SUMMARY

# 2014/65 Inadequate “pre-negotiation” with employee representatives can invalidate dismissal (SK)

***<p>Slovakian law requires employers to consult with their employee representatives before handing an employee a written notice of termination. Failure to follow the correct procedure can invalidate a subsequent dismissal, as this case demonstrates. The employee was offered a written notice of termination on 30 June 2010, signed by the director and co-signed by the employee representative alongside the statement: <i>“This notice was discussed with the employee representative I.S. on 28/6/10”. </i>The Supreme Court found that this constituted insufficient evidence that there had been a real discussion with the employee representative prior to the dismissal. This made the dismissal void.</p>***

**Summary**

Slovakian law requires employers to consult with their employee representatives before handing an employee a written notice of termination. Failure to follow the correct procedure can invalidate a subsequent dismissal, as this case demonstrates. The employee was offered a written notice of termination on 30 June 2010, signed by the director and co-signed by the employee representative alongside the statement: *"This notice was discussed with the employee representative I.S. on 28/6/10"*. The Supreme Court found that this constituted insufficient

evidence that there had been a real discussion with the employee representative prior to the dismissal. This made the dismissal void.

**Facts**

The plaintiff in this case was a school teacher. In the course of 2010 his employer (the school) dismissed him by means of a written notice dated 30 June 2010 and signed by the school's director, on grounds of repeated breach of duties. He brought legal proceedings against his dismissal, seeking a declaratory judgment that it was invalid. He alleged that the notice of termination that had been issued had not been discussed with the employee representative as required under Slovakian law.

The Slovakian Labour Code provides that - on pain of nullity - a notice of termination of employment by an employer must be "pre-negotiated" with the employee representative. What this means is that the employer must invite the employee representative to discuss its intention to dismiss a certain employee before expressing that intention to the employee. The invitation may be verbal, and the employer is free to organise the discussion in any way it chooses (e.g. the employee need not be asked for his or her view), provided that the notice specifies the reason(s) for the proposed dismissal precisely and in a way that avoids there being any confusion or doubt about the reason(s). If the employee representative does not respond within a certain time (currently, seven working days, but previously ten calendar days), the employer may go ahead as proposed without the further involvement of the employee representative. The burden of proof that the pre-negotiation process has been followed correctly rests with the employer.

The defendant argued that the pre-negotiation requirement had been satisfied. The employee representative had known for a long time about the problems with the plaintiff, not only in her capacity as the employee representative but also as a school secretary and as the mother of a child in the plaintiff's class. She had been continuously informed and had been personally involved in resolving some of the issues that preceded the dismissal. Moreover, the employee representative co-signed the notice of termination, which stated, "*This notice was discussed with the employee representative I.S. on 28/6/2010*". When the employee representative was later heard as a witness in court, she confirmed that she had discussed the school's intention to dismiss the plaintiff two days before the notice of dismissal was issued and that she had co-signed that notice because when the director attempted to hand it to the plaintiff personally, the plaintiff refused to take receipt of the notice.

The plaintiff pointed out that, when the employee representative was heard as a witness, she was unable to specify the exact date and time on which she had discussed with the director his

intention to dismiss the plaintiff. Thus, the only evidence to go by was the employee representative's signature alongside the statement "This notice was discussed with the employee representative I.S. on 28/6/2010". This, in the plaintiff's view, was insufficient evidence that there had been a real discussion between the employer and the employee representative as required by law.

The court of first instance found in favour of the plaintiff, holding that the notice given to him was invalid because the employer - on whom the burden of proof rested - had failed to provide sufficient evidence that it had discussed its intention to terminate his contract prior to the notice. On appeal, the judgment was overturned. The appellate court found that the notice had been discussed with the employee representative in advance of the notice. It returned the case to the court of first instance for a retrial. The court of first instance now found in favour of the defendant. On appeal (again) the Court of Appeal confirmed this judgment.

**Judgment**

The Prosecutor General of the Slovak Republic filed an extraordinary appellate review application with the Supreme Court. He took the position that the available evidence did not support the conclusion that there had been proper consultation with the employee representative before issuing the notice of termination. It is true that the employee representative had co-signed that notice, but she had put her signature, not to confirm that the statement *"This notice was discussed with the employee representative I.S. on 28/6/2010"* was accurate, but merely because the plaintiff had refused to take personal delivery of the notice when it was presented to him.

The Supreme Court overturned the appellate court's judgment and that of the court of first instance and returned the case to the latter for a retrial. It noted that, when questioned as a witness, the employee representative was unable to tell the court when exactly she had discussed the matter with the employer nor how the discussion went. The only indication that a discussion had been held prior to the notice was the employee's signature alongside the statement. This was insufficient evidence. Given that the Supreme Court had previously held that failure to discuss a notice in advance causes invalidity, the notice in this case was void.

Following the Supreme Court's judgment, the plaintiff withdrew his claim. The reason is likely to be that the parties reached an out-of- court settlement.

**Commentary**

Article 74(1) of the Slovakian Labour Code creates an obligation for employers to pre-negotiate decisions in respect of the termination of individual employment contracts with

employee representatives. However, there is no explanation about how pre-negotiationshould be implemented, nor is there a definition of the term pre-negotiation. Therefore, it was crucially important for preserving legal certainty to generate case law capable of remedying this shortcoming in the Slovakian Labour Code.

This particular case concerns the temporal aspect of pre-negotiation. It supplements previous decisions of the Supreme Court in which it specified that termination of an employment contract must be pre- negotiated with competent employee representatives, otherwise it is invalid, and that a request for pre-negotiation addressed to the employee representatives must include clearly defined reasons for the proposed termination so as to avoid confusion with other reasons.

This case adds another condition for validity of termination, which is the requirement that the pre-negotiation meeting is held in such way that there can be no doubt that it was conducted and that it was conducted in advance. For this reason, we recommend employers should always make a written record of the discussion of the notice with the employee representatives and inform employee representatives thoroughly about particular reasons for the employment termination.

**Comments from other jurisdictions**

*Croatia (Dina Vlahov)*: Croatian law, similar to Slovakian law, prescribes that an employer must consult with the works council or union representative before making any important decision in relation to employees, including dismissal. Under the Croatian Employment Act and case law the employer must deliver to the works council or union all information that is important in understanding the proposed decision. However, the way in which this is done is not prescribed, therefore a simple verbal communication of the employer's intention to dismiss is sufficient. Nevertheless, the information must be delivered to the works council or union in full and within a reasonable time, so as to allow for comments and suggestions and enable the employer to take account of what is said.

Considering the above, it is very likely that the Croatian courts would have come to the same conclusion as the Slovak Supreme Court.

*Latvia (Andis Burkevics)*: Latvian law contains a somewhat similar, and even more restrictive provision, stating, in essence, that the termination of an employee who is a member of a trade union is permitted only in cases where the relevant trade union has granted its consent to termination. There are some, limited cases, where the trade union's consent is not required, for example if the reason for the termination is the liquidation of the company. If the employer dismisses an employee without obtaining the trade union's consent, this is regarded in Latvian

court practice as a grave procedural breach and in such cases the employment termination will be automatically declared unlawful.

However, as far as the consequences of the employer's non-compliance are concerned, the Latvian courts take the view that this may grant each affected employee the right to claim compensation from the employer, but provided the dismissal is otherwise factually and legally grounded, there is no reason for the court to declare the decision invalid.

To illustrate, the Latvian Supreme Court in its judgment of 26 April 2013 in civil matter No SKC-1106/2013 ruled that if the employer has not complied with its information and consultation obligations in the case of a collective redundancy, the employees can claim compensation from the employer for lost salary during the period that the employment relationship would have continued to exist, had the consultations taken place. However, even if no consultation had been conducted at all, this would not be a reason to declare the termination of employment as unlawful or the termination notices invalid.

*Slovenia (Petra Smolnikar and Nives Slemenjak)*: Similar to Slovakian law, Slovenian law envisages an obligation on employers to notify the trade union that the employee is a member of when the procedure starts or, in the absence of a union, the employee representative (i.e. works council or works trustee). However, this obligation only exists if the employee requests that notification be made. The law also provides that the employer may terminate the employment agreement whatever the relevant employee representative says about the dismissal.

The law, however, does not specify what the consequences should be if the employer fails to notify the relevant representative upon an employee's request. In one of its judgments, the Supreme Court ruled that this cannot, of itself, result in termination being unlawful. This is because an employee representative's opposition to the dismissal cannot bind the employer and therefore could not have changed the outcome. One therefore wonders how the obligation to notify serves to protect employees against unfounded terminations - and ultimately, what its purpose could be. The answer may be found in another Supreme Court decision, indicating that termination of the employment agreement is only lawful when served on lawful grounds (i.e. business, incapacity or culpability grounds). Other (procedural) statutory provisions must be verified and considered in each individual case, taking into account the following questions: (i) for whose benefit is the provision intended; (ii) who does the provision require to take action; and (iii) does the action (or omission) impact on the legality of the termination? In this respect, Slovenian law deviates from Slovakian, by offering Slovenian employers more scope simply to ignore procedural provisions that it should in theory observe.

**Subject**: Unfair dismissal

**Parties**: M. K. – v – S.

**Court**: Najvyšší súd Slovenskej republiky (Supreme Court of the Slovak Republic)

**Date**: 3 April 2014

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**Creator**: Najvyšší súd Slovenskej republiky (Supreme Court of the Slovak Republic)
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**Case number**: 3 MCdo 14/2013