

SUMMARY

2010/67: Failure to provide a 'statement of employment particulars' can be costly (DE)

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Facts

This case concerned a woman who, after having been employed for seven months at a café, thought that she had been promoted to manager. Previously, she had asked for a 'statement of particulars'. This is a statement as provided in the Statement of Employment Particulars Act, which is the Danish transposition of Directive 91/533. It obligates employers to notify their employees in writing of 'the essential aspects of the contract', which include job title, position, nature of work, etc., and to inform them in writing of all changes in these essential aspects. Failure to comply with this requirement gives the employee the right to claim damages. The plaintiff in this case had never been issued with a statement of particulars, despite having asked for one. When she tripped with a glass in her hand later that year, she damaged a nerve in her hand. She went on sick leave, but she did not receive full salary during this leave, instead receiving (lesser) sickness benefits.¹ Had she been promoted to manager, she would have been able to claim sick pay as a 'salaried employee', given that, under the Danish Salaried Employees Act, in the event of sickness, 'salaried employees' (which basically refers to all white collar workers) are entitled to continued payment of their full salary for an indefinite period. In Danish practice, however, waiters and waitresses are usually not 'salaried

employees' and are therefore not eligible for sick pay.

The plaintiff sued the owner of the café for sick pay, arguing that she had been promoted to manager, producing three pay slips as evidence that she had been given a raise. The owner denied having promoted the employee, pointing out that she was still being paid by the hour, which managers are not. Therefore, she was not entitled to sick pay, so the café owner claimed.

Judgment

The Court noted that the failure to provide the employee with a statement of particulars had had tangible effects on her. Had she been issued with a statement of particulars, there would have been no doubt as to when her employment began², her pay, the nature of her job (including whether she held a managerial position) and her hours of work. The Court also took into account that she had asked for a statement of particulars. On these grounds, the Court held that there were aggravating circumstances and awarded her the maximum compensation available under the Danish Statement of Employment Particulars Act, which is the equivalent of 20 weeks' pay.

With regard to sick pay, the Court held on the evidence that the employee had been promoted to manager with effect from July 2008 and that she was therefore a salaried employee and thus protected by the Danish Salaried Employees Act and entitled to sick pay.

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 is protected by the Danish Statement of Employment Particulars Act instead.

In this case, the employee was not protected by a collective agreement, and she was therefore protected by the Danish Statement of Employment Particulars Act. Under the Act, employees are entitled to compensation if the employer has failed to issue a statement of employment within one month of employment. In extraordinary circumstances, the compensation can amount to as much as 20 weeks' pay. Although such high awards are rare, this case shows that they do happen.

In this case, however, the award seems quite excessive based on previous case law (see EELC 2009/55), and the judgment has in fact been appealed to the High Court.

Comments from other jurisdictions

Austria (Andreas Tinhofer): In Austria, failure to provide a written statement of the relevant particulars entitles the employee to sue the employer for issuance of such a statement. In practice, written statements (or employment contracts in writing) quite often fall short of the statutory requirements. This may be due to the lack of effective and dissuasive sanctions. However, it is difficult to see how the employee could claim damages. The lack of appropriate information on the essential particulars of employment might make it more difficult for employees to enforce their rights, but in normal circumstances it is not likely to cause any real harm.

Ireland (Georgina Kabemba): In Ireland the maximum compensation that a complainant could be awarded under the Terms of Employment (Information) Act, 1994 is eight weeks' pay. The complainant may also have certain other avenues of redress in Ireland. For example, the plaintiff in the case reported above could have claimed under the Payment of Wages Act, 1991 if she had contractual entitlement to company sick pay. However, there is no automatic entitlement to sick pay from an employer in Ireland.

The Netherlands (Peter Vas Nunes): In a Dutch court, a case could perhaps be made that failure to issue an employee with a statement of employment particulars as provided in Directive 91/533, which has been transposed into domestic law in The Netherlands, can trigger a reversal of the burden of proof. In that event, the plaintiff in the case reported above could have claimed sick pay unless her employer proved that she had not been promoted to manager.

Spain (Ana Campos): In Spain, Directive 91/533 was transposed in Section 8.5 of the Workers' Statute, according to which employers are obliged to inform employees with a length of service over four weeks of the essential elements of their employment relationship, unless there is an employment contract containing all these elements. Failure to do so is an administrative labour infraction, punishable by a fine ranging from € 60 to € 625.

According to Spanish law, temporary employment contracts, part-time employment contracts and other types of contracts must always be in writing. If there is no written employment contract, then the burden of proof of working conditions shifts to the employer.

The situation examined in this case would not happen in Spain, because temporary disability pay is calculated based on contributions made to Social Security, which is calculated according to the remuneration received by the employee, regardless of job category.

United Kingdom (Richard Lister): The remedy for a failure to provide a statement of employment particulars under the equivalent UK legislation is that the employment tribunal will determine what particulars ought to have been included (s.11 of the Employment Rights Act 1996). Tribunals have no power to enforce their decision by making a monetary award. However, the position is different where an employee has made a successful claim under various tribunal jurisdictions (e.g. discrimination, unfair dismissal, redundancy pay, or breach of contract) and it transpires that the employer was also in breach of its duty to provide a full and accurate statement of employment particulars. In such circumstances, the tribunal must make an award of between two and four weeks' pay – in addition to whatever compensation is awarded in respect of the 'main' claim – unless there are exceptional circumstances making such an award unjust or inequitable.

Footnotes

¹ Sickness benefits are paid by the local municipality. Salaried employees are entitled to continued payment of their full salary on condition that they assign to their employer their entitlement to sickness benefits.

² The Court found that she had been employed in November 2007 and that she had been promoted with effect from July 2008.

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