SUMMARY

2013/52 Dismissal discriminatory even if HR department was unaware of real reason for dismissal (AT)

<p>An Austrian woman with a Polish background was dismissed following taunts about her ethnicity, even though the HR department was given a different reason to dismiss her (sickness absence) and said it would not have dismissed her had it known the real reason. The Court found against the employer, demonstrating that it was responsible for the employee’s discrimination by her manager despite the manager having deceived the employer into dismissing the employee.</p>

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An Austrian woman with a Polish background was dismissed following taunts about her ethnicity, even though the HR department was given a different reason to dismiss her (sickness absence) and said it would not have dismissed her had it known the real reason. The Court found against the employer, demonstrating that it was responsible for the employee's discrimination by her manager despite the manager having deceived the employer into dismissing the employee.

Facts

In 2009, the plaintiff, who was an Austrian woman with Polish roots, started to work for the defendant restaurant as a cook's assistant. During her employment she and other work colleagues had to tolerate a number of unreasonable practices by the production manager, her direct supervisor. She was subject to unfair work allocation, high work pressure and degrading

and insulting comments, which referred to her Polish roots. As a result of this treatment the plaintiff suffered psychological stress and this was one of several factors that led to her taking extended sick leave.

The plaintiff and several other employees complained about the behaviour of the production manager in a meeting with the production manager's superior (the kitchen manager). The plaintiff stated in particular that she had been insulted and badly treated because of her Polish origins. As a result, the production manager was transferred to another position for a period of three months.

A few weeks before the production manager was supposed to return to his old workplace, the plaintiff was given notice of termination by the defendant at the request of the kitchen manager. The reason the kitchen manager had given to the human resources department for his request was the plaintiff's long and frequent sickness absence. However, in reality it seems the kitchen manager believed that no further cooperation between the plaintiff and the production manager was possible because of the plaintiff's complaint. It was later established that if the human resources department had been informed about the real reason for the kitchen manager's request, the employer would not have terminated the contract.

The plaintiff then sued the defendant for workplace discrimination.

The court of first instance and the Court of Appeal *(Oberlandesgericht Wien*) both found in favour of the employee. They declared the termination ineffective because it was based on discrimination on grounds of ethnicity. The defendant appealed against the decision.

Judgment

The Civil Servant Act 1995 (*Vertragsbedienstetenordnung1995, the 'VBO'*), a local act applying to civil servants in Vienna, as a Federal State of Austria, which implements Directives 2000/43/EC and 2000/78/EC, applied. Section 4a of the VBO provides that a person must not be discriminated against, either directly or indirectly based on a protected characteristic, such as ethnic origin. Harassment and victimisation are considered to be forms of discrimination. Harassment occurs where there is negative behaviour in relation to a person's ethnic origin that qualifies as offensive or inappropriate and creates a hostile, degrading or humiliating environment for the person. Victimisation includes cases where an employee has made a disclosure relating to equal treatment and is dismissed as a result.

The Supreme Court (*Oberster Gerichtshof)* upheld the Court of Appeal's decision. The judge pointed out that a broad view must be taken when considering whether harassment is related to a protected characteristic (e.g. ethnic origin) and so the harassment did not need to be

based exclusively on the actual ethnic origin of the employee.

The Supreme Court had the opportunity to examine the notion of 'ethnic origin' as it is used in Directive 2000/43, s4a of the VBO and s17 of the Equal Treatment Act. The Court first noted that the Directive speaks of "racial or ethnic origin", whereas the Equal Treatment Act only refers to "ethic origin". The Court's interpretation was that people may be discriminated against because they are considered to be 'aliens' and not members of a given social group. Therefore, in assessing ethnic origin, a person's cultural background can be taken into account. In this case, the plaintiff could be seen to have immigrant roots, which falls within the ambit of the law.

The Court also affirmed that the plaintiff's employment was terminated for discriminatory reasons. As the true reason for the dismissal was the employee's complaint about her superior, she had been victimised in violation of equal treatment law. The fact that the human resources department would not have terminated the contract if they had known the real circumstances was held to be irrelevant, as the employer had to accept responsibility for the actions of its managers. The Court therefore found that the reason for termination of the employment was unlawful victimisation.

Commentary

The case demonstrates that employers are liable for the discriminatory practices of their managers even if their managers deceive them. In this case, the Court established that the employee would not have been dismissed if the human resources department had known the true motivation for the kitchen manager's request. It is unclear from the facts of the case, however, why it was that the human resources department was unaware of the employee's complaint about harassment by her superior. Further, it seems to me that even the employee's sick leave could not constitute a non-discriminatory reason for the termination of employment - as this was caused, at least in part, by harassment on ethnic grounds.

Nevertheless, the reality for the employee was that she was dismissed as a result of her complaint about discriminatory harassment by her superior and was a subject of victimisation.

The case shows very clearly that the concept of 'ethnic origin' applies to anyone with a migration background, irrespective of their skin colour or country of origin. According to the legislative materials relating to the Equal Treatment Act, the crucial question is whether a person is *considered* to belong to a different social group by reason of a factor that cannot be easily changed. Possible factors include skin colour, but others might be language, religion, culture and customs. In this way the Court took a 'constructivist' approach in coming to its view.

Comments from other jurisdictions

Germany (Dagmar Hellenkemper): It is very likely that a German court would have applied the same reasoning given that it demonstrated the relevant principles in a recent decision (see *Schreiner/Hellenkemper*, Incorrect information by employer may indicate discrimination, EELC 2012-4, p. 6 ff). In this decision, the court had ruled that it was clear that the employee might have been treated differently because of her ethnic origin (Turkish), at least the employer had failed to establish that the different treatment was for other reasons. Although other employees in the above-cited OGH-case had also complained about the kitchen manager's behaviour, the plaintiff in this case could establish that discrimination on grounds of ethnic origin had led to her contract being terminated, as she had suffered insulting comments referring to her Polish origin. A German Court therefore would have reasoned that her ethnic origin would have been at least part of the 'bundle of motives' (*Motivbündel*) that led to her termination.

Subject: Ethnic discrimination Parties: L K (worker) – v – S (employer)

Court: Oberster Gerichtshof (Austrian Supreme Court)

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