SUMMARY

2010/82: Employer succeeds in discriminatory dismissal of employee who lacked work permit (AU)

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Facts

A Turkish woman ("the plaintiff") moved to Austria in 2002. In March 2008, she applied for a job as a cleaner. At that time she had a residence permit, but no work permit. She filled in a form in which she confirmed that she did have a work permit and was not pregnant.

The plaintiff started her work on 1 April 2008. On 6 May 2008, her gynaecologist informed her that she was in her 10th week of pregnancy. On 14 May 2008, she informed her employer that she was pregnant. She was dismissed summarily (termination without notice) on the grounds that she had not disclosed her pregnancy during the recruitment process. Nevertheless, an administrative fine was imposed on the employer for having employed a foreigner without a valid work permit. On 12 June 2008, the plaintiff had an abortion. A causal link with the termination of employment could not be established in the ensuing court proceedings.

The plaintiff sued her employer, claiming both a termination indemnity and immaterial damages. Her claim in respect of the termination indemnity was based on the Austrian Maternity Protection Act, which provides that a dismissal during pregnancy is invalid. Given that the dismissal prohibition continued until the date of the abortion and that the applicable

notice period was two weeks, she argued that the employment contract did not terminate until 27 June 2008. Therefore, the claim for a termination indemnity equalled her salary for the six-week period of 14 May to 27 June 2008. The claim for immaterial damages, in the amount of € 1,500, was based on the argument that the termination was sex-discriminatory.

The defendant based its position on an Austrian law, which provides that the employment contract of a person who needs but lacks a work permit is invalid, i.e. is deemed never to have existed. Any salary paid for work actually performed need not be refunded. Therefore, no salary was owed beyond 14 May 2008, so the defendant argued.

Judgment

The court of first instance found in favour of the plaintiff as regards the termination indemnity, but her claim for immaterial damages was turned down. Both parties appealed.

The Court of Appeal ("*Oberlandesgericht Innsbruck*") overturned the judgment inasmuch as it awarded a termination indemnity. It held that, pursuant to the Employment of Foreigners Act, a termination indemnity is not owed in the event the employee lied about having a work permit. The case was remanded back to the court of first instance, which was instructed to examine whether the plaintiff had lied that she held a work permit or whether the information she had provided at the time of her application for the job was the result of a misunderstanding.

As for the immaterial damages, the Court of Appeal rejected the plaintiff's claim. It confirmed that the termination of the plaintiff's employment because of her pregnancy constituted sex discrimination outlawed by the Equal Treatment Act (*Gleichbehandlungsgesetz*, "GlBG"). It even accepted that the Equal Treatment Act, if construed in compliance with Directive 76/207/EC (as amended by Directive 2002/73/EC), would cover situations where the employment contract was null and void under the Employment of Foreigners Act. However, before being amended in August 2008, the Equal Treatment Act did not provide for damages in cases of discriminatory termination of employment. Instead, the employee could challenge the termination and apply for re-instatement. The Court of Appeal held that under the Equal Treatment Act, as it stood at the relevant time, there was neither the need nor the possibility to read an immaterial damages remedy into the Act.

The plaintiff applied for judicial review by the Supreme Court. This court held that the clear wording of the Equal Treatment Act, as it stood prior to its amendment in 2008, excluded any further remedy in case of a discriminatory termination of employment, other than a challenge to the termination's validity. On this basis the Supreme Court felt no need to investigate whether that situation was in compliance with European equal treatment legislation.

On the issue of the termination indemnity, the Supreme Court corrected the Court of Appeal's decision. It held that the Maternity Protection Act cannot be invoked by an illegal worker. Therefore, the fact that the plaintiff's employment was discriminatory was not considered relevant.

Commentary

It must be noted that in August 2008, three months after the plaintiff's dismissal, the Austrian Equal Treatment Act was amended so that employees whose employment is terminated because of their sex can now choose between challenging the termination (seeking re-instatement) and claiming material and immaterial damages (section 12(7) GlBG). Prior to that amendment, the lack of a provision in the Equal Treatment Act explicitly enabling employees to claim damages in the event of a discriminatory termination of employment was criticised on the ground that it failed to comply with European Equal Treatment law.

The Supreme Court's approach to the issue of immaterial damages, as claimed by the plaintiff, may seem rather restrictive. However, in view of the number of provisions in the (old) Equal Treatment Act explicitly enabling the employee to claim immaterial damages for sex discrimination, it must be assumed that the Austrian Parliament had deliberately chosen the challenge of the discriminatory termination to be the sole legal remedy in that case. On the basis of the principles of interpretation in compliance with European law as applied in Austria, the Supreme Court seems to have had no choice but to deny the award of immaterial damages.

It remains to be added that on the basis of the "*Francovic*h" doctrine the plaintiff could claim damages from the Austrian State for the delay in fully implementing Directive 76/207/EC (as amended by Directive 2002/73/EC). Legal scholars had already pointed out that not providing for immaterial damages in relation to termination of employment (as opposed to other forms of sex discrimination) falls short of the Directive.

Comments from other jurisdictions

Germany (Paul Schreiner and Christian Busch): Under German law a missing work permit does not invalidate an employment contract, although an employer is under an obligation to terminate such a contract. However, doing so can conflict with paragraph 9 of the German Maternity Protection Act ("MuSchG"), which provides that termination during pregnancy is invalid. Although there is, as far as can be seen, no decision of the Federal Labour Court concerning this, in view of the enormous relevance of the MuSchG for pregnant employees and their interest in not having their contracts terminated during pregnancy, its protection should take precedence over the employer's right to terminate.

The employer in the reported case therefore could only have challenged the employment contract with the argument of having been illegally misled by the plaintiff. This of course cannot be based on the plaintiff's lie about her pregnancy. It is established case law in Germany that an employer may not ask a job applicant whether she is pregnant and that an employee who is nevertheless asked such a question has the right to lie.

Concerning an entitlement to immaterial damages, in contrast to the situation in Austria, there has been a provision in Germany since August 2006 that provides a right to compensation and indemnity in paragraph 15 of the German General Equal Treatment Act ("AGG") in the case of discriminatory behaviour by the employer. Although § 2(4) AGG suggests that a termination of employment does not fall within the scope of the AGG, the Federal Labour Court ruled in 2009 that compensation or an indemnity according to paragraph 15 AGG owing to a discriminatory termination are nevertheless possible. Therefore, under German law the claimant would have been entitled to compensation on the grounds of sex discrimination.

Ireland (Georgina Kabemba): In Ireland it is illegal to employ someone without a valid employment permit. Therefore the plaintiff's employment would have been terminated solely for this reason. Issues in relation to her pregnancy should not have been referred to as the Employment Equality Acts, 1998 and 2004 prohibit discrimination on grounds of gender. In addition, it is not illegal in Ireland to dismiss an employee during her pregnancy, with the exception of when the employee is on protective leave provided for under the Irish Maternity Protection Acts, 1994 and 2004, which generally commences 2 to 4 weeks prior to the birth of the child and lasts for a maximum period of 42 weeks.

United Kingdom (Hester Briant): In the UK, the outcome of this case would depend on the Employment Tribunal's finding as to the reason for the dismissal: was it because of the plaintiff's pregnancy or her immigration status? Any dismissal where the principal reason is connected to an employee's pregnancy or maternity leave is automatically unfair (and would also constitute direct sex discrimination). In contrast, termination by reason of "illegality", which would include not having the right to work in the UK, is potentially a fair reason to dismiss. However, employers are likely to be found to have acted unfairly if they terminate employment for this reason without first allowing the employee an opportunity to clarify or appeal their immigration status with the UK Border Agency.

Employers in the UK are therefore currently in the unfortunate position of trying to combine their strict obligations under immigration law, including potentially severe penalties for employing illegal workers, with their duties to employees under unfair dismissal law. One practical solution is to: (1) terminate the individual's employment on grounds of illegality; (2)

offer them an extended time period to appeal their dismissal and support them in their application or appeal to the UK Border Agency during this time; and (3) depending on the outcome of that process, reinstate them if appropriate.

Subject: Gender discrimination, unfair dismissal

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