EELA EUROPEAN EMPLOYMENT LAWYERS ASSOCIATION

SUMMARY

2016/44 Is there a genuine remedy for the employer's failure to consult? (HU)

<p>During negotiations for a collective bargaining agreement, the employer stopped consulting the employee representatives because a sectorial collective bargaining agreement had entered into force that also applied to the employer. After this, the trade union requested an appointment with the employer on a specific date and proposed an agenda for the meeting, including consultation on the impact of the sectorial collective bargaining agreement on the employees. The employer refused to meet on the requested date. The trade union challenged this via the Labour Court. The first and second instance courts turned down the trade union's claim and confirmed the employer had acted lawfully. The Curia (the Supreme Court) established that the employer had breached its obligation to consult – an obligation deriving from the Labour Code which implemented Directive 2002/14 establishing a general framework for informing and consulting employees – but at the same time it refused to order the employer to proceed with the consultations, leaving the trade union without an effective remedy.</p>

Summary

During negotiations for a collective bargaining agreement, the employer stopped consulting the employee representatives because a sectorial collective bargaining agreement had entered into force that also applied to the employer. After this, the trade union requested an appointment with the employer on a specific date and proposed an agenda for the meeting, including consultation on the impact of the sectorial collective bargaining agreement on the

employees. The employer refused to meet on the requested date. The trade union challenged this via the Labour Court. The first and second instance courts turned down the trade union's claim and confirmed the employer had acted lawfully. The Curia (the Supreme Court) established that the employer had breached its obligation to consult – an obligation deriving from the Labour Code which implemented Directive 2002/14 establishing a general framework for informing and consulting employees – but at the same time it refused to order the employer to proceed with the consultations, leaving the trade union without an effective remedy.

Facts

The trade union had been negotiating with the employer on a collective bargaining agreement since 25 March 2013. On 1 July 2013 the employer informed the trade union that it was cancelling the consultation because a sectorial collective bargaining agreement would apply to the employer as from 1 July 2013. On 1 July 2013, the employer formally closed the consultation process. Then on 7 July 2013 the trade union asked for a meeting with the employer, to be held on 15 July 2013, and set out the agenda for the meeting, including the issue of the application of the sectorial collective bargaining agreement. The employer rejected the request for consultation and even told the trade union to make a claim in court. This can be done under the Labour Code within five days of a breach of the information or consultation rules. However, the parties continued to negotiate after the trade union's request for a consultation and later met on 2 September 2013. Nevertheless, the trade union issued a letter of claim at the employment tribunal, requesting a ruling that the employer had breached the statutory rules on consultation and asking the court to order the employer to proceed with the consultation.

Judgment

The Court of First Instance refused to accept the trade union's claim. It ruled that the fact that the employer had refused to consult on the requested date could not be considered a breach of its consultation obligations. The court took into account the fact that the parties continued negotiations even after the trade union's request for a consultation and that the parties had met on 2 September 2013.

The trade union appealed. The Court of Appeal affirmed the judgment of the court of first instance, and emphasised that the parties had started their consultation on 25 March 2013, followed by written correspondence and further consultation on 1 July 2013, when the employer formally closed the consultation process. However, the employer was available for informal consultation even after this and the parties liaised and exchanged letters after 1 July 2013.

The trade union filed an extraordinary appeal with the Curia. It argued that the court of first instance had disregarded the fact that the employer did not propose another date to meet with the trade union. It also argued that it was irrelevant that there had been further correspondence between the parties even after the employer refused to meet on 15 July 2013, since the claim related to the employer's failure to meet on 15 July 2013. The trade union challenged the Court of Appeal's decision and argued that the employer should have proposed another date for consultation instead of advising the trade union to seek judicial review.

The Curia partly accepted the arguments of the trade union. It relied on section 233(1b) and (2) of the Labour Code (which includes the definition of consultation), implementing the terms of EU Directive 2002/14. According to this, consultation means a dialogue and exchange of views between the employer and the works council or trade union. Consultation must take place with a view to reaching an agreement and ensuring purposeful dialogue, as well as ensuring a) that the parties are properly represented; b) that there is a direct exchange of views and dialogue; and c) the discussion is substantive.

Unlike the previous courts, the Curia came to the conclusion that the parties did not consult about the sectorial collective bargaining agreement as requested by the trade union. Instead, the employer refused to consult and even told the trade union to go to court. In the view of this, the Curia overturned the previous judgments and declared that the employer had breached its statutory consultation obligations. At the same time the Curia ruled that there was no legal basis for the employer to be ordered to proceed with consultation with the trade union, given that there is no obligation on the parties to reach consensus. Therefore the Curia rejected the trade union's request for an order for the employer to consult.

Commentary

This case is an interesting example of how the information and consultation rights of employee representative bodies should be interpreted. Whilst the provisions of the Directive are implemented in the Labour Code, certain questions remained unanswered. Article 8 of the Directive says that Member States must provide appropriate measures in the event of non-compliance with the Directive by the employer or employee representatives. Under the old Labour Code of 1992, the rule was that if there was a breach of consultation obligations, the consultation had to be repeated. The new 2012 Labour Code is silent on the consequences of failure to consult with employee representatives.

The decision of the Curia confirms that under the current Labour Code, if the consultation obligations are breached, the only available legal remedy is a declaratory judgement of breach of law. In theory, the trade union may claim damages, but only if it can prove it suffered harm

or loss, which may be difficult. In any event, the Curia explained that the employer cannot be ordered to proceed with a consultation with employees. Also, there was no reference in the Curia's ruling that the lack of consultation would invalidate the employer's actions. Following the logic of the judgment, since there is no obligation to reach a consensus during the consultation and the employer cannot be ordered to proceed with it, this also means the actions of the employer cannot be declared invalid if it breaches its consultation obligations.

The Labour Code currently provides that "the employer, the works council or the trade union may bring an action in court within five days in the event of any violation of the provisions on information or consultation". This remedy has little significance if we accept the Curia's interpretation and leaves employee representatives without any effective legal remedy for breaches of their consultation rights. It also begs the question whether the Labour Code appropriately implements Article 8 of the Directive.

Comments from other jurisdictions

Austria (Erika Kovács, Vienna University of Economics and Business): The situation is different in Austria because in Austria collective bargaining mainly operates at the sectoral level and company agreements are rare. Therefore, the employer has no obligation to consult with trade unions at company level. Quite the contrary, single employers are not normally able to conclude collective agreements, although in certain circumstances, the law vests the competence to do so in single employers. This tends to be the case with legal persons operating under public law (e.g. the Austrian Broadcasting Corporation) and with companies outsourced from the state (e.g. Austrian Federal Forests PLC and the Federal Theatre Company). The second option is that a special authority, the Federal Conciliation Agency, recognizes this competence and this occurs particularly with associations. However, in the main, collective bargaining takes place at sectoral level and companies have no obligation to negotiate with trade unions.

At company level, the employer will tend to consult with the works council on certain issues specified in law. If a works council has been set up at the company, the employer must consult with it on a broad range of issues. Breach of this consultation obligation can invalidate the employer's decisions (e.g. if the works council was not informed before the dismissal of a worker, the dismissal would be invalid).

Subject: Employee representatives/collective bargaining, obligation to consult

Parties: Not published

Court: Curia (Supreme Court)

EELA EUROPEAN EMPLOYMENT LAWYERS ASSOCIATION

Date: 2014

Case Number: EBH 2014. M.24.

Creator: Curia (Supreme Court)
Verdict at: 2014-01-01
Case number: EBH 2014 M24