SUMMARY

2018/15 (International) air carriers under Austrian Labour Constitution Law (AT)

<p>The general protection against dismissal under Austrian labour law only applies if at least five employees are employed permanently. The special provisions for air carriers under Austrian law only apply to air carriers that have their principal place of business in Austria. Whether foreign businesses and their employees employed outside Austria should be afforded protection against dismissal remains unresolved.</p>

Facts

The defendant, an air carrier with its principal place of business outside Austria, had employed a certain employee since 1988 in Austria. From 2000, the defendant started to reduce its personnel for operational reasons and this affected 220 employees in Germany. The defendant also significantly reduced its workforce in Austria, to the extent that, as of 16 May 2015, the employee was the last person employed in Austria by the defendant. The employee was the station head at Vienna International Airport.

However, the defendant decided to change this from later the same year, replacing the station heads by trans-regional station heads. Thus, from that point on, Vienna International Airport was supervised from outside Austria. The defendant also decided that all assistance to flight crews should be provided in a centralised way from outside Austria. The last employee was therefore made redundant on 15 November 2015, with notice effective until 30 June 2016.

Since 1 November 2008, the defendant had employed fewer than five employees in Austria and there had only been a works council until 2011. Therefore, the employee was terminated without dismissal protection.

Proceedings

The employee challenged the termination pursuant to the general protections against dismissal provided in the *Allgemeiner Kündigungsschutz*, the 'ArbVG'). However, this general protection only applies to employees employed in businesses with five or more permanent employees in Austria.

The employee therefore argued that all workplaces belonging to an air carrier must be considered as one common business in calculating the threshold of five permanent employees. He also argued in the alternative that he was in fact part of the defendant's business in Germany and that the German workforce, having more than four additional employees was enough to trigger the general protections under Austrian law.

The effect of this would have been that the defendant would have had to comply with the preliminary procedure, which stipulates that the works council must be notified by the employer before notice of termination is given to an employee. In effect, this meant that the defendant should have notified its German works council about the termination. As this did not happen, the argument was that the termination was void. The employee also argued that even if the termination was not void, it was at least challengeable for being socially unfair under the general protection against dismissal.

The first two instance courts both concluded that the defendant did employ five or more people permanently at Vienna International Airport and that the general protections against dismissal termination did not apply.

Judgment

The Supreme Court (*Oberster Gerichtshof*, 'OGH') considered, not only the general provisions of the law, but also certain special provisions that effectively merge the workplaces of air carriers in order to take account of the dispersed nature of their business. These provisions help avoid the need to establish large numbers of individual works councils.

However, in the Supreme Court's view, these provisions only applied to air carriers under a particular section of the Austrian Aviation Act, namely those with an operating licence to carry passengers, mail and/or cargo for gain, who have their principal place of business in Austria. As the defendant's principal place of business was outside Austria, the provisions did not apply. Therefore, it was not necessary to clarify whether foreign workplaces belonging to an air carrier with an Austrian operating licence fell within the terms of this provision.

As concerned the alleged failure of defendant to comply with the preliminary procedure and

notify a German works council before issuing notice of termination, the Supreme Court stated that in Austria, there had been no works council at the defendant since 2011. Moreover, it appeared from the facts that there was no German works council. Therefore, given that there was no works council either in Austria or in Germany, the Supreme Court was of the view that the preliminary procedure did not apply. According to the Supreme Court, this would also have held true if the termination had been subject to German law. Thus, the Supreme Court rejected the employee's claim.

Finally, the Supreme Court assessed whether or not employees employed by Defendant in Germany needed to be taken into account in calculating the threshold of five employees for the general protection against dismissal. The Supreme Court felt that the employee had not adequately shown that he was integrated into the German workforce. There had been a works council for the Austrian workforce until 2011 and the employee had failed to prove how the situation had changed since then, in such a way that he had since been integrated into the German business.

The Supreme Court further stated that a reduction in force does not automatically lead to a change to the structure of the business and the employee could not prove that he had transferred to the German arm of it. The fact that he reported to the headquarters of the business – which is not situated in Germany – and that the trans-national station head in charge of Vienna International Airport was also not situated in Germany, did not support the idea that the employee was integrated into the defendant's German business. Hence, the Supreme Court concluded that he did not belong to German business. Thus, according to the Supreme Court, he had not been employed in a business with five or more permanent employees and the general protections against dismissal did not apply.

As Claimant did not belong to Defendant's German business the Supreme Court was not required to address whether employees employed in foreign businesses have to be taken into account with regard to the protections against dismissal under Austrian law.

The Supreme Court rejected all the employee's claims.

Commentary

In a globalised and highly connected professional world, full of complex organisations and dispersed workplaces, questions about which employees belong to which business and whose laws apply are becoming increasingly important. When general protections against dismissal are also linked to these questions, clear answers would be beneficial for everyone.

Certain legal scholars in Austria have concluded that Austrian general protection against

dismissal requires a business in Austria in which a works council could be established under the ArbVG.[1] In other words, the application of the general protection against dismissal under Austrian law requires five employees employed by an Austrian business. This means that employees employed outside Austria do not have to be taken into account in assessing the provisions on the general protection against dismissal.

In addition, in the case law of the German Federal Labour Court (*Bundesarbeitsgericht*, 'BAG') employees employed by businesses of the same employer, situated outside Germany are not taken into account in calculating the employee thresholds in the German Protection Against Dismissal Act (the *Deutsches Kündigungsschutzgesetz*).[2] Thus, only taking into account employees employed by the Austrian business in terms of the Austrian general protection against dismissal would provide the same result as current German case law.

In the recent years, the Austrian Supreme Court has had to resolve a number of cases in which fewer than five employees were employed in Austria by foreign employers who also employed people outside Austria (mainly in Germany). The Supreme Court has stated that the German Protection Against Dismissal Act does not apply to employees hired and employed solely in Austria by a German employer.[3] Nevertheless, the Austrian Supreme Court has also stated that the German Protection Against Dismissal Act may apply to the employment of an employee in Austria by a German employer if German law was explicitly or even implicitly agreed upon.[4]

However, there is no Austrian Supreme Court case law clarifying whether businesses in another jurisdiction have to be taken into account with regard to the general protection against dismissal of employees employed in Austria. Although this question was raised in the current case, the Supreme Court did not have to answer it, as the employee could not sufficiently proof that he was integrated into the defendant's German business. But the Supreme Court at least stated that employees in foreign businesses with employees employed in Austria, who are nevertheless not integrated with them, do not have to be taken into account in terms of the general protection against dismissal under Austrian law.

But the question of whether employees in foreign businesses have to be taken into account if an employee employed in Austria is, at least to a certain extent, integrated into the foreign business, remains – as does the question of whether a foreign works council needs to be involved in the termination procedure.

Comments from other jurisdictions

Germany (Jana Voigt, Luther Rechtsanwaltsgesellschaft mbH): This decision is in line with German case law in comparable cases. The relevant section of the German Dismissal Protection Law (*Kündigungsschutzgesetz*, 'KSchG') is Section 23(1), according to which, the

KSchG applies to operations regularly employing more than ten employees. The KSchG also applies if more than five people have been employed since before 1 January 2004.

But the KSchG only applies if the operation is situated in Germany. This is even the case if a foreign operation creates a joint venture with an operation based in Germany. Under German law an operation is an organisational unit of work equipment, which enables it technically to pursue an activity, either alone or in cooperation with its employees. It is not necessary for the employer to have its registered office in Germany.

Section 24 KSchG applies to the flight crews of aviation companies but 'land personnel' remain covered by Section 23 KSchG, which requires an operation in Germany. If an employee works outside Germany, the KSchG only applies to the employment relationship if the international assignment is for a limited time and the employee remains assimilated within the German operation.

Subject: Dismissal

Parties: not published

Court: *Oberster Gerichtshof* (Austrian Supreme Court)

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1. See Niksova, Kündigungsschutz und Kollisionsrecht – eine harmonische Beziehung? in *Kozak*, Die Tücken des Bestandschutzes 2017, p73.

2. See BAG 17 January 2008, 2 AZR 902/06; BAG 26 March 2009, 2 AZR 883/07; BAG 8 October 2009, 2 AZR 654/08; BAG 29 August 2013, 2 AZR 809/12.

3. See OGH 16 September 2011, 9 ObA 65/11s; OGH 27 September 2013, 9 ObA 54/13a.

4. See OGH 25 November 2014, 8 ObA 34/14d.

Creator: Oberster Gerichtshof (Austrian Supreme Court)
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