SUMMARY

2014/29 Withdrawing an opera singer from previously awarded roles infringes her right to work and violates her dignity (SL)

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Facts

This case, which set in motion a chain of proceedings, concerns a world-renowned opera singer. She had concluded an employment agreement with a Slovenian opera house to perform as a soloist in a variety of operatic roles. Her employment contract explicitly allowed her to perform on an occasional basis for third parties outside the opera house. In 1998, after declining an appearance for the employer due to an outside performance, the managing director, who at the time was also the artistic director of the opera house, withdrew the opera singer from two roles that had previously been awarded to her. The opera singer objected, claiming that her explicit withdrawal was a reprisal for her refusal to sing in the performance

that had been offered to her. She was hurt and offended by the withdrawal. In response, the public relations office of the opera house publicly stated that the opera singer was merely putting on "the aureole of a martyr" and was not as affected by the withdrawal as she was trying to appear.

The opera singer filed a lawsuit against the opera house before the Labour Court, claiming, *inter alia*, non-pecuniary damages for breach of her right to personal dignity as a result of the unjustified withdrawal from the two already-assigned roles. This resulted in a number of judgments by the Labour Court, the Court of Appeal and, finally, the Supreme Court. The end result of all this litigation was that the case was referred back to the court of first instance. Its new judgment was appealed again and the Court of Appeal's decision on that appeal, delivered in March 2013, finally put an end to the litigation.

Throughout the proceedings, the defence of the opera house was primarily that the artistic director of an opera house is entitled to assign roles at his own discretion, without interference by the courts.

Judgment

The Court of Appeal upheld the (latest) decision of the court of first instance by ruling that the unjustified and maliciously intended withdrawal of the opera singer from her previously assigned opera roles represented a breach of her constitutional right to personal dignity and safety, in particular because the intention behind the withdrawal was to sanction the opera singer for declining to appear in a previous opera performance. The court clearly conveyed that abuse of an artistic director's legitimate power to appoint opera roles is unlawful and that, in this case, the opera house was liable for non-pecuniary damages for breach of the right to personal dignity and security. Consequently, the Court of Appeal upheld the decision of the first instance, awarding the opera singer compensation amounting to € 3,000.

Commentary

Both the Slovenian Constitution and the Employment Relationship Act guarantee the right to personal dignity. The Employment Relationship Act presently obliges employers to provide their employees with the opportunity to perform their work, i.e. they may not be put on involuntary garden leave, except where there is insufficient work. The act as it stood at the time the plaintiff in this case was withdrawn from the two opera roles was even stricter. Although it did not state so explicitly, it was interpreted as more or less prohibiting involuntary garden leave in all circumstances, even where there was a lack of work.

Slovenian law does not prohibit employers from imposing disciplinary sanctions, such as

warnings and fines or, in extreme cases, dismissal. The paradox highlighted in this case is that the opera singer's employer could perhaps have penalised her and possibly even dismissed her for her refusal to sing in a production, but it was not allowed to withdraw her from two other roles, at least, not by way of reprisal. The issue of whether the opera house could have penalised the plaintiff was not litigated and the Court of Appeal consciously distanced itself from that issue.

In the end, the Court of Appeal gave precedence to the plaintiff's right to perform in the roles previously awarded to her over the artistic director's right to assign roles at his discretion. It seems the scales of justice tipped in favour of the plaintiff on account of the constitutional right to personal dignity and the inviolability of an employee's right to work.

Comments of other jurisdictions

Poland (Marcin Wujczyk): Just like Slovenian law, the Polish Labour Code guarantees employees the right to protect their dignity and other 'personal interests' (Article 11 of the Labour Code). This Article 11 says that "the employer is obliged to respect" those interests and it must prohibit their infringement. This requires the employer to take steps to ensure the best conditions possible to allow employees under which to enjoy those interests. There has been much litigation about the infringement of employees' personal interests. Article 11 requires employers to resolve any doubts in favour of the employee and to act vis-à-vis employees in a way that shows respect for their occupational skills, social position, affiliation with national, religious or racial groups or political beliefs.

Depriving an employee of some of his responsibilities would not be generally treated as an infringement of his dignity, as this does not automatically lead to loss of reputation. The employee might only claim infringement of his dignity if it seemed that the removal of responsibilities was degrading, offensive or groundless and that it called his competency into question.

However, the employee is able to challenge the employer's decision under the Labour Code by invoking the employer's duty to provide work for the employee. The obligation to give work to an employee should be regarded as one of the fundamental rules of labour law, albeit not defined in the section of the Labour Code that is devoted to those rules. The wording of Article 22 of the Labour Code implies that an employer may only be discharged from the obligation to provide work if both parties to the employment relationship agree. Any unilateral departure from the obligation is only permissible in exceptional special circumstances, namely where continued performance of work by the employee may entail significant risk to the employer's interests. Therefore, a unilateral decision to refuse work to an employee (even if the employee

continues to be paid) generally provides a basis for the employee to request reinstatement. Thus, the Slovenian opera singer would also have had the opportunity to regain the role she lost under the Polish law.

United Kingdom (Sean Illing): It appears that in Slovenia the employer is under a duty to provide employees with the opportunity to work, but this is not always the case in the United Kingdom. Generally speaking, whereas an employer has an obligation to pay wages, it does not have an obligation to provide work. However, there are certain circumstances in which a right to work will be implied.

The first is where a failure to provide work will affect the employee's pay, such as in the case of piece-work or where pay includes a substantial element of commission. However, even in these circumstances, the right to work will not be absolute. So, for example, in the case of *Devonald – v – Rosser and Sons* [1906] 2 KB 728, the Court of Appeal held that a piece-worker was entitled to be provided with work because he could not earn anything without it; however, there would still be circumstances (such as where the employer's equipment fails) in which the employer does not have to provide work.

The other type of circumstance in which a right to work may be implied is where the nature of the work is such that the employee needs to keep working in order to maintain a public profile or to preserve skills. This is particularly the case for actors or others in the performing arts – such as opera singers. The UK courts have for many years recognised that, for actors, the publicity from performing is as important as the pay. In the 1930 case of *Herbert Clayton and Jack Waller Ltd – v – Oliver* [1930] AC 209 the House of Lords (now the Supreme Court) awarded an actor substantial damages for loss of publicity and reputation as well as loss of salary when he was not cast in leading parts that he had been promised.

This doctrine has been extended recently to other types of work. In the case of *William Hill Organisation Ltd – v - Tucker* [1999] ICR 291, the Court of Appeal held that a senior dealer at a bookmakers, who was responsible for the compiling of odds, had an implied right to work. His skills needed to be regularly exercised, and the contract specifically imposed on the employee the duty to work the hours necessary to maintain his skills. The court therefore held that his employer could not require him to stay away from work, even on full pay, during his notice period (i.e. put him on 'garden leave') without an express contractual right to do so. In contrast, in the case of *Ibe – v – McNally (Inspector of Taxes)* [2005] EWHC 1551, the High Court held that the William Hill case did not support "so sweeping a proposition" that the employer is always obliged to provide work for the employee during the notice period.

In the case of *S G and R Valuation Service Co LLC – v – Boudrais and ors* [2008] IRLR 770, the

High Court found that the employees bringing the claim did, on the correct construction of their contract, have a 'right' to work but that they had demonstrated that they were not ready or willing to work by committing a serious breach of contract. In this case, the employees had stolen confidential information and details of potential business opportunities to pass on to a competitor they were planning to join. This demonstrated such 'hostility' towards the employer that the employer was relieved of its obligation to provide them with work.

In the light of these decisions, if this Slovenian case were to be decided in the UK, the opera singer would be likely to succeed whereas other employees doing different kinds of work would not. As a singer, the claimant is clearly doing the sort of job that carries with it an implied right to work. It is unlikely that she would be regarded as having breached the contract so fundamentally that the employer would be relieved of its obligation to provide work, particularly as her contract allowed her to perform occasionally for others.

The claimant could take one of several approaches to try to enforce her rights. She could bring a breach of contract claim in the county court whilst remaining employed and claim damages for the loss incurred (loss of earnings, reputation and publicity). Alternatively, rather than claiming damages, she might be able to bring a claim in the High Court for an injunction compelling the employer to give her the roles it had promised; this is known as a claim for 'specific performance'. The claimant would only be able to get an injunction if the court decided that damages were not an adequate remedy. The courts have traditionally been reluctant to order specific performance of an employment contract but it has been awarded in exceptional circumstances. Yet another alternative would be to resign and claim constructive dismissal. Constructive dismissal is where the employer breaches the contract so fundamentally that the employee is entitled to resign and treat it as a dismissal, bringing claims relating to the dismissal (wrongful dismissal and unfair dismissal).

Subject: Right to work; right to personal dignity

Parties: not disclosed

Court: Višje delovno in socialno sodišče (Higher Labour and Social Court)

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