SUMMARY

2013/44 Employee representatives must know precise reason for proposal to dismiss employee (SK)

<p>Notice given to an employee must be discussed with the employee representatives (if any), prior to its delivery to the employee. Failure to meet this obligation makes the notice invalid. The employer fulfils the obligation only if the document presented to the employee representatives specifies the reasons for the proposed dismissal clearly, fully and exactly.</p>

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Facts

The plaintiff was a teacher. Her employer was not satisfied with her performance and decided to terminate her employment. The employer sent the employee representatives - in this case, a union - an invitation (the “application”) to discuss the proposal to terminate the employee’s contract by notice. This was in accordance with Slovak law, which requires the employer, whenever it proposes to terminate a contract of employment involuntarily (except during a probationary period), to inform the employee representatives in the organisation (works council, trade union or employees), if any, of the reason for the proposal and to invite them to discuss the proposal. The rationale for this requirement is to protect the employee(s) in question against abuse of the employer’s right to dismiss and against unfair dismissal.

The Labour Code does not specify the procedure other than that the application to the employee representatives should be in writing. Case law has added the requirement that the application should state the reason for the proposed termination and that that reason should be materially identical to the reason subsequently given to the employee in the letter of notice. The case law does not specify in how much detail the reason for termination must be set out in the application nor whether it should be provided verbally or in writing. The employee in question need not even be provided with a copy of the application, let alone be given an opportunity to present his or her view on the matter to the employee representatives. In the event the employee representatives fail to respond within the period set out in statute (currently seven working days), the employer is deemed to have complied with its obligation and may proceed to serve notice on the employee. The same applies in the event the employee representatives disagree with the proposal: the employer is not bound to do as they wish, it is merely required to offer to discuss its proposal.

The Labour Code also provides an additional obligation on the employer. Where the employee´s contract is to be terminated by notice as a result of a breach of working discipline the employer must inform the employee of the reasons for the termination and provide the employee with an opportunity to give his or her opinion on the matter. The Labour Code does not prescribe how this should be done, nor the way the employee should give his or her opinion. The employer may request a written statement from the employee or it may invite him or her to discuss the matter in person. According to case law the opportunity should normally be given to the employee in person before the delivery of the notice.

In this case, the application the employer presented to the employee representatives mentioned, in a general way, that the employee was underperforming. According to the application, the underperformance consisted of lack of discipline, failure to comply with orders, insubordination, refusal to cooperate with colleagues, reasonable complaints by parents about the plaintiff's work and her relations with students, breach of statutory administrative duties and unsatisfactory handling of students' personal data. However, the application was not specific and did not give examples. The employee representatives responded positively, whereupon, the employer proceeded to dismiss the employee, giving written notice. The written notice of dismissal was more specific than the application regarding the reasons for dismissal, now specifying that the employee failed to attend a meeting on 16 September 2004, that she failed to split classes on 11 October 2004 and that she took certain documents home on 10 November 2004.

The employee claimed her dismissal was invalid, reasoning that the application for discussion with the employee representatives did not contain specific reasons. The application failed to state the complaints set out in the letter of notice.

Judgment

The court of first instance found in favour of the employer. On appeal, this judgment was overturned and the dismissal was declared to be invalid. The Supreme Court upheld the Court of Appeal's decision, holding that the notice given to the plaintiff was invalid. The Supreme Court acknowledged that the application had been discussed with the employee representatives in a timely fashion pursuant to the Slovak Labour Code. On the other hand, however, it was apparent from the testimony and the documents that the application for discussion with the employee representatives specified neither the precise reasons for the dismissal nor the particular acts of the employee on account of which the employer proposed to terminate the employment. It was proved that, unlike the notice, the application did not contain a description of the facts that were set out in the notice. Although the application did give reasons, none of them met the statutory condition of a clear description of facts. The reasons for the notice were also given to the employee representatives orally but there was no evidence about how much detail was provided.

The court concluded that there was no proper discussion at the meeting of employee representatives and that they had insufficient evidence upon which to take a position, as the reasons and acts of the employee were not properly specified to them. Therefore, the notice of termination was deemed to be invalid owing to the failure to meet the conditions prescribed by the Slovak Labour Code.

Commentary

When an employer wishes to give notice to an employee for failure to comply with his or her duties, as in this case, the employer must, as a rule, follow two procedures, either in parallel or one after the other: (i) the employer must present its case to the employee representatives (if any) and (ii) the employer must inform the employee about the reasons for the notice and give him or her an opportunity to present his or her views on the matter. As for procedure (i), it is a matter for the employee representatives to decide whether to invite the employee to the hearing to present his or her view. However, it is difficult to see how failure to obtain a valid view from the employee representatives would constitute a breach of due process or indeed any international rule to which Slovakia is a party (such as ILO convention 158), as the employer is not bound by the employee representatives´ opinion.

Nevertheless, the judgment reported above does stress the importance of fair procedure in relation to (i). The employee representatives are not required to hear the employee ´s view, but the employer must provide them with sufficiently precise, detailed and concrete information to enable them to form a reasoned opinion on the matter. Although the Slovak

Labour Code does not set out the essential elements of an application for discussion of a dismissal proposal with the employee representatives, in this case the court decided that it is not sufficient simply to summarise the general areas of deficiency without reference to the facts of the case. A summary does not provide the employee representatives with sufficient information to come to a reasoned view. Unless the employee representatives can do so, the employer's obligation to discuss the notice with them becomes just an empty formality.

Comments from other jurisdictions

Germany (Paul Schreiner): In Germany the duty to inform the works council before an employee is terminated, is governed by section 102(1) of the Works Council Constitution Act (Betriebsverfassungsgesetz):

"The works council shall be consulted before every dismissal. The employer shall indicate to the works council the reasons for dismissal. Any notice of dismissal that is given without consulting the works council shall be null and void."

By this statutory obligation the employer needs to provide the works council with the exact reasons for termination. However, it does not have to do this in writing; therefore we often see written applications from HR departments, accompanied by verbal descriptions of the facts that led to the intended termination. In such a situation, the employer can tell the court which details were provided to the works council.

Note that by contrast, there is no generally applicable obligation on the employer to discuss or explain the reasons for termination with the employee.

If the employer does not disclose the reason for a termination when so requested by the employee, this does not usually lead to the notice of termination being invalid.

Hungary (Gabriella Ormai): Under Hungarian law the approval of the employee representatives to dismiss an employee is required only in certain circumstances:

Pursuant to Act I of 2012 on the Hungarian Labour Code (in force since 1 July 2012) the prior consent of the works council is required for the dismissal of its chairman. Previously, the Labour Code had granted such protection to every member of the works council. The protection applies during the term of the chairman's appointment and an additional period of six months following its expiry, provided he or she has held the position for at least 12 months.

As in Slovakia, the legislation does not specify the process in detail, merely providing that the employer must notify the works council in writing. The law does not stipulate what the notification must include, but in our view it should at least cover the reason for the proposed

dismissal. The works council must provide its written response within eight days. If the works council disagrees with the proposal, the written answer must contain its reasons. If the works council fails to provide an answer within the above deadline, its approval is deemed to have been given.

The courts' practice is to deem a termination unfair if the employer has failed to notify the works council. It is debatable what the consequences are if, for example, the works council's response is not in written form or if it disagrees with the termination but does not give its reasons. However, based on a request by the employer, the court has the power to approve the dismissal if the required conditions have been met in other respects.

The protection against dismissal also applies to shop stewards (in Hungarian: '*üzemi megbízott*'). In such cases, the process is even more vexed, as the approval of employees is required for any such dismissal but the law does not provide further details on the process.

There are certain other employment-related positions that enjoy similar dismissal protection: e.g. trade union officials, although, contrary to the previous Labour Code, how many official are protected depends on the employees' headcount. Members of the European Works Council are also protected, as are members of the special negotiation body, and health and safety representatives.

Subject: Individual termination

Parties: I.H. – v – S.

Court: Najvyšší súd SR (The Supreme Court of the Slovak Republic)

Date: 30 October 2012

Case number: 4 Cdo 160/2012

Internet publication: http://www.supcourt.gov.sk/ > Rozhodnutia > Spisová znacka > case number

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Creator: Najvyšší súd Slovenskej republiky (Supreme Court of the Slovak Republic)
Verdict at: 2012-10-30
Case number: 4 Cdo 160/2012