SUMMARY

2016/51 Separate discrimination claims relating to an unlawful dismissal now possible (PL)

<p>It is possible to make a claim for unlawful discrimination in respect of termination of an employment contract even if no claims has been made for unlawful termination.</p>

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It is possible to make a claim for unlawful discrimination in respect of termination of an employment contract even if no claim has been made for unlawful termination.

Background

Under Polish Labour Law, an employee whose employment contract is terminated may challenge that decision in court by lodging a claim with a labour court within seven days of being served notice of contract termination. If the termination is found defective, the court may order reinstatement of the employee or award financial compensation. There are two main grounds under the Labour Code on which termination of a permanent employment contract may be deemed defective. The first is on formal grounds, for example, if it breaches the provisions concerning duration or any prohibitions against termination. The second is on material grounds, in other words, for lack of a reason to justify or substantiate the termination. Material grounds may include cases of dismissal for economic reasons, where the employee underperforms, has lower professional qualifications or has a shorter length of service than others.

The Polish Labour Code implements the provisions of European employment law with regard to equal treatment in employment. This gives employees the right to be compensated if the principle of equal treatment has been breached.

Normally, a claim for unlawful discrimination would be heard as part of the same legal proceedings in which the termination itself is challenged. For an employee to lodge a discrimination claim without also challenging the termination has been problematic under the Polish law.

Facts

The plaintiff, J.N., was employed for an indefinite period from 1 July 1998 as a production planning and settlement specialist. In January 2009, the employer, M.F. Spółka z o.o.('Spółka'), decided to dismiss some of its employees under a collective dismissal, owing to a decline in orders and demand for services. The selection criteria for the dismissals were: an overall assessment of the employee's work, his or her usefulness in the specific position and the employee's family situation. Consideration was also given to professional experience, knowledge of specialist computer programs, command of English, teamwork and other skills. Having considered these criteria, Spółka, in a letter dated 26 February 2009, gave notice of termination to J.N. On 26 February 2010 (i.e. after a year after the notice of termination) J.N. made a claim for unfair termination of the contract. In his view, the employer had breached the principles of equal treatment when selecting employees for dismissal, and she was in fact selected because of her age (being over 50). The District Court rejected the claim because the statutory term of seven days for asserting labour claims had been exceeded. Further, the District Court stated that Spółka had adopted lawful criteria for selecting employees for dismissal.

J.N. lodged another claim, this time for compensation for breach of the principle of equal treatment in employment. The Regional Court rejected that claim, concluding it was not admissible. It held it could not consider the grounds for selecting J.N. for dismissal, since those circumstances had been included in the previous claim. J.N. appealed to the Supreme Court against this decision.

Judgment

The Supreme Court set out two views that had been developed in previous judicial decisions. Pursuant to the first view, the employee may only demonstrate the unlawfulness of a termination by way of a claim for the court to rule the termination ineffective, or to request reinstatement or compensation. If no such claim has been lodged, the court will not consider the unlawfulness of the termination in any other proceedings, and so there is no separate way for the employee to claim compensation. Therefore, the rejection by the court of the claim against termination was also binding in relation to the case for compensation for unlawful discrimination. This view was based on previous Supreme Court rulings.

The second view, on the other hand, was that a claim for compensation for discrimination does not necessarily have to be made in legal proceedings challenging the termination and so a claim of this kind may be introduced in separate proceedings, regardless whether the employee has challenged the termination itself in court or not. This is because nowhere in the Labour Code does it say that there was any interdependence between challenging a termination and requesting compensation for discrimination. Such claims appear to be separate and independent, they relate to different kinds of breach by the employer and have a different purpose. A claim for unlawful termination applies in a situation where the termination was either not justified on material grounds or has breached the formal provisions governing termination of contracts of employment. This entitles the employee to make a claim for compensation for the financial consequences of unlawful termination. By contrast, compensation for discriminatory termination is intended to provide redress for breach of the principle of equal treatment in employment. In such cases, the employee should not even have to establish that he or she has suffered financial loss. If there is found to have been a breach of the principle of equal treatment, the employee will be awarded some financial compensation in any event, even if there was no actual financial loss. In addition, although a termination will generally be unjustified if the employer has acted in a discriminatory way, the two cases may be quite distinct. It is therefore questionable whether an award of compensation for discrimination should be dependent on a challenge to the lawfulness of a termination.

The former line of judicial decisions of the Supreme Court meant that employees could only seek compensation for discrimination if they have complied with the seven-day time limit provided in the Labour Code for submission of an appeal against termination. However, in its resolution the Supreme Court supported the opposing view. In the opinion of the Supreme Court, this period was too short for asserting claims for the violation of the principle of equal treatment in employment, since it does not give the dismissed employee time to consider whether the termination was for discriminatory reasons and does not allow the employee enough time to gather the evidence. This applies particularly to material harm to a person or harm to intangible assets of the employee (such as dignity and reputation).

The Supreme Court therefore concluded that the employee should have the right to claim unlawful discrimination in the termination of her employment contract, even though she had not (successfully) lodged a prior claim against the termination itself. In such cases, the period for asserting a claim is three years, rather than seven days.

Commentary

This decision breaks away from previous case law in relation to claims for compensation for

discrimination in employment. The employee does not necessarily have to file a claim against termination of the contract within the statutory term of seven days.

This is a very important decision from the perspective of both employees and employers. The extension of the period for the submission of claims for breach of the principle of equal treatment in employment from seven days to three years must be considered advantageous for employees. The previous stance did not give employees a proper opportunity to consider whether they had been discriminated against. In some situations (e.g. in cases of indirect discrimination), seven days was insufficient for the employee even to become aware of the possibility of discrimination.

Comments from other jurisdictions

Croatia (Dina Vlahov Buhin, Schoenherr): The Croatian courts would likely support the stance of the Polish Supreme Court, namely that a claim for discriminatory termination is independent from termination of the employment contract as such. In fact, the Croatian legislator has made it possible to seek compensation for discrimination independently of any challenge to the termination of an employment contract. The Croatian Labour Act stipulates that all direct and indirect discrimination in employment is prohibited, including, for example, the selection criteria and requirements for employment, advances in employment and education and training. The Anti-Discrimination Act further stipulates that someone claiming to be a victim of discrimination can bring an action and request, inter alia, damages from the person liable for the discrimination, irrespective of the existence or otherwise of any other proceedings.

By contrast, the procedure regarding judicial protection of rights arising from employment is somewhat different to Polish law. Under Croatian law, if an employee believes the employer has prevented him from exercising any of his employment rights or has breached his employment rights, he may require the employer to allow him to exercise these rights within 15 days following receipt of the employer's decision to deny them or within 15 days of becoming aware that the rights were being breached by the employer. If the employer does not agree to the employee's request, after a further 15 days, the employee may seek judicial protection from the court. However, in my view, although this is longer than allowed under Polish law, it is still insufficient time for the employee to make a proper case for discrimination. I think it is likely that the Croatian court would allow a compensation claim based on discrimination even if it was filed a year or more after the alleged discrimination took place – with five years possibly being the outer limit.

Greece (Anastasia Kelveridou, KG Law Firm): Greek law does not require the existence of a

'serious cause' for the termination of indefinite term contracts. However, the employee may challenge the validity of the termination in case of an abuse of rights by the employer. A typical case of such abuse would be the termination of an employee who performs well for unjustifiable reasons, such as revenge or discrimination.

In order to avoid any risks, the employer must be able to prove in a future litigation that the employment agreement was terminated due to justified reasons.

In any case of termination, the employee is entitled to contest the validity of his dismissal within 3 months as of the termination date; in addition, he is entitled to claim additional severance amount within 6 months as of the termination date, in case he claims that the severance amount paid to him was not correctly calculated. In case the court considers that the termination was invalid, then the employee will be entitled to receive salaries due as of the termination date, as well as compensation for moral damages; in addition, the employee shall be reinstated to the company, due to the invalidity of the termination.

Redundancy is a potentially fair reason for dismissal. However, a dismissal for redundancy can still be unfair if:

employee's job position is not genuinely redundant;
employee is unfairly selected for redundancy (in case the employer does not respect the social economic criteria set by law);
employer does not consider the employee for other positions;
employer fails to follow a fair procedure, according to the principle of good faith.

More specifically, in case of redundancies due to reorganization or due to technical-economic reasons of the company, the employer is obliged to follow objective criteria when selecting the employees to be made redundant. The most important criteria are:

performance of the employee
seniority
age
family burdens
financial situation
possibility of finding a new job

Among such criteria, the case law gives a general and firm preponderance to the performance of the employee.

Therefore, based on the above, the employee may contest the validity of his termination due to the abusive behaviour of the company. In such case the employee may claim compensation for moral damages as well. The Court will judge on a case to case basis and its decision will be based on the specific facts of each case. If it considers that the termination was abusive in case the employer did not follow the criteria provided by law when selecting the employees to be made redundant, then compensation for moral damages could be granted to the employee, as well as reinstatement and/or salaries in arrears.

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