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## Employment & Labour - Austria

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### Supreme Court considers works council consent as act of revenge

Contributed by **Graf & Pitkowitz**

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**Legal framework**

**Facts**

**Decision**

The Supreme Court recently clarified that an employer is not obliged or authorised to examine the decision-making process of a works council regarding its consent to the termination of an employee, provided that the employer was unaware of any illegality concerning the internal decision-making process of the works council.

#### **Legal framework**

Austrian legislation protects employees against the socially unjustified termination of employment.

As a general rule, an employee may individually challenge the termination of his or her employment before the courts if the termination causes, in his or her individual situation, more than "the usual detrimental consequences and hardship associated with an employment termination". This forms the first prong of the three-prong test for unjustified termination. The usual consequences of termination are deemed to be a short period of unemployment (ie, zero to four months), but with realistic prospects of finding another job in a related area with similar pay. Conversely, unusual consequences would be a longer-than-average period of unemployment. A court-appointed expert witness will be called to testify as to whether the employee has established this first prong of the test.

Under the second prong of the test, the employer can claim that the challenged termination is still justified on grounds attributable to:

- the employee himself or herself (ie, personality-related causes such as constant illness, inability to perform at an average level or unfriendly behaviour to customers or co-workers); or
- the fair business judgment of the employer (ie, business-related causes such as closure of the business or part of the business, outsourcing the employee's job or department, downsizing, a considerable decline in revenue or commissions or following a merger).

Finally, under the third prong of the test, and only if both the employee (under the first prong) and the employer (under the second prong) have duly established their cases, the court will weigh the arguments given under the first and second prongs against each other and consider whether termination imposes a greater hardship on the employee than continuation of the employment would impose on the employer. In case of doubt, the employee will prevail. It is thus crucial that employers can provide convincing evidence to support their business judgement decisions.

Under Section 105 of the Labour Relations Act an employer must inform the works council before terminating an employment agreement. On receipt of the relevant information, the works council will have one week in which to submit a statement on the proposed termination. Any termination made without prior consultation of the works council, or before the end of the one-week period, will be deemed null and void, unless the works council has already stated its position. The works council may either agree or disagree with the proposed termination, or refrain from making a

statement. The right to challenge a termination as socially unjustified will depend on the reaction by the works council:

- If the works council expressly consents to the intended termination, the employee cannot challenge the termination as socially unjustified.
- If the works council objects, the employee concerned can request that the works council challenge the termination on his or her behalf. If the works council refuses, the employee can challenge the termination himself or herself.
- If the works council refrains from making any statement, the employee may challenge the termination himself or herself within two weeks of the notice of termination.

## Facts

In the case at hand, the employer decided to terminate the employment relationship with its human resources manager and informed the works council accordingly. The works council granted its consent without further consulting either the employee or the employer. The works council's consent was based on its apparent dissatisfaction with the human resources (HR) manager's actions. It later became apparent that the works council had wanted to retaliate against certain of the HR manager's misdeeds and various measures taken by him that had conflicted with the works council's position.

By virtue of the works council's consent to the termination, the HR manager was prevented from bringing a challenge before the court. Nonetheless, the HR manager brought the case before the court and argued that as the consent was based on retaliation against him, it was ineffective and did not constitute a valid consideration of his interests by the works council. Both the trial court and the court of appeals rejected his claim, a decision that the Supreme Court confirmed.

## Decision

The Supreme Court ruled that a works council decision on termination can be threatened with nullity only in cases where the employer acted in collusion with the works council with the intention of depriving the employee of his or her rights to challenge a termination. The plaintiff failed to show that such a conspiracy had occurred; therefore, the court argued that the employer could validly rely on the works council's statement (ie, consent to termination).

The Supreme Court also made it clear that, in the absence of a collusive element or an apparent transgression of the legal framework by the works council, neither the employer nor the courts are authorised to investigate the internal decision-making process of the works council as the representative body of all employees nominated in a democratic electoral process.

*For further information on this topic please contact [Jakob Widner](#) at Graf & Pitkowicz Rechtsanwälte GmbH by telephone (+431 401 17 0), fax (+431 401 17 40) or email ([widner@gpp.at](mailto:widner@gpp.at)).*

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## Author

### Jakob Widner



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