

**Non-certified translation of the Austrian Supreme Court Judgment  
of 28 June 2016 in the matter of Friedrich Rödler v. serv.ip**

**Court:** Supreme Court

**Date of decision:** 28.06.2016

**Reference:** 80bA40/16i

**Headnote**

The Supreme Court, as appellate court in labour and social law matters, in the following composition

- Vice-President of the Supreme Court, Prof. Dr Spenling, as Chairman,
  - Hofrätin Dr Tarmann-Prentner and Hofrat Dr Brenn,
  - as well as expert lay judges Dr Josef Schleinzner and Mag Regina Albrecht, as further judges,
- in the employment lawsuit of
- the plaintiff Dr. Friedrich Rödler, represented by CMS Reich-Rohrwig Hainz Rechtsanwälte GmbH in Vienna,

against

- the defendant serv.ip, represented by the Finanzprokuratur, 1010 Vienna, Singerstraße 17-19,
- in respect of the amount of EUR 152,567.83 gross,

concerning the appeal of the plaintiff against the judgment of 29 March 2016 of the Oberlandesgericht Wien (Higher Regional Court, Vienna) as the appellate court in labour and social law matters , GZ 10 Ra 116/15z-26, by which the judgment of 7 July 2015 of the Labour and Social Court of Vienna , GZ 13 Cga 72/14y-22, was overturned,

has decided in closed session as follows:

**Verdict**

The appeal is not allowed.

The plaintiff is obliged to reimburse the defendant the costs of EUR 2,092.95 for its response to the appeal within 14 days.

## Text

### Grounds for the decision:

The defendant [serv.ip] is a unit of the Austrian Patent Office with partial legal autonomy under Sections 58a and 58b Patent Act, which offers services and information in the field of industrial property protection. The partial legal autonomy was created by the Patent Act Amendment 1992, Federal Law Gazette 1992/771. Amendments to these provisions were made by Federal Law Gazette I 1998/175, Federal Law Gazette I 2004/149 and Federal Law Gazette I 2009/126. According to a ministerial draft for an amendment to the Patent Act 2016, the provisions on partial legal capacity are to be repealed without replacement.

The appellant [Friedrich Rödler] has been employed as a civil servant by the Republic of Austria since 2 July 1973.

As of 1 October 2004, he was entrusted with the *ad interim* management of the Austrian Patent Office.

On 4 April 2005, he was appointed Director of the Patent Office for a term of five years. After the expiry of this term of office, the applicant was re-appointed Director of the Patent Office for a further five years. He departed from this position on 3 April 2015.

On 24 November 2004, an employment contract concerning the management of the partially autonomous unit from the date and for the duration of his appointment as Director of the Patent Office was concluded between the plaintiff, on the one hand, and the BMVIT, represented by the Head of the Subsidiary Management Department, on the other hand.

In this contract, an additional remuneration, a severance payment entitlement under the Salaried Employees Act and a pension provision were agreed with the plaintiff for his activities as managing director of the partially autonomous unit, without prejudice to his remuneration as a federal employee (Director of the Patent Office).

On 10 June 2013, the BMVIT instructed the plaintiff to discontinue all benefits based on the agreement of 24 November 2004 with immediate effect.

In its decision of 18 December 2014, ZI Ro 2014/12/0023, the Administrative Court annulled the BMVIT's decision, according to which compliance with the instruction was part of the plaintiff's official duties, on the grounds that its content was unlawful.

The plaintiff sought payment of the remuneration agreed in the employment contract and of the pension fund contributions for the period December 2013 to February 2015. The legal basis for the employment contract was Sections 58a and 58b Patent Act. An employment contract under the Salaried Employees Act was to be concluded for the activity as managing director of the partially autonomous unit. For this activity, there was no employment relationship with the Austrian State. The agreement of 24 November 2004 had been validly concluded.

The defendant replied that it was comparable to a foundation or institution under public law. According to the provisions of the Patent Act, the Director of the Patent Office was *ex lege* managing director of the defendant [serv.ip]. The management of the partially autonomous unit was therefore part of the duties of the Director of the Patent Office by operation of law. There was no separate claim to remuneration. There was no legal basis for the conclusion of a contract of employment as managing director of the unit with partial legal capacity. The employment contract was also void because it violated the Staffing Act and the Contract Template Ordinance based thereon.

The court of first instance granted the application. According to the Patent Act, there was a clear separation between the administrative office of the Patent Office on the one hand and the unit with partial legal capacity on the other. It did not follow from Section 58 (3) Patent Act that the conclusion of an employment contract for the function as managing director of the partially legally autonomous unit was prohibited. The legislative material to the 2004 Patent Law Amendment confirmed that the Director was responsible for concluding contracts within the scope of the partially autonomous unit, whereas the BMVIT was responsible for regulations concerning the latter. This view was also held by the Administrative Court.

The Court of Appeal upheld the appeal of the defendant and dismissed the claim. It was questionable whether the conclusion of the contract in question had taken place within the framework of the partial legal capacity stipulated by the Patent Act. This was not the case. According to Section 58a (3) Patent Act, the partial legal capacity to establish employment relationships only existed for the employment of other persons for the service and information services to be provided. In contrast, no employment contract was provided for the function of the Director of the Patent Office as managing director of the partially autonomous unit. There was no legal basis for this. The 2004 amendment to the patent law had not changed this. The legislative material could only be used for the interpretation of a legal provision if the wording of the law itself was doubtful. This was not the case. All in all, the partial legal capacity of the defendant did not include the contractual arrangement of its legal relationship with the Director of the Patent Office as managing director of the unit with partial legal capacity. The ordinary appeal was admissible because the decision went beyond the individual case.

The plaintiff's appeal is directed against this decision and seeks to have the claim upheld.

In its response to the appeal, the defendant requested that the other party's appeal be rejected.

## **Legal assessment**

The appeal is admissible because the question at issue - whether the conclusion of an employment contract under the terms of the Salaried Employees Act with the Director of the Austrian Patent Office as the managing director of the partially autonomous unit is covered by the partial legal capacity under Sections 58a, 58b Patent Act - has not yet been answered in the case law of the Supreme Court.

However, the appeal is not allowable on the merits.

The plaintiff is of the opinion that the Director of the Patent Office performs the activity as managing director of the partially autonomous unit on the basis of an employment contract within the meaning of Sec. 58b (3) Patent Act. It was mandatory to appoint the Director of the Patent Office as the managing director of the unit with partial legal capacity. Subsequently, a corresponding employment contract was to be concluded with him. In this regard, the plaintiff mainly refers to the legislative material of the Patent Law Amendment 2004 (RV 621 BlgNR 22. GP 7 f).

These considerations cannot be followed.

2.1 Pursuant to Section 58(3) Patent Act, as amended by the 2004 Patent Law Amendment, the Director of the Patent Office is at the same time the managing director of the partially autonomous unit. This function is assumed *ex lege* by the Director of the Patent Office. The Patent Act appoints him to this function. An act of appointment is not required. Nor does the law provide for the conclusion of an (employment) contract for this additional function of the Director of the Patent Office.

This provision in the Patent Act is unambiguous. Contrary to the applicant's view, there are not "two readings" in this respect. An interpretation to the effect that the Director of the Patent Office is, by virtue of the law, the managing director of the partially incorporated unit and that he "then" performs this activity on the basis of an employment contract "within the meaning of Section 58b (3) Patent Act" cannot be reconciled with either the wording or the systematics of the legal provisions in question. If the law stipulates that the Director of the Patent Office "is" at the same time the managing director of the partially autonomous unit, this necessarily implies that he also "exercises" this function as managing director. The function as managing director of the partially autonomous unit thus includes the activity as managing director. Since it would not be obligatory for the Director of the Patent Office to have the function as managing director of the partially autonomous unit without a statutory order, this had to be standardised. In contrast, his function as Director of the Patent Office results from the act of appointment.

The difference in wording between "the Director is responsible for the management of the Patent Office" and "the Director is the managing director of the partially autonomous unit" is thus a legal necessity, but says nothing about whether for the exercise of the function as managing director of the partially autonomous unit, another act, more specifically the conclusion of an employment contract, would have to be added.

2.2 Nor can the plaintiff rely on the legislative material to Section 58 (3) in the version of the Patent Law Amendment 2004 (RV 621 BlgNR 22. GP 7).

The wording there reads: *"In addition, it is now clarified that the Director of the Patent Office is at the same time also (in particular under civil law) the responsible executive employee (managing director) of the partially autonomous unit of the Patent Office"*.

The phrase *"executive employee (managing director)"* was intended to express the legal responsibility with respect to the partially autonomous unit, but not to define the legal relationship between the managing director and the partially legally capable unit as that of an "employee". Furthermore, the legislative materials cannot supplant the lack of statutory authorisation to conclude an employment contract.

The result obtained is confirmed by the interpretation of Section 58b (3) Patent Act.

3.1 The appellant himself proceeds from the assumption that the conclusion of an employment contract with the Director of the Patent Office (as a civil servant and organ of a federal public authority) for the function as managing director of the partially autonomous unit requires a legal basis or a statutory authorisation. In this respect, he refers to Section 58b (3) Patent Act. He points out that according to Sec. 58b (3) Patent Act, the unit with partial legal capacity has the power to conclude service contracts and that such a contract does not establish an employment relationship with the Federal Government.

3.2 Section 58a Patent Act regulates the services (service and information services) provided within the scope of the partially autonomous unit. Section 58b Patent Act regulates the conduct and conclusion of certain legal transactions (service contracts), whereby it is repeatedly stated that Sec. 58b applies *"within the scope of Sec. 58a"* or *"within the scope of partial legal capacity"*.

Section 58b Patent Act thus has only a limited scope of application. It only applies to the provision of services under Sec. 58a Patent Act. For this purpose, i.e. for the provision of the services provided for in Sec. 58a Patent Act, service contracts under the Salaried Employees Act (or, since 2009, also contracts for work and services) may be concluded (Sec. 58b (3)) and activities (e.g. accounting) may be outsourced and external services may be purchased (Sec. 58a (3)).

The appellate court's assessment that the partial legal capacity only exists for the establishment of employment relationships for the employment of other persons for the service and information services to be provided, therefore proves to be correct.

The conclusion of a contract of employment is not, however, possible for the function or activity as managing director of the partially autonomous unit. Rather, Section 58b Patent Act presupposes the function or activity of the Director of the Patent Office as managing director of the partially autonomous unit. This result is ultimately confirmed by the 2009 amendment to the Patent Act, especially since Section 58b (5) Patent Act clarifies the managing director's power of representation to conclude legal transactions (including service contracts) and also stipulates that the managing director may authorise other persons to conclude such legal transactions.

The legal basis of Sec. 58b Patent Act is thus not available for the conclusion of an employment contract in respect of the function of managing director of the partially autonomous unit.

3.3 The 2004 Patent Law Amendment did not change the meaning of Section 58b Patent Act. Nevertheless, the following sentence can be found in the legislative material on this provision (RV 621 BlgNR 22. GP 8): *"In connection with the amendment of Sec. 58, it should also be noted that the Director (for regulations concerning the Director himself, the Federal Ministry of Transport, Innovation and Technology) is competent to conclude contracts within the scope of partial legal capacity"*.

This passage in the explanatory text may have been an attempt to legitimise the employment contract concluded with the plaintiff on 24 November 2004. However, this explanatory statement lacks a suitable statutory provision on which it is based, which would affect the legal relationship for the function as managing director (head) of the partially autonomous unit. The clarifying addition in Sec. 58 (3) Patent Act, according to which *"the Director is the head (managing director) of the partially autonomous unit"*, is neither a substantive amendment nor does it contain a statement on the legal relationship between the partially autonomous unit and the Director as managing director of this unit. The fact that service contracts can only be concluded by the partially autonomous unit within the scope of Section 58a Patent Act has not changed.

The Court of Appeal's assessment that the above-mentioned statements in the legislative materials lacked a basis in the wording of the law, especially since the 2004 amendment did not extend the partial legal capacity either in Section 58 or in Sections 58a and 58b to the area of the contractual arrangement of the legal relationship between the Director of the Patent Office (as managing director of the partially autonomous unit) and the partially autonomous unit, is thus also not open to objection.

A legal principle that is not implied in the statute and is only referred to in the accompanying legal materials cannot acquire validity by means of interpretation (RIS-Justiz RS0008799).

4. In the decision referred to by the plaintiff (Zl Ro 2014/12/0023), the Administrative Court had to clarify the question of whether compliance with the instruction of 10 June 2013 (based on section 44 BDG 1979) concerning the immediate discontinuation of the remuneration for the management of serv.ip was part of the plaintiff's official duties.

The decision of the Administrative Court was based on the consideration of the assignment of civil servants to an outsourced legal entity on the basis of a job description.

The Administrative Court prefaced its substantive assessment with the following statement: *"The agreement of 24 November 2004 in question - irrespective of the question of its nullity - is to be interpreted, in any case in the absence of findings to the contrary regarding the intention of the parties expressed in the contractual negotiations, to the effect that an agreement under civil law was to be concluded between the appellant, on the one hand, and, on the other hand, the unit of*

*the Austrian Patent Office with partial legal capacity, as whose representative the Federal Minister for Transport, Innovation and Technology acted".*

In addition, the Administrative Court stated that *"the authority concerned did not make any further findings on the content of the appointment notice of the appellant as Director of the Austrian Patent Office"*.

Thus, all relevant civil law issues were not assessed.

Rather, for its assessment of the effectiveness of the instruction, the Administrative Court assumed the validity of the agreement in question. It is, however, correct that the Administrative Court also referred to the legislative materials of the 2004 Patent Law Amendment and considered as relevant the reference contained therein, according to which the Federal Minister of Transport, Innovation and Technology was responsible for concluding contracts (including, in particular, service contracts) with the Director of the Patent Office in relation to the partially autonomous unit. The Supreme Court does not share this view on the purported significance of the legislative materials.

5. The question raised by the plaintiff regarding the remuneration for the activity as managing director of the partially autonomous unit is secondary insofar as the assignment of a function by law without providing for a separate remuneration for it, cannot override the lack of legal authorisation to conclude an employment contract. Apart from this, the activity as managing director of the partially autonomous unit was taken into account in the professional classification of the appellant as Director of the Patent Office (cf. Exhibit ./6).

6. Finally, the plaintiff cannot rely on the finding of the court of first instance that the then Director in 1997 had recruited his own executive employee for the task as managing director of the partially autonomous unit, because discussions about giving the Director separate compensation for this task had not led to any result. That finding does not contain an assessment of the legality of this procedure, nor does it concern itself with the question of the conclusion of an employment contract with the Director [of the Patent Office] in his capacity as managing director of the partially autonomous unit.

7. Overall, the result is that neither Section 58 (3) nor Section 58b (3) Patent Act constitute a suitable legal basis for the conclusion of an employment contract with the Director of the Patent Office in respect of the function or activity as managing director of the partially autonomous unit. Accordingly, the decision of the Court of Appeal is not open to objection. On the contrary, the reasoning of the Court of Appeal proves to be sound. The plaintiff's appeal is therefore to be rejected.

The decision on costs is based on Sections 41, 50 ZPO in connection with Section 2 par. 1 ASGG.

## **European Case Law Identifier**

ECLI:AT:OGH0002:2016:0080BA00040.16I.0628.000

## **Original text in German:**

[https://www.ris.bka.gv.at/Dokumente/Justiz/JJT\\_20160628\\_OGH0002\\_0080BA00040\\_16I0000\\_000/JJT\\_20160628\\_OGH0002\\_0080BA00040\\_16I0000\\_000.html](https://www.ris.bka.gv.at/Dokumente/Justiz/JJT_20160628_OGH0002_0080BA00040_16I0000_000/JJT_20160628_OGH0002_0080BA00040_16I0000_000.html)