SUMMARY

2012/27: Protection of personal data in relation to union membership (PL)

<p>The rules protecting personal data prevail over those on consultation between employer and trade union in individual dismissal cases.</p>

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Facts

Polish law allows employers to dismiss most employees quite easily, as long as (i) the correct procedure has been followed and (ii) the dismissal is for good reason. Where the employee is a trade union member (or a person who has registered with a union without being a member, also known as a "protected non-union employee"1), the procedure is for the employer to send the employee's union a letter with information about the reasons for the proposed dismissal before making a decision to dismiss the employee. If the union does not respond within five days, the employee can be dismissed without further ado.

In the event an employee is dismissed without his or her union having been consulted, i.e. in breach of the rules, the employee can claim reinstatement or compensation with a maximum of three months' salary.

Employers are not permitted to ask their employees whether they are a member of a union.

The plaintiff in this case, a trade union member, was employed by a bank. Several trade unions were active within the bank. The employer did not know whether the plaintiff was a trade union member and, if so, of which union she was a member. For this reason the bank sent all of the relevant trade unions a letter asking them to provide it with a list of all of their

members within the bank. The trade unions complied except one, which happened to be the union of which the plaintiff was a member. This union (Solidarity, the largest union in Poland) responded that providing a list of all of its members would violate the data protection rules and would therefore be illegal. The bank did not go on to the second stage of writing a letter to the union with details of the reasons for dismissal and then waiting five days, but proceeded straight to dismissal based on the provision of law to the effect that if the employee's union does not respond (adequately) within a certain time, the employee can be dismissed without consultation. The bank reasoned that Solidarity had failed to respond adequately. The employee brought proceedings against the bank.

At Solidarity's request, the Personal Data Protection Agency, GIODO, ordered the bank to remove the lists of union members it had received. GIODO took the position that each time an employer contemplates terminating an employee's contract it should ask all of the unions active within the organisation whether that individual employee is a member of theirs and, if the response is positive, send the relevant union the required letter with information on the reason for the proposed dismissal. An employer should not be in possession of trade union membership lists for future reference or indeed for any general purpose.

The court of first instance found in favour of the employee. It held that the law was imprecise as to when and how employers wishing to dismiss staff should consult with the appropriate unions. The court applied well-established case law condemning the practice of collecting employees' personal data prematurely and without a specific purpose. Accordingly, it held that the employer in this case should not have collected such data. Further, the employer should have consulted on an individual basis with the employee's union before proceeding to dismiss. Thus, the termination of the employee's contract was unlawful and the plaintiff was awarded compensation.

The bank appealed to the Court of Appeal, which referred the matter to the Supreme Court for guidance on the data protection rules.

Judgment

The Supreme Court began by analysing its existing case law, which was far from being homogenous. Most of the relevant case law allowed employers to ask the unions active within their organisation to provide them with a list of all their members, but a minority of Supreme Court judgments held that employers may only ask for membership details of individual employees if and when there is a need for such information, such as when the employer considers dismissal. In analysing this diffuse case law, the Supreme Court noted that its case law had failed to take account of the law on personal data protection. Referring to case law

developed by the administrative courts in disputes with GIODO, the Supreme Court observed that personal data may only be collected for specified, explicit and legitimate purposes and that such data must be adequate, relevant and not excessive in relation to such purposes. Based on these principles, the collection of information on union membership of all employees within an organisation would only be necessary where the employer was contemplating dismissing its entire workforce.

The Supreme Court informed the Court of Appeal accordingly. Presumably this led, or will lead, to that court upholding the court of first instance's judgment.

Commentary

This judgment may have a perverse effect on employee data protection. Until now the practice has been for employers to ask the relevant unions, initially, for a list of all their members[2]. Every time a new union member joined the employer's workforce his or her name was added to the list and every time someone left, his or her name was removed. All the employer needed to do when contemplating dismissal was to check the membership lists. If that person's name was not on one of the lists, he could be dismissed without consulting the union. This practice may have been at odds with data protection rules, but it had the virtue of being simple.

Now, following this ruling, unions are no longer willing to provide employers with membership lists. Every time an employer wishes to dismiss an employee it will need to send all the relevant unions a letter asking them whether the employee is one of their members. This involves revealing the purpose of the enquiry, namely that the employer is contemplating dismissal. Not only does this infringe the employee's privacy, it may also harm the employers' interests, as this way employees may find out at an earlier stage that their employer is considering dismissing them, in which case they may call in sick before they are given notice, thereby frustrating the dismissal[3].

The Supreme Court was aware of these drawbacks, but it was of the view that data protection legislation as applied by the administrative courts took precedence.

It is likely that employers will react to this judgment by asking the unions about the membership of more employees than actually contemplated for dismissal. For example, if an employer plans to dismiss two workers, he could pretend to be planning to dismiss five workers and, having obtained union membership information on all five workers, dismiss the two and retain the information on the other three. Admittedly, this is in breach of the data protection rules, but this is hard to prove.

In my view, the provision of law regarding the procedure for dismissing unionised employees

should be amended so as to strike the right balance between data protection and employers' needs.

Academic commentary (Professor A.M. Swiatkowski)**

On the one hand trade union membership is considered by Polish labour law to be protected information which the unions, in their capacity as administrators of that information, may not reveal save specifically for the purposes stated in national legislation. On the other hand, information on protected non-union employees is not covered by that legislation. Therefore the normal data protection rules apply to these employees. This can be to their advantage (because the exception allowing union membership to be revealed does not apply), but it can also be a disadvantage (because the fact that they are not union members does not qualify as "sensitive" information). This discrepancy has not been solved by the judgment reported above.

The Polish Supreme Court is torn between the "devil" - the obligation of trade unions to provide information in the event of an employer's request in connection with one or more contemplated dismissals - and the "deep blue sea" - the prohibition on providing personal data other than in certain specific situations (such as the identities of employees who form a new union).

Both solutions are inadequate because neither of them serves the purpose of protecting information concerning protected nonunion employees, whom the employer, in the case of a future labour dispute, might consider to be trade union supporters. But this most recent Supreme Court judgment, which does its best to combine both principles, is no better. According to the judgment reported above, the employer is relieved of a legal obligation established by Polish labour law and may request trade unions for a list of protected employees only when refusal to provide such information may not be justified by reason of legal protection of sensitive information.

Discrepancies between the labour courts and the administrative courts, as well as within the Supreme Court between various adjudicating panels, ought to be regarded as an urgent call for the national legislator to amend the 1991 Trade Union Act.

Comments from other jurisdictions

Austria (Andreas Tinhofer): The practice of providing the employer with a membership list can hardly be justified by the need to consult with trade unions in individual dismissal cases. For this purpose it would be sufficient for the employer to inform all the trade unions active in the company about the planned dismissal of a specific employee without revealing the reason.

The relevant trade union could then ask the employer for consultation on the reason for the dismissal. Such a procedure would reduce the impairment of the employee's privacy as other trade unions would not receive information that might be of a rather personal nature. However, it seems that such a solution would require changing the statutory rules on the involvement of trade unions in individual dismissal cases.

Czech Republic (Nataša Randlová): In the Czech Republic there is a similar obligation as in Polish law. Under Czech law the employer is obliged to consult with the trade union in advance in individual dismissal cases. However, it differs from Polish law, in that this obligation to applies to any notice or immediate termination, regardless whether the employee is a member of any trade union established at the employer.

In order to comply with the obligation to consult with the trade union in an individual dismissal case, it is necessary (unless the employee informs the employer that he or she is not willing to be represented by any trade union – very unusual but possible) to contact all trade unions active within the employer and ask them whether the individual employee is one of their members. This is the only way to find out which trade union to consult with in respect of the relevant individual dismissal. In the event the employee is not a member of any trade union established at the employer, the employee is represented by the union with the highest number of members employed by the employer, unless the employee specifies otherwise.

Since the Czech Labour Code prohibits employers from asking about membership in a trade union, requesting the trade unions active within their organisation to provide employers with a list of all their members is not allowed. This is because of the rules protecting personal data. Thus, the situation in the Czech Republic resembles that in Poland, in that the data protection rules take precedence over the rules on union consultation.

There is, however, an important difference with the Polish situation, namely that non-compliance with the obligation to consult with the relevant union in advance of an individual dismissal case does not invalidate the relevant notice or immediate termination. However, the employer could be fined up to CZK 300,000 (approximately € 12,000) for breach of the obligation relating to termination of employment.

Notwithstanding the above, there is a special regime in the event notice or immediate termination of employment is given to a trade union officer. In that case the trade union´s consent is necessary. Should the trade union not grant its consent, notice of termination is invalid, unless the employer proves before the court that all of the essentials of termination of employment have been complied with and that the employer cannot be reasonably expected to continue employing the employee. The employer may use the consent granted for up to two

months, after that a new consent must be acquired.

Germany (Elisabeth Höller): The German legal situation is quite different. In terms of dismissal procedures, trade union members are treated the same way as non-union members. According to German law, employers do not need to consult the responsible trade union in order to validly dismiss a trade union member.

German law does not provide a right for employers to ask trade unions for membership lists or to enquire whether an employee is a member of a trade union, either in cases of dismissal or otherwise.

However, in Germany there is some debate about whether employers have the right to ask employees about membership of trade unions at the beginning of the employment relationship. As the Federal Labour Court has ruled that more than one trade union can be active within one company, employers have a special interest in trade union membership because employees' rate of pay is dependent on which collective agreement applies to him or her.

On the other hand, membership of a trade union is one of the inviolable rights of the person protected by the Federal Data Protection Law (BDSG). Employers must obtain the explicit consent of the employee to collect such data. The notion that employers have a legitimate interest in acquiring this data for employment purposes without the agreement of the employee has always been rejected. Given that in addition, the German Constitution provides a specific prohibition against discrimination relating to membership of a trade union, any question by an employer about an employee's membership of a trade union before recruitment would be unacceptable. As a result, employees have the right to lie about membership of a trade union if the employer asks about it in a job interview.

Whether employers can ask employees about trade union membership once the employment relationship has started is still an open question.

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Parties: not published

EELA EUROPEAN EMPLOYMENT LAWYERS ASSOCIATION

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