SUMMARY

2014/45 Unproven accusation of sexual harassment: no reason for dismissal (AT)

<p>An employee who claims to be a victim of sexual harassment by a superior must not be dismissed for loss of trust and confidence, unless the employer can prove that the accusations were false.</p>

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Facts

The plaintiff in this case was employed as a bus driver by the municipality of Vienna and assigned to *Wiener Linien GmbH & Co KG*, the Viennese public transport company. On 28 October 2007, she approached the municipality with a complaint against her immediate superior at *Wiener Linien*, claiming that she had suffered sexual harassment on several occasions. According to the complainant, her superior had repeatedly bothered her with sexual innuendos, 'compliments' about her body and questions about her husband's sexual performance. He had offered her help in drafting a report in exchange for meeting him 'in private', and in one instance had grabbed both of her breasts, asking whether they were 'real'.

The municipality started disciplinary proceedings against the plaintiff's superior, in the course of which the Vienna Commission for Equal Treatment was involved. When an expert opinion issued by that Commission concluded that it could not be established that the alleged instances of harassment had actually taken place, the plaintiff was dismissed summarily and without compensation, with the approval of the municipality's Staff Representatives

Commission. The legal basis relied on was section 45(2) 1 of the Vienna Contracted Staff Act (*Wiener Vertragsbedienstetenordnung*, 'VBO 1995'), which states that gross insult and defamation of the employer or a colleague is a reason for immediate dismissal.

The plaintiff brought a claim before the Vienna Labour and Social Court, seeking to declare her dismissal void. The court rejected the claim, holding that all an employer needs to do to justify immediate dismissal based on section 45 of the VBO 1995, is to establish that the employee's behaviour has had serious consequences for her superior's reputation and has endangered his position in the organisation. Such serious misbehaviour entitles the employer to proceed to immediate dismissal without compensation, unless the employee proves that her behaviour was justified by legitimate interests.

The plaintiff appealed to the *Oberlandesgericht Wien*. It overturned the first instance court's judgment and ordered the municipality to reinstate the plaintiff in her former position. The municipality appealed to the Supreme Court, relying on a 1989 precedent (9ObA186/89), in which the Supreme Court, in a nearly identical situation, had held that it was for the employee to prove that her colleague had indeed harassed her (as she claimed before the police) and that failure to provide sufficient evidence entitled the employer to dismiss her for loss of trust and confidence.

Judgment

The judgement delivered by the Supreme Court is exceptional in terms of the clarity in which it expressly departs from its earlier case law, stating that the 1989 precedent must be declared inapplicable in light of political developments in the preceding decades – most notably on the European level. The judgment cites the crucial provisions of the Recast Equal Treatment Directive 2006/54 and its predecessors Directives 97/80 (burden of proof) and 2002/73 amending 76/207 (equal treatment for men and women), in particular Article 19(1) of Directive 2006/54:

"1. Member States shall take such measures as are necessary, in accordance with their national judicial systems, to ensure that, when persons who consider themselves wronged because the principle of equal treatment has not been applied to them establish, before a court or other competent authority, facts from which it may be presumed that there has been direct or indirect discrimination, it shall be for the respondent to prove that there has been no breach of the principle of equal treatment."

and Article 24:

"Member States shall introduce into their national legal systems such measures as are necessary to

protect employees, […] against dismissal or other adverse treatment by the employer as a reaction to a complaint within the undertaking or to any legal proceedings aimed at enforcing compliance with the principle of equal treatment.”

The court also cites the principle of effectiveness and finds that it would be clearly irreconcilable with these provisions to produce a legal precedent that places the full burden of proof on the employee.

Accordingly, the Supreme Court upheld the main findings of the second-instance judgment: an employee claiming to be a victim of sexual harassment can be dismissed for this reason only if the employer proves that the accusations were not accurate. In this case, the first instance judgment showed that there was no proof of this in relation to the physical assault. The allegation of earlier verbal harassment was not addressed in the evidence and so that the Supreme Court referred the case back to the first instance court for completion.

Commentary

As stated above, the Supreme Court's ruling is of striking clarity, which leaves little to add in terms of its outcome. Yet, the fact that the Court refers to several provisions of European law without clarifying which of them it considers applicable in the case warrants a closer look at the EU provisions at issue.

The burden of proof standards contained in Article 19 of the Recast Directive provide that the claimant need only adduce "facts from which it may be presumed that there has been […] discrimination" in order to shift the burden of proof to the respondent. Although this is intended to strengthen the equal treatment standards of the directive, in practice, in situations where it boils down to one word against the other (which are very frequent), it is questionable how helpful this is. If Article 19 is interpreted to apply in such a situation, this could lead to some disproportionate outcomes: in the case at issue, it would imply that the superior should be found guilty based on the mere *accusation* of sexual harassment in any judicial or administrative procedure brought against him by the claimant (though not in a criminal procedure: see Article 19 (5)).

In addition, there is little European-level guidance on the threshold for when it can be 'presumed' that discrimination has taken place. This would suggest that there should be concrete reasons that raise doubts about the defendant's version of the story – such as an employer's refusal to disclose relevant documents (case Kelly[1]) or a renewed job advertisement for a post for which a female applicant had not been considered despite her apparently suitable qualifications (case Meister[2]). Concrete reasons such as these are typically be missing from sexual harassment cases, as there are usually no witnesses, but only

the perpetrator and the victim. This would suggest that in the case at hand, Article 19 should be relied on because apart from the allegation of the claimant there are simply no "facts from which it may be presumed" that she was a victim of harassment.

Precisely for this reason it is all the more important that Article 24 of the Recast Directive should expressly apply to any complaint or proceedings 'aimed at enforcing compliance with the principle of equal treatment', irrespective of the outcome of those proceedings. This Article ensures that even victims who cannot prove their case under the more favourable standards of proof set out in Article 19 will at least be protected from retaliatory actions by the employer – the most important of which being dismissal as a 'sanction' for bringing the claim.

However, a question arises as to whether all claims of sexual harassment are automatically protected by Article 24, or whether it has to be established that the complaint is 'aimed at enforcing compliance...', rather than being a conscious false accusation to discredit a colleague (as was suggested by the employer in the present case). Clearly, the directive should not be used to grant protection in cases of abuse. At the same time, it would be incompatible with the principle of effectiveness if the plaintiff were required to prove the aim of her claim, as that would hardly be possible in practice. It follows that the only reasonable interpretation of Article 24 is that it applies to every complaint based on the directive, except if it can be proven that the claim was abusive. Since in the present case neither side could prove their allegations, Article 24 shields the employee from dismissal as a sanction for her actions.

The seemingly contradictory outcome of the case at issue – that the plaintiff lost her case in the disciplinary proceedings against her superior, but won her appeal against her own dismissal – appears to be the only reasonable outcome in line with European law. Action against discrimination and harassment must be supported as far as possible as long as this is not at the cost of disproportionate interferences with the rights of others.

Footnotes

[1] CJEU, 21 July 2011, Case C‑104/10.

[2] CJEU, 19 April 2012, Case C‑415/10.

Subject: Sexual harassment – burden of proof

Parties: J.W. (employee) – v - Municipality of Vienna

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