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Austrian Supreme Court rules on lack of dismissal protection during covid-19 furlough scheme

GRAF ISOLA Rechtsanwälte GmbH | **Employment & Immigration - Austria**

JAKOB WIDNER

SARAH MICHEUZ

Introduction

The Supreme Court recently decided for the first time on the issue of whether employees enjoy individual protection against dismissals when performing covid-19 short-time work.[(1)] The Court clarified that there is no such individual protection, either during that period or the subsequent one-month retention period. Furlough schemes seek to keep staff employed and subsidise employers to achieve that. In contrast, the individual protection of employees against termination of their employment is set out in other sources of employment law. Furlough schemes are not meant to add an additional layer of protection in this regard.

Facts

The plaintiff was employed by the defendant as a project manager in software development. With effect from 23 March 2020, during the first national covid-19 lockdown, the defendant concluded individual agreements with 15 employees (excluding the plaintiff) regarding covid-19 short-time work. As of 15 April 2020, the defendant announced via videoconference that short-time work would be extended to the whole workforce. On 23 April 2020, a draft of the agreement and an additional flex-time agreement for the short-time working phase were disseminated to staff via the intranet, with a request to return them duly signed by 27 April 2020. The plaintiff asked several questions in the chatroom visible to all employees and announced that he would seek legal advice and probably submit the requested documents a week later. The defendant was displeased with plaintiff's response in the given circumstances and terminated the employment relationship because of this incident and previous discrepancies with the plaintiff on other issues. The notice letter was sent on 27 April 2020, the termination became effective on 31 July 2020 and the plaintiff was put on garden leave until that date. The defendant hired a replacement for plaintiff.

The plaintiff sued for payment of overtime, redundancy pay and compensation for unused vacation, all calculated as per 31 October 2020. The plaintiff argued that the defendant had had no right to terminate the employment relationship before the end of the retention period would have lapsed – due to the short-time work scheme applicable to the entire staff, including the plaintiff – which ended on 31 October 2020.

The trial court dismissed the claim on the ground that plaintiff's termination did not infringe the terms of the covid-19 short-time work agreement. According to the court, the plaintiff was terminated for personal reasons, rooted in his argumentative conduct, which is a permitted ground for dismissal during furlough.

The court of appeal upheld the plaintiff's appeal on the payment of overtime. However, the court shared the legal opinion of the lower court that the plaintiff's personal conduct and his adamant refusal to consider his employer's interest in a furlough scheme during the covid-19 pandemic were valid grounds for termination.

Decision

The case was appealed to the Supreme Court.

The Court opined that the decisive purpose of Austria's agreements on furlough schemes prompted by the covid-19 crisis – which are based on model agreements negotiated by the "social partners" (ie, the Chamber of Commerce and trade unions) – is to create the conditions necessary for obtaining the subsidies on short-time work that are granted under the Austrian Labour Market Service Act. The statutory conditions expressly mention that the total number of the workforce must be upheld, but they are silent on any aspects pertaining to individual protection against dismissal of individual employees. Accordingly, a termination during covid-19 short-time work or the subsequent one-month retention period is generally legally effective. However, the fact that employers receive public subsidies to maintain their workforce has some relevance. Employees can challenge a termination based on the assertion that it lacks sufficient social justification. Employers can then show that either personal or operational reasons made the termination inevitable. Operational reasons will be hard to prove during a furlough scheme, since employers receive public subsidies compensating them for almost all of their wage costs.

Comment

This landmark decision is of great relevance. The issue of dismissal protection was widely debated among legal scholars, and employers were at a loss as to how to proceed when it came to dismissals during phases of short-time work. Often, they chose to refrain from dismissals, fearing lawsuits (such as in this case) and continued an employment relationship for longer than necessary.

For further information on this topic please contact Jakob Widner or Sarah Micheuz at GRAF ISOLA by telephone (+43 1 401 170) or email (j.widner@grafisola.at or s.micheuz@grafisola.at). The GRAF ISOLA website can be accessed at www.grafisola.at.

Endnotes

(1) OGH 8 ObA 48/21y.