

Supreme Court on pink ribbons

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In a recent decision⁽¹⁾ the Supreme Court sought to set the standard for an employer's right to introduce or enforce a dress code. The court based its decision on the privacy rights emanating under the Austrian Civil Code and the European Convention on Human Rights.

Facts

The employer, which offered municipal transport services, sued the defendant over a pink hair ribbon which he wore during his shifts as a bus driver. Despite the fact that the employee had failed to comply with previous instructions to refrain from wearing the ribbon, the employer could not terminate the employment relationship without the competent labour court's prior consent, as the employee was on paternity leave and was therefore afforded special statutory protection against dismissal.

The employer had issued general instructions regarding dress codes and staff uniforms. Under the dress code employees could wear only staff uniforms, not a combination of personal and professional clothing; however, the dress code did not prohibit wearing hair ribbons, head coverings or headscarves, as female drivers were allowed to wear these items, provided that they were discreet and unobtrusive.

The employer did not contest that the employee had to wear a hairband, scrunchie or similar item due to his admittedly "thick and bushy" hair. According to the employer, this need did not include a right to wear a pink ribbon. The employer argued that its operational interests were materially affected, as wearing a pink ribbon, although functional in the employee's case, was far too unusual and striking.

The district court and the appeals court upheld the complaint. The Supreme Court reversed these decisions.

Decision

According to the Supreme Court, an employer's instructions are enforceable only if they are in line with the terms of the employment contract and, at the same time, safeguard the valid moral and material interests of the employee. If the interests of the employer and employee do not match, on weighing these respective interests, the employer's interests must prevail or the instruction will be deemed unenforceable.

Instructions that affect employees' personal rights – including their outer appearance – must be treated particularly delicately. The balancing of interests in such cases must be undertaken cautiously. Based on the personality protections under the Civil Code and the European Convention on Human Rights, each person has a right to privacy. Those privacy rights also extend to the employment relationship, allowing employees to choose their clothing, hairstyle, jewellery, piercings and tattoos. Regulations that restrict personality rights in relation to hairstyle, piercings and tattoos rather than mere dress codes are particularly prone to privacy rights violations as they

also affect off-duty conduct. Seeking to draw a line between the operational interests of the employer and the personality rights of employees, the Supreme Court opined that an employer can interfere with an employee's personality rights only where the employee's outer appearance is viewed as improper or untrustworthy and would prompt "broad sections of the population" to conclude that he or she should not be taken seriously while attending to his or her duties (the Supreme Court also cited a previous case where a bank clerk with regular customer contact was deemed untrustworthy because he was wearing a striking gold necklace).

However, according to the Supreme Court, the employer did not show that passengers would doubt a bus driver's professional conduct and integrity just because he was wearing a hair ribbon in a striking colour. The employer also failed to show that customers would refuse to be driven by a bus driver with a pink hair ribbon. Although the Supreme Court conceded that the employer had a valid interest in the uniform appearance of its drivers, this interest was already safeguarded by the staff uniform, which the defendant had been wearing throughout. The Supreme Court also rebutted the employer's argument that, in case of an emergency, bus drivers should be easily recognisable by passengers and that this need might be impaired by a pink ribbon. Slightly sarcastically, the Supreme Court added that the evidence had not shown any relevant increase in passenger safety by wearing a hair ribbon in a less striking colour.

Comment

The court clarified that an employee's outer appearance is his or her private affair, and that the test applied by the court as to where this privacy ends is trustworthiness. How this test is to be applied remains somewhat murky, because the benchmark is the presumed taste and assessment of "broad sections of the population" (ie, the majority). Why only the majority of the population should have a say when it comes to trustworthiness is less clear.

It could be argued that an employer in the transport industry is offering its services to everybody (and not only the majority) and that therefore the remaining minority of passengers or customers should also find an employee trustworthy. Further, dress codes vary depending on job tasks and across different industries. In the bank case noted above, the pink hair ribbon would probably also have given rise to an argument of untrustworthiness.

Although clear-cut in theory, the guidance provided by the court still leaves considerable leeway for interpretation on a case-by-case basis.

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Endnotes

(1) OGH November 24 2015, 9 ObA 82/15 x.

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