EELA EUROPEAN EMPLOYMENT LAWYERS ASSOCIATION

SUMMARY

2017/48 Supreme Court rules on scope of collective dismissal procedure (PL)

<p>The Polish Supreme Court has recently confirmed that the collective dismissal procedure should also cover cases where the employment relationship is terminated as a result of the termination of conditions of work or pay.</p>

Summary

The Polish Supreme Court has recently confirmed that the collective dismissal procedure should also cover cases where the employment relationship is terminated as a result of the termination of conditions of work or pay.

Facts

M. was employed at X, a bank, in the years 1998-2007. He left but rejoined in August 2008 under an indefinite employment contract, as ‘chief specialist’. Later, based on its business situation, the Bank decided that its costs were disproportionate to its expected revenue and that they could not be sustained. Therefore, in May 2012, the management board adopted resolutions to restructure the bank in line with its operational needs. The Board then made an agreement with trade unions on the selection procedure for redundancies. Under the agreement, employees who were being dismissed and those whose employment conditions were being amended were entitled to severance pay pursuant to the Collective Dismissals Act, as well as additional compensation. As a result of the restructuring, the unit M. worked in was dissolved and M. received notice of written the amendment of certain of his employment conditions.

After the notice period had expired, he was offered the position of senior personal banking advisor at a different branch office of the Bank. The other provisions of his contract remained unchanged. However, he refused to accept the new employment conditions, as he considered

them degrading to him as an employee and because they did not offer any further development opportunities. This, he felt, meant that the amendments met the definition of "major changes to the detriment of the employee and changes inconvenient for the employee". Under Polish law, this entitled him to severance pay pursuant to the Collective Dismissals Act. M. demanded what he felt was a proper amount of severance, plus compensation for what he considered had been violations of the principles of equal treatment and non-discrimination in the agreement between the Bank and the trade unions.

Legal background

Collective dismissals are the subject of international legal regulations: the ILO Convention No. 158 of 2 June 1982 on Termination of Employment; Council Directive of 17 February 1975 on the approximation of the laws of the Member States relating to collective redundancies (75/129/EEC), amended by Directive 92/56/EC of 24 June 1992 on the approximation of the laws of the Member States relating to collective redundancies and replaced by Council Directive 98/59/EC of 20 July, 1998 on the approximation of the laws of the Member States relating to collective redundancies.

Although the ILO Convention has not been ratified by Poland, it influences the Polish labour law system. Pursuant to Article 2 of the Convention, the main principle protecting the employment relationship is that it cannot be terminated without significant reasons connected with the usefulness or behaviour of the employee or the operational requirements of the business. Under the Convention, an employee who is terminated should be entitled to financial compensation or other, similar benefits. By contrast, the directives are so-called 'structural directives'. They aim to protect employees from the negative consequences of globalisation, which may force businesses to restructure. But the protection of employees subject to the collective redundancies procedure cannot prevent an employer from taking an economic decision to reduce the workforce.

Under the Polish Labour Code, an employer may make unilateral modifications to work or pay conditions by terminating the conditions of work and proposing new ones. If the employee does not consent to the new ones, he or she may reject them, giving half of the normal notice period (which varies depending on length of service). But if the employee does not actively reject the new contract, the new work conditions are binding once the notice period has expired.

In the Polish Collective Dismissals Act, the legislator has defined collective dismissal as a "necessity to terminate the employment relationship". The employer must therefore be convinced that termination is necessary. Moreover, termination may not be connected with

(the performance of) the employee.

Supreme Court case law also has it that the provisions of the Act apply to termination of the conditions of work, and that termination of the conditions of work and pay is grounds for the employee to file a claim for reinstatement on the old terms or for compensation. By case law, termination of the employment relationship resulting from rejection of the proposed work and pay conditions does stop the employee from receiving severance pay under the Collective Dismissals Act, if the proposed conditions are significantly different from the previous ones and their rejection is objectively justified. This is because the main aim of the termination of work conditions should be to transform the employment relationship, and termination of the relationship if the employee does not consent is only a secondary objective. The terminating effect is the result of the will of both parties to the employment relationship.

Judgment

The dispute before the Supreme Court centred on whether the claim for severance pay was justified. The Supreme Court found that under the definition provided in Article 1, item 1a(i) of Directive 98/59/EC and Article 1 of the Act on special principles of termination of employment contracts with employees for reasons not related to employees, the term "collective dismissals" is based on the number of dismissed employees compared the total number of people employed by the given employer and the period, during which the employment relationship with employees is terminated – and the fact that the reason for the dismissals is not related to individual employees. Thus, there are two prerequisites: the scale of the dismissals and the reason for them.

The Supreme Court felt that the provisions of the Act on special principles of termination of employment contracts with employees for reasons not related to employees also applied to the termination of work conditions (Article 1, item 1 of the Act in connection with Article 42(1) of the Polish Labour Code). According to the Court, its view is supported by the fact that the courts must interpret domestic law in a way that is compliant with EU law. Article 1, item 1 of Directive 98/59 refers to: "terminations of employment contracts which occur on the employer's initiative". The termination of work conditions by the employer results in the termination of the employment relationship if the employee rejects its proposal. This happens as a result of the initial action of the employer and if the termination of an employment contract on the initiative of the employer is subject to Article 1, item 2 of the Collective Dismissals Act, then it should apply to the termination of the conditions of work.

In the opinion of the Supreme Court, the main reason for the terminations was organisational transformation, with the aim of improving the economic efficiency of the Bank. The decision

in the case depended on whether this was the sole reason or whether the rejection of the new work conditions was an accompanying reason for termination of the employment contract between the parties, the consequence of the latter being that the dismissal would not fall within the scope of a collective dismissal.

The Supreme Court found no element of discrimination in the way the employee was treated. It found that it was not the intention of the Bank to terminate the employment relationship with M. on the pretext of amending conditions. The changes were to the name of the job, reporting line and the place of work. The claimant could not prove that the change of workplace was so inconvenient that he needed to resign. The new job was at a similar level in the organisational hierarchy as the old one, nor were the jobs different in terms of duties or pay. The main reasons that the employee felt there was a loss of professional status were the office premises and transport to and from the office. However, in the opinion of the Supreme Court, this was not enough to constitute objective justification for rejecting the new working conditions. As a result, M.'s decision needed to be considered as an accompanying reason for termination of the employment relationship.

Commentary

The position of the Supreme Court seems correct. Under the directives, employees should be protected from any form of termination of their employment contract that is carried out on the initiative of the employer. In Poland, if an employee rejects new terms, this will result in termination and this means that employees who have lost their jobs as a result should be entitled to severance pay. This is in line with the ECJ judgment in case C-429/16 (21 of September 2017), where the Court said that termination of the contract following an employee's refusal to accept a change must be regarded as a termination of the employment contract on the employer's initiative, within the meaning of Article 1(1) of Directive 98/59, and that therefore, it must be taken into account in calculating the total number of redundancies.

Comment from other jurisdiction

Bulgaria (Rusalena Angelova, Djingov, Gouginski, Kyutchukov & Velichkov): Bulgarian rules regarding collective dismissal largely coincide with the requirements of Council Directive 98/59, which is transposed in Bulgarian law. The term collective dismissal refers to a dismissal carried out by an employer for one or more reasons not related to the affected employees and their performance, if within a period of 30 days, the employer has terminated at least the following numbers of employees:

10 employees, where the total number of employees in the business is between 20 and 100;
10 percent of the total number of employees, where the total number of employees in the business is between 100 and 300; or
30 employees, where the total number of employees is 300 or more.

The relevant termination grounds for collective dismissals are: (i) closing the enterprise where the individual is employed (or part of it); (ii) reducing the number of jobs; (iii) decreasing work volume; (iii) discontinuation of work by the employer for more than 15 business days; (iv) vacation of a position to accommodate an employee who has been reinstated after unlawful dismissal; (v) changes to the requirements for performance of job duties which the employee fails to meet; (vi) objective impossibility for performance by the employee; and (vii) termination by mutual consent at the employer's initiative, with compensation.

Thus, in Bulgaria, a change to pay conditions (even if these give the employee the right to unilaterally terminate the employment contract) would not be covered by the collective dismissal rules.

Subjects: Collective dismissal

Parties: M. – v – Bank

Court: Supreme Court

Date: 14 December 2016

Case number: II PK 281/15

Internet publication: www.sn.pl/sites/orzecznictwo/orzeczenia3/ii%20pk%20281-15-1.pdf

---

Creator: Supreme Court
Verdict at: 2016-12-14
Case number: II PK 281/15