SUMMARY

2010/68: A group of companies that reorganise may, for redundancy selection purposes, assess the need to terminate staff at group level (FI)

<p>The employer was entitled to terminate the employment contract of an employee in a situation where the group was reorganised owing to its weak financial position, as the operations of the group of companies constituted a single operational and economic entity.</p>

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Facts

This case concerned a situation where the employer, Sisu Auto Huoltopalvelut Oy ('Huoltopalvelut'), a company in the group of Oy Sisu Auto Ab ('Sisu'), had terminated the employment contract of a sales representative (the 'plaintiff') on financial and production-related grounds resulting from the reorganisation of operations within the Sisu group of companies (the 'Sisu Group'). Following the termination of the Plaintiff's employment contract, an employee of Sisu was reassigned to Huoltopalvelut to perform the same tasks as the plaintiff. Both the plaintiff and the reassigned employee worked within the spare parts business division of the Sisu Group.

The plaintiff instituted legal proceedings against Huoltopalvelut claiming, primarily, compensation for unjustified termination of his employment contract and, alternatively,

damages for breach of the employer's re-employment obligation. He argued that because another employee was reassigned to perform the same duties as he had performed before being dismissed, the amount of work had not been substantially and permanently reduced, as required in the Employment Contracts Act. Huoltopalvelut's operational results had not been negative. Termination of the plaintiff's employment had therefore been unjustified. As for the employer's re-employment obligation, the plaintiff stated that Huoltopalvelut should have first offered the available work to him instead of employing someone from another group company.

Huoltopalvelut responded by stating that it was entitled to terminate the plaintiff's employment contract in order to reorganise the Sisu Group's operations and cost structure. According to Huoltopalvelut, the Sisu Group's financial results had been negative. Another relevant circumstance was that, prior to his employment with Huoltopalvelut, the plaintiff had worked for Sisu. Huoltopalvelut argued that it was entitled to treat all employees reassigned from one company in the group to another in a similar manner. Therefore, Huoltopalvelut was not obliged to terminate the employment contract of the reassigned employee whose expertise best met its requirements.

Judgment

The Supreme Court held that the termination of the plaintiff's employment contract was not unjustified and that Huoltopalvelut had not violated its re-employment obligation. According to the Supreme Court, the assessment of grounds for terminating an employment contract on financial and production-related grounds must be based primarily on the circumstances within the entity that is legally the employee's employer. The Supreme Court continued, however, by stating that if the group of companies' operations are not independent from each other but rather constitute one operational entity, the assessment could be made on a group level.

Taking into account, among other things, that the spare parts business division of the Sisu Group included operations and personnel from different group companies, the Supreme Court stated that the group of companies within the Sisu Group were financially and operationally dependent on each other and, thus, constituted one operational and economic entity. In addition, the co-determination negotiations that took place prior to the Sisu Group's reorganisation were carried out at group level without particular emphasis on the employees' official employer companies. Therefore, the Supreme Court held that the assessment of financial and production-related grounds for terminating the plaintiff's contract could be made on the basis of the Sisu Group's financial and production-related circumstances.

The Supreme Court concluded that because of the Sisu Group's weak financial position, the reorganisation was justified. Consequently, the amount of work had been reduced and the Sisu Group had financial and production-related grounds for redundancies. As the assessment was to be made at group level, Huoltopalvelut's profitable results were not relevant when considering the grounds for terminating the plaintiff's employment contract. The Supreme Court also stated that, because the plaintiff and the reassigned employee had been working within the same spare parts business division of the Sisu Group, the fact that the reassigned employee had been instructed to carry out the same duties as the plaintiff did not the mean that the amount of work had not been substantially and permanently reduced.

Finally, the Supreme Court assessed whether Huoltopalvelut should have given preference to the plaintiff when deciding whom to make redundant and whether Huoltopalvelut had breached its re-employment obligation. The Supreme Court concluded that, according to case law, an employer may decide which employment contracts to terminate on financial and production-related grounds, as long as the decision criteria the employer applies are neither inappropriate nor discriminatory. The employee who was reassigned to perform the same duties as the plaintiff had worked in similar tasks with the same business division of another company within the group and, therefore, the reassigned employee was in a position equivalent to the plaintiff. The Supreme Court did not find any grounds to suggest that the decision criteria had been inappropriate or discriminatory. Given that the employer had the right to reassign the employee, the Supreme Court concluded that Huoltopalvelut had breached neither its re-employment obligation nor its obligation to offer the plaintiff the position as required in the Employment Contracts Act.

Commentary

Although the case was adjudicated solely on the basis of Finnish law and no EU law was involved, the Supreme Court's judgment may be of interest to employment lawyers outside Finland because it addresses a difficult issue which I expect exists everywhere, namely whether one can look across the borders of an employer's legal entity when selecting employees for redundancy.

In its landmark decision the Supreme Court confirmed for the first time that, under certain conditions, the assessment of the reasons for terminating an employment contract on financial and production-related grounds can be made at group level. The ruling forms an exception to the main rule under Finnish law, according to which assessment must be based primarily on the situation within the 'official' employer company.

Even though this assessment depends on case-specific conditions, the Supreme Court's

reasoning provides some guidelines for such assessment. The judgment implies that the assessment could be made at group level, e.g., in a situation where the businesses of companies within a group have been organised so that the group is financially and operationally interdependent and forms one operational and economic entity. Further, prior co-determination negotiations carried out at group level can be seen as one indicator favouring a group-level assessment.

Comments from other jurisdictions

France (Claire Toumieux and Aude Pellegrin): In France, it has long been established that if economic dismissals are carried out as a result of a reorganisation necessary to safeguard the competitiveness of the employer and the French company belongs to a group, the assessment of the need to safeguard competitiveness will be made at group level. French courts will only consider the reorganisation to be a valid cause of dismissal if it was carried out to safeguard the group's sector of activity worldwide.

Moreover, in France as in Finland, it is undisputed that an employer may not select which employees to make redundant without applying ordered criteria, which must be neither inappropriate nor discriminatory. However, unlike the present Finnish case, the selection of employees to be dismissed may only be done at the French level. Indeed, the criteria may only be applied to the employees of the French company or of the various French establishments of the company, but not to employees of a worldwide operation.

In addition, job elimination that may justify redundancies is assessed at French company level and not at group level. Therefore, unlike the present decision, French courts, in their assessment of the validity of an economic dismissal, will verify whether a position within a French company really has been eliminated.

Germany (Dr. Gerald Peter Müller): The outcome would have been different, had the case been brought before a German employment court.

Protection against unfair dismissal in Germany is provided by the '*Kündigungsschutzgesetz*' (Unfair Dismissal Protection Act): the necessary justification for a termination of an employment contract falling within the Act's scope requires a 'fair reason'. One of the reasons that can justify a layoff is a dismissal for urgent business reasons, i.e. a reduction in demand for manpower which may, for example, derive from restructuring measures. In such cases, the employer has to prove that for business reasons the employee in question can neither be

sustained in his or her current position nor could he or she be appointed to another position. The *Kündigungsschutzgesetz* primarily refers to the demand for workforce in the establishment. If there is no demand, the Act requires the employer to look for alternative positions within other establishments within the same company (i.e. the contractual employer). Furthermore, employers must abide by the rules of the so-called 'social selection process' ('*Sozialauswahl*'), as follows: imagine a case where out of 10 similar positions only one position ceases to exist. According to the rules of *Sozialauswahl*, the employer cannot freely – or even just without being discriminatory or inappropriate – choose one of the employees to be made redundant. The employer must choose the employee who deserves the least level of social protection (according to his or her of age, length of service, alimony obligations and severe disability). The employer's argument that he believes one employee to be 'fitter' for the job than the other would not be considered in this respect. Therefore, in the case at hand – and unless he was less worthy of social protection in the aforesaid meaning – the plaintiff may well have kept his job.

An interesting point in the judgment of the Finnish Supreme Court is the idea of 'switching' from company level to group level in order to assess the justification of the plaintiff's dismissal. A different manifestation of the same idea that under specific circumstances a group of companies may constitute a 'single operational and economic entity' for the purpose of deciding the validity of a dismissal can also be found in German employment law – albeit under different prerequisites. In cases where different employers (i.e. companies – even if not part of the same group) operate commonly in the same workplace, jointly take administrative decisions and decisions on the assignment of staff, the (different) employers' common 'structure' is known as 'joint works' ('*Gemeinschaftsbetrieb*') and considered to be a single entity for the purposes of fulfilling the conditions of the test for validity of the dismissal. This would include, for example, lack of alternative employment for the person to be dismissed.

United Kingdom (Richard Lister): For the purposes of the statutory definition of redundancy in the UK, the 'business' of an employer may be treated as one with the business of an associated employer. Two employers are 'associated' if one is a company controlled by the other, or if both are companies controlled by another company. In practical terms, this means that a group of companies is entitled to select employees for redundancy regardless of whether or not there is a redundancy situation in each individual company. In other words, the group can be considered as a whole when applying a redundancy selection procedure.

The flipside of this is that, in order to establish a fair and reasonable redundancy procedure,

employers generally need to show that they gave proper consideration to the availability of alternative employment for those employees selected for redundancy. In this context, it will normally be appropriate to consider potential alternative jobs not just within the particular company in which the individual was employed but also within other subsidiaries in the same group.

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