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## Employment & Benefits - Austria

### Supreme Court rules on alcohol testing

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August 19 2015

#### **Facts**

#### **Decision**

#### **Comment**

The Supreme Court recently ruled<sup>(1)</sup> for the first time on whether and how an employer can request that employees submit to alcohol testing.

#### **Facts**

The defendant employer, a railway company, had introduced a zero-tolerance alcohol policy, prompted by incidents where railway staff operating trains and equipment were caught working under the influence of alcohol. Railway companies are under specific statutory obligations to ensure operational safety. Under the regulatory framework, operating traction units under the influence of alcohol and consuming alcohol while operating units are strictly prohibited. The works council acknowledged the importance of the zero-tolerance policy in order to maintain operational safety and employees' safety in the workplace.

Shortly after another incident involving a train driver who was disciplined for operating a traction unit under the influence of alcohol, the employer conducted random breathalyser tests on all of its employees, both operational and administrative. None of the 42 employees tested showed any traces of alcohol in their breath.

Although generally in line with the employer's efforts to eliminate operational safety risks caused by staff working under the influence of alcohol, the works council requested that the employer refrain from further testing. The works council invoked a provision of the Labour Relations Act that allows it to veto control measures in the workplace that affect human dignity. The employer refused, citing statutory obligations on operational safety. The works council then sued and requested a preliminary injunction. The works council asserted that comprehensive alcohol testing without reasonable cause violated the privacy rights of the employees being tested. Should comprehensive alcohol testing without a particular suspicion of abuse not already amount to a violation of personality rights, the measure would qualify as a control measure that affected human dignity and would therefore require the works council's express consent, which had not been given.

The employer invoked its enhanced obligation to monitor and guarantee operational safety under the applicable legislation. Although the employer conceded that this enhanced diligence applies only with respect to operational staff of railway companies, alcohol testing was introduced for all employees (including office staff) to ensure equal treatment and help management to set a good example. The employer further claimed that the past incidents had clearly shown that the ban on alcohol had been disregarded, which made it necessary to conduct unannounced alcohol checks. Only such measures could ensure that minor cases of alcohol abuse and residual alcohol – both of which are banned under applicable safety legislation – were detected. The employer argued that human dignity was not at issue, because the control measure was introduced as a protection of human safety, uninfluenced by commercial considerations. In addition, the control density was within reasonable limits. More moderate means of control were unavailable under the circumstances.

The first-instance court found the employer's arguments convincing and dismissed the plaintiff's request for a preliminary injunction. The court of appeal upheld this decision, adding that the control measure was the result of a comprehensive balancing of interests. The court of appeal noted that the employer did not have the option to obtain the works council's express consent, because the employer could not force consent on the works council. Under the Labour Relations Act, the works council could decide to veto the control measure.

## Decision

The Supreme Court reversed the court of appeal's decision, qualifying the unannounced breathalyser tests as a control measure that affected human dignity and thus required the works council's prior and express consent in the form of a written works agreement. Summarising the various views on the issue in legal literature, the Supreme Court stated that the meaning of the non-specific legal concept of 'human dignity' can be derived by interpreting fundamental principles of civil law and employment law – in particular, the employer's duty of care. Citing Section 16 of the Civil Code, the Supreme Court concluded that this statutory provision – which affords each individual certain unalienable natural rights – constitutes a fundamental principle of Austrian law, which at its core aims to protect human dignity. When referencing human dignity in connection with control measures, Section 96(1)(3) of the Labour Relations Act sets out that the right to individual personality development is not subject to disproportional interference by the employer. According to the Supreme Court, there can be no doubt that physical integrity and privacy are also protected under this human dignity standard.

Control measures that in no way interfere with human dignity can be introduced without the works council's consent. Control measures that violate human dignity must not be introduced, even if the works council consents to the measures. The relevant level of interference lies between those two extremes – a tangent of human dignity.

In seeking to substantiate legal theory, the Supreme Court opined that determining whether a control measure affects human dignity requires careful consideration and a weighing of interests. While employers generally have a right to control and supervise their employees and protect property, employees have a viable interest in protecting their personality rights. Therefore, a control measure is permissible only if it constitutes the least intrusive measure that still achieves a legitimate result; otherwise, the measure will be considered to violate an employee's personality rights. Applying this test to the facts at hand, the Supreme Court criticised the alcohol testing, as it affected office workers, was unannounced and took place with no specific suspicion of abuse. Employees' privacy rights were inferred with without due regard to whether a violation of the ban on alcohol created a hazardous situation. Since breathalyser tests can detect low levels of alcohol (which could stem from the consumption of foods prepared with alcohol), the control measure did not consider whether the ability to work was impaired.

Under those circumstances, the employer's interests were not oriented towards safety aspects but, according to the Supreme Court, merely constituted "control for the sake of control (or discipline)". In addition, since the alcohol controls occurred at the start of the work day, the employer was testing the leisure habits of its employees. Finally, employees submitted to breathalyser tests would be under constant suspicion of misconduct, even if they complied with employer's zero-tolerance policy.

The Supreme Court did not qualify the breathalyser tests as a violation of rights, but made it clear that prior works council consent is legally required for alcohol testing that:

- is unannounced;
- is conducted without the employees' consent;
- is conducted without a reasonable suspicion of abuse;
- is conducted irrespective of whether minor abuse impairs an employee's ability to perform his or her duties properly; and
- occurs regardless of whether abuse creates a hazardous situation.

Without the works council's consent, control measures that meet the above criteria are illegal and employees need not comply.

## Comment

This first decision by the Supreme Court on the criteria for alcohol testing has left some questions for employers. Taken literally, the decision might suggest that even train operators working under enhanced safety regulations have a right to their daily *coq au vin* before showing up for work and that, generally, employees can show up for work with a hangover (ie, leisure activity) unless their employer can smell it (ie, specific suspicion). On the other hand, it is almost impossible for employers to comply with strict safety standards without unannounced testing, and employers are at a loss when the works council refuses to enter into a works agreement governing the issue. Maintaining safety should not hinge on the works council's whim – in particular, not where employers are held by law to an enhanced safety standard. Operating means of mass transport under the influence can cost lives and putting the protection of employees' personality rights first appears as a doubtful rationale.

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## Endnotes

<sup>(1)</sup> OGH 20.03.2015, 9 ObA 23/15w.

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