SUMMARY

2010/86: The need to protect one employee’s interests can justify unilaterally changing a colleague’s working times (PT)

<p>An employer may unilaterally change an employee’s working times (from fixed hours to a shift schedule) if that is necessary to avoid harming another employee’s interests.</p>

Summary

An employer may unilaterally change an employee's working times (from fixed hours to a shift schedule) if that is necessary to avoid harming another employee's interests.

Facts

The employee in this case was hired in 1999. She worked in one of the defendant's shops ("shop 1"). Since at least 2005 her working times were compatible with the opening hours of her daughter's nursery.[1] In February 2008 she was transferred to another shop.[2] This other shop ("shop 2") had different business hours, namely 9:30-20:48. For this reason the employees in shop 2 worked according to a two-shift schedule: an early shift from 9:30-13:00 and 14:00-18:18 hours (morning and afternoon) and a late shift from 13:00-20:48 hours (afternoon and evening). This schedule called for the plaintiff and another employee (the "colleague") to work on alternating shifts on a weekly basis, i.e. the plaintiff in an early shift and the colleague in a late shift in week 1, vice-versa in week 2, etc.

In view of her daughter's nursery schedule, the plaintiff asked her employer to exempt her from these alternating shifts and to allow her to work at fixed times compatible with the nursery schedule, as she had done in shop[1]. The employer agreed to let her work exclusively

on the early shift (mornings and afternoons), starting in March 2008, on two conditions: (i) that this exemption from the normal two-shift schedule would not last longer than two years and (ii) that the plaintiff would not apply under the provisions in Portuguese law that entitle mothers of children under 12 to work part-time and/or on a flexible basis. The plaintiff agreed with these conditions, thereby creating an unconditional agreement between the parties. Accordingly, the colleague was informed that she would henceforth not work on alternating early/late shifts but would work, for the time being at least, exclusively late shifts (until 20:48 hours). The colleague objected, pointing out that she also had a young child and that it would be unfair to grant the plaintiff more favourable working times than herself. This objection obligated the employer to cancel the agreement he had made with the plaintiff and to require her to work alternating shifts after all.

The plaintiff brought legal proceedings. She asked the court to order her employer to establish working times compatible with her daughter's nursery schedule. She based this application on Article 173 of the Portuguese Labour Code in combination with the fact that, besides herself, there was nobody to take care of her daughter when the nursery closed in the evening. Article 173 (now Article 217(4)) of the Portuguese Labour Code prohibits employers from making unilateral changes to working times that have been agreed individually.

The court of first instance turned down the application, whereupon the plaintiff appealed. She took the position that her working times had been agreed individually with the defendant in February 2008, precisely to enable her to collect her daughter from nursery every day. The employer's unilateral decision to amend this agreement, so she argued, was in breach of said Article 173.

Judgment

The court of first instance found in favour of the employer and the Court of Appeal confirmed the lower court's decision. The Court of Appeal held, on the one hand, that although the Labour Code provides for protective measures for maternity, such as part-time work and flexible working hours for parents with children under the age of 12, the plaintiff had never requested any of those specific benefits. Thus, there was an unconditional and straightforward agreement between the parties on working time, namely that the plaintiff could work exclusively mornings and afternoons.

On the other hand, however, the prohibition of the employer to make unilateral changes to a working time individually agreed with the employee cannot be applied automatically without taking the employer's and third parties' situations into consideration. A third party in this case was the colleague. The employer was obliged to take account of the fact that she found herself

in a similar position to that of the plaintiff, also having to collect her child from nursery. It would not be acceptable, so the Court reasoned, to favour one employee to the detriment of the other. In the Court's analysis, this was a typical case of "conflicting rights" as provided in Article 335 of the Portuguese Civil Code. This provision deals with the situation where two (or more) parties have equally strong rights. Where such rights collide, the parties have an obligation to waive them proportionately, in this case equally. This is precisely what the employer had achieved by requiring the plaintiff and her colleague to working late on alternate weeks.

Commentary

In our view the decision reported above is in accordance with the basic principles of Portuguese law and reflects a great sense of equity. We share the Court's observation that the statutory right of parents of children aged under 12 to demand part-time work and/or flexible working hours were not at issue, for two reasons. First, one of the conditions to the agreement between the parties that the plaintiff could work mornings and afternoons was that she would not invoke this statutory right. Secondly, she had not followed the procedure for claiming under that right. In addition, even if the plaintiff had been able to invoke said statutory right, it would still have been impossible to grant it to her without discriminating against her colleague.

The same logic must be applied to the interpretation of Article 173 of the Labour Code. The fact that the employer was prohibited from making unilateral changes to the working time individually agreed with the employee cannot be used to condone prejudice to other employees' rights, otherwise this might lead to an issue of discrimination or inequity.

Nevertheless, reference must be made to the fact that the Portuguese legal framework provides remarkable benefits for maternity and paternity. In fact, the Portuguese Labour Code goes way beyond the Pregnant Workers Directive[3] in providing that parents of children under the age of 12 are entitled to work on a part-time or flexible working time basis. The Pregnant Workers Directive, on the other hand, only grants benefits – such as the possibility to refuse night work (Article 7) – to pregnant workers and workers who have recently given birth or are breastfeeding.

Comments from other jurisdictions

Austria (Martin E. Risak): In Austria the Working Time Act (*Arbeitszeitgesetz*) states in s19(c) that the beginning and end of work on particular days of the week, as well as the timing of breaks, must be agreed, if no provisions exist in collective or work agreements. The employer may only change these provisions unilaterally if he has been granted such a right, has

observed a notice period of at least two weeks and there are no significant opposing interests of the employee. Without such contractual provision an employer cannot therefore change individually agreed working times unilaterally under Austrian law, even if this would be necessary to avoid discrimination against another employee. There is also no provision in the Austrian General Civil Code (*Allgemeines Bürgerliches Gesetzbuch*) that deals with "conflicting rights" or could provide a legal basis for balancing the opposing interests of two employees, in the way provided by the Portuguese Civil Code. As a last resort an Austrian employer could issue a notice of termination pending a change of contract (*Änderungskündigung*). The termination would become effective in the event that the employee does not agree to the intended change of working time. However, the employee may contest his dismissal in court, where the reasonableness of the change of contract would be taken into account.

Ireland (Georgina Kabemba): In Ireland there is no specific statutory law that prohibits employers from making unilateral changes to working times that have been agreed individually. However, employees could argue that such changes are a material variation to their contract of employment without consent and, as such, bring a claim in relation to same. In many cases, contracts of employment are drafted to allow for some reasonable change to working hours where required by an employer.

Parents in the Irish workforce are not automatically entitled to part-time or flexible working where requested. However, employers must act reasonably with regard to such requests. As outlined in Paragraph 8 of the Code of Practice on Access to Part Time Working, best practice indicates that employers should treat such requests seriously and where possible, discuss with their employees if and how they can be accommodated. The Code advises looking at relevant factors in arriving at the conclusion to grant part-time working including "the personal and family needs of the applicant; the number of employees already availing of part-time work; the urgency of the request and the effect, if any, on the staffing needs of the organisation." On this basis, such an employee would not have automatic rights to part-time work.

The Netherlands (Peter Vas Nunes): In this case three questions of law, none of which is regulated concretely at the European level, converge:

- may an employer make changes to an employee's terms or conditions of work unilaterally and, if so, under what conditions and to which extent may he do so?

- does an employee have the right to an adjustment of his or her working hours, times or patterns in order to accommodate his or her family needs, other than pursuant to the right to parental leave?

- may an employer treat employees differently from one another if the difference is not based on one of the expressly forbidden characteristics (gender, age, disability, race, etc.)?

Although EU law does not deal expressly with any of these issues, it is worth noting that Clause 6(1) of the Framework Agreement on Parental Leave, implemented through Directive 2010/18 (repealing Directive 96/34), provides:

"In order to promote better reconciliation, Member States and/or social partners shall take the necessary measures to ensure that workers, when returning from parental leave, may request changes to their working hours and/or patterns for a set period of time. Employers shall consider and respond to such requests, taking into account both employers' and workers' needs."

Spain (Ana Campos): According to Spanish Law, employees enjoying working time reductions because they are taking care of a small child (under 8 years of age) are entitled to distribute their working time in whatever way would suit that purpose. Any conflicts arising from the employee's decision on working time may be subject to a special urgent judicial procedure. In this case, where neither of the employees had asked for a reduction of working time, it would be questionable whether they would have been entitled to such a determination. It is noticeable here that although the Court's decision was equitable, it nevertheless left both employees dissatisfied.

Footnotes

1 The judgment does not specify her working times in shop 1.

2 It is not known whether this was a unilateral decision by the employer and, if so, whether the plaintiff protested, nor whether her other terms and conditions were amended.

3 Council Directive 92/85/EEC of 19 October 1992 on the introduction of measures to encourage improvements in the safety and health at work of pregnant workers and workers who have recently given birth or are breastfeeding.

Subject: Working time, terms of employment

Parties: Unnamed plaintiffs (employee and employer)

Court: Oporto Court of Appeal (*Tribunal da Relação do Porto*)

Date: 26 April 2010

Case number: JTRP00043850

Internet publication: www.dgsi.pt

Creator: Tribunal da Relação do Porto (Court of Appeal, Porto)
Verdict at: 2010-04-26
Case number: JTRP00043850