EELA EUROPEAN EMPLOYMENT LAWYERS ASSOCIATION

SUMMARY

2013/7 Not all employee representatives active within one organisation need necessarily enjoy the same conditions for their activities (CZ)

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Facts

The defendant in this case was the National Heritage Institute, a government organisation responsible for the upkeep of historic buildings, monuments and works of art. It had several hundred employees, of whom only a portion were unionised. The plaintiff was a trade union called OPORA. It had recently been formed by six individuals. One of them was an outsider who had never been employed by the National Heritage Institute, three were former employees and two were employees who had been given notice of termination and were no longer at work but claimed that their termination was invalid.

Czech law provides that employers must provide employee representatives (trade unions, works councils, etc.) that are active within their organisation with the means to carry out their activities. Based on this provision of law, OPORA requested management to provide it with a heated lockable room equipped with two desks, ten chairs, two lockers, a coat rack, a computer with certain software, email and Internet access, a monitor and printer, a telephone connected to a phone line, (the use of) a fax and copier, office paper, envelopes, printer cartridges, etc.

Management refused to provide OPORA with these facilities, whereupon OPORA applied for a court order. During the court proceedings it emerged that OPORA had been established with the sole aim of exacting revenge on the employer, as opposed to defending the employees' interests. A number of employees even signed a petition demanding to be represented by another trade union operating at the employer, claiming that the OPORA officials were untrustworthy and did not represent their interests.

The court of first instance accepted the claim and imposed on the employer the duty to provide OPORA with the above-mentioned facilities. Only the fax and the copier were not judged to be necessary, given OPORA's low number of members.

The court of second instance overturned the decision and rejected the claim. It focused on the purpose of trade unions, which is to defend the rights of employees and to represent them in collective bargaining with the employer. In this case, the court found that OPORA did not fulfil the purpose of a trade union, because it did not have any members working for the employer. Therefore, OPORA's demands were judged to be unreasonable and contrary to ethical practice.

OPORA filed an extraordinary appeal with the Supreme Court, arguing that it is not possible to differentiate between trade unions only on the basis of the number of their members, because trade unions represent not only their own members but, in some cases, also non-unionised employees. OPORA also accused the employer of discrimination. It took the view that the employer had deliberately discriminated against it based on its low number of members, in not securing the same conditions for its activities as it did for those of other trade unions operating at the employer. According to OPORA, allowing an employer to discriminate against a particular union prejudices the right of every non-unionised employee to have a free choice of representative in labour matters.

Judgment

The Supreme Court's starting point was that although the Labour Code provides that employers have a duty to create the conditions for the proper performance of the activities of

employee representatives, it does not specify how the employer should meet this obligation. The court may therefore decide what conditions are adequate for each trade union on a case by case basis. The fundamental factor in determining what is adequate - as regulated by the Labour Code - is the employer's resources. A large or financially sound employer can be expected to provide more elaborate facilities than a small or financially struggling organisation. However, the Supreme Court ruled that the courts may also consider other factors, such as the number of members, the real purpose of the trade union's establishment at the employer, its activities, its participation in labour law relationships at the employer, its popularity among employees who are not unionised and the extent to which the trade union relies on facilities created by the employer.

The number of factors that can be considered means, according to the Supreme Court, that what is adequate may differ for each trade union and the employer's approach towards its trade unions may differ. Therefore, a different approach towards different trade unions cannot automatically be regarded as discriminatory.

The Supreme Court also gave an interpretation of the statutory reference to "operation at the employer". It held that only trade unions that genuinely operate within an employer are entitled to the statutory rights afforded to trade unions. The Court found that a trade union's operation at the employer should consist of an active and recognisable activity focusing on the employer. Without reasonable facilities, a trade union would be unlikely to be able to fulfil its main goal, which is to fight for the rights and rightful interests of employees and to represent them in collective bargaining.

Based on these grounds and on evidence presented during the proceedings in the lower courts, the Supreme Court reached the same conclusion as the court of second instance, namely that OPORA's demands were contrary to proper ethical practice. The Supreme Court therefore dismissed the extraordinary appeal.

Commentary

This Supreme Court ruling gives employers that are creating conditions for the activities of trade unions, the opportunity to consider what conditions are reasonable in relation to its resources, the number of members of the trade union, the nature of its activities and the other factors described above, without concern that this approach may be considered discriminatory. It also means that newly established trade unions will not automatically be given the same facilities by the employer as unions that have been operating and functioning properly for a longer period.

This decision is also noteworthy for employees who might wish to set up a trade union for

personal advantage (e.g. resulting from being trade unions officials), as opposed to protecting other employees' rights and interests. With this decision, the Supreme Court gave a clear message that a trade union must demonstrate genuine activity in order to be able to claim the rights endowed on unions by law.

Comments from other jurisdictions

Germany (Paul Schreiner): German law gives no right for trade unions to receive material resources from an employer, but only the right to physically enter the workplace. This is provided in Article 2(2) of the Works Council Constitution Act: "In order to permit the trade unions representative in the establishment to exercise the powers and duties established by this Act, their agents shall, after notification of the employer or his representative, be granted access to the establishment, in so far as this does not run counter to essential operational requirements, mandatory safety rules or the protection of trade secrets".

Unlike in the Czech Republic, a trade union in Germany must be economically independent of the employer to ensure that the needs of employees are the sole motive of the union's actions. However, employers must provide their works council with all the material resources needed to fulfil its legal obligations towards employees. This includes the kind of resources demanded by the Czech trade union in the case at hand.

Subject: Unions

Parties: O.P.O.R.A. – v – National Heritage Institute

Court: Nejvyšši soud Ceské republiky (Supreme Court of the Czech Republic)

Date: 28 January 2013

Case number: 21 Cdo 974/2012

Hard copy publication: -

Internet publication: http://www.nsoud.cz/

Creator: Nejvyšší soud (Czech Supreme Court)
Verdict at: 2013-01-28
Case number: 21 Cdo 974/2012