article 8 ECHR) and the right to data privacy (Section 1 Data Protection Act). The statutory requirement to ask the works council for its prior approval was designed to avoid employees' private lives being affected by technical systems or measures that are not justified by a legitimate purpose and/or are not proportionate to that purpose.

In the case at hand, the Supreme Court acknowledged the employer's legitimate interest in implementing a ban on alcohol and in monitoring compliance with that policy. However, the Court listed several reasons why the measure in question was disproportionate to its objective. First, the employees were subjected to breathalyser tests without any indication that

they had violated the non-alcohol policy. Second, the tests were conducted without asking the employees for their consent. Third, the employer did not restrict the testing to those employees who could endanger others whilst intoxicated (e.g. train drivers). Fourth, because of the sensitivity of the breathalyser, which detects alcohol even if the employee has simply eaten a meal prepared with a few splashes of alcohol, the result may have no bearing on the employee's capacity to work. Fifth, subjecting an employee to a breath test, implies an allegation against the employee, even if the employee has done no wrong.

As a result, the employer was ordered to refrain from conducting alcohol tests either on all employees or on those against whom there was no suspicion of violation of the non-alcohol policy.

Commentary

This is a rare case where the Supreme Court has had to decide whether a specific monitoring measure infringed employees' "human dignity" within the meaning of Article 96(1)(3) ArbVG, thereby triggering the works council's right to veto that measure. In the 'fingerscan case' (9 ObA 109/06d), the employees of a hospital were required to have their fingers scanned at a terminal so as to record their working time. As there was no agreement with the works council to this technical system, the works council sued the employer. Applying the same approach as in the alcohol test case, the Supreme Court acknowledged the employer's interest in recording employees' working time, which employers are required under the Working Time Act to do. However, the Court did not accept that an employer should process biometric data for such a "trivial purpose" as the recording of working time.

In both cases, the Supreme Court made clear that the use of biometric data or the imposition of medical tests on employees affects their rights to physical integrity and privacy at the workplace. Therefore, such measures are only lawful if they are based on an agreement with the works council.

Comments from other jurisdictions

Belgium (Isabel Plets): There is no case law in Belgium on the use or conditions of alcohol tests in the workplace, but alcohol tests for employees using breathalysers are strictly regulated in National Collective Labour Agreement n°100 on preventative alcohol and drugs policies in companies. The use of breathalysers in the workplace must be covered in the work rules and the consent of the works council is therefore required.

Breathalyser tests should meet very strict requirements, for example:

the test can only be used as a preventative measure, to verify whether an employee can either start or continue work;
the results of the test alone cannot be used to justify a sanction and can therefore only serve as one element of a global assessment of the employee;
the test must be proportionate;
testing requires the employee's consent; and
the results of the test must be processed in line with privacy legislation.

Czech Republic (Natasa Randlová): In the Czech Republic, a person (specified by position) able to give instructions to conduct an alcohol monitoring test must be identified in the employer's work rules in advance of any monitoring taking place. In addition, the employer can ask to conduct an alcohol test only where there is a suspicion that the employee is under the influence. Conducting general alcohol tests without any specific suspicion is not permitted under Czech law. However, this rule is frequently breached, particularly in factories where zero alcohol tolerance is absolutely necessary for safety reasons.

Germany (Dagmar Hellenkemper): The German Courts have, in the past, only dealt with cases of dismissals on grounds of alcohol consumption or alcohol testing during general pre-employment medical check-ups. Based on the groundwork laid in these cases, it seems likely that a similar case in Germany would have a similar outcome. Alcohol and drug test are only allowed where operational safety is at stake. Increasingly, companies in Germany enter into works agreements with the works council in order to implement a ban on drugs and alcohol. A general breathalyser test however, without any suspicion or evidence of alcohol consumption, would be considered a violation of the employees' "human dignity" and general right of personality, just as in our neighbouring country.

Hungary (Gabriella Ormai): In Hungary the Act on Health and Safety requires employees to carry out work whilst in a condition fit for work. The Labour Code also stipulates that employees must appear at work in a condition fit for work and must remain in such a condition during working time. Therefore, the employee cannot be under the influence of alcohol and there is a presumption that alcohol consumption is not permitted.

Based on the interpretation of the Curia (previously the Supreme Court), since the employer is obliged to provide healthy and safe working conditions, it can test whether the employee is in a condition fit for work, including whether he or she is under the influence of alcohol. The testing cannot breach the employee's personality rights and cannot be degrading or excessive. Consequently, the employee must cooperate.

Testing for alcohol consumption would constitute an abuse of the employee's rights, for example, if the employer repeated the test several times a day for several days without any actual indication of alcohol consumption. In one case, the court found that summary dismissal based on the employee's refusal to take an alcohol test was unfair. The employer had wanted to check whether the employee was under the influence of alcohol even though there was no sign of such influence. The employer asked the employee's supervisor and the chair of the trade union to be present at the testing and later also called the police. The employee also indicated that he was willing to undergo a blood test.

Lithuania (Inga Klimasauskiene): In the Austrian case reported above the issue seems to be whether an employer may check if an employee has come to work intoxicated, when he or she is refusing voluntarily to be tested by a breathalyzer, in order to reduce the risks caused by inebriated employees.

Under the Lithuanian Labour Code, if an employee comes to work intoxicated with alcohol, narcotics or other toxic substances, the employer has the right to bar him or her from coming into work on that day (or shift) and to suspend his or her wages. Further, being under the influence of alcohol, narcotics or toxic substances is considered a gross breach of work duties, giving the employer the right to dismiss the employee without notice.

The Lithuanian Labour Code does not specify how to establish whether an employee is inebriated. According to case law, this can be determined by any means or procedure available to the employer that is within the law. Unfortunately, the law is silent on how far the employer can go. Evidence that an employee was under the influence of alcohol, narcotic or toxic substances during working time can be based on both medical findings and reports made on the day, as well as on any other records, such as photographs or videos showing drunken behaviour. However, if an employee refuses to be tested by a breathalyzer, the employer does not have the right to compel the employee to do so, as that would constitute an infringement of the employee's right to privacy.

In order to mitigate the risk of intoxication on the job, an employer has the right to suspend an employee from his work duties without pay in the event there is an indication that he is inebriated. In order to do this lawfully, the employer might need to draw up a document, signed by a number of employees (an ad hoc committee), stating that the employee has come to work intoxicated with alcohol, narcotic or toxic substances.

Lithuanian law does not require that such a statement should be approved or coordinated with employee representatives (trade union delegates or the works council).

In such cases, however, the employer is taking a risk, because the employee could then present

a medical certificate refuting the employer's position. This is recognized as valid counter-evidence provided the medical test on which it is based was done without delay. In this case the employer may be obliged to compensate for the damage caused to the employee by the suspension. Notwithstanding, this seems to be a lesser risk than to allow a likely intoxicated employee to pursue his or her work duties.

Admittedly, suspension may not be very practical, especially where, as with the railways, a large number of employees need to be checked at the same time, but it is one way to mitigate the risks.

Slovak Republic (Gabriel Havrilla): The situation in the Slovak republic is very different. Not only is the employer entitled to test whether the employee is under the influence of alcohol, but the Act on the Protection of the Health of Employees obliges the employer to check systematically whether employees are under the influence of alcohol, drugs or other psychotropic substances during working time. Moreover, no prior or later approval from the working council is required. Further, the Act on the Protection of the Health of Employees stipulates that employees must submit to alcohol tests. Refusal to undergo such a test is deemed a violation of work rules and under certain circumstances specified in the Labour Code, could lead to summary dismissal. This approach is supported by case law from the lower courts (Rc 4Cdo 64/95) which says that an employee may only refuse to take alcohol breath tests if he or she can produce a medical certificate to show there is a genuine medical difficulty in breathing continuously into a breathalyser (e.g. severe asthma).

Subject: Fundamental rights, privacy

Parties: Zentralbetriebsrat der ÖBB GmbH – v – ÖBB GmbH

Court: Oberster Gerichtshof Supreme Court)

Date: 20 March 2015

Case number: 9 ObA 23/15w

Internet-publication: http://www.ris.bka.gv.at/Jus/

Creator: Oberster Gerichtshof (Austrian Supreme Court)
Verdict at: 2015-03-20
Case number: 9 ObA 23/15w