

SUMMARY

2012/50 Unlawful dismissal of foreigner with temporary residence permit: employer to pay compensation for unemployment (BU)

<p>This case concerns the dismissal of a foreign national and payment of compensation for unlawful dismissal. One of the questions raised before the Supreme Court was whether the employer was required to pay compensation for unemployment following the unlawful dismissal of a foreign national whose temporary residence permit was withdrawn because his work permit had expired.</p>

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Facts

The Bulgarian company Litasko Bulgaria EOOD² obtained a 12-month work permit from the Bulgarian Employment Agency, expiring on 14 December 2005, for Alexander Olegovich Gribchenkov, a citizen of the Russian Federation. It appointed him as its full time “Administrative Manager”. Initially, the employment agreement was concluded for a fixed term. It was later changed to an indefinite term by virtue of a written annex. Under the annex, the employer undertook to compensate the employee in the event of unilateral termination,

initiated by the employer, in the amount of five times his gross monthly remuneration. On 1 October 2005, before the work permit expired, the employment agreement was terminated. The employer claimed that the termination was by mutual consent and stopped paying salary to the employee.

The employee brought a claim before Sofia Regional Court, acting as court of first instance, against the employer, requesting the court to declare his dismissal unlawful, i.e. without good grounds. Further, the employee requested to be awarded (i) compensation for unemployment for the maximum statutory six-month term and (ii) compensation for unilateral termination of the employment agreement as per the annex to his employment agreement, in the amount of five times his gross monthly remuneration.

The employer, who carried the burden of proof that the employee had consented to the termination, failed to furnish proof of this and, as a result, the court found that the law had not been complied with and the employee had been dismissed illegally.

The employer objected to the claim for compensation as per the annex to the Agreement, maintaining that the work permit was granted for a 12-month term, thus disallowing the conversion of the employment agreement into an agreement of indefinite duration, and therefore rendering the annex invalid in its entirety. The court, however, established that the employment agreement, as amended by the annex, was only partially invalid, namely only in respect of its term, i.e. that the employment agreement was only invalid from the date on which the work permit expired. Accordingly, the court awarded the employee the requested compensation for unilateral termination of the employment agreement.

As for the claim for compensation for unemployment, the court found this claim to be well-founded, given that the employee was dismissed illegally and had sustained harm (loss of salary) as a direct result of the illegal dismissal. However, the court found that the claimant was entitled to compensation solely for the period from his dismissal until the date on which his work permit expired, namely from 1 October 2005 until 14 December 2005, and not for the maximum statutory six-month term.

The second instance Sofia City Court reviewed the decision of the court of first instance, which was appealed by both parties. It confirmed that the employee had been dismissed illegally, that the employment agreement became invalid as of the date on which the work permit expired, and that the employee was due both unemployment compensation from 1 October 2005 until 14 December 2005 and compensation under the annex to the Agreement.

The employer appealed to the Supreme Court.

Judgment

Under Bulgarian civil procedure, court decisions are subject to review ('cassation') by the Supreme Court if the court of appeal decided on a material issue of substantive or procedural law in a manner that is (i) at odds with the Supreme Court's case law, (ii) self-contradictory or (iii) at odds with the accurate application or the correct development of the law. In the case at hand, the Supreme Court admitted the appeal on the last of these. It formulated the material issue, relevant to the accurate application and development of the law, as: "Is a foreign citizen who holds a permit for temporary residence entitled to compensation for unemployment and is a clause for payment of termination compensation valid regardless of the ground on which the employment was terminated?"

The Supreme Court stated that, further to Article 225(1) of the Bulgarian Labour Code, in the event that an employee's dismissal is illegal, compensation of his or her gross monthly pay for the period of the employee's unemployment shall be paid for up to six months. Pursuant to Article 73(1) of the Law on the Encouragement of Employment, the employment and social security relations with foreign nationals employed in Bulgaria by local employers shall be governed by Bulgarian employment and social security legislation, i.e. in the event of unlawful dismissal of a foreign national, the employer shall be obliged to pay him or her compensation in compliance with Article 225(1) of the Labour Code.

Notwithstanding the citizenship of the employee, the period for which the compensation is due would depend on the period of his or her actual unemployment within the statutory time-frame of six months following the dismissal. It does not depend on the term of the work permit, as that depends on the actions of the employer. The employer could, for example, decide to apply for an extension of the permit pursuant to Article 70(2) and Article 72(2) of the Law on the Encouragement of Employment. Therefore, the Supreme Court ruled that a foreign national who has been unlawfully dismissed should receive compensation under Article 225(1) of the Bulgarian Labour Code from the employer for the entire period of his or her unemployment up to the statutory maximum of six months.

The Supreme Court further held that a clause in the employment agreement relating to compensation for termination regardless of the ground on which the employment was terminated is valid, as this is not contrary to a mandatory provision of law.

Footnotes

¹ Foreign citizens holding a work permit are entitled to apply for a permit for temporary residence in the country, with a maximum one- year term.

² The company was later succeeded by Lukoil Neftochim Burgas AD.

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