

SUMMARY

## **2011/65: Dismissal for marrying a woman of Chinese origin is unfair (GER)**

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### **Summary**

The Regional Labour Court in Schleswig-Holstein has recently decided that dismissing an employee for marrying a woman of Chinese origin is unfair.

### **Facts**

The plaintiff was an engineer who had worked for the company (a supplier for the German armed forces) as a secondee since May 2006. Whilst doing so (via a third party employment agency), the plaintiff visited his girlfriend in China on several occasions (trips in relation to which he received security clearance from the company). In 2009 the company offered the plaintiff a permanent job which he planned to take up in February 2010 after his marriage in China in December 2009. After the wedding, however, the plaintiff's wife remained in China. As a result of this situation, the plaintiff was in frequent contact with his wife from Germany and he intended to continue visiting China on a regular basis. On 5 March 2010 the plaintiff was suspended by the company as it had 'security concerns'. In June 2010 the company dismissed the plaintiff.

### **Legal arguments**

In Germany, an employee is protected against dismissal pursuant to the Protection Against Unfair Dismissal Act (the 'Act') once he or she has completed six months of service, whether on the basis of a permanent or a fixed-term contract. Accordingly, in this case, where the

plaintiff had only been directly employed by the company for a brief period, the employee was not protected. If the Act applies, dismissal is only fair provided it relates to the employee's conduct or personal situation or operational reasons relating to the company. Nevertheless, even where the Act does not apply, pursuant to the German Civil Code dismissals may not be arbitrary. Moreover, the German anti-discrimination legislation applies to dismissals even in cases where the Act does not apply.

The company argued that the dismissal was not arbitrary, as a real security risk existed. According to the company, the fact that the plaintiff's wife lived in China constituted a risk because the Chinese government could use her in order to pressure him to disclose information. Furthermore, he would be travelling back and forth between Germany and China on a regular basis, giving the Chinese government more opportunities to put pressure on the employee. In explaining why the dismissal was not discriminatory, the company argued that while place of origin and nationality are both 'protected characteristics' in relation to which discrimination is prohibited (also by association), residency is not. The company argued that the problem was not that the plaintiff's wife was Chinese, but merely that she lived in China. Had she decided to move to Germany following the wedding no security risk would have arisen.

## **Decision**

The Local Labour Court in Elsmhorn judged in favour of the company. However, on appeal, the Regional Labour Court in Schleswig-Holstein held that the company's decision was arbitrary, in that the plaintiff's situation had not materially changed as a result of his marriage (his trips to China as a secondee had previously been approved with no issue) and the security risk alleged by the company was not factually supported. Interestingly, the anti-discrimination angle was not touched upon by the court when issuing its ruling. However, the court did reference the protection of family life contained within the German Constitution (which protection includes the right to marry whomever one chooses) and, importantly, concluded that the company's decision was contrary to German public policy as well as to established norms of decency.

Normally, under German law the remedy where a dismissal is deemed to be unfair is reinstatement. However, as the court found the company's decision to be contrary to public policy, it was able to decide to terminate the (automatically reinstated) employment relationship between the parties and order the company to pay the plaintiff a lump sum in the amount of seven months' salary. A typical lump sum in unfair dismissal cases equals half or (at most) one month's salary for each complete year of service so the court's award in this case (where the employee has only been employed for four months) was perhaps designed to send

a message that dismissals on these grounds will not be tolerated.

### **Appeal**

The company immediately sought leave to appeal to the German Federal Court, but this was initially denied by the Regional Court. However, the company has lodged a special application for permission to appeal and is currently awaiting the result of this application.

### **Commentary**

The plaintiff in this case also grounded his initial claim on indirect associative racial discrimination within the meaning of Directive 2000/43. In its judgment in the Coleman case, which concerned disability discrimination, the ECJ held that the prohibition of direct discrimination laid down in Directive 2000/78 was not limited to people who themselves were disabled. There is no reason why the ECJ's reasoning regarding 'associative discrimination' in Coleman would not also apply to the other discrimination strands listed in Directive 2000/78 (age, belief etc.) and in Directive 2000/43 (race).

Whether that doctrine could also be applied to indirect discrimination is more controversial, but in any event, the ECJ in the Coleman case had no need to address this question as the referring court had limited its questions to the issue of direct associative discrimination. In any event, it is perhaps not easy to come up with examples of indirect discrimination on the basis of another person's protected characteristics.

However, this case is the perfect example of such a situation. The plaintiff was treated less favourably than his colleagues on account of the residency of his wife. While residence is not a protected characteristic, it is obvious that a policy that disfavors people living in China affects relatively more Chinese than non-Chinese people. It is also obvious that the characteristic 'Chinese' is one that relates to racial or ethnic origin within the meaning of Directive 2000/43. However, on first instance, the Local Labour Court in Elsmhorn dismissed the plaintiff's argument in this regard on the basis that 'residence' is not a protected characteristic and the plaintiff appeared to accept this reasoning: he did not raise the issue again before the Regional Labour Court.

**Subject:** Unfair dismissal, other forms of discrimination

**Parties:** Autoflug GmbH - v - Blase

**Court:** Regional Labour Court in Schleswig-Holstein, Germany

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**Creator:** Regional Labour Court in Schleswig-Holstein

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