SUMMARY

2015/12 Financial difficulties cannot justify unilateral variations of salary and benefits (CY)

<p>Unilateral variations by the employer of basic employment terms may be construed as a breach of the employment relationship, giving the employee the right to either “stand and sue” or resign and claim constructive dismissal. If the employee does not resign, the court may decide that all employment terms and benefits should be restored. If, however, the employee resigns, the court may grant compensation for unlawful (constructive) dismissal. Note that if the employee does not resign, he or she should make a claim immediately, as a long period before claiming may be considered to show implied acceptance of the variations.</p>

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Facts

The applicant in this case was an airline pilot. He was employed by Cyprus Airways Public Ltd, formerly the national airline of Cyprus (the 'Company'). He was a member of the Pan-Cyprian Pilots' Trade Union. His terms of employment were governed by a collective agreement concluded with the union, which was renewed from time to time. In 2004, the Company unilaterally reduced the salaries and certain other benefits of its pilots, with effect from 1 January 2005. These reductions are refered to below, collectively, as the "salary reduction". The applicant protested, noting that neither he nor his union had agreed to the reductions, which were therefore unlawful and ineffective. He brought legal proceedings before the Nicosia Employment Court, claiming the balance between his earnings and the sums to which he was entitled.

The Company argued that the salary reduction was necessitated by such severe financial difficulties that the Company would not have survived without them. It treated these difficulties as a force majeure. Following refusal by the union and the applicant to agree to the salary reduction, the Company had discussed the situation with the Ministry of Labour, Welfare and Social Insurance and other public authorities in the context of their efforts to secure the airline's continued existence. The Ministry had taken the view that reducing the pilots' salary level, which was one of many suggested measures, would not be a unilateral amendment or a violation of the collective agreement because it was necessitated by force majeure.

The Company also argued that the applicant, by continuing to perform his work, rather than resigning and claiming compensation based on constructive dismissal, had implicitly agreed to the salary reduction, causing his old employment contract to be replaced by a new contract on the new terms.

Judgment

For a reason that is not relevant here[1], the court did not adjudicate the case on its merits until 2014, nine years after the application was filed. The court issued a long and detailed decision relating to the salary reduction effected in 2005.

The court held that any variation to an employee's terms of employment must be agreed between the parties. This could be done in writing, verbally or impliedly. The employee's consent could be obtained either indirectly via the union following collective negotiations or directly. Individual consent may also be inferred from the employee's behaviour. Any variation of terms made without the employee's consent or without a provision in the contract allowing for unilateral amendment by the employer, is a violation of the contract of employment. The fact that the salary reduction in this case was necessitated by the Company's extremely

negative financial situation does not alter this basic principle.

Consequently, the court awarded the applicant ¤ 19,310 in salary arrears plus expenses, VAT and interest.

Commentary

This judgment was delivered in a period during which Cyprus was - and still is - facing a very serious financial crisis as a result of which numerous companies were (and still are) closing down daily because of their negative financial situation. However, the Employment Court's view was that neither the financial crisis in Cyprus nor the specific financial difficulties that a company may be experiencing can result in a breach of an employment contract for the sake of the company/employer.

Less than three months after this judgment was delivered, Cyprus Airways Public Ltd announced its closure (January 2015) because of the extreme financial difficulties it was experiencing and because its bailout scheme did not bring the results necessary to rescue it.

Comments from other jurisdictions

Germany (Peter Dworski): As an instrument for companies to squeeze financial bottlenecks and to realise temporary economic relief, German law provides them with the opportunity to introduce short-time work. Short-time work stands for the temporary reduction of the employee's working time corresponding with a prorated reduction of the employee's claim to remuneration. For a certain period of time, the loss of salary is compensated through payments by the Federal Labour Office. However, the employer is not entitled to introduce short-time work unilaterally, as the introduction requires a legal basis, for example provisions of a collective or company agreement. Furthermore, the possibility to introduce short-time work can be regulated in individual employment contracts. It is important thereby that the regulation contains a term of notice (at least three weeks). Especially in view of the crisis years 2008 and 2009, many companies added short-time work-clauses as a standard to their employment contracts. All in all, the regulations regarding short-time work have proven their value as an effective means for the avoidance of dismissals based on operational reasons in times of crisis.

Another possibility for the employer to reduce the salary of an employee unilaterally is the dismissal for variation of contract. Content of this measure is the dismissal of the current employment agreement by the employer associated with a new contractual offer for the employee on amended conditions (e.g. reduced salary). Generally, dismissal for variation of contract requires a statutory ground for dismissal (i.e. grounds that are related to the person or

the conduct of the employee or operating requirements) and has to meet the principle of proportionality. In this regard, the dismissal for variation of contract as a means to reduce the salary of an employee is only justified, if through the reduction of personnel costs the closure of operations or a significant reduction of the workforce can be prevented. According to German case law, this generally requires an extensive redevelopment concept by the employer that exploits all possible means that are less severe than the dismissal for variation of contract.

Furthermore, it is possible to reduce the salary of employees through a collective agreement (e.g. in connection with a reduction of the working time). According to German case law, the parties to a collective agreement have a broad margin of discretion regarding the reduction of costs and the protection of jobs. Remuneration agreements in collective agreements are subject to a very limited judicial control. This is an expression of the constitutionally guaranteed operational freedom of the parties to collective agreements.

The Netherlands (Peter Vas Nunes):

The financial crisis has caused many employers to explore avenues to reduce payroll costs, not only through headcount reduction but also by cutting salaries or, more often, other benefits such as pension. The most obvious technique is to seek the cooperation of the relevant union(s), if any. Even though union membership has dropped to below 20% of the workforce, and in many sectors is close to nil, the vast majority of employment contracts in this country incorporate the contents of a collective agreement concluded between the employer (or the employers' association of which it is a member) and one or more unions. The clause in the employment contract incorporating the collective agreement is usually formulated (or interpreted as being) "dynamic", that is to say that the collective agreement's contents apply as those contents evolve over time. In theory, this means that if the unions agree to replace a collective agreement with a less generous one, the employees' terms of employment automatically drop to the new, lower level. However, there is a complication. Most collective agreements are what is known as "minimum" agreements. That is to say that employers are free to offer their staff better terms. In these cases, the existing terms of employment continue despite a new collective agreement being less favourable than the previous one. A way to get round this complication is to formulate the relevant provision in the new collective agreement as being a (minimum and) maximum term.

The United Kingdom (Bethan Carney):

In the last few years many employers in the UK have also tried to vary employees' contractual terms because of unfavourable trading conditions caused by the recession. Employers have attempted various measures, including cutting salaries and other benefits or reducing hours.

Unlike in the Netherlands, most UK employment contracts are not governed by collective agreements with trade unions, so if an employer wishes to change terms and conditions it must normally agree this with the employees directly. As in Cyprus, a unilateral variation by the employer would be a breach of contract permitting the employee to resign and claim constructive dismissal or to remain employed whilst bringing a breach of contract claim.

However, the employer might be able to enforce changes in a different way. If the employer has a real and urgent need to make the change it could consult with the employees seeking their consent. If any refuse consent, the employer might be able to dismiss these individuals (giving them due notice of termination) and offer them a new contract of employment on the new terms. Giving the individual their contractual notice entitlement would prevent a breach of contract claim, the risk would be that employees with sufficient service (normally 2 years) could bring an unfair dismissal claim. However, if the employer has a real business need to make the change this could be a potentially fair reason for the dismissal, meaning that employees would not succeed in an unfair dismissal claim. In addition, the new offer would go some way to mitigating any loss they might suffer and would reduce compensation if there had been an unfair dismissal. Attempting to change contractual terms in this way is a delicate matter and has to be handled carefully. One potential pitfall for employers to watch out for is that if they dismiss at least 20 employees, it could be a collective redundancy situation necessitating collective consultation with employee representatives or trade unions. This is because the definition of 'redundancy' in the legislation implementing the Collective Redundancies Directive (98/59/EC) is a dismissal for a reason not related to the individual concerned, which definition is clearly wide enough to encompass dismissals made to change terms and conditions.

Footnote

1 The Labour Court delivered a judgment which was overturned by the Supreme Court on the ground that the court's composition was incorrect. The Supreme Court ordered a retrial.

Subject: Terms of employment, Unilateral amendment

Parties: Chrysanthos Chatzichrysanthou – v – Cyprus Airways Public Ltd

Court: Nicosia Employment Court

EELA EUROPEAN EMPLOYMENT LAWYERS ASSOCIATION

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