

SUMMARY

2011/17: Portuguese judgment highlights distinction between regular dismissal and probationary termination (PT)

<p>If the parties to an employment agreement are silent on a probationary or notice period, they must be deemed to have agreed to a probationary period of 90 days, during which the employee lacks protection against termination.</p>

Summary

If the parties to an employment agreement are silent on a probationary or notice period, they must be deemed to have agreed to a probationary period of 90 days, during which the employee lacks protection against termination.

Facts

The defendant, the owner of a restaurant, hired the plaintiff as a Food & Beverage Manager, starting on 1 September 2009. The parties did not put their agreement in writing. On Saturday 21 November 2009, following an incident at work, the plaintiff was told to leave. He asked whether he was being dismissed and, if so, whether he would be receiving a document evidencing his dismissal, which would enable him to collect unemployment benefits. He was told to come back on Monday, when he would be given this document. When the plaintiff returned on Monday, he said he did not accept his dismissal, that he was coming to work and that he refused to leave. In the end, the police were called in to evict him from the premises. He brought legal proceedings, claiming that his dismissal was unlawful, as the procedure for dismissal required under Portuguese law had not been followed. Accordingly, he demanded payment of his salary and fringe benefits for the period between 1 and 21 November 2009

(which had not been paid), salary from 21 November 2009 until such date as his employment would have validly terminated and compensation in lieu of reinstatement in the amount of three months' salary. The employer's defence was that the plaintiff had not been dismissed, but had been terminated during his probationary period. The court accepted this defence and awarded only a small portion of the plaintiff's claim. He appealed.

Judgment

The Court of Appeal held that, as there was no evidence that the parties had made an agreement (verbally or otherwise) in respect of a probationary or notice period, the statutory probationary period of 90 days and the statutory notice period of (in this case) seven days applied. Therefore, given that the plaintiff's employment had lasted just under 90 days, the dismissal was deemed to be a termination during the probationary period and the plaintiff was merely entitled to his salary up until 21 November 2009 and compensation in lieu of seven days' notice.

Commentary

This judgment received a fair amount of publicity in Portugal, as it highlighted the distinction between dismissal and termination during a probationary period.

Comments from other jurisdictions

Austria (Martin E. Risak): Under Austrian law, a probationary employment relationship that can be terminated by either party without notice and without giving reasons must be agreed upon in the employment contract or provided for in the collective bargaining agreement. In general, it is limited by statute to the first month of the employment relationship. In practice, most employment contracts contain such a clause.

Finland (Karoliina Koistila): Under Finnish law, the employer and employee must explicitly agree to a probationary period (or refer to such a condition in an applicable collective bargaining agreement) in order for it to apply. Further, if the employment is for less than eight months, the probationary period may at most be for half the duration of the employment. In addition, there is no notice period for termination during a probationary period.

France (Claire Toumieux & Susan Ekrami): French judges would not have ruled similarly in such circumstances. Indeed, Article L.1221-23 of the French Labour Code expressly provides that "The trial period and the possibility of its renewal cannot be presumed. It is expressly stipulated in the commitment letter or the employment contract". Therefore, the probationary period should be confirmed in writing, both in its principle and duration, from the very

beginning of the employment contract. Furthermore, the employee must give his or her consent to such a probationary period by signing the employment contract, otherwise it is unenforceable against the employee and termination of the employment during such a period will amount to a dismissal.

Germany (Paul Schreiner): In Germany, the parties to an employment contract must explicitly agree on a probationary period, otherwise the employment relationship is deemed not to have one. The probationary period under German law has only one consequence, which is that a notice period of two weeks applies instead of the normal notice period during the first two years of employment, which is four weeks to the 15th of each month or to the month end. However, the German Unfair Dismissal Protection Act only applies after a period of six months, unless the parties agree otherwise. Therefore, in essence the situation in Portugal is comparable to the one in Germany, as far as the treatment of the dismissal (without regard to the notice period) is concerned.

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Parties: identities not known

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