SUMMARY

2011/39 No damages for discriminatory dismissal (AT)

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Facts

The employee worked as a waitress. In October 2006 a customer grabbed her between the legs and touched her intimately. The waitress shouted at the customer and told him that he was not allowed to touch her and that he should never try to do so again. The manager of the establishment summarily dismissed her. He told the waitress that if a customer drinks two bottles of wine, behaviour like this is 'regarded as part of the deal'. By not accepting this behaviour, the employee was not what he considered a 'real' waitress.

The waitress sued her employer for damages resulting from the loss of her job. As a result of the sexual harassment she was afraid to work night shifts and she failed to find suitable employment in a day job. She claimed compensation in lieu of notice (i.e. the remuneration which would have been paid if proper notice had been given, in her case, two weeks pay) as well as the difference between her former wages and her unemployment benefits for a period of about eight months.

Judgment

The court of first instance (Arbeits- und Sozialgericht Wien) ruled that the employee was only entitled to compensation in lieu of notice and not to any additional damages. It reasoned that compensation in lieu of notice is a form of 'abstract damages', meaning that it is owed irrespective of actual loss. For this reason, the sum paid as compensation for not observing the correct notice period is seen as constituting full compensation for unjust summary dismissal, however unfair the dismissal may be. In other words, there is no other remedy for unfair dismissal. In the case of the waitress, she would have been eligible for compensation equal to two weeks of salary, were it not that the time limit of six months for raising such a claim had expired, for which reason even that claim was dismissed.

The Appellate Court of Vienna (Oberlandesgericht Wien) upheld the lower court's decision but argued differently. It noted that the employee's claim was neither for immaterial damages resulting from the discriminatory dismissal nor for damages resulting from the sexual harassment by the customer. The only thing the employee had applied for in her submission to the court was compensation of material damages resulting from the dismissal. Section 12 (7) of the Austrian Equal Treatment Act (Gleichbehandlungsgesetz), as it read at the relevant time, allowed only one type of claim for discriminatory dismissal, namely reinstatement, but this was not something the employee had claimed. The court cited literature to the effect that additional damages may be claimed, but that loss of income exceeding the compensation in lieu of notice is not seen as damages attributable to the discriminatory dismissal. Given that Austrian law does not require an employer such as the one in this case[1] to give a reason for terminating an employment contract, loss such as that claimed by the waitress, inasmuch as it exceeded two weeks' wages, would also have occurred in the event she had been dismissed for a non-discriminatory reason, and therefore need not be compensated by the former employer.

The Supreme Court (Oberster Gerichtshof) upheld the decisions of the lower courts but again took a different approach to justify this result.

According to the Supreme Court it was undisputed that the reason for the dismissal was the way in which the waitress had reacted to sexual harassment by a customer, and it was also beyond doubt that this dismissal was discriminatory and therefore illegal. The Equal Treatment Act, as it stood before it was amended in 2008 provided reinstatement as the only remedy for discriminatory dismissal. However, as the plaintiff had not claimed reinstatement, but only loss of wages exceeding the notice period of two weeks, her claim had to be denied.

The Supreme Court went on to cite existing case law, which did not award remedies other than reinstatement. That case law refers to the government's Explanatory Memorandum to

the Bill of Parliament that led to the amendment of the Equal Treatment Act in 2008. The amendment introduced a choice for the employee either to claim reinstatement or to accept termination and claim (material and immaterial) damages. According to the Explanatory Memorandum the amendment was intended to create a significant legal change by giving employees a choice between two options. The Supreme Court therefore assumed that the option just to claim damages did not exist before 2008.

The Supreme Court noted explicitly that it did not consider the employee's argument that reinstatement would lead to an unacceptable situation, as this argument was introduced at too late a stage in the proceedings and therefore constituted an inadmissible alteration of the claim.

The Supreme Court therefore concluded that the exclusivity of the right to challenge a dismissal by claiming reinstatement as a sanction for discriminatory dismissal pre-2008 can only lead to the conclusion that there is no legal basis for any of the claimed damages (neither compensation for notice nor additional damages).

Commentary

From a national point of view this decision is surprising, seeing that any employee who has been dismissed summarily without good reason may claim compensation for notice if he or she does not want to be reinstated or if reinstatement is not an option available because he or she is not covered by the general protection against dismissals (usually because of working in a business with fewer than five employees). It therefore seems that under the pre-2008 law employees who claimed discriminatory dismissal were less well-off than employees who had been dismissed unfairly for a non-discriminatory reason, having not more but fewer options. This is something that does not fit in too well with the Austrian constitutional principle of equal treatment.

From an EU point of view it is also doubtful whether the remedies offered by the pre-2008 Equal Treatment Act were sanctions that met the 'effective, proportionate and dissuasive' test as foreseen in EU legislation.

The Supreme Court mentioned in an obiter dictum that it might have ruled differently had the employee based her claim on the argument that reinstatement was unacceptable (which in my view would be very much the case here). In that case the Court might have granted some other remedy. However, it is questionable whether, in that event, more than the compensation for non-observance of the notice period would have been granted.

Although the remedy issue is no longer relevant since the amendment to the law on 1 August

2008, new questions have arisen. Under the new legal regime it is not clear how to calculate monetary damages. As the decision reported above illustrates, Austrian courts are reluctant to grant more than remuneration during the notice period, reasoning that employment relationships in Austria may be terminated by giving notice, even without just cause. Some scholars therefore argue that if employees can be dismissed summarily without good reason and cannot claim compensation beyond salary for the non-observed notice period, why should a discriminatory dismissal yield a higher monetary award? Others point out that EU law requires sanctions in the event of discrimination to be sufficiently effective, proportionate and dissuasive and that therefore further compensation is called for. If the latter view prevails, given that I cannot see punitive awards becoming accepted in Austrian practice, claims for immaterial loss will be likely to become increasingly common.

It should be noted that in the case reported above none of the courts dealt with the question of whether the waitress could claim compensation for the sexual harassment by the customer, the waitress having limited her claim to loss of earnings resulting from the dismissal. However, it is by no means certain that a claim for harassment would have been successful.

Comments from other jurisdictions

Germany (Paul Schreiner): In Germany the summary dismissal of an employee must be based on a good reason. In the case at hand, it is hard to find one. Consequently, had the case been heard in Germany, the plaintiff probably would have asked the court to declare the termination invalid.

If a notice of termination is drafted properly, it will usually include the reasons for termination of the employment, even though these do not generally have to be justified unless the employer has more than ten employees. If so, i.e. if there are more than ten employees, the Dismissal Protection Act will apply. However, regardless of whether it applies, the termination in the case reported above can probably be seen as discriminatory and therefore invalid by reason of harassment under the German Equal Treatment Act (Allgemeines Gleichbehandlungsgesetz, or 'AGG'). If the termination was invalid, the consequence would be reinstatement. Therefore, it is likely that in Germany the plaintiff in this case could have declared the summary dismissal to have been invalid and void.

Besides the option of obtaining payments during the notice period, the plaintiff would also have been able to claim immaterial damages in accordance with section 15(2) AGG. This provision covers immaterial damages of any kind, including violations of dignity. Claims for immaterial damages are in principle not limited (the only exception being where a job applicant whose application is rejected for discriminatory reasons can only be awarded up to

three months' salary where it is clear that he or she would not have got the job even without the discrimination).

Further, the AGG contains provisions relating to material damages (section 15(1)). Given that the summary dismissal was unlawful in the case at hand, there are no further material damages to be awarded.

United Kingdom (Carla Feakins): Based on the facts of this case, a UK employee could argue that she had been discriminated against on a number of grounds. Firstly the dismissal itself could amount to sexual harassment. Harassment can occur where an employee is treated less favourably by her employer because of her rejection of unwanted sexual conduct, even where the sexual conduct was that of a third party, as was the case here.

Secondly, the employee could argue direct discrimination on the basis that she was treated less favourably than a male waiter in the same situation would have been.

Thirdly, she could argue she had suffered indirect discrimination on grounds of her sex. The test is whether the employer applied a provision, criterion or practice that puts women at a particular disadvantage without justification. For example, a practice that waiting staff must put up with sexual harassment from customers would affect women more than men.

In October 2010 a new cause of action was introduced in the UK by the Equality Act 2010, allowing employees to bring claims against their employer for failure to prevent 'third party' harassment. The action is limited to situations where the employer knows that the employee has been harassed in the course of his or her employment on two other occasions - not necessarily by the same person - and the employer fails to take reasonably practicable steps to prevent it. (It is not clear whether the waitress in this case suffered other harassment such as to have enabled her to bring this type of claim.) However, in March 2011 the UK government announced that it will consult on abolishing this particular type of claim, which it has described as 'unworkable'.

In addition to the various types of discrimination claim in this case, the employee would also have a claim for unfair dismissal.

At the time the case was heard, the only apparent remedy available for a discriminatory dismissal in Austria was reinstatement. In the UK remedies for discrimination are dealt with separately from those for unfair dismissal. UK remedies for unfair dismissal include reinstatement, re-engagement (engagement by the employer to do comparable work) and compensation for financial loss including loss of earnings, which is currently capped at £68,400.

In contrast, tribunals cannot award reinstatement in discrimination claims: the principal remedy is compensation, which is uncapped. Discrimination damages can include awards for injury to feelings and financial losses, including loss of earnings. A loss of earnings award is calculated by putting the employee in the position he or she would have been in if the discrimination had not occurred. In a case of this severity, the court might also decide to make an award for aggravated damages where the employer has acted in a 'high-handed, malicious, insulting or oppressive manner'.

Footnote

1 Employers with fewer than five employees are not required to give a reason for dismissal. Austria has not ratified ILO Convention 158.

Subject: Unfair dismissal, gender discrimination

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