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Dismissal for violation of Covid-19 quarantine order (AT)

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Summary

For the first time in Austria, the Supreme Court had to deal with the question of whether the summary dismissal of an employee for violating a Covid-19 quarantine order was lawful under Austrian employment law. The Court held that the immediate dismissal of an employee who violated such an order and nevertheless went to work was justified. According to the Court, an employer may take immediate action, such as specifically issuing a dismissal, when employees are negligently exposed to a risk of infection by workmates. The Court stated that it was irrelevant whether the employee was actually ill or not. The Court ruled that the dismissal was justified and in good time.

Facts

The employee (the claimant) had heard on 11 March 2020, before the beginning of the first lockdown due to Covid-19 in Austria (16 March 2020), that an employee of the company had been potentially infected with Covid-19. Since the claimant was also taking care of her sick father, she had herself tested for Covid-19 on Sunday, 15 March 2020. Because the employee was classified as a person suspected of being infected with Covid-19, the medical professional who carried out the test gave her a quarantine order. The order mandated a 14-day quarantine period. In particular, the employee was instructed not to leave her home during this period.

Despite the quarantine order, the employee went to work on Monday, 16 March 2020. The employee was already showing symptoms at this time. The employee gave her superiors the impression that she had a cold. When asked, the employee stated that she did not have a fever and that she felt "fine so far". The employee did not mention the quarantine order or the classification as a suspected Covid-19 case.

On the next day, 17 March 2020, the employee was notified by the health department that the test was positive. Only after that did the employee submit a photo of the Covid-19 quarantine order to the human resources department. The health department also contacted the employer and asked the employer to quarantine the entire team for a period of 14 days. The employee's department included 23 other employees. On 18 March 2020, the employee was summarily dismissed.

The employee challenged the dismissal and sought a declaration that her employment relationship was still valid. In the first and second instance decisions, the claim was dismissed. Consequently, the employee appealed to the Austrian Supreme Court.

Judgment

The preliminary decisions ruled that the claimant's behaviour constituted a breach of trust justifying a summary dismissal. The main reason was that she had appeared at work despite the risk of spreading the virus and infecting her colleagues. In addition, her behaviour resulted in the quarantine of 23 other employees for a period of 14 days which was held to cause a severe problem for the employer.

The Supreme Court confirmed these rulings rejecting all the reasons for appeal presented by the claimant. First the Court stated that it was not important whether the claimant was actually ill or not. The employee was not accused of being ill having Covid-19, but of showing up for work despite the quarantine order and without informing the employer. In doing so, the claimant negligently exposed all colleagues in her department to the risk of infection. In the opinion of the Supreme Court, this behaviour reflected a problematic attitude on the part of the employee.

Second, the uncertainty prevailing in society as a whole at the beginning of the first lockdown on 16 March 2020 was not accepted as an excuse for the employee's behaviour. Precisely because of the uncertainty about the dangerousness and spread of the disease, the employee should have strictly followed official orders.

The Supreme Court also found the dismissal to be timely. The employer immediately dispatched the entire

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department, including the employee, to quarantine after hearing of the employee's positive Covid-19 test. By doing so, the employer – even though the dismissal was not pronounced until one day later – did not engage in any conduct that the claimant could have understood as acceptance of her misconduct.

Commentary

This case is among the first cases in Austria dealing with the pandemic's implications for employment. More specifically, this judgment demonstrates that Covid-19 measures must be taken seriously by employees.
Any violations of Covid-19 quarantine orders can result in a health risk due to the high risk of infection to all employees. In addition, the official precautions ordered in response can lead to a significant loss of employees and thus to major economic problems. The Supreme Court has now confirmed that such conduct affecting employees and business operations constitutes a ground for summary dismissal for lack of trustworthiness.
However, if the employer becomes aware of a violation of a Covid-19 rule, an immediate action by the employer is required due to the principle of promptness (*Unverzüglichkeitsgrundsatz*) laid down in Austrian employment law. Continued employment of the employee with knowledge of violations without taking any action may result in the loss of the right to (summarily) terminate the employment relationship.

Comments from other jurisdictions

Bulgaria (Rusalena Angelova, DGKV): Bulgarian law contains an extensive legal framework regulating the termination of employment agreements. Employment agreements can be terminated (i) with the consent of both parties, or (ii) unilaterally by the employer or the employee. Individual employment agreements may be validly terminated by the employer only on those grounds explicitly stated in the Labour Code and strictly following the procedure set out therein. Bulgarian law does not recognize unilateral termination by the employer at will. Thus, dismissal of an employee for violating a Covid-19 quarantine order would not be lawful under Bulgarian employment law.
The period of a Covid-19 quarantine is covered by a sick leave certificate issued to the employee concerned. The latter is not allowed to appear at work during the period for which a sick leave certificate is issued. If an employee acts in breach of the sick leave certificate and appears at work, the employer is allowed to suspend the employee from work and to prevent them from entering the employer's premises.
Violation of a Covid-19 quarantine order in Bulgaria is in addition related to engaging administrative and criminal liability of the individual violating the order.

Denmark (Christian K. Clasen, Norrbom Vinding): We have yet to see a similar case in Denmark concerning violation of quarantine regulations, but there have been a few cases related to employment law regarding Covid-19 regulations and more are expected in the future.
One of these examples is related to the frequently changing official travel guidelines from the Danish Ministry of Foreign Affairs that classified certain countries in different security levels (green, yellow, orange or red) meaning, among other things, that people arriving in Denmark from an orange or red country faced a compulsory two-week quarantine.
In a recent case before an industrial arbitration tribunal, an employee had travelled to an 'orange' country in his summer holiday. Before the holiday, the employer had informed all employees that absence from work due to travel-related quarantine restrictions would be regarded as unlawful and would have consequences for their employment. While on holiday, the employee was contacted by his immediate superior and informed that he would be dismissed if he did not immediately travel home, as he would otherwise be unable to return to work after the holiday due to quarantine restrictions. The employee did not travel home and was therefore summarily dismissed. The case was brought before an industrial arbitration tribunal where the employee's trade union argued that the dismissal was unfair on the grounds that the employer's announcements regarding travel-related quarantine had been unclear and that the employee, for personal reasons, had been unable to return to Denmark when contacted by his immediate superior. The industrial arbitration tribunal found the dismissal lawful, stating that it had been clear to the employee that he risked dismissal if he travelled to an 'orange country' in his holiday. Furthermore, even if the employer's communication had been open to different interpretations, there was a strong presumption that the employer would not have accepted the possibility that, in principle, every employee in the company had the option of taking two weeks' unpaid leave.
In another recent case before the Dismissals Tribunal, a company's summary dismissal of an employee, who refused weekly Covid-19 testing due to personal beliefs, was found lawful. The employee was informed that he would face dismissal if he persisted in refusing to be tested but continued to refuse even so. The decision should be seen in light of Danish legislation in place at the relevant time, allowing employers to require employees to undergo regular Covid-19 testing if such a requirement pursued a legitimate aim.
Along with the Austrian case, the two examples illustrate that an employee's refusal to comply with national or company guidelines in regard to Covid-19 may have consequences for their employment. This may especially be the case if the guidelines are justified by serious health risks to the employee's co-workers or out of con-

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sideration to the ongoing operations and if the guidelines – and possible employment-related consequences – have been made clear to the employee. The full scope of the justification of such dismissals remains to be seen in case law.

Finland (Janne Nurminen, Roschier, Attorneys Ltd): According to the Finnish Employment Contracts Act (55/2001, as amended) termination of an employment relationship requires relevant and substantial grounds. Before an employee can be dismissed, the employer must usually first issue the employee with a warning. In addition, the employer is usually obliged to observe the applicable notice period.

The law does not provide exact examples of acceptable dismissal grounds. According to the Employment Contracts Act a serious breach or neglect to fulfil an obligation arising from the employment contract or the law, which has a material impact on the employment relationship, and material change in the working ability of the employee which makes the employee incapable of working may be considered relevant and substantial grounds for termination on individual grounds. In the Finnish court praxis, the threshold for valid dismissal grounds has been set rather high. There is a large variety of acceptable dismissal grounds. For example, an employee's inappropriate behaviour may entitle the employer to terminate the employment. Further potential dismissal grounds include acting against the employer's instructions, lack of trust and carelessness at work, just to name a few.

In very exceptional and severe cases the employer can dismiss the employee with immediate effect, i.e. without complying with the notice period. This requires particularly weighty grounds, meaning employee's actions or omissions that breach the employee's responsibilities so severely that the employer cannot reasonably be required to continue the employment even for the duration of the notice period. Typically, criminal offences with elements of dishonesty or violence against the employer or a colleague entitle an immediate dismissal.

Whether an employee's actions or omissions constitute lawful dismissal grounds is determined on a case-by-case basis and depends on, for example, the severeness of the employee's action or omission, the employee's role and responsibilities in the employer's organization, the employer's prevailing policy as well as other circumstances. Discriminatory dismissal grounds are always considered unlawful. For example, as a rule, an employee may not be dismissed on the grounds of illness. Thus, it is not possible to dismiss an employee simply because he/she has Covid-19. However, a violation of Covid-19 quarantine orders could constitute grounds for termination of employment on individual grounds.

In Finland, there is no case law concerning a dismissal of an employee who has violated an infectious disease quarantine order. However, a violation of a Covid-19 quarantine order could constitute grounds for termination of employment on individual grounds, as such conduct could under certain circumstances be regarded as a serious breach of the employee's duty of loyalty. By violating a quarantine order the employee could also put his/her colleagues' health at risk, thus violating the occupational safety rules. Also the employer's customers could be at risk. In addition, according to the Finnish Criminal Code (39/1889, as amended), one who intentionally or by gross negligence violates quarantine or isolation under the Infectious Diseases Act (1227/2016, as amended) may be sentenced to a fine or imprisonment of up to three months for a health protection violation. As violation of a Covid-19 quarantine order is criminalized in Finland, the employee violating this order would simultaneously commit a crime. As criminal offences with elements of dishonesty against the employer or a colleague could entitle an immediate dismissal, it seems that at least a normal dismissal with a notice on the ground of violating the Covid-19 quarantine order could be possible in Finland. Nevertheless, whether dismissal grounds exist is always considered on a case-by-case assessment based on factual circumstances of the case at hand.

Germany (Othmar K. Traber, Ahlers & Vogel): The Covid-19 pandemic has become a major challenge for many countries in the past two years, in particular for advisors and tribunals in employment law. Questions have been raised which were partly completely new or at least shed light on regulations which were lost in obscurity for a long time.

One topic that must be addressed in this context is which ramifications an employee may face when breaching a quarantine order because of the risk of potentially being infected with Covid-19. In the case at hand the claimant did not inform her superiors about her quarantine order, nor of the fact that the symptoms she showed were potentially related to an infection with Covid-19. By showing up for work at the employers' premises against the quarantine order she bore the risk of eventually infecting other employees. The Supreme Court confirmed this behaviour as an attitude that cannot be accepted in terms of the employee's duties to also prevent her colleagues from the risk of being infected. This assessment would be probably the same in Germany. Also in Germany, employees must not work at their workplace when a quarantine order has been given (working remotely remains still possible if suitable to the job). The quarantine must be followed, even though the test result is not available at this time. Violating a quarantine order means a breach of the German law as well as the contractual duties of an employee and could be regarded as good cause for an immediate dismissal.

Another topic of this case touches on the right time for giving notice with immediate effect. Following Austrian employment law, the principle of promptness says that the employer is required to act immediately when it becomes aware of a good cause. This seemed to be problematic since the dismissal had been given not on the same day but one day after the employer became aware of the fact of gross misconduct. Even though the Supreme Court found the dismissal to be timely, the

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employer could have almost lost its right to summarily dismiss the employee due to the principle of promptness. An equal principle of promptness also exists in Germany but not as strict as it seems to be in Austria. Section 626(2) of the German Civil Code stipulates that notice must be given within 14 days after becoming aware of the unlawful behaviour being a good cause for such a dismissal. As a result, the employer must have this knowledge or the person being responsible for personnel matters such as a HR Director for instance. Besides this given deadline, it could also be as in the Austrian case a problem if an employer acted in a way that could be regarded as a kind of acceptance of this behaviour in question, for example if the employer let the employee still work during this decision period instead of putting them on a time-limited interim garden leave until giving notice. But this depends, for sure, on the particular good cause and the individual situation and the later justification given by the employer during a lawsuit.
To sum up, the Austrian decision could have been the same in Germany.

Germany (Leif Born, Luther Rechtsanwaltsgesellschaft mbH): The Covid 19 issue has, of course, also occupied the German labour courts in the last two years. Some interesting decisions have emerged on issues such as default of acceptance and operational risk, annual leave, employment entitlement and unfair dismissal.
As far as we know, there has not yet been a case identical to the proceedings before the Austrian Supreme Court. But there was a case with a quasi-reversed scenario. An employer called their employee in to work although an official quarantine order had been issued against them. After the employee refused to come to work, they were dismissed by the employer. The Labour Court of Cologne ruled that the employee was justified in refusing to work and considered the dismissal invalid. The Labour Court based the decision on the fact that the employee was obliged to comply with the quarantine order and it was therefore impossible for them to come to work.
There have also been cases in Germany involving employees who were dismissed for breaching hygiene regulations. Several cases have been brought by employees who were dismissed because they refused to wear a mask at work or worked without a mask despite the employer's instructions. In all these cases, the labour courts dismissed the employees' claims for protection against dismissal and considered the dismissals to be effective. The reasoning here is the same as that of the Austrian Supreme Court: employers are entitled or even obliged to take protective measures during the pandemic. Employees who do not comply with these measures violate work instructions and, moreover, endanger their co-workers as well as customers or patients.
One case received special attention in Germany. An employee was dismissed after stealing a bottle of disinfectant from their employer. The Labour Court – unsurprisingly – dismissed the employee's claim against the dismissal and held that the dismissal was effective. However, the decision was not so much influenced by the circumstances of the pandemic, but was in line with the case law of the Federal Labour Court on theft by employees.
Summarising the jurisprudence of the German courts, it can be said that the protection against infection is considered an important aspect in the employment relationship. Both employer and employee must comply with the infection protection regulations. Employers can demand that employees comply with hygiene regulations. Violations by employees can justify dismissals.

Greece (Effie Mitsopoulou, Effie Mitsopoulou Law Firm): There is no case law in Greece yet on this subject. The only decision in relation to Covid-19 compulsory vaccination is a Conseil d'Etat decision, which, in its Plenary Session issued last December, ruled that the compulsory vaccination of certain categories of employees such as healthcare personnel, firefighters, paramedics and National Emergency Aid Center personnel was in accordance with the Greek Constitution. The compulsory vaccination of healthcare personnel has been considered as a constitutional obligation manifesting social solidarity. The Conseil d'Etat furthermore ruled that compulsory vaccination does not violate the principle of equal treatment in relation to other categories of employees and that the procedure for testing and controlling compliance with the vaccination obligation against Covid-19 does not violate the data protection legal provisions.

Hungary (Gabriela Ormai, CMS Cameron McKenna): This case is interesting from a Hungarian legal point of view because, although the legislation is similar to the Austrian regulations, it is possible that the Hungarian courts might have ruled differently in this case.
Under Hungarian law, in addition to compliance with the quarantine obligations of Covid-19 due to the pandemic, the emphasis is on compliance with the obligations arising from the employment relationship. While an essential element of this is the duty of cooperation between the parties, even more emphasis is placed on the employer's obligation to provide a safe and healthy workplace, particularly with respect to the pandemic.
In this case, although the employee was negligent in failing to comply with the relevant quarantine rules and the cooperation rules with the employer, the employer was more strictly liable for failing to check the employee's possible infection. In Hungary, in practice, some employers required regular, even daily, (PCR) testing, and it was also common practice for employers to carry out body temperature tests when employees entered the workplace, which in practice gave them a better chance of screening out suspicious cases.
On the basis of the above, it is possible that the Hungarian courts would have come to the conclusion that in this case the termination of the employee's employment relationship by summary notice was not justified and therefore unlawful.

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Romania (Andreea Suciu, Andreea Oprea, Suciu – Employment and Data Protection Lawyers): Firstly, as a general remark, the concept of summary dismissal is not regulated by the Romanian labour law. Therefore, employers must comply with certain complex procedures laid down by the Labour Code when deciding to dismiss an employee (either for disciplinary/professional unfitness reasons or based on restructuring grounds, etc.).

Despite the legislative differences, we welcome such a decision rendered by the Austrian Supreme Court given the sensitive way in which the measures to prevent Covid-19 infection have been and continue to be treated both in Romania and in the EU in general when it comes to employment relationships. This can be observed both at the legislative level when certain countries (Romania included) are reluctant to enact concrete measures that can be taken against employees who disregard the gravity of the situation caused by a global pandemic, and at the social level when employers are reluctant to take concrete measures against such employees.

However, in the present case, the irresponsibility of such an employee was successfully sanctioned by her employer and, further, the Austrian Supreme Court considered this an act which rendered the employee unworthy of the employer's trust and therefore ruled that the summary dismissal was justified.

Secondly, and to our knowledge, this is the second decision of the Austrian Supreme Court involving a dismissal of an employee who did not adhere to the epidemic law following the dismissal of an employee who refused to get tested for Covid-19. In this case, the decision was in favour of the obligation to test since it was not up to the employee to "question the reasonableness of protective measures which his employer was obliged to implement under applicable legislation".

Even if these rulings cannot serve as a general basis for any kind of termination of employment, they provide guidance and are to be welcomed. Nevertheless, it will always be necessary to weigh all factors, evaluate and act on a case-by-case basis taking into account the national applicable legal provisions.

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