SUMMARY

2011/14: Employer may not deny bonus to employees who participate in an unlawful strike (FI)

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Facts

The Stora Enso group of companies (the "Group") operated a resultbased bonus scheme for its employees. The terms of the bonus scheme were decided annually and unilaterally by the Group. In 2005, the Group added a new condition to the scheme: employees who participated in unlawful strikes would see their bonuses reduced by an amount corresponding to the employee's share in the loss suffered by the employer because of the strike. In May 2005, the Union of Salaried Employees organised a strike, which affected Stora Enso Ingerois Oy, one of the Group's subsidiaries. The Finnish Labour Court deemed the strike unlawful. Invoking the new restrictive condition of the Group's bonus scheme, management of the subsidiary refused to pay the result-based bonuses to the employees who had participated in the strike. The employees whose bonuses were left unpaid ("Applicants") brought a claim against their

employer for failing to pay the bonuses and further claimed that they were entitled to compensation for discrimination under the Non-Discrimination Act (21/2004).

Judgment

First, the Supreme Court found that the scheme constituted neither a contract nor an established practice. Therefore, the Group was entitled to amend it unilaterally. The Supreme Court then examined whether the new condition in the bonus scheme represented a restriction of the employees' right to participate in trade union activities in light of the freedom of association under Article 11(1) of the European Convention on Human Rights ("ECHR"), which provides that "everyone has the right to [...] join trade unions for the protection of his interests". The result of this examination was that the employer could not amend the bonus scheme in a manner that would breach its mandatory duties under Finnish law, including its duties not to restrict employees' freedom of association, not to discriminate against employees, and not to treat employees in comparable situations differently without justifiable grounds. Based on ECHR case law, the Supreme Court held that the right to strike is part of the freedom of association and that this right may be restricted only by law and in a manner consistent with Article 11(2) ECHR, which provides that "No restrictions shall be placed on the exercise of these rights other than such as are prescribed by law and are necessary in a democratic society in the interests of national security or public safety, for the prevention of disorder or crime, for the protection of health or morals or for the protection of the rights and freedoms of others". The Supreme Court noted that the right to participate in industrial actions organised by trade unions is not restricted under Finnish law. Nonetheless, the Supreme Court examined whether the fact that the strike in question was unlawful was relevant. It was not, given that under Finnish law only the trade unions themselves bear responsibility for unlawful strikes. Thus, employees cannot be punished for participating in trade union activities, even if those activities would subsequently be found to breach the trade union's duties. Even strikes that are unlawful for trade unions are thus legitimate trade union activities for employees and are protected as such. While the Court found that the aim of the Group as such was to protect a legitimate business interest, the measures taken nonetheless meant restricting the employees' freedom of association. In addition, those measures were discriminatory, because they meant assigning responsibility to employees for trade union actions in a manner incompatible with Finnish law. Therefore, the new restrictive bonus condition could not be applied. The Applicants also claimed that their employer's actions entitled them to compensation for discrimination under the Non-Discrimination Act. The court concluded that, whilst treating someone differently because of membership of an association is encompassed by the definition of discrimination in the Non-Discrimination Act (which lists various forms of discrimination, including "other personal characteristics", which

is deemed to include trade union membership), the provision dealing with compensation for discrimination recognises only a narrower scope of discrimination and contains an exhaustive list of grounds on which compensation may be granted, association membership not being one of those grounds. The Applicants argued that their entitlement to compensation would be based on discrimination on the grounds of belief and opinion, both of which are covered by an entitlement to compensation, but the Court found that the employees had not been treated differently because of their ideology or opinions, but instead because they had participated in trade union activities with the aim of asserting economic interests. Therefore, the Applicants had not been discriminated against based on opinions or beliefs and were not entitled to compensation.

Commentary

The Finnish system for prohibiting discrimination is based, inter alia, on Directives 2000/43/EC and 2000/78/EC. The provisions governing protection against discrimination are divided amongst three partially overlapping Acts: the Employment Contracts Act 55/2001, containing a general prohibition against discrimination; the Act on Equality between Men and Women 609/1986, concerning gender-based discrimination; and the Non-Discrimination Act, for forms of discrimination not based on gender. Therefore, the system is complex, and at times considerably so. Even though the bonus was acknowledged to be discretionary, the employer's decision to limit bonuses for striking employees was considered incompatible with mandatory law, as it would have resulted in a breach of the employer's mandatory duties. The decision by the Court is in line with previous legal doctrine, in accordance with which employees can have their employment terminated for participation in an unlawful strike, only if the strike has not been initiated by or contributed to by a trade union. Protection for trade union activities is therefore strong. The Court's interpretation of the criteria under which employees who have suffered discrimination may be entitled to compensation under the Non-Discrimination Act is interesting, but not surprising. It must be noted that in relation to the compensation in question, whether the employees might have been entitled to compensation for loss caused by the discrimination was not addressed in the case. Instead, compensation in this case referred to a punitive payment of a fixed maximum amount. Because the Non-Discrimination Act provides an "assumption of discrimination" (i.e. that if an employee claiming discrimination can demonstrate prima facie that his or her claim is not unfounded, the burden of proof shifts to the employer), it is prudent of the Court to interpret the entitlement to compensation narrowly.

Comments from other jurisdictions

Austria (Martin E. Risak): Austria does not have any legislation dealing with the effect of

industrial action on the individual employment relationship, nor has it developed jurisprudence on these issues (because for some decades there have been few strikes). Therefore, industrial action legislation is for the most part based on rather outdated academic literature with little practical relevance. A prevalent opinion still holds that a striking employee is in breach of his or her duty to work and therefore always loses the right to receive pay and may also be summarily dismissed.

France (Claire Toumieux & Susan Ekrami): Under French law, any pecuniary sanction is prohibited, even if employees take part in an unlawful strike. If taking part in an unlawful strike is considered as a form of misconduct, the employer can only impose non-pecuniary sanctions on the employees involved. Indeed, this was confirmed by the Supreme Court in a decision dated 17 April 1991 (no 1707 Omi-cron et Maurel – v – Edimo-Ekhoutou), where the employer had imposed a reduction in salary on employees who had taken part in a go-slow strike ("grêve perlée"), which is unlawful in France. The judges held that such a reduction was a pecuniary sanction and therefore prohibited.

Germany (Paul Schreiner): The legal situation in Germany differs from the Finnish one in many ways. First of all, unlawful strikes are usually so-called "wild strikes", meaning that they are not initiated or endorsed by a trade union. In general, the term "strike" only refers to a situation in which the employees try to force a settlement with the employer in the form of a collective bargaining agreement. Such collective bargaining agreements, however, can only be concluded with the trade union on one side and the employer on the other. A strike that cannot lead to such a collective bargaining agreement is therefore considered unlawful. In such a case, the participating employees can in principle not only have their employment terminated, but may also be held liable for the harm caused by the unlawful strike. In practice, such cases are rare, because usually a trade union will endorse the strike at some point, with the intention of beginning to represent the employees. Usually, an agreement will be reached in which any liability of the participating employees will be excluded. Apart from this, the main issue with the Finnish decision was whether or not the participation in an unlawful strike could be seen as a reason for refusing to make a bonus payment. Since unlawful strikes led by trade unions are very rare in Germany, in practice this particular problem has not arisen. However, if this case were to arise in Germany, a court would probably ask the same question, namely, whether or not the employee suffered a detriment as a result of his or her membership of the trade union. If so, the bonus could not be cut. However, in my view, it is likely that the court would also consider the fact that strictly speaking, the reduction of the bonus did not result from membership of the trade union, but from participation in an unlawful strike. Such participation, however, is not lawful in Germany and cannot in principle result in termination of employment and a claim for compensation by the employer.

Therefore, it might be arguable that the failure to pay the bonus is lawful under German law.

United Kingdom (Tarun Tawakley): UK employees have the right not to be subjected to any detriment (e.g. withdrawal of benefits) for taking part in trade union activities. This protection is limited to certain activities, such as attending trade union meetings, and does not include taking part in strike action whether lawful or otherwise. The protection afforded to employees taking part in strike action is limited to unfair dismissal, as opposed to a more general protection against being subjected to a detriment. Where a trade union authorizes its member to take part in strike action, but that action is nonetheless unlawful, the employer may dismiss all those employees who took part in the unlawful strike action. The relevant employees would only have a claim for unfair dismissal, if the employer selectively dismissed some, but not all, of the employees (or, having dismissed all the relevant employees, selectively re-engaged only some of them). If a case like Stora Enso was brought in the UK, rather than contending that the withdrawal of the bonus was a 'detriment' short of dismissal, the employees might be able to argue that it amounted to a fundamental breach of contract, thus enabling them to treat themselves as constructively dismissed. That would not, however, be an attractive stance as the employer would counter that the withdrawal of the bonus was in response to the employee's own fundamental breach of contract in engaging in industrial action. To date, the UK courts have been unwilling to interpret Article 11 of the European Convention on Human Rights as incorporating a positive right to strike. This is currently the subject of a legal challenge by a trade union against the UK in the European Court of Human Rights.

Subject: Unions, other fundamental rights, other forms of discrimination

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