EELA EUROPEAN EMPLOYMENT LAWYERS ASSOCIATION

SUMMARY

2014/51 Potential breakthrough for employee requests for reduced working hours (CZ)

<p>An employer may decline an employee’s request for reduced working hours or a different distribution of working hours if the employer has serious operational reasons for doing so, even if the employee applies for the reduction in order to take care of a child under 15 or a disabled person or because she is pregnant. The impact on the business activities of the employer at the time of the employee’s request is the crucial consideration in assessing how serious the operational reasons are. If a solution can be found, such as employing someone to cover the employee for the required time, the employer must not decline the employee’s request.</p>

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An employer may decline an employee's request for reduced working hours or a different distribution of working hours if the employer has serious operational reasons for doing so, even if the employee applies for the reduction in order to take care of a child under 15 or a disabled person or because she is pregnant. The impact on the business activities of the employer at the time of the employee's request is the crucial consideration in assessing how serious the operational reasons are. If a solution can be found, such as employing someone to cover the employee for the required time, the employer must not decline the employee's request.

Facts

The employee in this case was a municipal clerk. Before the end of her parental leave, she asked her employer to agree to reduce her working time from 5 x 8 = 40 to 5 x 7 = 35 hours per week in order to be able to care for her child. The employer agreed and the employee began to work seven hours per day, at a reduced salary, leaving one hour earlier each afternoon. The work that the employee performed during the one hour per day that she ceased to work is referred to below as 'the missing hour's work'.

Under Czech law, a reduction in working hours at the employee's request in order to care for a child or a disabled person is not seen as a change to the contractual terms of employment but as a temporary accommodation that the employer must grant in the absence of compelling operational reasons either to decline the request or to withdraw a previously granted working time reduction.

After about six months, the employer cancelled the employee's permission to work reduced hours and demanded that the employee resume her contractual 40-hour working week. The reason given was that the reduced working hours were causing "serious operational difficulties".

However, the employee did not comply and continued to perform her work only for 35 hours per week. The employer gave her a warning stating that it considered her behaviour to be a breach of her contractual obligations. Eventually, the employer gave the employee notice of termination based on breach of contract.

The employee brought an action claiming that the notice of termination was invalid, since there were no serious operational difficulties justifying the employer's decision. The court, however, accepted the employer's arguments and held that the notice of termination was valid and reasonable.

On appeal, the employee provided evidence that (i) during the period in which she had worked reduced hours, a colleague had done both her own work and the missing hour's work and (ii) the colleague was still working in that way at the time the employer withdrew its permission for her to work reduced hours. Although the employer responded that it had planned to dismiss the colleague within about two months following the withdrawal of permission, the fact remained that she was still carrying out her own work and putting in the missing hour's work at the time of the withdrawal. Based on this fact, the Court of Appeal concluded that at the time of the employer's decision to cancel the employee's short working hours, there were no serious operational difficulties which could justify the cancellation. The Court of Appeal therefore overturned the lower court's decision and declared the notice of

termination to be invalid.

Judgment

The employer filed an extraordinary appeal with the Supreme Court of the Czech Republic, claiming that it had been necessary to require the employee to work full time (40 hours per week) in order to ensure that the employer – a municipal office open to the public – was continuously operational on behalf of the public during opening hours. The employer acknowledged that the employee's colleague had for a while managed to do both her own work and the missing hour's work. However, the colleague was scheduled to leave soon after the employer cancelled the employee's reduced working hours' arrangement. Consequently, there would no longer be cover for the missing hour following the colleague's departure.

The Supreme Court confirmed that in a case such as this, it is crucial to determine whether there were serious operational difficulties justifying the refusal of the employee's request to continue working a reduced number of hours. On the one hand, the court reiterated its previous case law, in which it had held[1]:

that an employee's request for a reduction in working hours in order to take care of a child or disabled person, or because of pregnancy, may only be turned down in the event the reduction threatens to disable the normal operation of the organisation, to disrupt it severely or to jeopardise it;
that in assessing operational difficulties, it is necessary to take into account factors such as the type of business of the employer, the technical facilities in the workplace, the number of employees, their interchangeability and the employer's financial means.

The Supreme Court also added a new element into the equation, namely whether a new employee could be hired to cover the missing working hours for the duration of the working time reduction. The Court said that an operational threat could be overcome by hiring a new employee.

Based on the facts of the case, the Supreme Court overturned the previous courts' decisions and ordered the court of first instance to decide anew, taking the employer's alleged serious operational difficulties into account.

Commentary

The obligation to accept an employee's request for short working hours in cases where the employee is pregnant, taking care of a child under 15 years or a disabled person is governed by

the Czech Labour Code and has been confirmed by previous case law of the Supreme Court. The case law also determines the rules for assessing the operational reasons the employer can use to decline the employee's request.

In 2007, the Supreme Court clearly stipulated that it is at the sole discretion of the employer to decide on the exact number of employees necessary to perform the work. The employer cannot be required to employ an (otherwise) redundant employee in order to be able to accept another employee's request of for short working hours. In the words of the Supreme Court:

"the decision as to whether severe operational reasons prevent the acceptance of the employee's request cannot be affected by the consideration that the alleged disabling, disruption or severe jeopardising of the employer's proper operation would not happen if the employer were to hire another (new) employee."

The new case is a departure from this, but if the employer can now hire new employees in order to allow others to work with short working hours, this will lead to a substantial increase in employees' rights. Employees will only have to prove that the employer had the opportunity to employ someone else as a substitute for the employer to be obliged to accept their request. In more menial jobs, this should be relatively easy to do. Only for senior managers and highly specialised workers will it not be possible to find a substitute. In consequence, the application of this new case law may lead to increases in headcount.

The decision is also controversial because it bears no relation to the case at issue. None of the parties was actually making this argument and so the solution the Supreme Court came up with seems hard to understand. In addition, quite how the new case law and the old can be reconciled seems problematic, as they are in direct conflict.

This suggests that at some point the new case law will be revisited by the Supreme Court, but in the meantime, it has opened up new horizons for some employees.

Comments from other jurisdictions

The Netherlands (Peter Vas Nunes): A case such as this would be unthinkable in The Netherlands, for two reasons. First, a reduction of working time would amount to an amendment of the contractual terms. Unless it was clearly temporary, it would be a permanent amendment that could not, in principle, be undone unilaterally by the employer.

Secondly, Dutch employees have the right to apply for a reduction (or an increase!) in their working hours without having to give any reason and, provided certain formalities have been fulfilled, the employer must agree to the reduction unless it (provably) has a very serious

reason for turning down the application. The case law goes to show that the courts do not easily accept employers' arguments for refusing part-time work. An argument that it is not reasonably possible, or excessively expensive, to hire a replacement to cover the "missing" working time, would need to be substantiated. Having said this, however, I could imagine that if the employer in the case reported above could convince the court that it needed a clerk during the last hour of the day (say, from 4 to 5 pm), the court would likely accept that it is almost impossible to hire someone, let alone a qualified person, for five one-hour workdays (from 4-5 pm).

In the end, the acceptance of part-time work is probably more culturally than legally determined.

Subject: *Working time*

Parties: *Employee – v – City of Liberec*

Court: *Nejvyšší soud České republiky(Supreme Court of the Czech Republic)*

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Case number: *21 Cdo 1821/2013*

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