

SUMMARY

2014/43 Supreme Court rules on equal pay and on redundancy selection criteria (PL)

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Facts

The plaintiff in this case was a clerk, Ms U.P. She was employed at a shipyard, in a department consisting of four clerks who did more or less similar (but overlapping) work. It is not known whether Ms U.P.'s colleagues were men or women. On 10 August 2010 the shipyard's management gave the plaintiff notice of termination, applying a three month notice period. Thus, the plaintiff's employment ended on 30 November 2010. The reason given for the dismissal was that the shipyard was experiencing a downturn in work and that therefore one clerical position was being removed, making one of the clerks redundant. The plaintiff's work was taken over by one of her colleagues.

The plaintiff brought legal proceedings against the shipyard. She made two unrelated claims:

she claimed compensation for unfair dismissal, alleging that not she but one of her colleagues should have been selected for redundancy;

she claimed compensation for discrimination, alleging that she had been paid less than her three colleagues in breach of the rules on equal treatment.

The court of first instance and the appellate court found in favour of the plaintiff. They held:

(re 1.) that the defendant had failed to compare adequately the work performed by the plaintiff and her colleagues;

(re 2.) that the plaintiff had for many years been paid less than her colleagues even though their work was similar and the defendant had failed to provide evidence of objective reasons for the pay differential.

The shipyard appealed to the Supreme Court.

Judgment

As far as the unfair dismissal claim was concerned, the Supreme Court referenced Article 45 of the Labour Code, which requires dismissals to be 'justified'. This means that a dismissal may not be arbitrary. In the event an employee is dismissed for business reasons, the employer must base its selection for redundancy on objective and fair criteria, taking account of both parties' legitimate interests. The Supreme Court listed the principal criteria, namely, the employee's:

professional qualifications, skills and professional experience;
performance;
professional attitude;
ability to work in a team;
availability;
suitability for the position in question in general;
length of service.

However, in certain circumstances, it may be legitimate, or even necessary, to depart from these criteria.

The Supreme Court found that the lower courts had failed to apply them properly.

As far as the pay discrimination claim was concerned, the Supreme Court observed that the principle of equality does not mean that everyone performing similar work should be paid the same salary. There can be legitimate reasons for paying some more than others, for instance to grade employees according to their potential for development or to reward high performance.

An employee who brings a pay discrimination claim must present and, where necessary, prove facts from which it may be presumed that (i) one or more comparators perform the same work or work of equal value as the plaintiff; (ii) those comparators are paid more; and (iii) the reason for the pay differential is unlawful. It is not until the plaintiff has provided sufficient *prima facie* evidence in respect of these facts that the burden of proof shifts to the employer to justify the pay differential.

The Supreme Court found that the lower courts had failed to establish that the plaintiff had provided such *prima facie* evidence of discrimination. For these reasons, the Supreme Court overturned the appellate court's judgment and ordered a retrial by that court.

Commentary

The arguments presented by the Supreme Court in this judgment should be broadly approved.

In terms of the criteria for dismissing an employee, it should be noted that Poland has not ratified Convention No. 158 of the International Labour Organisation, which requires there to be a "valid reason" underlying the termination of an employment contract. But Article 45 of the Polish Labour Code requires each employment contract termination to be properly "justified". It means that there must be objective reasons to suggest that an employer may terminate an employment relationship. In a series of sentences explaining "justified terminations", the Polish Supreme Court underlined that Article 45 is a general clause, offering a general way of assessing grounds for termination.

It also noted that termination with notice constitutes a normal and typical way of unilaterally terminating employment contracts concluded for an indefinite period. Under the ordinary rules for the termination of employment contracts, the employer can give notice of termination, provided it correctly selects employees for termination. Therefore, employees should be aware that the employer can terminate employees for its own reasons, except during periods when their employment is protected against termination. No extraordinary circumstances are required for the employer to exercise its discretion.

Nevertheless, if the reason for the termination involves a reduction of staff requiring the employer to select employees for redundancy, termination will only be justified where the selection process was conducted based on objective criteria. The law provides no list of objective criteria nor any guidance on this, but the case reported here clarifies which criteria should be taken into account - as listed above. An employer should be guided first of all by the employee's professional qualifications, skills and professional experience and his or her performance. Only then it should consider such criteria as the employee's attitude or

availability, for example. However, the Supreme Court also explained that in some cases, the employer can decide that the criteria normally perceived as the most important can be regarded as secondary in the circumstances, but it did not say what kind of cases those were. They may be, for example, where skills and experience are less important in the context than an employee's potential for development or his or her willingness to change workplaces.

It is worth noting, (though the Supreme Court did not consider this in the case at hand), that there is some debate in Poland as to whether the termination notice given to an employee should set out the criteria used for selecting employees for dismissal and if so how this requirement should be formulated. Recently, the Supreme Court has changed its standpoint on this, saying that employers should include the criteria used for selecting employees in order to allow employees to check whether they were justified pursuant to Article 45 of the Labour Code.

Where the employer is carrying out a collective dismissal, the selection criteria it uses must be included as part of the information and consultation procedure provided by law, (the rules about this being contained in the law transposing Council Directive 98/59/EC). In the case at hand, the dismissal was not part of a collective dismissal because the number of dismissed employees was too small. The Collective Dismissals Act did apply in certain respects, however, because the dismissals were not related to the employee. Therefore, severance had to be paid, but the employer had no obligation to conduct a consultation and information procedure.

In terms of unequal pay, the Supreme Court's ruling appears to me to be correct. Article 18^{3a} of the Labour Code sets out the most obviously discriminatory criteria, but the list is not exhaustive. Therefore it must be assumed that any distinction that is not objective may be considered discriminatory. For example, if the employer discriminates between employees based on their appearance, this could be discriminatory even though it is not listed in Article 18^{3a} of the Labour Code. However, the Labour Code does clearly address discrimination in terms of pay, stating in Article 18^{3c} that "employees have the right to equal pay for equal work or work of equal value".

Nevertheless, any consideration of whether an employee has been discriminated against in terms of pay should not only consist of a comparison of remuneration. The courts will also look at any differences between the competencies of the employees and assess their work and contribution to the employer's business. Slight differences in the pay of individual employees holding similar posts could, for example, be the result of the employer's financial policy or economic situation. Its actions will only be discriminatory if an employee's pay differs significantly from that of other employees performing the same work or work of equal value.

The Supreme Court rightly says that the employee must be able to, at least, set out a *prima facie* case to support the allegation of discrimination. Only at that point will the burden of proof shift to the employer to prove there was no discrimination. However, it should be noted that in most cases it is extremely difficult for an employee even to establish a *prima facie* case, as the employee usually does not have the necessary information and this could lead employees' cases failing at the first hurdle. In my view, this situation leads to injustice and is contrary to the principles enshrined in EU law. But until there is some clearer ECJ case law on this point the Supreme Court is unlikely to soften its position.

Comments from other jurisdictions

Austria (Daniela Krömer): Generally, the Austrian solution to the problem posed does not differ. The claimant needs to establish that there is an unlawful reason for the pay gap, such as direct or indirect gender discrimination. In addition, the general principle of equal treatment in employment relationships (*Arbeitsrechtlicher Gleichbehandlungsgrundsatz*) can be invoked: an employer cannot treat a minority of employees worse than the majority, unless there is a justification for the difference in treatment. The employee could have invoked that principle in this case and the employer would then have had to explain and prove the reason for the difference in pay.

Germany (Dagmar Hellenkemper): The selection criteria for termination for operational reasons are very limited in Germany. In fact, there are only four statutory criteria that the employer has to respect in the selection process: (1) employee's seniority, (2) age, (3) duties to support dependents and (4) severe disability. Exemptions can be made if a particular employee's continued employment is in the justified operational interest of the employer, in particular due to his or her knowledge, skills and performance or in order to ensure a balanced personnel structure in the establishment. The burden of proof usually falls on the employer if he makes an exemption for certain employees. In the Polish case reported here, as data for all the other employed clerks within the shipyard is not provided, it cannot be determined from a German point of view whether the termination would have been considered valid.

As for the pay discrimination claim, the German principles are in line with the decision of the Polish Supreme Court. It has to be shown by the employee that one or more comparators perform the same work or work of equal value, those comparators are paid more and that there is no reason for the differential treatment.

Subjects: Collective redundancies, Other forms of discrimination

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