SUMMARY

2011/49 Creative interpretation of law on compensating forced absence from work in light of EU principles (LT)

<p>If an employee has been reinstated at work by a court judgment, compensation for forced absence from work cannot be calculated differently as a result of the fact that before the dismissal the employee did not actually perform his or her work.</p>

Summary

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Facts

The plaintiff was on childcare leave from 14 November 2005 until 13 May 2007 (18 months). On the very first day she returned from leave her employer, the Ministry of Health, served her with an employment contract termination notice. The notice was given on the grounds that an audit conducted back in 2005 had shown bad results.

The employee brought an action claiming, amongst other issues, for invalidation of the termination notice and reinstatement in her former position.

The court of first instance rejected the employee's claim. The Court of Appeal partly satisfied the claim by invalidating the employment termination notice, reinstating the employee and ordering the Ministry of Health to pay the employee compensation for missed earnings for the period between 14 May 2007 and the date of the reinstatement. The claim was based on the concept of unfair dismissal.

In 2009 the Supreme Court overturned the part of the judgment that concerned compensation for forced absence from work and the matter was once again heard by the Court of Appeal.

The Court of Appeal established that it was undisputed that the Ministry of Health had to pay the employee compensation for the whole period of forced absence from work. However, the way the compensation should be calculated was unclear.

According to Latvian labour law, the compensation should consist of the employee's average earnings for the whole period of forced absence from work. Average earnings are based on the employee's salary during the six month period prior to the forced absence including supplementary payments specified in law, collective agreements or the employment contract and including bonuses.

However, the law also states that if the employee has not worked for the previous 12 months and has not been paid during this period, average earnings are to be calculated based on the statutory minimum wage. As the employee at issue had not worked for the last 18 months prior to the termination of her employment, the court of appeal held that for the purpose of calculating average earnings (i.e. to compensate for forced absence from work) the statutory minimum wage should be applied. In practice this meant that the employee's compensation for forced absence from work was significantly reduced.

The employee challenged this judgment with the Supreme Court, claiming that it should be reversed because:

1) it violates the principle of equal pay for men and women as stipulated in Directive 75/117 and Article 157 TFEU because predominantly women make use of long term childcare leave and, thus, it will mainly be women who fall within the scope of the provision of the labour law to the effect that if the employee has not worked for the previous 12 months and remuneration has not been paid to him or her, average earnings must be calculated based on the minimum statutory minimum wage; and

2) reducing average earnings to the level of the statutory minimum wage is contrary to Council Directive 2003/88, which provides that employees have the right to at least four weeks of annual paid leave. (Under Latvian labour law compensation for annual leave is also payable based on average earnings.)

Consequently, the case went to the Supreme Court for the second time.

Judgment

First, the Supreme Court referred to the ECJ's judgment in case C-167/97 (Regina v Secretary of State for Employment, ex parte Nicole Seymour-Smith and Laura Perez). The Supreme Court explained that compensation for termination of employment without valid grounds should consist of the amount that would have been paid if the employment had continued. Thus, this type of compensation is covered by the definition of pay for the purposes of Article 119 of the EC Treaty.

The Supreme Court also cited the ECJ's judgment in joined cases C-350/06 and C-520/06 (Gerhard Schultz-Hoff v Deutsche Rentversicherung Bund and Stringer and Others v Her Majesty's Revenue and Customs) stating that Article 7(2) of Directive 2003/88 must be interpreted as precluding national legislation or practices which provide that, on termination of the employment relationship, no allowances in lieu of paid untaken annual leave need be paid to a worker who has been on sick leave for the whole or part of the leave year and/or of a carry-over period Ð which was the reason why that worker could not exercise his right to paid annual leave. Therefore, the worker's normal remuneration (i.e. the amount that must be paid during rest periods corresponding to paid annual leave) should be used to calculate the allowance in lieu.

Based on these arguments, the Supreme Court ruled that a situation where compensation for forced absence from work is calculated without taking into account the employee's salary as stipulated in the employment contract would place an employee who has been on a long term childcare leave in a much less favourable position than an employee, who before the termination, was performing his or her duties. This was not an acceptable position, not only because it was inequitable, but also because, in the court's view, only the salary that the employee could have earned was relevant Ð irrespective of any circumstances that prevented the employee from actually working Ð because if, for example, the employee had been unable to perform her duties because of sickness, she would have been awarded an amount based on her ordinary salary by the court.

Thus, the Supreme Court ruled that the plaintiff had the right to a level of compensation for forced absence from work that corresponded to her normal average earnings Ð and not to average earnings under the statutory minimum wage Ð in contrast to the ruling of the Court of Appeal.

The Supreme Court held that the legal provision whereby the amount of average earnings of an employee who has been on long term childcare and sickness leave, has not worked for the previous 12 months and has not been paid, significantly reduces (i.e. it is equal to the statutory minimum), does not apply to situations where compensation is due to the employee for forced

absence from work for unfair dismissal.

Commentary

This judgment reaffirms a positive trend, namely that the Latvian Supreme Court is ready to apply principles arising from the ECJ's case law relating to employment law matters even where they contradict national law.

The judgment is also of particular interest because the Supreme Court changed its initial opinion of 2009 on the way average earnings for the purposes of determining compensation for forced absence from work should be calculated.

Comments from other jurisdictions

Czech Republic (Natasa Randlova): In the Czech Republic if the employee believes that the termination of employment is unfair and therefore invalid, he or she may inform the employer in writing that he or she insists on further employment. Then, if the court determines that the dismissal was unfair, the employer is obliged to provide the employee with salary compensation as of the date the employee informed the employer of its decision until the employee is reinstated or until a valid termination of employment takes place.

Salary compensation is provided in the amount of the employee's average earnings. Average earnings are calculated based on gross salary for payment to the employee during the decisive period (i.e. from the previous calendar quarter) and the period of work performed in the decisive period. If the employee had worked for less than 21 days during the decisive period, 'probable earnings' will apply.

Probable earnings are determined from the gross salary that the employee would probably have earned. Consideration will be given to the usual amounts of the individual components of the salary (e.g. bonuses) of the employee, or of the salary of other employees performing the same work or work of similar value at the employer's business.

Only if the average earnings are calculated as being lower than the minimum wage stipulated by law to which the employee would have been entitled in the respective calendar month, would the average earnings be increased Ð to the amount of the minimum wage. The same principle applies to probable earnings.

Germany (Paul Schreiner): In Germany there is no such thing as a minimum wage per hour stipulated by the state. In cases like this, a German court would probably simply have held that the normal remuneration must be paid for the period of forced absence from work. If some

elements of the total remuneration were variable, a German court would likely have awarded a claim based on 100% performance. In the case of additional benefits such as overtime payments, however, a German court would be likely to look at how much overtime had been done in the past and apply those average additional hours to the period of forced absence from work.

Subject: Unfair dismissal, maternity and parental leave

Parties: I.T. - v - Ministry of Health of the Republic of Latvia

Court: Supreme Court

Date: 15 December 2010

Case number: SKC-694/2010

Hardcopy publication: Not published

Internet publication: http://www.at.gov.lv/files/archive/department1/2010/694-10.pdf

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Creator: Latvijas Republikas Augstākās tiesas Civillietu departaments (Supreme Court of the Republic of Latvia, civil section)
Verdict at: 2010-12-15
Case number: SKC-694/2010