SUMMARY

2010/49: A single act - here relocating an employee to another location in a factory - can constitute harassment (PT)

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Facts

The employer, a company of considerable size, noted a decrease in productivity from one of its employees, without any apparent reason. Consequently, the company moved the employee from her usual workplace in the production line and placed her behind a sewing machine in front of the production line near the supervisor, in order to monitor the employee's performance. The company's alleged intention was to understand the reason for the employee's decrease in productivity and to help her to increase it.

The Regional Inspection of Labour was alerted and it sentenced the company to pay a fine in the amount of EUR 8,736 for violating Articles 23(1) and 24(2) of the Portuguese Labour Code and Article 32(2a) of the Regulatory Legislation.[1] These provisions prohibit harassment.

The company challenged the fine in the court of first instance. However, this court decided in favour of the Regional Inspection of Labour, reasoning that monitoring and the assistance would have been possible without moving the employee from her usual workplace to another,

where she was isolated from, yet in full view of her colleagues, thereby humiliating her. Dissatisfied with this decision, the company filed an appeal to the Court of Second Instance alleging that the change of workplace was necessary to find out the reason for the unsatisfactory level of productivity. Additionally, the company contended that an employer has the authority as a "master" to change an employee's workplace. Finally, the company denied having had the intention to humiliate the employee.

Judgment

Based on the proven facts of the previous instance, the Court of Appeal concluded that this was a case of harassment and that the company's conduct had breached Articles 23(1) and 24(2) of the Portuguese Labour Code and Article 32(2a) of the Regulatory Legislation.

This Court considered that the change of the employee's usual work place in the production line in order to place her behind a sewing machine in front of the said production line, where the employee was in full view of her colleagues, constituted discriminatory behaviour without legitimate grounds, given that the company's real motive was not, in fact, to improve the employee's productivity. Further, this situation lasted for a certain period of time, having as consequence the humiliation of the employee and damage to her personal dignity.

The Court also mentioned that this was not only a case of "vertical" harassment (harassment by a superior) but also one of "horizontal" harassment (harassment by colleagues) given that the employee's colleagues were watching her constantly - an added pressure that worked in the employer's favour.

As a final note, the Court of Appeal stated that, even if harassment was not the company's intention (in which case, its conduct would nevertheless have been considered negligent), the fact remains that the company's behaviour caused the employee to feel humiliated, and was therefore unjustified and contrary to the principle of good faith.

Commentary

As is widely known, harassment consists of the systematic and continuous victimisation of an employee by his or her colleagues or superiors over a relatively long period with a view to forcing the employee out of his or her job. Harassment involves repeated non-physical attacks of various kinds and degrees, including continuous and unjustified criticism and making the victim perform degrading tasks or actions that may harm the employee's professional and personal image before third parties, colleagues or superiors.

This behaviour is at odds with the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions, as established by Directive 76/207/EEC (amended in Directive 2002/73/EC). The directive was transposed into the Portuguese Labour Code in its 2003 version under Articles 23(1) and 24(2) thereof and Article 32(2a) of the Regulatory Legislation. It is now restated in the 2009 version of the Labour Code.

The interesting feature of this decision is that the Portuguese Court of Appeal considered that one single act (change of workplace) was enough for harassment to be found, notwithstanding that the general concept of harassment is one of systematic and continuous victimisation of an employee. In addition, the court held that even if the company's intention was not to humiliate the employee, it caused her humiliation, which is a breach of the employer's duty to create good working conditions. In this sense, negligence is sufficient to render harassment an administrative offence.

Claims based on harassment are not very frequent in the Portuguese courts, although there is a social awareness that this situation exists and that it may result in physical and psychological illness.

In this case, and having in mind the facts proven, we agree that the company's behaviour was discriminatory and unlawful and that the change of workplace was intended as a way of forcing the employee to resign and leave the company in order to avoid further humiliation.

Comments from other jurisdictions

Austria (Martin Risak): Reading this case the term "mobbing" comes to the Austrian reader's mind, as this is the heading under which similar cases are usually reported in the national media. As mobbing is not a legally defined concept, it can only have legal consequences if it either amounts to "harassment" in law, or is deemed to be an infringement of an employee's personal rights as provided by the General Civil Code.

Harassment is only explicitly forbidden when the unwanted conduct is related to the employee's sex, ethnical origin, sexual orientation, age, disability, religion or belief. In such a case the conduct does not need to be systematic or continuous (as indicated in the commentary) - a single act of harassment may be enough. In this case, where the unwanted conduct was not related to sex, ethnic origin, etc. an employee's claim in Austria would need to be based on infringement of personal rights, such as "mobbing". The social sciences describe "mobbing" as a systematic and continuous victimisation of the employee. Usually a single action will not be sufficient in itself to amount to an infringement of an employee's personal rights, as protected under the general provisions of the Civil Code. Therefore, the

grounds for unwanted conduct are important, in that a harassment claim is easier to litigate than a claim for infringement of personal rights.

Cases of harassment and mobbing are getting a lot of attention recently, not only in the legal arena, but also in Austria's popular mass media. Very slowly the traditional view that these problems occur because the victim is just "oversensitive", seems to be changing.

Belgium (Isabel Plets): A similar judgement is unlikely in Belgium. Harassment cannot exist in one action or behaviour alone. Belgian legislation defines harassment as several similar or diverse unjustified actions during a certain time and aimed at attacking or causing an attack of the employee's personality, dignity or physical and/or mental integrity. A change of workplace could not therefore amount to harassment.

The Belgian legislator does not see harassment as the Dutch legislator does (see below). Harassment must not necessarily be related to certain characteristics, such as sex, age, disability etc.

Employees who claim to be victims of harassment may initiate disciplinary or legal proceedings. As from the moment the employee makes a formal complaint, he or she is protected against dismissal for reasons related to making the complaint.

Germany (Paul Schreiner): In Germany such conduct could potentially be seen as a form of harassment, because we are told that there have been circumstances which led the court to the conclusion that the change in workplace was intended as a way of victimising the employee. In contrast to the Portuguese decision, a German court would most probably not have viewed this measure as being a single action creating a humiliating work environment, but as a series of continuous actions creating a hostile working environment. However, there are no administrative fines for such conduct in Germany, although the employee could potentially claim material and immaterial damages. Whether such a claim would be successful in Germany is uncertain on the facts of this case.

The Netherlands (Peter Vas Nunes): That there was harassment in the case reported above is clear enough, but was there harassment in the meaning of Directive 2002/73/EC (now Directive 2006/54/EC), that is to say, unwanted conduct related to the employee's sex? The European anti-discrimination legislation prohibits harassment only where it is related to certain characteristics, such as sex, age, disability, etc. There is no indication in this judgement that there was harassment in this sense. The Dutch legislator sees harassment as such (i.e.

harassment not related to any particular characteristic) as a breach of the employer's responsibility to ensure the mental health of its employees, as provided in Articles 5 and 6 of Directive 89/391/EEC.

In The Netherlands, although harassment is an offence publishable by a fine, as in Portugal, it is rare for it to be prosecuted. A more common approach is for the employee who is or was harassed to sue the employer, for example, for compensation.

United Kingdom (Anna Sella): Under UK discrimination law, a one-off act may also be sufficient to constitute harassment (*Reed and another – v – Stedman* [1999] IRLR 299). However, on facts such as those in the above case, it would generally be difficult to establish that the harassment was on one of the prohibited discriminatory grounds, e.g. sex.

An alternative claim for an employee in this position would be unfair "constructive" dismissal. The argument would be that the employer committed a breach of a fundamental term of the employee's contract of employment by moving her workplace in this way with the effect that she was humiliated in front of her colleagues, and that she was therefore forced to resign as a result of to her employer's conduct.

A further possible legal avenue would be a claim in the civil courts under the Protection from Harassment Act 1997. This legislation was primarily intended to deal with the problem of stalking, rather than harassment in the workplace, but it is used increasingly in employment cases. Harassment under the Act is a criminal as well as a civil offence.

Footnote

1 The Portuguese Labour Code was amended on February 12, 2009 and its provisions were renumbered. Article 23(1) mentioned above, is now Article 25(1) ("Prohibition of discrimination") and its wording is as follows: "The employer shall not discriminate, directly or indirectly, based on, notably, parentage, sex, sexual orientation, marital status, family situation, genetic heritage, reduced work capacity, disability, chronic disease, nationality, ethnic origin, religion, political or ideological convictions, or union affiliation".

Article 24(2), now Article 29(1), states as follows: "Harassment shall be deemed to be any undesirable behaviour, notably based on a discrimination factor, which occurs while applying for a job or in the workplace, during work or professional training, with the intent or result of affecting the person's dignity or creating an intimidating, hostile, degrading, humiliating or de-stabilising atmosphere".

Article 32(2a) of the Regulatory Legislation is now article 23(1a) of the Labour Code and states as follows: "There is direct discrimination whenever, as a result of a discrimination factor, a person is subject to a less favourable treatment compared to the treatment given to another person in a comparable situation".

EELA EUROPEAN EMPLOYMENT LAWYERS ASSOCIATION

Subject: Others forms of discrimination, harassment

Parties: Unnamed plaintiff (company/employer) - v - Regional Inspection of Labour (*Inspecção Regional de Trabalho*)

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