SUMMARY

2011/45 No unilateral change of working time (CZ)

<p>A contract that specifies the employee’s number of working hours per week (in this case, 37.5) and/or her work schedule (in this case, a variable three-shift schedule) limits the employer’s ability to make use of its statutory right to determine those terms of employment at its own discretion.</p>

Summary

A contract that specifies the employee's number of working hours per week (in this case, 37.5) and/or her work schedule (in this case, a variable three-shift schedule) limits the employer's ability to make use of its statutory right to determine those terms of employment at its own discretion.

Facts

The plaintiff was a call centre operator whose contract provided that she was employed on a three-shift work schedule for 37.5 hours per week. This meant that she worked alternately on a daytime shift, an evening shift and a night shift, and that she was paid a supplement[1] for the night work on top of her base salary.

In March 2006 the plaintiff was informed that she was being switched from a three-shift to a two-shift work schedule (i.e. daytime and evening shifts only) and that, accordingly, her weekly number of hours would rise to 38.75. As a result, her work schedule would change, she would no longer work night shifts and she would not receive a supplement for night work. The reason given for this change was that night shifts were being assigned to less experienced operators.

The plaintiff objected to the change, which was at odds with her contract, and she continued to work according to her original work schedule. Her employer saw this as a severe breach of

her duties and dismissed her, giving notice. When she continued to refuse to work in accordance with her new work schedule during the notice period, she was dismissed again, this time summarily. The employer gave as its reason for this measure the plaintiff's repeated absences from her newly scheduled shifts.

The plaintiff took her employer to court, alleging that both of her dismissals were invalid. She based her claim on the fact that her employer had not been entitled to change her work schedule unilaterally, that therefore her original work schedule had remained in force and that she had not breached her obligations. The reason for her absence on the new shifts was simply because she was still, quite legitimately, working to the old shift pattern.

The court of first instance and the Court of Appeal found in favour of the employer. They referred to Article 81 of the Czech Labour Code, which provides expressly that the employer may determine the working times and the start and finish times of shifts at its discretion. The weekly number of working hours in the contract was considered to be no more than a statement of the limits included in the Labour Code for individual shift schedules, given that according to Article 79, workers employed on the basis of a three-shift schedule may not work in excess of 37.5 hours per week, and workers employed on a two-shift schedule may not work longer than 38.75 hours per week.

The plaintiff appealed to the Supreme Court.

Judgment

The Supreme Court overturned the Court of Appeal's judgment. It acknowledged that the law gives the employer a discretionary right to determine working times (e.g. the beginning and end of shifts, shift schedules and rests between shifts). However, where the parties have agreed in their contract to certain working times, as in this case, that agreement overrules this discretionary right. In that case, precedence must be given to Article 40 of the Labour Code, which provides that the contents of an employment relationship (i.e. what has been mutually agreed) may only be amended by mutual agreement, not by one of the parties unilaterally.

Based on this reasoning, the Supreme Court concluded that the employee was entitled to demand an assignment of work within the agreed working times from the employer. Further, it ruled that she was not in breach of her duties by not accepting the new schedule.

The Supreme Court referred the case back to the Court of Appeal for a reassessment in light of its ruling.

Commentary

This is a landmark ruling. It has settled a long-standing controversy that has caused trouble to many employers. It also serves as a lesson to employers not to specify working times in employment contracts. Had the contract in this case been silent on working times, the employer would have had the right to switch the plaintiff from a three-shift to a two-shift schedule at its discretion and to increase her weekly working time accordingly.

Employers in the Czech Republic are advised to draft their employment contracts in a non-specific manner as regards working time. Even, for example, a provision that the employee is hired on the basis of 40 hours per week needs to be considered carefully, as it limits the employer's ability to introduce shift work (where the maximum number of working hours per week is less than 40). Whereas under the Labour Code rules the employer could require the employee to perform shift work without any further requirements, in this case the consent of the employee and a written amendment to the employment contract was necessary.

Czech law does not allow for a clause in an employment contract that gives the employer the right to amend its terms unilaterally. Therefore, with respect to certain terms such as working hours, the less a contract says, the better it is from an employer's perspective.

Comments from other jurisdictions

Austria (Andreas Tinhofer): In Austria, the number of regular weekly working hours and their allocation must be agreed between the parties. There is no legal requirement for such an agreement to be in writing. Therefore, if a certain working time scheduled has been established, in practice the employment courts will often supplement the employment contract in accordance with what has been agreed. Employers can, however, preserve some flexibility by inserting a specific clause into the employment contract. Even then any (unilateral) change to working hours must be justified by business reasons that are not outweighed by the individual interests of the employee concerned. The change must also be notified at least two weeks in advance.

In businesses with a works council the allocation of working hours can also be regulated by the works agreement. A works agreement is concluded between the employer and the works council at the plant level. A change of shift-patterns to the detriment of the employee could also be challenged by the employee if the works council has not given its approval beforehand.

Denmark (Jakob Arffmann): In Denmark, it is not advisable to allow the employment contract to be silent on working time as working time is an essential term of employment under the Danish Statement of Employment Particulars Act, which implements Directive 91/533/EC on

employers' obligations to inform employees of the conditions applicable to the contract or employment relationship. Consequently, the employment contract must reflect the agreed (essential) terms of the employment, including working time. If working time cannot be specified because of the nature of the work, the contract should attest to this.

Germany (Paul Schreiner): In Germany the situation would be comparable Czech Republic. In principle, it is the employer's right to determine when, where and in what way the work must be done. However, the employer's rights may be reduced by specifying those things in the employment contract. To ensure that an employment contract does not have this effect, German employers usually put a clause in the contract stipulating that the description of the duties is not binding and that the employer reserves the right to transfer the employee to a different position, to ask him or her to perform different tasks in a different location or to change working times.

Working time itself, however, is not subject in the discretion of German employers. The employment contract must stipulate a weekly working time and if the employee wants to be able to change this unilaterally, it must also contain a provision giving it that option. Usually the parties to the contract agree that the employer can ask the employee to work overtime, but a reduction in working time is rare, though possible in principle. The German BAG (German Federal Court) has found that an employment contract can stipulate that working time can be reduced by the employer by up to 25 % at its discretion if the contract so provides.

Poland (Marek Wandzel): The decision of the Polish court would probably be the same, given the well-established principle that if the parties have stipulated a term of the contract, this can only be altered by mutual agreement or by means of a unilateral alteration notice by the employer with notice. This could include changes to the working time of an employee. In Poland the question of severance pay would also arise if the employee's contract was terminated following an employee's refusal to accept new working times given in an alteration notice. Since the alteration to working time in this case was made for reasons not attributable to the employee (i.e. in this case, it was the employer that made the decision to assign night shifts to less experienced operators) it would be up to the court to decide if the proposed new working times were fair. If they were fair, but the employee still failed to accept the proposed change, he or she would not be entitled to severance pay.

Footnote

1 There is no shift supplement under Czech law, only a supplement for night work, i.e. work from 10 p.m. to 6 a.m.

Subject: Terms of employment

Parties: Ing. H. Z. (employee) - v - Kooperativa pojit'ovna a.s., Vienna Insurance Group (employer)

Court: Supreme Court of the Czech Republic

Date: 10 May 2011

Case Number: 21 Cdo 1395/2010

Hardcopy publication: Not yet available

Internet publication: http://www.nsoud.cz/

Creator: Nejvyšší soud (Czech Supreme Court)
Verdict at: 2011-05-10
Case number: 21 Cdo 1395/2010