

### Validity of dismissal due to verbal attacks against an employer's lawyer?

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#### Headnote

The employee, a highly qualified university graduate, phoned his employer's lawyer directly without going through his own lawyer during ongoing proceedings before the Labour Court concerning performance-based compensation and accused the lawyer of making himself look ridiculous and risking his licence to practise by spreading the employer's lies and slander during the proceedings. This was found to constitute a compelling reason for summary dismissal within the meaning of § 626(1) of the German Civil Code (*Bürgerliches Gesetzbuch* – BGB).

(Cologne Higher Labour Court, judgment of 23 January 2014 – 7 Sa 97/13)

#### Facts

The Cologne Higher Labour Court, which heard the appeal, had to decide, among other things, whether to allow a summary dismissal or a dismissal with notice and at the same time rule on the employer's request that the employment contract be terminated against payment of a reasonable severance amount.

On 1 March 2012, the plaintiff phoned the lawyer of his employer, the defendant, directly without going through his own lawyer. In this telephone call, the plaintiff accused his employer's lawyer of spreading lies and slander about him. He further claimed that he – the lawyer of the defendant – did not have the defendant "under control". The plaintiff also said that the employer's lawyer was making himself look ridiculous by spreading lies and slander. This telephone conversation lasted approximately 20 minutes.

The defendant then terminated the employment relationship with immediate effect and, alternatively, with

notice. The plaintiff filed an action for protection against dismissal. In the course of this action, the defendant submitted an alternative motion to have the employment contract terminated against payment of a reasonable severance amount. The court of first instance, the Labour Court, found that neither the summary dismissal nor the dismissal with notice was valid and also denied the motion for termination against payment of a reasonable severance amount.

#### Decision

The defendant's appeal of the judgment of the court of first instance was upheld by the Higher Labour Court only in respect of the motion for termination against payment of a reasonable severance amount. The Higher Labour Court was of the opinion that neither the summary dismissal nor the dismissal with notice was valid. The court did find that the statements made to the defendant's lawyer by the plaintiff were of such a nature as to constitute a cause for dismissal. However, the defendant's lawyer was not an uninvolved third party since the defendant had chosen the latter on the basis of a lengthy relationship to represent its interests vis-à-vis the plaintiff in an extremely sensitive personnel matter. As a result, the court concluded, that the lawyer was acting directly on behalf of the defendant by virtue of the power of attorney received from the latter.

However, the crucial factor was the fact that the verbal attacks made by the plaintiff in the telephone call with the defendant's lawyer were primarily directed against the defendant itself. The plaintiff's allegation to the effect that the defendant's lawyer was spreading lies and slander cannot, according to the court, be taken to mean that the plaintiff was claiming that the lawyer made these statements on his own initiative and without the authorisation of the defendant. Moreover, the allegations

would in fact apply to the lawyer only insofar as the lawyer repeated, in the context of the proceedings, lies and slander originating with the defendant. In addition, the plaintiff also claimed that the defendant's lawyer was jeopardizing his licence to practise law because of these lies and slander, thereby also exposing himself to the possibility of prosecution.

Nevertheless, the court found that dismissal was not compatible with the principle of proportionality in view of the circumstances in this particular case and that it was necessary to take into account that the plaintiff was a party to the proceedings and had become emotionally involved with the matter at issue. The decision also contained mention of the fact that the defendant's lawyer was also partially responsible for the escalation in the course of the telephone call since the latter should not have allowed a conversation of this nature with the plaintiff – and especially not one of this length – to take place for reasons of professional ethics.

The Higher Labour Court granted the defendant's motion for termination against payment of a reasonable severance amount pursuant to § 9(1) sent. 2 of the Employment Protection Act (*Kündigungsschutzgesetz* – KSchG) on the basis of the telephone call and other events.

## Comments

The decision of the Cologne Higher Labour Court is welcome since it established that insults directed at the lawyer of an employer or at the employer through the lawyer are such as to justify summary dismissal. However, the question arises as to whether insults directed only at the lawyer of an employer also qualify as good cause for summary dismissal. According to the arguments of the Cologne Higher Labour Court, this is likely to be the case. For example, the Cologne Higher Labour Court stated in connection with its decision that an employer's lawyer acts virtually as a managing director or another permanent agent of the employer in dealings with employees, and a gross insult to a superior or managerial employees can also justify summary dismissal without notice.

It seems that a complaint against the denial of appeal has been filed in respect of the decision of the Cologne Higher Labour Court. The case is therefore currently pending before the Federal Labour Court (Ref: 9 AZN 617/14). It therefore remains to be seen how the Federal Labour Court will rule if the complaint against the denial of appeal is allowed.

## Note

This overview is intended exclusively for the purposes of general information and is not a substitute for qualified legal advice in an individual case. If you should have any questions, please get in touch with your usual contact at GÖRG or the author Dr. Christoph Müller by phoning 49 221 33660-524 or sending an e-mail to [cmueller@goerg.de](mailto:cmueller@goerg.de) an. For information about the author, please visit our website at [www.goerg.de](http://www.goerg.de).

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