

APPLICATION/REQUÊTE N° 10247/83

Karl OBERMEIER v/AUSTRIA

Karl OBERMEIER c/AUTRICHE

DÉCISION of 12 March 1986 on the admissibility of the application

DÉCISION du 12 mars 1986 sur la recevabilité de la requête

Article 6, paragraph 1 of the Convention : *The decision by which an administrative authority authorises an employer to dismiss an employee does not constitute a determination of the employee's civil rights (*).*

Article 6, paragraphe 1, de la Convention : *La décision par laquelle l'autorité administrative autorise un employeur à licencier un employé ne tranche pas une contestation portant sur des droits et obligations de caractère civil de l'employé (*).*

THE FACTS (Extracts)

(français : voir p. 77)

The applicant is an Austrian citizen born in 1926 who resides in Linz.

The applicant was employed by a private insurance company as the Director of their regional branch office for Upper Austria. He was also entrusted with the administration of the company's building in which the branch office was situated. A dispute arose between the applicant and the company as to the remuneration of this latter activity, following which the company gave notice to the applicant in order to terminate his building administration functions with effect from 1 January 1975. The applicant thereby lost an additional income of about AS 70,000 per year.

(*) See however N° 11761/85, Obermeier v. Austria, Comm. Report 15.12.88, paras. 184-195.

Voir, par contre, N° 11761/85, Obermeier c/Autriche, rapport Comm. 15.12.88, par. 184-195.

The applicant challenged the termination by an action lodged with the Labour Court of Vienna in which he claimed in particular that the building administration formed part of the duties under his employment contract, and that partial termination of this contract was inadmissible. The action was allowed in first instance by a decision of 23 October 1979.

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In connection with the above litigation, the applicant's employers suspended him from his duties as Director of the regional office on the day following the first hearing before the Labour Court of Vienna, i.e. on 10 March 1978. The applicant challenged his suspension by an action which he lodged with the Labour Court of Linz on 9 March 1981, claiming in particular that the suspension was unjustified because it was in reality a sanction for his having sued the employers in court. The relevant proceedings are still pending.

The applicant's employers eventually decided to dismiss him with effect from 31 March 1982. This followed unsuccessful attempts to arrive at a friendly settlement with him concerning the various matters which by then had given rise to judicial litigation. However, as the applicant was 70 % handicapped, his dismissal required the previous consent of the invalidity office in accordance with the provisions of the Disabled Persons (Employment) Act. Administrative proceedings were therefore instituted for this purpose. The invalidity office declared its consent to the dismissal on 8 July 1981, and this decision was confirmed on appeal by the Provincial Governor for Upper Austria on 16 October 1981. The applicant then lodged a complaint with the Administrative Court which was eventually rejected on 9 March 1983.

The Court found essentially that the reason for the applicant's dismissal had not been his invalidity, and that the authorities had not overstepped the limits of their discretionary powers by finding that there were objective reasons for the applicant's dismissal as he had rejected all offers to settle the dispute with his employers. In view of the pension to which the applicant was entitled there was no question of a social hardship arising for him. The Administrative Court finally considered that no procedural principles had been violated in the administrative proceedings, in particular as regards the applicant's right to be granted access to the file.

The applicant not having appealed to the Constitutional Court, the consent to his dismissal thereby became final. However, by a decision of the Supreme Court issued on 23 October 1984 in the above proceedings concerning the validity of the applicant's suspension, the notice of dismissal was declared void because it had been given to the applicant prior to the Administrative Court's above decision. The employers now have instituted new proceedings before the invalidity office seeking retroactive consent to the applicant's dismissal in accordance with Section 8 (2) of the Disabled Persons (Employment) Act. The relevant proceedings are still pending (for further details see application No. 11761/85).

COMPLAINTS (Extract)

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As regards the proceedings before the Administrative Court concerning the consent to his dismissal, the applicant considers Article 6 para. 1 to be applicable because the proceedings in question were decisive for the determination of his civil rights.

In the applicant's view this provision was violated in particular because the Administrative Court did not hold a public hearing. The refusal of a public hearing was based on Section 39 (2) (f) of the Administrative Court Act which allows it to dispense with a hearing if on the basis of the written procedure it can be assumed that it will not lead to further clarifications. The applicant claims that this provision is as such incompatible with Article 6 para. 1 of the Convention.

Its application in his case was furthermore particularly unfair because it deprived him of the possibility to challenge effectively a number of incorrect findings in the impugned administrative decisions. They were in part based on documents submitted by his employers containing wrong and disparaging assertions which had not been disclosed to him in the administrative proceedings despite his requests to be granted access to the file. They involved in particular the wrong assertions that there had been continued efforts for a friendly settlement, and that he had unreasonably rejected all proposals made to him in this context. In reality there had been only one offer based on the mediation of the Minister for Social Affairs, and even this offer had not been rejected unconditionally by him.

The applicant also alleges bias in this connection. The Minister in question was in fact the husband of the Head of Personnel in his firm, and he was at the same time the Chairman of his trade union (whose representatives in the staff committee had backed the employers' measures and which had further refused him legal aid), and he was finally even the hierarchical superior of the invalidity office which had declared its consent to his dismissal.

The applicant finally considers the Administrative Court's decision as unfair and infringing the basic principles of the rule of law because it implies that a dismissal can be considered as justified merely because the employee concerned has sued his employers in the courts and is not ready to accept a settlement on their terms.

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THE LAW (Extract)

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The applicant [secondly] complains of the administrative proceedings on the consent to his dismissal under the Disabled Persons (Employment) Act, claiming that these proceedings, too, concerned the determination of his civil rights and obligations within the meaning of Article 6 para. 1 of the Convention. He alleges in particular that the Administrative Court proceedings on this question were not public and that their conduct has not been fair.

The Commission notes that the Disabled Persons (Employment) Act (Invalideneinstellungsgesetz) requires the employer to seek the prior consent of the competent authority before he can terminate a contract of employment of a handicapped person such as the applicant.

In the applicant's view, the procedure involved a decision concerning "civil rights and obligations" within the meaning of Article 6 para. 1 of the Convention, since the authorisation granted by the invalidity office and confirmed by the Provincial Governor and the Administrative Court had enabled his employer to dismiss him.

The Commission observes, in this respect, that the procedure of which the applicant complains concerns relations between the relevant administrative authority (the invalidity office) and the employer.

It is incontestable that the decision on dismissal rests ultimately with the employer himself.

The Commission considers therefore that, even if it is admitted that the procedure in question may have affected rights and obligations deriving from the relations between the applicant and his employer, it cannot be considered in any way to have decisively determined civil rights and obligations within the meaning of Article 6 para. 1 of the Convention.

The Commission notes that the dismissal actually pronounced with the authority's consent can subsequently be challenged in the Labour Courts, and that the applicant in fact made use of this possibility.

It follows that Article 6 para. 1 is not applicable to the administrative procedure in question; consequently, this complaint by the applicant is incompatible *ratione materiae* with the provisions of the Convention. This part of application must therefore be rejected in accordance with Article 27 para. 2 of the Convention (cf. No. 8974/80 Dec. 8.10.80, D.R. 24 p. 187).