

## Employment & Labour - Austria

### Supreme Court rules on paid leave for works council members

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#### Legal framework

##### Facts

##### Decision

In a recent decision the Supreme Court clarified that arrangements by works council members for a paid leave of absence are not enforceable if they go beyond the limits set forth in the Labour Relations Act.

#### Legal framework

Section 116 of the act provides that works council members should be granted the necessary time off with full pay during normal working hours in order to perform their duties as elected staff representatives.

In addition, Section 117 of the act provides that, depending on the number of staff and following a request by the works council, one or more council members can be given a permanent paid leave of absence for that purpose during their four-year tenure, according to the following schedule:

- one works council member in businesses with more than 150 employees;
- two works council members in businesses with more than 700 employees;
- three works council members in businesses with more than 3,000 employees; and
- one additional member for every additional 3,000 employees.

#### Facts

The employer (an airline) concluded an agreement with the labour union, according to which a specifically named member of the elected works council (a pilot heading the labour union's airline department) should be given a paid leave of absence "in analogy to Section 117".

The employer honoured this agreement for several years. However, in 2011 the employer decided that it should no longer be bound by the agreement and refused payment when the employee did not show up for flights as scheduled.

The employee sued for monetary damages, and both the Labour Court and the Court of Appeals granted his action. The Supreme Court reversed.

#### Decision

The Supreme Court ruled that Section 117 of the act is mandatory and compulsory for both employer and works council members and leaves no room for deviation, regardless of whether an agreement would benefit the specific works council member. Under the legal framework, a works council member performs a voluntary and honorary activity and must not derive any extra benefits from his or her position. The permanent paid leave granted under Section 117 is the exception to that rule; any agreement that provides for paid leave in excess of the statutory framework is therefore null and void (not only voidable). An employer can also invoke the nullity of the agreement and refuse to continue an illicit practice that goes against basic principles of employee representation.

The only permissible way to increase the number of works council members with a permanent paid leave of absence is therefore an increase in staff (ie, once the number of employees in the respective organisational unit exceeds the next threshold under Section 117, an extra member can benefit).

The court made it clear that the paid leave in the agreement at hand exceeded the

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benefits that works council members could accept in exchange for their honorary post. The court therefore concluded that the agreement between the employer and the labour union conferred an undue advantage on the plaintiff and violated the concept of volunteering. Under such circumstances, the employer was entitled to terminate the permanent leave of absence and withhold payment, even though the leave of absence had already lasted for a number of years.

The decision demonstrates that the Supreme Court is unwilling to deviate from the letter of the law when interpreting the far-reaching rights of works council members under the act.

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