SUMMARY

2011/32 Employer may amend performance-related pay scheme (PT)

<p>A field salesperson was transferred to the employer’s shop for reasons of performance and internal restructuring. In addition, the employer amended the sales commission scheme, as a result of which the salesperson’s earnings dropped. The salesperson challenged both changes but, surprisingly, the court found in favour of the employer.</p>

Summary

A field salesperson was transferred to the employer's shop for reasons of performance and internal restructuring. In addition, the employer amended the sales commission scheme, as a result of which the salesperson's earnings dropped. The salesperson challenged both changes but, surprisingly, the court found in favour of the employer.

Facts

The defendant is a company that sells hearing aids. It owns several shops all over Portugal and also employs salespersons who visit (potential) customers in their homes. The plaintiff was a saleswoman who was hired in November 2002. Her contract provided that she should either work in one of the shops or in the field (i.e. visiting customers), as determined by the company. Such a provision is known as a "mobility clause". For the first five years of her employment (until June 2007) she worked as a field salesperson within a certain geographic area.

The company's salespersons, both those in the shop and in the field, were paid a fixed base salary and a sales commission equal to a given percentage of their monthly sales, with certain thresholds. Their contracts provided that the company determined the thresholds and the percentages unilaterally on an annual basis.

In July 2007, the plaintiff was transferred from the field to one of the shops. She remained based in the shop until February 2009, when she was instructed to work in the field again, albeit in a different sales region.

Around the same time as the plaintiff's transfer from the shop back to the field, the company amended the terms of the sales commission scheme, raising certain thresholds. The plaintiff contended that this amendment caused her income to drop. She brought proceedings before the local Labour Court, challenging both the decision to transfer her from a shop position to the field (she demanded reinstatement in her former field position) and the decision to amend the terms of the commission scheme.

Judgment

On the issue of the mobility clause, the court observed that although the clause was worded in general terms, given the limited geographical area where the company did business and given the nature of the work to be performed, the clause's scope was not so wide as to invalidate it. Not only was the clause itself valid, the employer was, under the circumstances, entitled to enforce it against the plaintiff, because she had given her written consent to future work location changes when she signed her contract, and because the potential changes were limited. Thus, the court rejected the plaintiff's demand for reinstatement in her shop position.

As for the amendment of the sales commission terms, the plaintiff invoked the Labour Code, which prohibits employers from reducing an employee's remuneration (except in certain specific cases, such as a new collective agreement, that were not relevant in these proceedings). The court concluded, however, that the amendment at issue was not in breach of the Labour Code, for the following reasons.

The court began by noting that the plaintiff, by signing her contract, which stipulated that the employer determined the commission terms on an annual basis, had given her consent to future modifications of the commission scheme. This was not, in itself, illegal. The Labour Code allows an employer to retain discretion in changing the terms of such a scheme, provided the employee's total earnings are not necessarily reduced. The employer is not obliged to maintain a variable remuneration scheme unaltered for ever. In the case of the plaintiff, the fact that (i) the contract provided for the employer's right to amend the scheme, (ii) the plaintiff had performed poorly and (iii) all employees had the same opportunity to meet the targets, which some of them in fact had met, combined to lead the court to find that the employer had not contravened the Labour Code. In addition, the period of time between the amendment of the commission scheme and the introduction of the claim was too short to determine whether the plaintiff's earnings really had necessarily been reduced.

Commentary

This judgment is innovative, for a number of reasons.

Under Portuguese law a "mobility clause" is invalid if it is widely defined. For example, a clause that allows the employer to determine the employee's place of work anywhere in Portugal would be invalid and therefore ineffective. Additionally, the Labour Code provides that a mobility clause, if valid in the first place, ceases to be valid if it is not used for a period of two years.

In the absence of a (valid) mobility clause, an employee may be transferred to a different work location, either temporarily or permanently, but only within certain restrictions. Temporary relocation requires reasonable prior notice and is only allowed in certain situations or if it has no serious impact on the employee. Permanent relocation gives the employee the right to claim constructive dismissal with compensation.

In the case of the plaintiff, none of these legal obstacles prevented the court from finding in favour of the employer. The court interpreted the rather inflexible Portuguese employment legislation in such a manner that it allows a mobility clause, even where it is widely defined, in certain situations, particularly where the nature of the work and the company's area of operations need to be determined in more detail. Likewise, the court took a flexible approach to a clause allowing the employer to change the composition of an employee's remuneration. This represents an important signal that the Portuguese employment courts are beginning to heed employers' need for flexibility.

Comments from other jurisdictions

Germany (Henning Seel): In Germany a "mobility clause" is common in employment agreements. It usually allows the employer to modify the employee's work to some extent. Such modifications can affect the content of the work, the time of work and the place of work. A mobility clause in a standard employment agreement is subject to an effectiveness test pursuant to section 305ff of the Civil Code ("BGB"). According to section 307(i) BGB provisions in standard business terms are invalid if, contrary to the requirements of good faith, they unreasonably disadvantage the other contractual party. An unreasonable disadvantage is, in case of doubt, to be assumed if a provision is incompatible with essential principles of the statutory provision because it deviates from these, or limits essential rights or duties inherent in the nature of the contract to such an extent that attainment of the purpose of the contract is jeopardized (see section 307(ii) BGB). A provision in an employment agreement which allows the employer to employ the employee at another site in Germany and thus change the employee's previous place of work is valid, since it complies with section 106 of the Industrial

Code ("GewO").

However, even if the mobility clause is valid as such, the court would undertake an "execution review", i.e. the determination of another place of work pursuant to a mobility clause must be made on the basis of reasonably exercised equitable discretion. Social aspects must be considered by the employer, who must weigh up interests of the company and of the employee. Whether a determination of the employee's place of work is valid or not thus depends on the special circumstances of the individual case. The nature of the employment and the objective business requirements in terms of flexibility are relevant to this. It is not unlikely that a German court would have decided in the same way as the Tribunal da Trabalho. To be cautious, however, an employer subject to German law should, in addition to determining another place of work in a mobility clause, give notice to the employee, with the option of modified conditions of employment ("Änderungskündigung"). By doing this, the employer can ensure that the employee will have to accept the new place of work either on the basis of the mobility clause or the notice.

Note also that if a works council exists, it will have a codetermination right with regard to the transfer of an employee. Therefore, the employer must obtain the works council's consent to the planned transfer. The works council must be consulted prior to the (precautionary) Änderungskündigung.

Subject: Terms of employment - unilateral amendment

Parties: Not known

Court: Tribunal da Trabalho (Labour Court) at Matosinhos

Date: 16 November 2010

Case number: 540/09.6 TTMTS

Creator: Tribunal da Trabalho Matosinhos (Labour Court Matosinhos)
Verdict at: 2010-11-16
Case number: 540/09.6 TTMTS