Supreme Court rules on formal requirements for dismissal challenge

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Introduction

In a recent decision (OGH 24.01.2020, 8 ObA 48/19w), the Supreme Court clarified the legal implications of one particular scenario of dismissal challenges: if a works council expressly objects to an employee's dismissal (as opposed to expressly consents or fails to make a statement), the right to challenge the dismissal rests with the works council, but only if the employee, within one week from such objection, requests the works council to act accordingly and file a lawsuit. Only if the works council does not comply with such a request does the right to challenge pass on to the employee, who can then – within a further two weeks – file a claim.

In this case, the employee had failed to contact the works council, but the works council confirmed that it would not have filed a lawsuit even if it had been so requested. Nonetheless, and absent a request, the Supreme Court ruled that the employee had no standing to sue their employer and dismissed the case.

Facts

The employee was given notice. In compliance with the Labour Relations Act, the employer notified the works council of this intention beforehand. The works council expressly objected to the dismissal and notified the employee accordingly in line with statutory procedures. The employee repeatedly tried to contact the works council's chair within the following week but failed. He then retained legal counsel to file a lawsuit, challenge the dismissal and seek reinstatement. Only after filing the lawsuit did the employer's legal counsel contact the works council and learn that in case of an express objection to a termination, the works council would invoke its right to challenge the dismissal and sue the employer on behalf of the employee only if the employee was a member of the labour union, which the employee in the case at hand was not.

Therefore, it was clear that the works council would not have filed the lawsuit even if the dismissed employee had approached it with a corresponding request.

The labour court dismissed the plaintiff's case on the grounds that absent any contact between the employee and the works council within one week of dismissal, and therefore without any sign of a request to have the works council challenge the dismissal, as mandated by law, the right to challenge could not have transferred from the works council to the employee, regardless of the works council's confirmation during proceedings that such a request would have been to no avail.

The Court of Appeals reversed, hypothesising that in light of the potential course of action revealed by the works council, a request by the employee to challenge would have come to nothing so therefore, legally, the employee's failure to comply with the letter of the law made no difference.

Decision

Surprisingly, the Supreme Court lifted the appellant court's decision, re-established the labour court's view and dismissed the case.

The Supreme Court stated that the legal requirements for an employee's request to have a works council challenge a dismissal in case of an express objection are not too formalistic and that it would suffice if the works council could derive from the employee's communications at least some hint that the employee wished the works council to act. However, a hypothetical request that would have

allegedly been denied by the works council does not pass this already relaxed legal test.

The Supreme Court conceded that an employee request can occur before the employer issues the notice letter if only the works council has been informed about the employer's intentions, and that employees must not observe a specific form of communication with a works council. However, the Supreme Court rebutted the view held by several legal scholars that an employee's presumed consent to challenge would trigger a works council's formal right for legal action and, absent compliance with such a presumed consent, the right to challenge would then pass on to the employee. According to this view rejected by the Supreme Court, the term 'request to challenge' would have to be interpreted as 'joint understanding to challenge'.

Conversely, the Supreme Court concluded that in order to qualify as a 'request' within the meaning of the law, at least some communication between the employee and the works council pointing in this direction is necessary. Absent any communication – written, oral or otherwise – there can be no request.

Comment

The Supreme Court's position in the case at hand appears somewhat formalistic, since the works council had made it clear during the court proceedings that a challenge was never an option without a union membership and that a request would have been useless anyway. The Supreme Court might as well have decided that the pre-condition for an employee's right to challenge can be deemed fulfilled where following the letter of the law does not add any substance to the case.

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