

SUMMARY

2010/89: Accepting compensation without protest causes employee to lose right to claim unfair dismissal (PT)

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Facts

This case deals with a new provision of the Portuguese Labour Code, introduced in February 2009 (Law no. 7/2009). The new provision relates to the compensation payable in the event of an individual dismissal or a collective redundancy. It constitutes an important legislative amendment in respect of an issue that for many years has been debated by authors and in the courts. The judgment reported below clarifies the issue even further.

The judgment concerns the payment of compensation for the termination of an employment agreement on grounds of individual dismissal, but also applies to cases of collective dismissal. The Court invoked section 401(4) of the Portuguese Labour Code (now section 366(4)), according to which there is a presumption that an employee who has been made redundant has accepted his “dismissal” in the event that he receives and retains severance compensation.

In the present case an employee who had been made redundant, having been paid statutory severance compensation through a deposit of the corresponding amount in his bank account, did not return this amount to his former employer. For this reason, the Court concluded that the employee, who claimed additional compensation under the doctrine of unfair dismissal, had failed to provide evidence that he had protested against his “dismissal”, which is a requirement under Portuguese law for bringing an unfair dismissal claim.

The Defendant (former employer) not only argued that the dismissal was fair, as all legal requirements foreseen by the Portuguese Labour Code had been complied with, but also that the Plaintiff had accepted his dismissal, given that he had failed to reimburse the severance compensation that had been paid to him.

Judgment

The Court of First Instance decided in favour of the Defendant, accepting its arguments. On appeal the Plaintiff fared no better. Indeed, the Court of Appeal held that, in accordance with section 401(4) of the Portuguese Labour Code, the payment/receipt of compensation in the terms described above is deemed to constitute acceptance of the dismissal by the employee.

Thus, both Courts concluded that a claim for unfair dismissal is not sufficient evidence to rebut the presumption of acceptance of the dismissal, where the dismissed employee had previously accepted the corresponding compensation.

Commentary

This case was decided under the 2003 Portuguese Labour Code. According to that code, an employee who kept a statutory severance payment (basically one month of salary for each year of service, or more in the event the dismissal is “unlawful”) without returning it was presumed to have accepted (the fairness of) his dismissal. However, there was some debate as to the nature of this presumption. One thing was clear, however, namely that such a presumption was *juris tantum*, i.e. refutable. The same applies under the current 2009 Labour Code, except that the 2009 Labour Code adds a paragraph to the provision in question. This new paragraph provides that the employee can only rebut said presumption if he returns or

puts at the disposal of the employer the total amount of the compensation received immediately after receiving it. This means that the employee must return the total amount of compensation in case he intends to contest in Court the legality of the dismissal, as his acceptance of the compensation qualifies as acceptance of the dismissal itself and of its compliance with the law.

The new rule has seen certain criticism. Indeed, there are some authors who consider that it breaches the fundamental right of access to justice provided by the Portuguese Constitution, as it tends to preclude employees from claiming unfair dismissal or from contesting their dismissal. They argue that only wealthy employees might have the means of subsistence necessary after a dismissal to enable them to refuse the compensation, whilst others would have to waive their right to claim unfair dismissal before a Court.

From this perspective, one might also say that this new rule is in breach of the European Convention on Human Rights and of the EU Charter of Fundamental Rights (now legally binding). Both these instruments postulate a fundamental right of access to justice, which right is prejudiced if a person who was made redundant but accepted statutory compensation, is prevented from successfully claiming unfair dismissal. In fact, the new statutory provision legitimises an unfair dismissal as long as the statutory compensation is paid.

From our point of view, although the above arguments have some validity and there is a danger that the provision under analysis might indeed legitimise unfair dismissal by means of a payment of compensation, equally, by not returning the compensation, the employee has no means of rebutting the statutory presumption and one might be forced to conclude that he has thereby accepted his dismissal. Any different understanding would be considered a malicious use of the legal process, given that an unfair dismissal claim made whilst in receipt of mandatory compensation would imply a *venire contra factum proprium* conclusion (i.e. a contradiction in terms).

Comments from other jurisdictions

Germany (Paul Schreiner and Simona Markert): The German legal situation is not comparable to the situation in Portugal. Indeed, the majority of disputes brought before the German labour courts (over 85 percent) end in a settlement and payment of a severance sum, even though German labour law does not confer any right to severance compensation in the case of redundancy. The Employment Protection Act (abbreviated “KSchG”) contains only two provisions (§1a and §9 KSchG) which provide for severance compensation.

With regard to § 9 KSchG the situation is as follows. An employee who has been made redundant must first successfully challenge his dismissal and ask for a dissolution of his

employment contract. The Court may then decide that the continuation of the employment contract is no longer acceptable for the employee. Following that, the employee will have a claim for compensation, which rises in relation to seniority.

Since 2004 German labour law has contained a further provision which provides for compensation, namely § 1 a KSchG. This provision was introduced with a view to reducing the number of disputes and the high cost of litigation. It entitles employees to severance compensation in the case of enforced redundancy. However, a claim for severance compensation only exists if the employer has advised the employee that his dismissal is based on operational reasons and that he has a claim for severance compensation if he does not take action against the dismissal within three weeks of receiving notice of termination. In this context it is important to note that German labour law assumes the legal effectiveness of a termination if the employee does not take action against the dismissal within the said period of three weeks. Provided that these conditions are fulfilled, the employee can bring a claim for severance compensation in the amount of half a month's salary for each year of seniority.

As the above should make clear, the German situation is totally different to that in Portugal. In Germany the employee does not have a choice between accepting severance compensation and taking action against the dismissal.

Ireland (Georgina Kabemba): This is a very interesting case. Under Portuguese law, it appears that by accepting a statutory redundancy payment from an employer, there is a presumption that the employee has accepted that the dismissal was fair and he or she is thus precluded from claiming unfair dismissal. In Ireland, the situation is treated very differently. All employers are obliged to pay a statutory redundancy payment provided that it is a genuine redundancy. (This is defined in the Redundancy Payments Acts, 1967-2007). Such a payment does not raise any presumption that the employee has accepted that the redundancy was genuine or that the procedures followed were fair. An employee would still be entitled to bring a claim under the Irish Unfair Dismissals Acts, 1977-2007. In order for an employee to be precluded from challenging the dismissal, the employee must expressly waive his or her claim in a separate agreement and compensation must be paid over and above an employee's statutory or contractual entitlements, i.e. an ex gratia payment. The agreement must be signed by both parties and the employee given the opportunity to take independent legal advice on the waiver and release agreement. Unlike Portugal, in Ireland an employee could accept a statutory redundancy payment and still challenge unfair dismissal if he or she wishes to do so.

Spain (Ana Campos): In Spain, the Workers Statute requires that, simultaneously with the notification (“at the time”) of the termination based on objective reasons, the employer must offer (“put at the disposal” of) the employee the legal severance compensation set forth for this kind of termination, namely 20 days’ salary per year worked. The employee may or may not take the amount, but neither action precludes him from bringing an action in court for unfair dismissal. If the termination should be deemed unfair, the employee would be entitled to 45 days’ (– that is, 25 days more –) salary per year worked plus all accrued salary since the date of termination.

Until our very recent labour law reform (in September 2010), the omission by the employer of this requirement – i.e. putting severance compensation at the disposal of the employee – rendered the termination void. Since the reform, it renders the termination unfair, unless the employer is in genuine financial difficulties.

It is certainly arguable that the Portuguese decision and law may violate the fundamental right of access to a court or tribunal.

United Kingdom (Richard Lister): In the UK, the fact that employees have accepted a statutory redundancy payment from their employer does not preclude them from pursuing a claim of unfair dismissal. A legal regime providing for that to happen seems somewhat harsh, although it should be noted that statutory severance payments are significantly more generous in Portugal than in the UK. The main situation in the UK in which an employee terminated by reason of redundancy would have no right to claim unfair dismissal would be if he or she had waived that right in a valid “compromise agreement”. There are stringent legal criteria for such agreements, including a requirement for the employee to have received independent legal advice.

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