SUMMARY

2012/48 Czech Supreme Court introduces concept of constructive dismissal (CZ)

<p>An employee was bullied and discriminated against by his superior for several weeks on account of his medical condition. As a result of this unbearable situation, the employee requested termination of his employment by agreement. The employer admitted the discriminatory behaviour and apologised. The issue before the court was whether the employee was entitled to compensation for lost earnings resulting from the loss of his job.</p>

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Facts

The plaintiff, a surgeon, had worked for the Trauma Hospital of Brno (the Hospital) since 1984. Since 1991 he held the position of Deputy Director for Science and Research. Beginning in June 2003, the plaintiff was increasingly exposed to bullying by the Hospital's Director, his superior. The bullying consisted of ridicule in front of other employees, disparagement of his expertise, unjust reduction of his salary, a prohibition against performing surgery and a ban on attending management meetings.

The situation escalated when the plaintiff was removed from his position and offered a job

that did not match his qualifications. He was also confronted with threats of further bullying. Because of this situation the plaintiff requested the Hospital to enter into an agreement terminating his employment with effect from 20 August 2003. The Hospital agreed and the plaintiff's employment terminated on that date.

Afterwards, the Hospital admitted that the plaintiff had indeed been bullied and discriminated against on account of his medical condition. The Hospital subsequently sent the plaintiff a written apology.

The plaintiff brought legal action against the Hospital. He demanded CZK 1,400,000 (€ 55,000) in compensation for loss of income due to the termination of his employment. The plaintiff was not able to find a new job after the termination and, as a result, his only income became, initially, social support benefits and, following his retirement, the state pension. The amount claimed was equal to the income he would have earned (up to a certain date), had his employment not been terminated, minus the social support benefits and state pension he had received.

The Court of First Instance rejected the plaintiff's claim. It accepted that the plaintiff had been discriminated against, but it considered the Hospital's apology to be sufficient compensation for the moral harm he suffered. The Court of First Instance based its decision on the absence of a provision in Czech law enabling damages to be awarded to a former employee who has consented to voluntary termination of his employment.

The Court of Appeal confirmed the first court's decision. However, in its reasoning, the court emphasized that the plaintiff's claim was solely compensation of pecuniary damage, defined as the balance between the income he would have received for further employment at the Hospital and the income he received after termination. The Court held that the plaintiff had suffered harm in terms of loss of income and that the Hospital had breached its duty as an employer because of the (admitted) discriminatory behaviour. However, the Court of Appeal found no causal relationship between the Hospital's breach of duty and the harm suffered, because the plaintiff had offered to terminate the employment relationship by agreement, and he was the one who initiated that termination. The plaintiff's reasons for agreeing to terminate were not found to be relevant by the Court of Appeal.

Judgment

The Supreme Court annulled the decisions of both lower courts. According to the Supreme Court there was a causal relationship between the breach of duties by the Hospital and the harm suffered by the plaintiff. The Supreme Court stated that, when considering a causal relationship, it is important to take into account, not only the manner of the termination of the

employment, but also the reasons for it.

The Supreme Court further stated that, if the plaintiff had acted as the Court of Appeal suggested, that would have meant he had to passively endure the continuing discriminatory behaviour of the Hospital with no opportunity to take action.

The Supreme Court remanded the case back to the Court of First Instance.

Commentary

The Supreme Court decided that, on considering damages in cases of termination of employment contracts by agreement owing to discrimination against the employee, the court must take into account not only the isolated fact that the employment was terminated by agreement but also the reasons which led to it.

This decision of the Supreme Court should serve to prevent extreme formalism being applied by the lower courts. An employee who is discriminated against must have the right to compensation for harm suffered in connection with the termination of employment owing to the discrimination. Otherwise, the employee is left with no option but to endure the discrimination until the employer decides either to terminate his or her employment or ceases the discriminative behaviour – and such a situation is unacceptable.

Comments from other jurisdictions

Germany (Dagmar Hellenkemper): In Germany, the employee could - in a case like the one described above - file a claim for damages whether or not he signed a mutual termination agreement. The problem rather arises from the fact that most mutual termination agreements include exclusion clauses that require the employee to waive all further entitlement. This relates mostly to the violation of contractual obligations, namely the employers' obligation to protect his employees. However, intentional tort cannot be excluded by agreement and so, if the employee can prove an intentional wrongful violation of his personal rights, the exclusion clause would not apply and the employee would be entitled to damages.

The Netherlands (Peter Vas Nunes): The Dutch civil code, of which one chapter deals with employment law, does not recognise the concept of 'constructive dismissal', a concept that, I believe, the English courts developed long ago. Sections 95 (1) (c) and 136 (1) (c) of the English Employment Rights Act 1996 provide that, for the purpose of redundancy payments and unfair dismissal, respectively, "an employee is dismissed by his employer if [……] the employee terminates the contractunder which he is employed (with or without notice) in circumstances in which he is entitled to terminate it without notice by reason of the employer's conduct". In

other words, it is the employee who resigns, but in those circumstances, he is deemed to have been dismissed.

Given that Dutch statute does not recognise this doctrine, employees who resign or enter into a termination agreement as a result of harassment, bullying, discrimination or for other reasons for which the employer is accountable, must rely on general contract law in combination with the provision in the Civil Code that employers have a duty to behave as a 'good employer'. In 1989, in its ground-breaking but nevertheless not well-known judgment in Deuss – v – Motel Maatschappij Holland, the Supreme Court held that where an employee has applied to the court to have his employment contract terminated, and the court terminates the contract for a serious reason attributable to the employer (in Ms Deuss' case, the reason being bullying), the employee is entitled to compensation for lost earnings - which can be an enormous claim. Whether employees can extend the scope of this doctrine to situations where they unilaterally resign for such reasons, rather than court-ordered termination situations, is a subject of debate.

Poland (Marek Wandzel): In Poland 'simple' compensation for bullying at work is not limited (although usually it is not high) and its aim is to deter the employer. Bullying may constitute grounds for an employee to terminate the employment relationship. The law requires however that such termination is made in writing and indicates bullying as its grounds. In most cases however, employees ask for or propose termination by mutal agreement – the fastest way to change employers or to escape an employer's discriminatory behaviour. In such a case, usually no grounds for termination are indicated in the agreement (it is unlikely that an employer will admit bullying) and therefore the courts refuse to grant ‚simple' compensation.

In my opinion, this requirement for an admission that bullying is the reason for the termination is disproportionate. If bullying did occur – it should be compensated for, no matter who terminated employment or how. It is worth mentioning that if the bullying leads to health problems for the employee, he or she may claim a different kind of compensation - irrespective of who terminated the relationship and how.

Subject: Unfair dismissal

Parties: MUDr. J. P. CSc. – v – Trauma Hospital of Brno, contributory organization

Court: Nejvyšši soud Ceské republiky (Supreme Court)

Date: 10 September 2012

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