EELA EUROPEAN EMPLOYMENT LAWYERS ASSOCIATION

SUMMARY

2011/11: Failure by employer to provide employee with statement of employment particulars does not reverse burden of proof (NL)

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Facts

An employee was hired for a six-month period between 13 June and 13 December 2005. His contract was silent on the number of hours he had to work per week, and all it stated in

respect of his earnings was that he would be paid a base salary of € 8.24 per hour. In the four-week periods 6, 7 and 8 of 2005 the employee worked and was paid as follows: Period Hours Wage 6 40 € 322 7 160 € 1,071 8 61 € 50 For each of these periods the employee was given a written salary specification, as required by Dutch tax law. These computer-generated specifications included many details, including "part-time percentage: 100". On 19 September 2005, the employee called in sick, claiming that he was overworked. This irritated the employer, which immediately told the employee that it no longer required his services and stopped paying his salary. The employee brought a claim against the employer. The court of first instance found that the plaintiff had been dismissed with immediate effect, the termination was invalid, the employment agreement therefore continued beyond 19 September 2005 and the plaintiff was entitled to payment of his salary for the remaining duration of his employment1 in the amount of 40 hours x € 8.24 per hour = € 329.60 per week. The employer appealed.

Judgment

The Court of Appeal, proceeding from the invalidity of the termination, focused on the issue of burden of proof. Was the plaintiff employed on a full-time (40 hours per week) basis as he claimed, or on an on-call basis as the employer claimed? The principal rule of evidence is that whoever alleges a fact bears the burden of proof with respect to that fact in the event the other party disputes it. According to this rule, the plaintiff would need to prove that he was employed on a full-time basis. However, if a plaintiff provides sufficient prima facie evidence of his or her claim, the court may shift the burden of proof to the defendant. The plaintiff in this case relied on this rule. Pointing to the fact that the three salary specifications he had received all mentioned "part-time percentage: 100", he argued that his employer would need to prove that the parties agreed to an on-call arrangement, i.e. an arrangement whereby the employer determines how much work the employee gets and pays only for the hours actually worked. The Court of Appeal applied Article 7:655 of the Civil Code, which is the Dutch transposition of Directive 91/533. Article 7:655 requires employers to provide their employees with a written specification of their main terms of employment, including the number of hours during which they must, as a rule, perform their work. Article 7:655 does not indicate what the consequence of breaching this duty is. In particular, it does not provide for a shift in the burden of proof. In fact, at the time the Bill that led to Article 7:655 was debated in Parliament, the government noted that this Article would not have the effect of altering the existing law on evidence and that it was up to the courts to determine what the evidenciary consequence would be of failure by an employer to provide an employee with the required written information. Given that national law is to be interpreted, wherever possible, in line with Directive 91/533, the court looked at Article 6 of that Directive. This provision, however,

was found not to shed light on the issue, merely providing, “this Directive shall be without prejudice to national law and practice concerning […] proof as regards the existence and content of a contract or employment relationship […] procedural rules”. In its ruling in the Kampelmann case2, the ECJ had held, “that the notification referred to in Article 2(1) of the Directive […] enjoys the same presumption as to its correctness as would attach, in domestic law, to any similar document drawn up by the employer and communicated to the employee”. This led the court to conclude that the employer’s failure to provide the employee with the required written information was insufficient to warrant shifting the burden of proof. Therefore, the judgment by the court of first instance needed to be overturned. However, this did not necessarily mean that the employee’s claim would be dismissed, because there was still the fact that the salary specifications mentioned “part-time percentage: 100”. The Court of Appeal wished to know how to interpret this wording and summoned the parties to appear in court in order to discuss it. The case was adjourned.

Commentary

Clearly the Danish courts have a different view on Directive 91/533 than the Dutch courts have. However, this judgment has been criticised by several Dutch authors.

Comments from other jurisdictions

Austria (Martin E. Risak): To date, there has been no Austrian case law dealing with the effect on the burden of proof in the case of an employer failing to provide an employee with a written specification of his or her main terms of employment. It has been argued in legal literature that in this case the employer must prove the existence of agreed terms that differ from the customary employment practices in the enterprise or industry. Based on this argument, a shift in the burden of proof would depend on whether the work performed is usually part of a fulltime employment contract or is done on an on-call basis.

Denmark (Mariann Norrbom): In Denmark, Directive 91/533 is implemented by the Danish Statement of Employment Particulars Act. The difference between Danish and Dutch law should not necessarily be seen as reflecting a difference in how the courts interpret the scope of Directive 91/533, but probably more as a reflection of the fact that the Danish courts have been unsure of how the Danish implementation Act should be understood. Article 8.1 of the Directive reads as follows: “Member States shall introduce into their national legal systems such measures as are necessary to enable all employees who consider themselves wronged by failure to comply with the obligations arising from this Directive to pursue their claims by judicial process after possible recourse to other competent authorities”. As mentioned in the previous case report, this provision has been implemented into Danish law through the option

in the Danish Statement of Employment Particulars Act of awarding compensation in the amount of up to 20 weeks' pay. So far, the question of how the Danish Statement of Employment Particulars Act is to be interpreted has been much disputed. Over the years, the Danish trade unions have brought a great number of claims on behalf of their members on this issue, as it has been a relatively easy way to win a substantial amount of money for their members. The Danish judgment reported above may put a stop to a great deal of such claims.

Germany (Paul Schreiner): In Germany, a violation of the "Nachweisgesetz" (German transposition of Directive 91/533, "NachwG") does not lead to a misdemeanour by the employer. If the employer fails to provide the employee with adequate documentation, the employee can bring a claim against it for not issuing the documentation and also for any harm suffered (e.g. if the employee does not know of a limitation period because of the employer's failure to provide sufficient documentation). Further, an employee may have the right to retain his or her work because of the employer's breach. Such cases are, however, rare. Also, the failure of the employer to provide adequate documentation can lead to a shift in the burden of proof, sometimes even to a reversal. This is because the employer causes a problem for the employee by failing to issue the required documentation (e.g. where the employee needs to prove that a specific employment condition was agreed on, in the absence of the statement of employment particulars). In such a case, the employee would need to prove fewer facts to substantiate a claim than would be the case if the employer had provided the correct documentation.

Footnotes

1 Normally, the agreement would have continued until 13 December 2005, the end of the six-month period for which the plaintiff was hired, but for a reason not relevant to this publication it was deemed to have ended on 10 October 2005. 2 ECJ 4 December 1997, joined cases C-253 through 258/96 (Kampelmann).

Subject: Terms of employment

Parties: names not published

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