

SUMMARY

2013/19 Employee with foreign disability certificate cannot claim Austrian disability dismissal protection (AT)

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Facts

The Austrian Act on the Employment of Persons with Disabilities (*Behinderteneinstellungsgesetz*) grants employees with a rate of disability of at least of 50% the status of a 'privileged worker with disabilities'. Such persons enjoy, in particular, special protection against dismissal. This status is granted by an administrative decision of the Federal Social Authority (*Bundessozialamt*) if applied for by the employee. The administrative decision is confirmed in a certificate. The employer is not informed of the application, nor of the decision.

An Austrian national living in Germany but working in Austria had a German certificate stating that he was disabled with a rate of disability of 50% according to the German Social Code (*Sozialgesetzbuch*). He did not enjoy the status of a privileged worker with disabilities under Austrian law, as he had not applied for that status. When he was dismissed by his

Austrian employer, he claimed compensation for unfair dismissal. His claim was based on the argument that, although he lacked an Austrian certificate, he was actually a worker with disabilities and the Austrian courts ought to accept the German certificate, given that he satisfied all the criteria for attaining that status and would have been awarded an Austrian certificate had he applied for one.

The lower courts rejected the claim. The *Landesgericht Wels* pointed out that the German decision could not substitute the necessary Austrian official status as a privileged worker. On appeal the *Oberlandesgericht Linz* upheld this decision and stated that the alleged direct binding effect of the German administrative decision had no legal basis under Austrian law. Additionally, the court saw no discrimination based on the worker's nationality, given that he was Austrian, nor an infringement of his freedom of movement as a worker within the EU. He appealed to the Supreme Court (*Oberste Gerichtshof*).

Judgment

The Supreme Court acknowledged that, as a cross-border worker, the plaintiff enjoyed all rights deriving from the freedom of movement of workers. However, it was not clear to the court how the Austrian provisions protecting privileged employees with disabilities against dismissal, which require an Austrian administrative decision, can hinder or prevent a worker from another member state to take up employment in Austria. The court pointed out that the procedure for obtaining an Austrian certificate is very low level, that foreign medical records are taken into account and that there is a public interest in treating all workers with disabilities who are employed in Austria in the same way.

The Supreme Court also commented that the status of a privileged worker entitles the employee to special benefits and to protection against dismissal, but that this status might also discourage employers from hiring such employees. The law therefore leaves it to the employee to decide whether to apply for this status. Additionally, it is possible to give up the status of privileged worker once it has been awarded. An automatic recognition of foreign status would strip the employee of the option not to apply for, or to give up this privileged status.

Commentary

In a way, this is a logical and straightforward decision. Yet it feels a bit unfair and the Supreme Court's reasoning does not feel convincing. The law providing disabled workers with extra dismissal protection is there for good reason. The plaintiff in this case was disabled, and if he had applied for an Austrian certificate, he would have got one. The plaintiff therefore deserved to be protected. He could be dismissed without extra protection, and he lost the case, solely because he neglected to have his German certificate 'converted' into an Austrian certificate.

The Supreme Court's reasoning in accepting the harsh result of this omission may be correct but it is formalistic and to some may not appear persuasive.

It is true that job applicants often do not inform their prospective employers about their privileged status for fear of not being hired on account of the extra difficulty in dismissing them. It is also true that some employees elect not to apply for a certificate or, if they already have one, to have it withdrawn.

Theoretically, therefore, it is true that, if having a German certificate would automatically confer privileged status in Austria, that would make it impossible for an Austrian employee to have his privileged status in Austria withdrawn without simultaneous withdrawal of his German certificate. However, this fact does not strike me as a strong basis for an argument to decline privileged status on the basis of a foreign disability certificate.

A more convincing argument, that was only used indirectly in this case, would have been that, in giving up the need for a national disability certificate and accepting equivalent foreign certificates, the employer, the employee and the court would be confronted with the need to decide whether a foreign certificate is equivalent to an Austrian certificate. This might weigh more heavily than the burden on the employee of making a simple application for an Austrian certificate. A compromise might perhaps be to publish a list of foreign certificates that are equivalent to the certificate provided in the Austrian Act on the Employment of Workers with Disability.

Comments from other jurisdictions

Germany (Dagmar Hellenkemper): In Germany, as in Austria, disabled employees with a certain degree of disability are protected by special restrictions concerning the termination of their employment. In general, the decision as to whether an employee is disabled is based on factual findings and the certificate has a purely declaratory effect. Nevertheless, a disabled employee will only enjoy special protection if the disability is either proven by the national certificate or if the disability is obvious.

This raises the question of whether or not a disability proven by a foreign certificate can be deemed obvious, bearing in mind that under German Law the disability is seen as obvious if the employer can objectively determine that the disabled person suffers a disability of at least 50%. As there is no official list of what kind of disabilities equate to what degree of disability, it might be hard for the court to tell whether the disability was obvious to the employer. As to the foreign certificate, the court might be inclined to ask whether the national and foreign criteria for determining a disability are comparable. In conclusion, I suspect that a German court would have decided likewise - provided the disability was not so obvious that the

employer would have been able to tell without doubt.

Subject: Other forms of free movement

Parties: Not identified

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