SUMMARY

2014/63 Employer need not offer redundant worker job in foreign branch (GE)

<p>The employer’s obligation to offer continued employment in order to avoid termination for operational reasons does not include the offer of vacant positions in foreign countries, including EU member states.</p>

Summary

The employer's obligation to offer continued employment in order to avoid termination for operational reasons does not include the offer of vacant positions in foreign countries, including EU member states.

Facts

The plaintiff in this case was a 45 or 46 year old textile worker. The defendant was a textile company in Wuppertal, Germany, where the plaintiff had worked since 1984. This company had a branch in the Czech Republic, at a distance of about 800km from Wuppertal.

In June 2011, the company decided to close its production facilities in Wuppertal and to move the machinery and equipment to the branch in the Czech Republic. The company terminated the employment contracts of all but two of its production workers, including the plaintiff, giving seven months' notice, i.e. until 31 January 2012. The two workers were given a notice period of 12 months, lasting until 30 June 2012.

The plaintiff brought proceedings, claiming that her dismissal was socially unjustified (*sozial ungerechtfertigt*) and therefore invalid, as provided in the Unfair Dismissal Act (*Kündigungsschutzgesetz*). One of her arguments was that she should have been one of the two workers who were given 12 months' notice. The other argument, that we are considering in

this case report was that she should have been offered a job in the branch in the Czech Republic, to where her work had been transferred. She asked the court to declare that her contract of employment had not been validly terminated and to order the defendant to continue paying her salary and maintain her other terms of employment beyond 31 January 2012.

The plaintiff's argument that she should have been offered a job in the Czech branch rested on two doctrines of German law. The first is that an employer may not dismiss an employee if it has the right to unilaterally transfer the employee to another position or another physical location and another position or other location is available. The second doctrine holds that, even where the employer does not have a right to unilaterally transfer the employee, it may still have an obligation to offer the employee another position and/or another work location if it can reasonably be expected that the employer should make such an offer. An employer that is under an obligation to offer an amendment to an employee's terms of employment but fails to do so, is not permitted to terminate the employment contract. One method of amending an employee's terms of employment is to apply a procedure known as *Änderungskündigung*. The procedure is that the employee is dismissed and simultaneously offered another position, another work location or some other amendment of his or her terms of employment. The employee can respond in one of three ways. He or she can accept the offer, in which case the term of employment is amended accordingly. The employee can also reject the offer, in which case, if the offer is reasonable and the termination valid, the employment contract terminates. Thirdly, the employee can accept the offer conditionally, the condition being that the court finds the termination to be valid and the offer to have been reasonable.

Judgment

The courts of first and second instance rejected the plaintiff's claim. She appealed to the highest court in labour matters, the *Bundesarbeitsgericht* (BAG). The BAG also turned down the claim. It held that the dismissal was justified by urgent operational requirements with due regard having been given to the relevant social aspects. The decision to stop production in Wuppertal and move the equipment to the Czech branch was understandable and therefore not arbitrary. Hence, there was no possibility to continue employing the plaintiff there.

The BAG then turned to the issue of whether the company had the right to unilaterally relocate the plaintiff's work location to the Czech Republic. This was not the case. First, the plaintiff's contract did not specify her place of work. Therefore, the defendant would have to rely on its "instruction right" as provided in section 106 of the Trade Regulations Act. This provision does not allow an employer to transfer an employee to a work location abroad, given that the scope of the Act is limited to the territory of Germany. Secondly, the distance between

Wuppertal and the Czech branch was too great to justify unilateral relocation.

Finally, the BAG addressed the issue of whether the defendant had had an obligation to offer the plaintiff a job in its Czech branch on amended terms of employment (including reduced salary). The BAG held that this was not the case. The relevant part of the Unfair Dismissal Act only applies to German establishments. This is because the legal requirements regarding the validity of a termination need to be the same for all of the employment relationships concerned, otherwise the main purpose of the Act to balance the interests of employee and employer, or those of employees between themselves - could not be achieved. If employees in different establishments in different countries are in competition for one vacant position, one cannot judge the situation on the basis of German law alone, since some employees will be subject to foreign law.

Commentary

This decision is not surprising given that the BAG recently rendered a judgment that clarified that the term "establishment" as set out in the provisions of the German Unfair Dismissal Act, was defined as "establishment in Germany". However, in relation to the question of whether the employer had an obligation to offer vacant positions in establishments in a foreign country, this had not been previously addressed by the BAG and was not addressed in the current decision either. The BAG specifically did not decide whether possible employment in a foreign country needs to be taken into account in cases involving the relocation of an establishment (or parts of an establishment), as the BAG held that the work in question was not organised in a way that would allow separation from the rest of the establishment.

Following the reasoning of the BAG in this decision, one will probably have to distinguish between cases involving only German staff and cases also involving foreign staff. If an establishment is relocated a few kilometers across the border and the employer needs exactly the same functions and employee qualifications it will probably have to offer employment to the affected employees in Germany. We believe this situation is comparable to a cross border transfer of undertaking. If the decision of the employer involves the merger of the German part of an establishment and a foreign establishment, the reasoning of the case at hand suggests that there is no obligation on the employer to offer employment, because otherwise the issue that there are different legal requirements in the affected countries arises.

Although the case law on this is likely to evolve, for the moment this decision brings at least some clarity on the correct interpretation of the Unfair Dismissal Act.

Comments from other jurisdictions

Austria (Daniela Krömer): The Austrian law on protection against dismissal (specifically section 105(3) of the Labour Constitution Act, *Arbeitsverfassungsgesetz*, 'ArbVG') resembles the German system described above relating to termination for organisational reasons. Before terminating an employment contract, the employer must offer the employee another position, if available. This obligation is generally limited to the establishment itself (*Betrieb*). However, there are two exceptions. One is where the employee has previously worked in other establishments within the organisation. In this case, according to case law, the employer must offer available positions, not only in the establishment, but within the entire organisation (Austrian Supreme Court, OGH 9 ObA 224/89; 8 ObA 236/94). The other exception is where the employment contract covers employment within a company group. In that case, case law now holds that positions within that group have to be offered (9 ObA 34/08b).

Whether the obligation to offer a job is limited to Austrian territory has not yet been decided, nor has it been – to the best of the author's knowledge – subject to much academic debate. Some argue that such an obligation can exist (depending on the contract). Others refer to the fact that, due to the works council's involvement in termination protection, this protection against termination is limited to Austrian territory (9 ObA 65/11s). The argument appears to be that, as the obligation to offer another position when terminating for organisational reasons forms part of the protection against termination, it must be limited to Austrian territory.

France (Claire Toumieux): This decision is interesting as it shows a strict application of lex loci laboris (local law). By contrast, French case law takes a much wider approach, providing an obligation on French employers to look for alternative positions not only in France but also outside France, in every location where the group to which it belongs is established. Article L.1233-4-1 of the French Labour Code even sets a specific process for this situation. The employer must first send a questionnaire to the employees to be made redundant, asking them whether they would accept job relocation offers outside France and if so, under what conditions (e.g. salary and working time). The burden of proof of effective relocation efforts lies with the French employer (Supreme Court, 17 June 2009, n° 07-44429). Should the company not be in a position to convince the court, the termination of employment will be held to be unfair.

Even though no sanction is imposed on companies outside France, they will need to actively contribute to the relocation effort, to support their French sister company.

That being said, the European reader will also be interested in the German approach insofar as it apparently suggests a strict view about cross-bordertransfer of undertakings. In this regard, the French courts seem to share the German reluctance to impose a change of employer on local employees where the transferee is located abroad, in a different legal environment.

Note that one should give proper consideration to the fact that whatever protection is afforded by the local laws of the transferee, the very fact that the employee will be unfamiliar with those laws puts him or her in a vulnerable position.

Greece (Faye Tasioula): Pursuant to the provision of Greek Law (2112/1920) on termination of employment agreements, if the employee does not accept a transfer abroad, the transfer will be considered as a unilateral deterioration in his or her employment terms and conditions.

In the event that a company closes down its business in Greece and transfers its activity abroad, the employer could, before terminating the employee's contract, as a lenient measure instead of termination, and applying the principals of proportionality and good faith, propose that he or she should transfer to another location and continue working their under the same terms and conditions. The transfer could equally be proposed by the employee.

Up to now, the Greek courts have not had to deal with a similar case and therefore we are not in a position to say how they might rule, but we consider it likely that the former employee would succeed in a claim against his employer, given the constitutionally guaranteed protection of the right to work.

Hungary (Gabriella Ormai): Under Hungarian employment law, the employer is only required to offer another position to an employee in certain cases before terminating the employment relationship with notice. The employer must offer another position (if there is one) if the reason for the termination is related to the employee's inability to carry out his or her work or to the employer's operation and (i) the employee will reach retirement age within five years; or (ii) the employee is a mother with a child under the age of three and is not on maternity or unpaid childcare leave; or (iii) the employee is a father who is a single parent with a child under three and is not on unpaid childcare leave.

The offered position must resemble the original position in terms of required ability, education and experience. However, its location must be the same as the employee's existing place of work. If there is no vacant position or the employee refuses the offer, the employer may terminate the employment relationship with notice, providing proper reasoning.

It is interesting that under German law an employer may not dismiss an employee if it has the right to unilaterally transfer the employee to another available position or physical location. Under Hungarian employment law, the employer's may only transfer the employee to another position or location for up to 44 working days per calendar year and therefore, could not relocate the employee in order to avoid dismissal. Because of this limitation, there is no requirement to offer employment in a different unit in a different place of work, even if this is within the employer's business operations. The employer could choose to make an offer to

vary the terms (relocation), but this is at the discretion of the employer.

Ireland (Orla O'Leary): In Ireland, a genuine redundancy provides a defence to a claim of unfair dismissal. As with the situation in Germany, in Ireland where an employer ceases to carry on the business in the location where the employee was employed, then a redundancy situation arises.

However, the position in Ireland is different to the German one insofar as the obligation to look for an suitable alternative role appears to be more onerous. Under the Unfair Dismissal Acts 1977 to 2014 an employer is required to act in a fair and reasonable manner. The Employment Appeals Tribunal has interpreted this to mean that the termination of one's employment is an absolute last resort. Therefore notwithstanding the fact that a redundancy situation exists, where the employer has a vacant position in its organisation, whether in Ireland or elsewhere, the employer is required to, at least, offer the employee the opportunity to apply for the position.

In the case of Patrick O'Connor (claimant) - v - Perivale Gutermann Ltd (respondent) the Employment Appeals Tribunal found that the claimant had been unfairly dismissed when the respondent did not consult with the claimant in relation to a position outside of Ireland notwithstanding the fact the respondent "did so in the context of believing that [the claimant] would not, in fact, take up a post outside Ireland."

In summary therefore, employers in Ireland need to exhaust all avenues before taking the final step to terminating an employee's employment on grounds of redundancy.

United Kingdom (Bethan Carney): The UK law on redundancy has some similarities to the law in Germany, as described here. Redundancy is a potentially fair reason for dismissal; however, in order for a dismissal to be fair the employer must also follow a fair procedure.

There is a redundancy situation under UK law if, as here, an employer has ceased or intends to cease to carry on the business for which the employee was employed in the place where the employee worked (section 139(1)(a)(ii) Employment Rights Act 1996). Even if the employer moves the business to a different location (rather than closing it completely), there will be a potential redundancy situation. Although there was some dispute in the UK courts for years as to whether the 'place' in which the employee was employed was where they actually worked, or, where they could be obliged to work under their contract, the Court of Appeal has decided the question by saying that the crucial issue is the actual place of work (*High Table Ltd* v *Horst and others 1998 ICR 409, CA*). So, there can be a redundancy situation if there is a diminution in the need for employees to carry out work at their usual location, even if, under their contract, they could be required to work elsewhere and there is work in that alternative

location for them to do. In the circumstances that arose in this case, there would be a *prima facie* redundancy situation and a potentially fair reason for the dismissal. The next question would then be whether the employer had followed a fair procedure.

A fair procedure in redundancy situations means (amongst other things) that the employer should do what it can, so far as is reasonable, to find and offer the redundant employee any available alternative work. This usually means that the employer should consult with redundant employees about any opportunities, even if it does not believe that they will want to accept them (e.g. because the jobs are paid less or are in a different location). There is no case law (and no legislation) which specifically states that if an employer does not offer a redundant employee an available vacancy in a different country it will render the redundancy procedure unfair. However, a prudent employer seeking to avoid unfair dismissal claims would consider whether there are any such vacancies and offer them to redundant employees unless there are good reasons not to do so.

If an employee *unreasonably* refuses an offer of suitable alternative employment, he or she will lose any entitlement to a statutory redundancy payment. It would not be considered unreasonable to refuse a job offer if the vacancy is based 800km away in a different country. However, it might be if it was just a mile or so away.

Subject: Termination for operational reasons, reasonable limits

Parties: unknown

Court: Federal Labour Court (BAG)

Date: 29 August 2013

Case number: 2 AZR 809/12

Hardcopy publication: NZA 2014, 730

Internet-publication: www.bundesarbeitsgericht>Entscheidun gen >type case number in "Aktenzeichen"

Creator: Bundesarbeitsgericht (Federal Labour Court)
Verdict at: 2013-08-29
Case number: 2 AZR 809/12