SUMMARY

2016/40 The court has no jurisdiction to rule on the merits of an employer's decision to make employees redundant (LI)

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Facts

The claimant, a mother of children under, had worked in the defendant's company as a designer-constructor. Management decided to shut down the design and construction department and expand the management department. The reason for the restructuring was that clients were no longer purchasing the company's design services but were sending the company moulds and technical information directly. This development eliminated the need for a design-construction department.

The employer offered all designer-constructors, including the claimant, a transfer to another position as a manager without a salary reduction. The claimant, however, turned down the offer.

The employer dismissed the claimant. She brought a claim before the court for unlawful

dismissal. She argued that the restructuring was not genuine, merely an exercise aimed at getting rid of her.

The court of first instance found that the restructuring was genuine. However, it found a procedural breach, namely that the employer had failed to observe the correct notice period. For this reason, the dismissal was held to be unlawful and the court replaced the termination date by a later date. Both parties appealed the decision.

In contrast to the court of first instance, the Court of Appeal held the restructuring, and therefore, the claimant's redundancy, to be unjustified. It found that the design and construction department had continued to exist and that there was no actual management department, the claimant's colleagues having merely changed their job title from 'designer-constructor' to 'manager' whilst continuing to perform the same work as before. The number of employees had remained unaltered.

The employer disagreed with the Court of Appeal and lodged an appeal with the Supreme Court.

Judgment

The Supreme Court emphasized that a restructuring can be recognized as an 'extraordinary case' within the meaning of Article 129(4) of the Labour Code, as long as the employer can prove a genuine basis for any redundancies. Article 129(4) provides that certain groups of employees, one of which is employees responsible for the care of children under 14 years of age, may only be dismissed in 'extraordinary cases'.

Based on previous case law, the Supreme Court pointed out that the court has no jurisdiction to assess the merits of decisions to make employees redundant where this is caused by economic reasons. Economic and organisational decisions are made at the employer's sole discretion.

The Court noted that, under the Labour Code of Lithuania, terminating an employment contract with an employee who is raising children under 14 years of age (as was the case here), is only permitted in exceptional circumstances, where retention of the employee would substantially violate the interests of the employer.

The Supreme Court held that allowing the employee to stay in her job without there being a need for her to provide services would mean the employer was paying for her services without getting the benefit of any work. The Supreme Court found that this could have an adverse effect on the employer's economic interests and that dismissal was reasonable in the

circumstances. A situation where the employee's job does not contribute to the employer's success but worsens the employer's financial situation constitutes an exceptional case, in which the employer is permitted to dismiss the employee under the Labour Code.The Supreme Court therefore overturned the decision of the Court of Appeal and upheld the reasoning of the first instance court that the employer's decision to restructure and make the claimant redundant was fair and reasonable.

Commentary

The decision reported above has crystallized the key elements that must be met in order for an employer to justify an employee's redundancy: (1) substantive justification and (2) procedural justification.

According to the Supreme Court, substantive justification means that the restructuring was not merely a charade by which an employer used redundancy to get rid of an employee. Absent such a charade, the courts cannot go on to assess the employer's commercial rationale for the decision. With this judgment, the Supreme Court clearly defines the boundaries of the courts' jurisdiction. The employer, when trying to prove a genuine basis for redundancy, must be able to provide evidence that the person's job no longer needs to be done. The causes can be various, for example, financial issues resulting in the need to downsize or realign, a merger with another business, a realignment of the business or brand or the outsourcing of certain business functions.

Procedural justification includes the court's assessment of whether the restructuring and redundancy complies with the procedural requirements set out in law. For example, whether an employer followed the requirements to consult with the employees or their representatives about the redundancy; whether it could have offered the employee another position within the employer's business or an associated entity; or whether it informed the employee about the redundancy within the time limits.

Failure to comply with the relevant procedural requirements, however, does not always mean that the redundancy is treated as unlawful. A procedural breach may not impact on the fairness or legitimacy of the redundancy.

This judgment is significant in that it clarifies that the courts must not involve themselves in business decisions and should restrict themselves to legal issues within their remit.

Comments from other jurisdictions

Austria (Erika Kovács, Vienna University of Economics and Business): The Austrian situation

is similar to the Lithuanian case to the extent that the Austrian courts have no competence to assess the merits of an employer's decision to restructure and dismiss employees. The employer has wide discretion in the management of its business. However, the employer must try all options within the company for further employment of the employee. This is known as the 'social constitution obligation' (soziale Gestaltungspflicht) and it requires the employer to consider the transfer of the employee to another position, even if that requires occupational retraining or other training measures. If possible, the employer should offer the option of altered conditions of employment at the time of dismissal.

Another important issue in cases of dismissal for closure or reduction of a department is 'social comparison' (Sozialvergleich). If the employer intends to reduce the number of employees in a certain department, it must select the employees from those doing a similar job and ensure that the employee selected for dismissal is the least adversely socially affected by the dismissal. The following criteria have to be considered: age, seniority, maintenance obligations, the income of the partner and other family members, legal debts and the expectation of unemployment after a possible dismissal.

In Austria, parents (both mother and father) enjoy special protection during maternity or paternity leave until the second birthday of the child at the latest or, in the case of part-time work based on parenthood, until the fourth birthday of the child. To dismiss such an employee, the employer needs the prior permission of the Labour Court. The court gives permission in the cases set out in law, which include the closure of a department, as occurred in the Lithuanian case. After the child is one year old, the court accepts broader reasons for dismissal. Permission is generally not necessary in the case of closure an entire workplace. After maternity, paternity leave or part-time leave for parents is over, parents are only protected against dismissal based on parenthood itself (i.e. parenthood may not serve as the reason for dismissal).

Germany (Paul Schreiner and Nina Stephan, Luther Rechtsanwaltsgesellschaft mbH): The decision of the Lithuanian Supreme Court is in the line with settled case law in Germany. Employers, in principle, are free to decide how to structure and restructure their company. They are only limited by law and by the prohibition against arbitrary dismissals. Whether a business decision to restructure is sound is therefore not subject to the jurisdiction of the court. The court only examines whether the decision is lawful or is clearly irrational or arbitrary. This can be the case, for example, if the sole motive of the restructuring is to let go of one particular person. Apart from that, the German dismissal Protection Act requires specific reasons to be given for termination, otherwise it will be considered invalid. This adds a second level of protection against an arbitrary dismissal.

The Netherlands (Peter Vas Nunes, BarentsKrans): Clearly, the employer, whose capital is at stake, has a margin of appreciation when it comes to restructuring its business. Even Dutch law, on this point perhaps the hardest in Europe for employers, recognizes this as a principle. The question is how far this extends. In essence, and grossly simplified, a decision to restructure a business comprises four steps:

Step 1: we will reduce headcount (e.g. from 100 to 80 employees);

Step 2: we will do this by reducing the number of employees in certain positions (e.g. number of designers to drop from 10 to 6 and number of engineers from 13 to 9);

Step 3: within each of the groups of employees to be reduced in number we will select those to be made redundant (e.g. on the basis of seniority or performance);

Step 4: we will dismiss those redundant employees whom we cannot offer an alternative position.

My reading of this Lithuanian judgment is that it relates to steps 1 and 2. Basically, if an employer says that the number of employees in the business is to drop by a certain number (step 1) and that the reduction is to be achieved by reducing certain numbers of employees in certain positions or departments (step 2), that is a given fact which the courts must accept, provided the correct procedure, including consultation of the works council, has been followed. Thus, the courts cannot review the reasonableness of the decisions, the only exception being where the 'restructuring' is no more than a charade to get rid of one or more specific employees for other reasons. What surprises me in this judgment is that the Court of Appeal had held that this exception applied, i.e. the 'restructuring' was not genuine, and that the Supreme Court, without addressing this finding, overturned it.

The United Kingdom (Bethan Carney, Lewis Silkin LLP): The law in the UK is the same as that of Lithuania on this point. Broadly speaking, the UK definition of a redundancy situation is met if there is a reduced need for employees because (i) a business is closing; (ii) a particular business site or location is closing; or (iii) the employer has a reduced need for employees to carry out work of a particular kind in a particular place (the situation described in this case). It is the employer's decision how to structure its business and the tribunal will not go behind that or require the employer to justify why the diminished requirement for employees has arisen, provided that it is genuinely the reason for the dismissal (Moon – v – Homeworthy Furniture (Northern) Ltd [1976] IRLR 298 (EAT)). In practice, tribunals are usually very ready to accept that a redundancy situation existed and will focus their consideration of the fairness of the dismissal on matters such as whether the selection for redundancy was fair, whether a proper consultation procedure was followed and whether the individual was offered any

available alternative employment.

Subject: Dismissal; redundancy

Parties: R. S.-U. – v – A.K. business

Court: Lietuvos Aukščiausiasis Teismas (Supreme Court of Lithuania)

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