SUMMARY

2011/10: Danish Supreme Court turns off the money printer in relation to failure to inform employee of employment particulars (DE)

<p>Following a period of confusion regarding the level of compensation for inadequate statements of employment particulars, the Danish Supreme Court laid down a number of assessment principles to apply when setting the correct level. In this particular case, the employee was awarded approximately € 1,350 in compensation for never being issued with a statement of particulars, although he had requested one.</p>

Summary

Following a period of confusion regarding the level of compensation for inadequate statements of employment particulars, the Danish Supreme Court laid down a number of assessment principles to apply when setting the correct level. In this particular case, the employee was awarded approximately € 1,350 in compensation for never being issued with a statement of particulars, although he had requested one.

Facts

Since the advent of the Statement of Employment Particulars Act in 1993, implementing Directive 91/533, there has been a wealth of lawsuits. Before the Danish Parliament intervened in 2007, even trivial breaches would sometimes trigger awards of at least approximately € 700. In March 2007, Parliament amended the Act, limiting awards to a maximum of 13 weeks' pay in ordinary cases and 20 weeks' pay in serious cases. The new law also specified that the courts had to consider whether the breach had a tangible impact on the employee and that in

trivial cases awards should not exceed approximately € 150. If the intention of Parliament was to provide clarification, the amendment of the Act did not achieve the desired effect. Since 2007, case law has not provided any clear guidelines. In the spring of 2010, a district court awarded compensation equal to 20 weeks' pay to a waiter who had not been issued with a statement of particulars. In comparison, the High Court has awarded between two and six weeks' pay. After a long period of confusion, the Danish Supreme Court then had to consider three different cases concerning inadequate statements of employment particulars and set the level of compensation. One of the cases concerned a man who never received a statement of particulars although he had asked for one. The employer was covered by a collective agreement, but the employee had never been informed of this. With a little help from his union, he became aware of his rights. In the meantime, the lack of a statement of particulars had caused some confusion as to his notice period and pension entitlements. He decided to bring a claim against the employer. The employer claimed that the non-existent statement of particulars had not had any tangible effect on the employee and had not given rise to any disagreement with him.

Judgment

On the basis of the explanatory notes to the Statement of Employment Particulars Act, the Danish Supreme Court first of all laid down a number of assessment principles to apply when setting the level of compensation in cases concerning inadequate or non-existent statements of particulars. If the breach is excusable and has had no tangible effect on the employee, the level of compensation should be between approximately € 0 and d150. For other breaches and in cases where the employer has issued no statement of particulars at all, the level of compensation should be approximately € 350. In cases where the inadequate or non-existent statement of particulars has given rise to an actual or potential dispute about the employment relationship, the level of compensation should be approximately € 1,000. In aggravating circumstances, the level of compensation should be a maximum of 20 weeks' pay. Awards of more than approximately € 3,400 should be reserved for particularly serious cases. Having regard to the employee's statement of particulars, the Court noted that the failure to provide one had had tangible effects on him, since doubts had arisen about his rights on termination. Also, a dispute had arisen about his overtime pay and pension entitlements. The Court also took into account that he had asked for a statement of particulars and that it was not the first time that the employer had failed to provide employees with one. However, the Court did not find that this was sufficient to constitute aggravating circumstances, and awarded the employee compensation amounting to approximately € 1,350.

Commentary

In Denmark, Directive 91/533/EEC is often implemented through collective agreements. If an employee is not protected by a collective agreement implementing Directive 91/533, he or she will be protected by the Danish Statement of Employment Particulars Act instead, as occurred in this case. Under the Danish Statement of Employment Particulars Act, compensation in extraordinary circumstances could amount to as much as 20 weeks' pay. In autumn 2010, a district court awarded a record amount of compensation for an inadequate statement of particulars, approximately € 13,500, as reported in EELC 2010-4. The case once again threw doubt on the price employers should pay for being careless about statements of particulars. Danish lawyers have therefore awaited the Danish Supreme Court judgment with great interest. Now, the Supreme Court has sent a clear signal that the level of compensation awarded by the district courts and the High Court after the amendment of the Danish Statement of Employment Particulars Act was too high. It seems as if the Supreme Court is getting closer to the level of compensation that used to apply and which still seems to apply in the industrial tribunal system.

Comments from other jurisdictions

Austria (Martin E. Risak): The Austrian law transposing Directive 91/533/EEC (s2 of the Act to Adapt Employment Contract Law, "Arbeitsvertragsrechtsanpassungsgesetz") does not provide any explicit sanctions for an employer's breach of its duty to provide an employee with a statement of employment particulars. There is no specific compensation, even where the employee suffers actual harm. The employee is, however, protected by measures under general civil law, i.e. he or she can bring a claim demanding compliance and/or a claim for compensation of loss that he or she has suffered because of the employer's failure to issue the statement of particulars. Disputes about the statement of employment particulars therefore do not feature prominently either in the courts or in legal discussion.

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 the 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 job because of the employer's breach. Such cases are, however, rare. In addition, the failure of the employer to provide adequate documentation can lead to a shift in the burden of proof, sometimes even 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 normally

need to prove fewer facts to substantiate a claim than would be the case if the employer had provided the correct documentation.

The Netherlands (Peter Vas Nunes): Why is it that there seem to be frequent disputes in Denmark in connection with (the national law transposing) Directive 91/533, whereas the Dutch law transposing this Directive (Article 7:655 of the Civil Code) is almost totally unknown and very rarely used in litigation? The Dutch case reported in the next case report is a rare exception.

Subject: Danish Statement of Employment Particulars Act, implementing Directive 91/533/EEC

Parties: The Danish Union 3F "Fagligt Faelles Forbund" acting for A – v – B

Court: The Danish Supreme Court Date: 17 December 2010

Case number: 90/2009

Internet publication: Please contact info@norrbomvinding.com

Creator: Højesteret (Danish Supreme Court)
Verdict at: 2010-12-17
Case number: 90/2009