SUMMARY

2012/47 Protection against dismissal of an employee who discloses pay discrimination (PL)

<p>An employer may not use any labour law sanctions against an employee who discloses breaches of the principle of equal treatment in employment or pay discrimination.</p>

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Facts

The Plaintiff was a commercial specialist in the Polish company K-T (the 'Company'). There was an unwritten rule in the Company that employees' pay should not be disclosed and some employees signed a confidentiality clause in respect of their pay. The Plaintiff did not sign any such clause but it appears he was aware that information about pay was confidential and he should not disclose it.

In January 2007, the Plaintiff asked the manager of the sales department (his immediate superior) how his bonus was calculated and how much he would be paid for the fourth quarter of 2006. The manager sent him an email with the required information, but he forgot to delete information about the pay and bonuses of other employees in the sales departments of branch offices of the Company. This meant that the Plaintiff found out about the pay of other employees. Since the differences were significant he forwarded the information to his colleagues from other sales departments. The Plaintiff and his colleagues then asked to meet with the manager so that he could explain the differences in pay between individual employees.

In the meeting the manager was unable to provide an adequate explanation for the differences and promised to organise a meeting with the managing director of one of the branch offices. The meeting was scheduled for a given date but did not take place. Instead, on that date, the managing director called the Plaintiff's manager and punished the manager with a written reprimand. He then called the Plaintiff to his office. The Plaintiff explained to him that he was aware of what he had done. The managing director punished him with a written reprimand and asked him if he would do the same again. The Plaintiff replied that he would, whereupon the managing director handed him written notice of termination of his employment for gross misconduct. The Plaintiff refused to accept it and said that, in fact, he was on sick leave that day. Later, on the instructions of his manager, the Plaintiff took his belongings, returned the electronic equipment he had used, announced that it was his last day at work and said goodbye to his colleagues.

On the same day, the employer sent the Plaintiff by post a statement of termination of employment for gross misconduct. The statement described the flow of emails revealing the information about pay and gave as the reason for the termination that he had breached rules of the Company by spreading confidential information amongst third parties, and that this had resulted in a loss of confidence in him.

The Plaintiff referred the case to the labour court, demanding compensation for unjust termination of the contract and separate compensation for discrimination in employment.

After several procedural turns that are not relevant here, the court of second instance decided that termination of the Plaintiff's contract was on justified grounds and was not discriminatory. The Plaintiff had been aware that he should not reveal the information to anyone, and by doing so he had jeopardized the employer's interests.

The Plaintiff challenged the decision before the Supreme Court.

Judgment

The Supreme Court overturned the decision of the second instance court and ordered it to hear the case once more and to grant the Plaintiff compensation.

The Supreme Court stated that the Plaintiff had acted legitimately and had not overstepped his rights. For example, he had met with his manager to discuss his concerns about the information he had received. According to Polish law, if an employee makes use of the principle of equal treatment in employment, by making efforts to obtain an explanation of the issues or by providing any form of support to other employees who want to prevent pay discrimination, this cannot be a reason for termination of an employment contract for gross

misconduct or for termination with notice. It does not matter how the employee obtained the information that demonstrates the breach of the principle of equal treatment in employment or pay discrimination.

In other words, an employer may not use labour law sanctions against an employee who takes action in relation to a breach of the principle of equal treatment in employment or pay discrimination. If employers were able to punish employees for this, it would render the mandatory provisions on equal treatment in employment ineffective.

Employers are entitled to protect their interests and can legitimately expect employees to keep information confidential if its disclosure could jeopardize essential interests of the employer (e.g. its competitiveness). However, the Company in this case could not abuse this right to confidentiality to conceal the fact that it was in breach of the principle of equal treatment in employment and had a discriminatory pay policy. As the Company was not shown to have had a legitimate reason to require non-disclosure, the transfer of the information from the Plaintiff to other employees was not a reason to terminate his employment contract.

Commentary

The general protection mechanism established e.g. in Article 24 of Directive 2006/54/EC of the European Parliament and of the Council of 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (recast) and in Article 11 of the Directive 2000/78/EC establishing a general framework for equal treatment in employment and occupation applied here, although it would seem that none of the grounds for discrimination enumerated in these directives occurred in this case. The directives apply to overt or disguised discrepancies in the treatment of men and women or to discrimination on grounds of religion or belief, disability, age or sexual orientation.

Interestingly, in Poland protection against pay discrimination applies to all employees who perform similar work or work of equal value. Therefore, equal pay law does not solely apply to disputes about pay between, for example, men and women or between homosexual and heterosexual employees. The national mechanisms of employee protection specified under sex discrimination law can equally be applied to discrimination not based on gender. The judgment does not specify whether the employees affected by this case were male or female or had different religions or beliefs.

National rules protecting employees who exercise their rights in relation to the principle of equal treatment in employment are contained in Article 183e of the Polish Labour Code. This provision indeed implements EU law, but at the same it goes further by

protecting all employees against pay discrimination. This provides a general prohibition against employers' victimising or otherwise acting negatively towards employees who exercise their rights. In particular, termination of employment is prohibited. The law protects not only the whistleblower, but also those who lend their support to the whistleblower.

The Supreme Court mentioned this provision in its judgment. It reasoned that an employee cannot be said to have infringed the employer's interests and cannot be guilty of gross misconduct if he or she has revealed confidential information for the purpose of benefiting other employees who were suffering discrimination. In this way, the Court gave priority to the principle of equality over the employee's duty to not to disclose confidential information.

Comments from other jurisdictions

Germany (Dagmar Hellenkemper): The outcome of a similar case in Germany would largely depend on the reasons for the unequal payment of the employees. There is no general equal pay principle applicable to all employees. The employee is free to negotiate an individual pay package with his or her employer. That being said, discrimination on the grounds of gender, race or ethnic origin, religion or belief, disability, age or sexual orientation is prohibited by Section 1 of the AGG (the German transposition of Directives 2000/43 and 2000/78/ EC). The employee would have to demonstrate that employees who are paid differently fulfil exactly the same duties and have the same qualifications to prove discriminatory behaviour by the employer on the grounds discussed.

Employees who disclose violations of those provisions to fellow employees or superiors cannot be terminated on the grounds of gross misconduct. The termination would be declared void.

On the other hand, the violation of a signed confidentiality agreement or the disclosure of internal company information to the public could be grounds for termination, even if the intent was to prevent pay discrimination within a group of co-workers.

In Germany there is no separate law to protect whistleblowers or to serve as an incentive for whistleblowing. Efforts to introduce a Whistleblowing Law in Germany (Hinweisgeberschutzgesetz) have not been successful as yet. Nonetheless, 'whistleblowing hotlines' are increasingly popular. These allow employees to air grievances and point out violations of policies or duties. The effects of this remain to be seen.

Subject: Other forms of discrimination

Parties: Bartłomiej S. – v – K – T Company

Court: Sąd Najwyższy (Supreme Court)

Date: 26 May 2011

Case Number: II PK 304/10

Creator: Sąd Najwyższy (Supreme Court)
Verdict at: 2011-05-26
Case number: II PK 304/10