

Employment & Labour - Austria

Supreme Court finds national origin comments discriminatory

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The Supreme Court recently ruled that dismissal of an employee because of his or her national origin constitutes unlawful workplace discrimination based on ethnic grounds.

Legal framework

In line with relevant EU legislation, the Equal Protection Act prohibits employers from discriminating against employees on the grounds of age, race or ethnicity, religion, sexual orientation or gender. Protection under the act starts with the hiring process, but also covers any other aspect of employment, including pay, job assignments, promotions, benefits, vocational training and layoffs. It is also unlawful to harass an employee on any of these protected grounds. A dismissal based on unlawful workplace discrimination can be challenged before the courts and declared invalid.

Facts

The plaintiff, an Austrian citizen of Polish descent, was employed as a kitchen assistant. Her direct superior put undue pressure on her and treated her unfavourably by assigning her subordinate tasks. He also criticised her for her work performance and made offensive and derogatory remarks about her Polish origin. This conduct contributed to the employee's depressive exhaustion. She subsequently called in sick for an extended period. The plaintiff and her co-workers complained about the superior's behaviour to the manager in charge; the plaintiff also mentioned that her superior had insulted her because of her Polish roots. As a consequence, the manager moved the plaintiff's superior to another job with no connection to the plaintiff, but only for a duration of three months.

The manager in charge then requested that the HR department dismiss the plaintiff, due to her extended period of sick leave. The department complied and dismissed the plaintiff, who challenged her dismissal as discriminatory. It later turned out that due to the plaintiff's complaints about her superior's conduct, the manager had considered future cooperation between the plaintiff and her superior virtually impossible. In fact, this was the real reason for his request to dismiss the plaintiff, but he did not disclose this fact to the HR department. Had the department been informed of his intentions and the plaintiff's unfavourable treatment, the plaintiff would not have been dismissed.

Decision

The Supreme Court confirmed the trial court and appellate court decisions and declared the dismissal invalid. The court reasoned that the offensive and derogatory remarks made by the plaintiff's direct superior about her Polish origins constituted unlawful harassment because of her ethnic origin. Such harassment can be attributed to an affiliation with an ethnic group.

The requirement for a "connection" between harassment and a certain ethnicity must not be narrowly construed; otherwise, the objective of rules against unlawful workplace discrimination could not be achieved. In contrast, the protected ground of "race or ethnic origin" should be broadly construed and does not depend on actual ethnic differences. In line with the EU Race Equality Directive (2000/43/EC), unlawful workplace discrimination based on race or ethnic origin will occur where derogatory remarks, even if not directed at another ethnic group in the literal sense of that term, include a "foreign labelling" of the victim, as in the case at hand.

The court also ruled that the superior's silence about the real, discriminatory

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background of his request to dismiss the plaintiff had to be attributed to the defendant employer, since it is an employer's responsibility to organise its operations in a way that relevant information can be properly procured and communicated. Employers are therefore also liable for harassment by supervisors or co-workers under their control.

Comment

Employers would be well advised to communicate clearly to staff that harassment, including offhand remarks or other verbal conduct, directed towards any ethnic or national group is unlawful. Ideally, appropriate mechanisms would also include policies and procedures addressing harassment complaints.

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