SUMMARY

2010/63: Dismissal for poor productivity does not constitute age discrimination unless discriminatory intent is proved (LU)

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Facts

The plaintiff was a 48 year old seamstress. She was employed by a manufacturer of industrial bags. In 2006, by which time she had been employed for over 13 years, she was dismissed, with six months notice. She asked to be given the reasons for her dismissal. The employer replied that she was being dismissed for business reasons, the manufacture of industrial bags having become a loss-making activity. The employer added that it had selected the plaintiff for dismissal because her productivity was 20% below that of the other seamstresses. The plaintiff

took her employer to court, claiming that the business argument was no more than a pretext (the employer was alleged to have hired two new seamstresses in the summer of 2007 to fulfil pending orders), that her lower productivity had to do with sick leave and medical problems, and that the decision to select her rather than any of her colleagues for dismissal was unfair and discriminatory. These circumstances made her dismissal unfair (abusif), she alleged, for which reason she claimed, inter alia, 25,000 for material loss and 10,000 for non-pecuniary harm.

Judgment

The court accepted that the plaintiff had been dismissed for business (economic) reasons. This was a relevant finding, because in 2007 the Luxembourg Superior Court confirmed a decision of 1999 to the effect that an employer that reduces staffing for sound business reasons is free to select the employees to be made redundant. The only defence such an employee has is either that the business reason is a pretext or that the employer has abused his right of dismissal. Given this discretionary freedom, there was no need for the court to investigate the employee's productivity or her sick leave or to compare them to those of the other seamstresses. There was no evidence that the employer had hired replacements for the plaintiff or that its decision to downsize staff was a pretext to get rid of the plaintiff, neither was there evidence that the employer had abused its right, given that it had demonstrated the plaintiff's lower productivity and that the plaintiff had not been able to prove that she had informed the employer of her alleged medical condition.

As already noted, one of the plaintiff's complaints was that selecting employees for redundancy on the basis of productivity constitutes indirect discrimination on the grounds of age, and that a Luxembourg law of 28 November 2006 implementing Directive 2000/78 forbids age discrimination. The court noted that this Luxembourg law did not come into force until two months after the plaintiff's dismissal. However, the court held that the dismissal could still be incompatible with the 'principle of non-discrimination'. In the case at hand, though, there was no such incompatibility. Referring to two French Court of Appeal judgments, one dating back to 1991 and the other to 2007, the court found that applying productivity as a criterion can, but does not necessarily, disadvantage older or unhealthy employees. The mere possibility of a disadvantage is insufficient to create indirect discrimination; the employee needs to prove discriminatory intent. As the plaintiff was not able to establish discriminatory intent, the court rejected her claim and her dismissal was held not to be abusif.

Commentary

The present case illustrates two developments in Luxembourg labour law: one relating to the justification of economic redundancy and the other to anti-discrimination.

As regards the justification of economic redundancy, the Labour Court accepted, in the present matter, that economic reasons for the dismissal had been provided, since the employer could point to objective facts demonstrating that the company was loss-making and that there was therefore a need to re-organise the company. Consequently, the Court applied, in line with certain case-law from the last decade, a judicial self-restraint, in refusing to review the employer's exercise of its discretion to select employees for redundancy.

Formerly, in Luxembourg case-law, the employer had to justify its choice to dismiss one employee rather than another in the case of economic redundancy. The choice of the employee to be dismissed could be justified by professional capacity, length of service, social and family situation, as well as productivity. Since 1999, in the words of Luxembourg case law, the employer is '*free to choose the dismissed person, unless the latter can prove to be the victim of any abuse of right or that the redundancy was only a pretext*'. Thus, the burden of proof is on the employee. In our case, the plaintiff lost her case because she failed on this point, even though she alleged that the employer had engaged two persons during the summer of 2007.

This new position of the Luxembourg courts does not seem very compliant with the legal obligation of the employer to give the precise reasons for the dismissal according to Article L.124-5(2) of the Labour Code. In fact, in the present case, the Court acknowledged the plaintiff's lack of productivity, which stands clearly in contradiction of the court's refusal to review the choice of employee to be made redundant.

This aspect takes on an even greater importance in the context of the prohibition of discrimination. On one hand, this decision shows the positive influence of European law on Luxembourg law, since the Court did not hesitate to refer to the principle of non-discrimination, in spite of the lack of applicability of Article L.251-1 of the Labour Code prohibiting discrimination, which was only introduced in Luxembourg by the above-mentioned law of 28 November 2006 and was not in force at the time the dismissal occurred. On the other hand, to require from the employee proof of discriminatory intent by the employer does not comply with the latest developments in anti-discrimination law, in particular, in relation to indirect discrimination. In fact, it is now well established that in order for circumstances to qualify as indirect discrimination, the employee must provide prima facie evidence that a category of employees is more affected by a measure than other categories. In such a case the burden of proof that there has been no breach of the principle of equal

treatment lies with the employer. Hopefully, the Labour Court will limit the evidentiary requirement of discriminatory intent to the time before the entry into force of the law of 28 November 2006.

Comments from other jurisdictions

Austria (Martin E. Risak): This case illustrates very well that aside from the protection against discrimination based on the discriminatory grounds provided for in EU law, the general provisions on protection against dismissal differ very much within the Member-States of the EU. Reducing staff for sound business reasons is seen as good cause for a dismissal under the Austrian system of protection against dismissal – but the statute provides also that the employer's decision as to which employees to select may be contested in court if the works council has protested against the dismissal. In such a case, the court tests whether the employer has taken the social situation of the dismissed employee sufficiently into account and in the context of that test, the employer may argue that some employees are not comparable, as they have different levels of productivity. However, a difference in productivity will only be relevant if it is significantly below average (though it is not clear if this is the average employee irrespective of age or the average employee within the age group of the employee who was dismissed).

Even so, I think that the protection against age-discrimination may add an additional layer of complexity since, as in the case reported here, the employee may also claim that a decision based on productivity constitutes an indirect age-discrimination. This would only be true if the below-average-productivity (inasmuch as considered relevant by the courts) refers to the average employee irrespective of his age as explained above (an approach I very much doubt a court would follow as it would open up arguments about indirect age-discrimination). Under the Austrian Equal Treatment Act (*Gleichbehandlungsgesetz*) the employee would not have to establish discriminatory intent by the employer but would be required to furnish prima facie evidence.

Germany (Paul Schreiner): In Germany, in the situation at hand, the "*Kündigungsschutzgesetz*" (Unfair Dismissal Protection Act) would probably apply, assuming that more than ten employees were employed in the company. The Unfair Dismissal Protection Act allows for the termination of employment only if the employer shows a valid reason (which can in principle be related to the conduct of the employee, to personal or to operational factors). If the employer can show such a valid reason, it must then choose amongst comparable employees, those whose employment should be terminated. To make that decision, the employer must follow the rules of social selection laid down in the Unfair Dismissal Protection Act. Age is one of the criteria for that decision, but productivity is not. Therefore, if the employer claims

operational reasons for the dismissal, he must to choose amongst the employees, which of them deserves the least protection for social reasons. In general, age is seen as a criterion that shows that an employee is particularly worthy of protection. Therefore, a justification of the termination in Germany would most probably have failed, since the employee in question was apparently one of the older employees.

Nevertheless, it is also possible in Germany to terminate a person's employment for not being productive. This requires evidence that the employee works less than he could, which is apparently not the case here. If an employee is less productive due to illness or multiple illnesses, this can also constitute a valid reason for a termination if the employer is over-burdened by paying salary, whilst not receiving adequate benefit from the work of the employee.

In summary, the requirements in German law for a termination owing to underperformance are generally very high. The discussion as to whether or not low performance is just a pretext for discrimination based on age is therefore not one that occurs with any frequency.

Ireland (Georgina Kabemba): In Ireland lack of productivity would normally be dealt with as a performance issue. Lack of productivity would not, of itself, be seen as a fair reason for selection for redundancy. There are many employers who would argue that a company should have the right to select the best employees in a redundancy exercise, particularly in the current economic climate. However, an employment tribunal in Ireland expects to see objective criteria, insofar as possible, for differentiating between employees in a redundancy selection process, for example skills, qualifications, training, experience, future business needs, etc.

Furthermore, it should be noted that in Ireland, under the Unfair Dismissals Acts 1977- 2007, dismissal of an employee, outside of the redundancy context, must not be deemed unfair where the dismissal results 'wholly or mainly' from lack of capability or competence of the employee in performing his or her job, and provided fair procedures are followed.

Finally, an additional avenue of redress in Ireland for the employee may have been to take an action for disability discrimination before an Equality Tribunal under the Employment Equality Acts 1998 and 2004. This would be a more common route in Ireland where an employee has been dismissed following various sickness absences.

United Kingdom (Hannah Vertigen): In the UK, a dismissal on the basis of productivity – in circumstances where lower productivity is connected to an individual's age, sick leave and medical problems – would be potentially indirectly discriminatory on the basis of both age

and disability. As such, it would not be for the employee to prove discriminatory intent, as in this case, but for the employer to show that the choice of productivity as a criterion was justified a proportionate means of achieving a legitimate aim.

Subject: Age discrimination

Parties: Ms X - v - SOLEM S.A.

Court: *Tribunal du Travail de Luxembourg*

Date: 15 February 2010

Case number: 646/2010

Creator: Tribunal du travail (Labour Court of Luxembourg)
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