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Complaint for harassment does not protect against dismissal based on the facts set out in the complaint but only against dismissal related to its filing (BE)

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Summary

The Belgian Court of Cassation (Supreme Court), in a decision of 20 January 2020, has ruled that the prohibition for an employer to terminate the employment relationship of a worker for reasons related to a complaint for acts of violence and/or moral and/or sexual harassment at work does not, however, preclude the dismissal from being justified by motives inferred from the facts set out in the complaint.

Legal background

The 4 August 1996 Law regarding the well-being of workers during the performance of their job (*loi du 4 août 1996 relative aux bien-être des travailleurs lors de l'exécution de leur travail* – 'well-being law') institutes a system of protection of workers against dismissal and/or detrimental measures taken as a result of a complaint for violence and/or moral and/or sexual harassment filed with the prevention advisor of the employer, the police and/or the labour inspectorate. This protection is also valid in a case where the worker initiates legal proceedings against the employer for violence and/or harassment at work and extends to the witnesses of such prohibited acts.

So, according to Article 32*tredecies*, 1st § of the well-being law, an employer cannot, *inter alia*, terminate the employment contract, except for reasons *unrelated* to the complaint. If the employer chooses to terminate the contract within 12 months from the filing of the complaint, it has to demonstrate that the termination does not relate to the complaint. If the employer fails to do so, the employee is entitled to a lump sum allowance corresponding to six months' remuneration or to damages covering his actual loss. The burden of proof is reversed once the 12-month period has elapsed.

Facts

Preliminary note: the Belgian Supreme Court does not judge the facts but the way the subordinate court applied the law. In the present case, the Supreme Court had to rule on a decision of the Brussels Labour Court of Appeal. Given the fact that the latter decision has not (yet) been published, the few facts available are these in the Supreme Court's decision.

The plaintiff was employed by the Federal Agency for the Reception of Asylum Seekers (the 'Agency'). At some point, the work relationship between the two parties turned sour.

On 4 March 2010, the Agency internally decided to terminate the employment contract with the plaintiff but did not yet communicate that decision to the plaintiff. That same decision was put in writing on 5 March 2010, around midday, and was still not communicated to the plaintiff. A little later on the same day, the Agency was notified that the plaintiff had filed a complaint for violence and/or harassment at work. The plaintiff thus fell under the protection of Article 32*tredecies* of the well-being law.

Nevertheless, the Agency communicated the termination to the plaintiff after having been notified of the complaint. Furthermore, it appears that the content of the complaint, and the motives upon which the termination was based, would (at least partially) be the same.

The Labour Court of Appeal was of the opinion that the dismissal was not related to the complaint because the process leading to it was already well under way when the employer became aware of the complaint and this despite similarities between the content of the complaint and the reasons for the dismissal.

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Judgment

The main question before the Supreme Court was the following: does Article 32*tredecies* of the well-being law preclude an employer from terminating the employment contract for motives that may be deduced from the complaint for violence and/or harassment at work?
In a very short decision, the Supreme Court ruled that Article 32*tredecies* of the well-being law allows an employer to base the termination of an employment contract on motives that entertain a link with the content of the complaint so long as the termination is not based upon the fact that such a complaint was filed.

Commentary

The decision provides much needed clarification over the burden of proof that lies on the employer who has dismissed an employee protected against dismissal after filing a complaint for violence and/or harassment at work.
The only thing the employer has to prove is that the termination is not a retaliation against the filing of the complaint. The fact that the motives of the termination relate to the specifics of the complaint is irrelevant.
The Supreme Court puts an end to a long-standing controversy over the interpretation to be given to the requirement that the dismissal must not relate to the complaint, some labour judges considering that the content of the complaint may be taken into account while many others ruling that the law has to be construed strictly and that it is the fact that a complaint has been filed and not the complaint itself which must guide the assessment.
This is a decision to be welcomed as it respects not only the wording of the law but also the will of the legislator. Its impact might be wider than expected as the Belgian anti-discrimination legislation contains a similar regime of protection. For instance, the general anti-discrimination Law of 10 May 2007 protects the employee against dismissal or any detrimental measure taken for reasons related to a complaint for discrimination. Following the decision of the Supreme Court, here as well the content of the complaint should become irrelevant for determining if the protection has been infringed.
The decision of the Supreme Court is also in line with the anti-discrimination Directives that the well-being law seeks to – partially – transpose because they consider harassment as a form of discrimination, namely:

- Directive 2006/54/EC of the European Parliament and of the Council of 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation ('Directive 2006/54').
- Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin ('Directive 2000/43').
- Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation ('Directive 2000/78').

Each of these Directives indeed contains the obligation for Member States to prevent employers from undermining the goals of the Directives by retaliating against workers who file a complaint based on grounds the Directives seek to protect (Article 24 of Directive 2006/54, Article 9 of Directive 2000/43 and Article 11 of Directive 2000/78). The wording is broadly similar in each of these Directives:

> "*Member States shall introduce into their national legal systems such measures as are necessary to protect employees, including those who are employees' representatives provided for by national laws and/or practices, against dismissal or other adverse treatment by the employer as* ***a reaction to a complaint*** *within the undertaking or to any legal proceedings aimed at enforcing compliance with the principle of equal treatment.*" (Emphasis added)

The purpose of these provisions is to avoid victimisation and so retaliation against the employee who files a complaint. Aside from that, the Member States must introduce remedies into their national legal systems so that an employee can seek redress against an employer who has exercised any form of violence, harassment and/or discrimination.
This means that the employee victim of violence, harassment and/or discrimination may seek redress in two different but cumulative ways. *Firstly*, dismissal following the filing of a complaint may give rise to the payment of a lump-sum allowance, as is the case in Belgium, or any other remedy provided for in national law, because the protection against dismissal has been infringed. *Secondly*, the employee may seek redress under national law for the discriminatory treatment in itself. Only in the latter case should the content of the complaint become relevant. In Belgium, this second means of redress translates into the possibility for the employee who is a victim of violence, harassment and/or discrimination to seek payment of an allowance corresponding to six months' remuneration.

Comments from other jurisdictions

Denmark (Christian K. Clasen, Norrbom Vinding): The Belgian case report illustrates some of the differences and similarities that may exist regarding the burden of proof in claims concerning *harassment in general* and claims based on anti-discrimination legislation containing protection against dismissal or any detrimental measures taken for *filing a complaint*.

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From a Danish point of view, the rules on the burden of proof in cases concerning the question of potential victimisation due to an employee's filing of a complaint regarding potential discrimination are laid down in the relevant anti-discrimination legislation.
The Danish Anti-Discrimination Act was amended in 2005 by which Directive 2000/43 (implementing the principle of equal treatment between persons irrespective of racial or ethnic origin) and Directive 2000/78 (establishing a general framework for equal treatment in employment and occupation) were partly implemented into the Act.
According to the preparatory works of the amendment, detrimental treatment caused by the filing of an equal treatment claim does not constitute discrimination within the meaning of the Directives, even though it may have some similarities with harassment based on, for instance, racial or ethnic origin. For that reason, the shared burden of proof, which generally applies under the Anti-Discrimination Act, does not apply in cases on victimisation based on the Anti-Discrimination Act.
The preparatory works further read that this 'classification' derives from the fact that the detrimental treatment occurs on grounds of the claim *per se* – and, accordingly, not on grounds of the protected criterion.
Claims for compensation based on victimisation under the Danish Act on Equal Treatment of Men and Women are, on the other hand, subject to the provision on the shared burden of proof in this Act. This follows explicitly from the Act.
The issue of the burden of proof in cases on victimisation under the Act on Equal Treatment of Men and Women has recently been addressed by the Danish Eastern High Court. The case concerned a carer for a disabled person who claimed that her dismissal was caused by her complaint about sexual harassment by the disabled person she was caring for.
The claim was based on the Act on Equal Treatment of Men and Women and the shared burden of proof therefore applied. Accordingly, it was for the employee to establish facts indicating that she had been dismissed because of her sexual harassment complaint.
In conclusion, the Belgian case report – and the above – illustrate that being exposed to harassment and filing a complaint for harassment should not be confused, and, further, that different considerations may affect the rules on the burden of proof that apply in different situations.

Germany (Andre Schüttauf & Phyllis Schacht, Luther Rechtsanwaltsgesellschaft mbH): In Germany, protection against discrimination for employees is regulated by the General Act on Equal Treatment (*Allgemeines Gleichbehandlungsgesetz*, 'AGG'). Section 16(1) AGG states:

> "*The employer shall not be permitted to discriminate against employees who assert their rights under Part 2 or on account of their refusal to carry out instructions that constitute a violation of the provisions of Part 2. The same shall apply to persons who support the employee in this or who testify as a witness.*"

In contrast to the Belgian 'well-being law', German law therefore does not expressly prohibit the dismissal of an employee because they are asserting their rights.
However, it is widely agreed in the German literature that a discrimination mentioned in Section 16(1) AGG can also be a dismissal of an employee if it is causally linked to the exercising of their rights under the AGG. This is based, among other things, on the prohibition of victimisation in Section 612a of the Civil Code (*Bürgerliches Gesetzbuch*, 'BGB'). According to Section 612a BGB:

> *"The employer may not discriminate against an employee in an agreement or a measure because that employee exercises their rights in a permissible way.*"

In accordance with the case law of the Federal Labour Court (BAG, judgment dated 21 September 2011 – 7 AZR 150/10) regarding the interpretation of the prohibition of victimisation, the link requires the exercising of the employee's rights to be the 'supporting motive' or 'essential motive' for the dismissal.
As far as can be seen, there is no German decision on the extent to which a termination can be based on the facts set out in a complaint.

United Kingdom (Richard Lister, Lewis Silkin LLP): The distinction drawn by the Supreme Court between (1) a termination motivated by the fact of a complaint of harassment having been made, and (2) a termination based on the specifics of the complaint itself seems to be quite a fine and subtle one. It would be useful to know more about the facts of the case to understand exactly how this issue arose. As Gautier says, it is an important point of interpretation that is likely to apply to the general protection against dismissal/detriment for reasons relating to a discrimination complaint under Belgian equality law. It will be interesting to see how it is applied in practice in future cases.
There are similar 'victimisation' provisions in the UK's Equality Act, which give employees broad protection from being penalised for doing various 'protected acts', which include bringing a discrimination or harassment complaint. The issue of causation often arises in UK cases: the employee must be able to establish a link between any detriment suffered and the doing of the 'protected act', i.e. the bringing of the claim. Importantly, however, a victimisation claimant need not show that detrimental treatment was meted out solely because of the protected act: it is enoughCourt watches that it has a 'significant influence' on the employer's decision-making.
Despite the breadth of protection against victimisation under UK law, it would in principle seem possible for a court or tribunal to take a similar approach to the Belgian Supreme Court. Depending on the facts, it might be appropriate to find that the employer was not influ-

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enced by the fact of the discrimination/harassment complaint having been brought, but rather by matters relating to the content of the complaint itself – with the result that the allegation of victimisation is not established.

Subject: Unfair Dismissal, Discrimination, Health and Safety

Parties: [Employee] – v – Agence fédérale pour l'accueil des demandeurs d'asile (Fedasil)

Court: *Cour de cassation* (Supreme Court)

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