SUMMARY

2018/19 Mobility clause precise enough in scope, even when covering possible future locations within France (FR)

<p>A mobility clause must be sufficiently precise, but this condition can still be fulfilled even if the clause tries to cover both current and possible future locations of the company, provided any future locations are still within France and provided any change of location is justified by the needs of the business.</p>

Facts

Ms X, an employee of Mind Company (subsidiary of Excent Group) refused to transfer from the company's La Rochelle office to Toulouse, even though her employment contract contained a mobility clause. The mobility clause provided that: "*the company may be required to modify Ms X's workplace [...] for reasons relating to the nature of the business, the organisation and proper functioning of the business or the evolution of the business. Ms X [...] can therefore be transferred to one of our current and/or future establishments in France (Belfort, Bourges, Colomiers, Figeac, Rennes, Paris, Saint-Nazaire [...])*". The mobility clause further provided that if she refused to transfer, she could be dismissed for serious misconduct.

Following Ms X's refusal to join the Toulouse office, the Company dismissed her for serious misconduct. She lodged an unfair dismissal claim against the Company, arguing the mobility clause in her employment contract was void, as it gave her employer the possibility to extend its geographical scope unilaterally by including possible, future establishments within its scope. She said her husband worked in La Rochelle and her two children (12 and 17 years old) also lived there. Hence, the transfer of about 400 kilometres would affect her personal and family life and this was neither justified in light of the requirements of Article L.1121-1 of the Labour Code, nor was it proportionate.

L.1121-1 of the Labour Code provides that "*no one may restrict the rights and freedoms of an individual or individuals in ways that are not justified by the nature of the task to be performed or are not proportionate to the aim pursued.*" Therefore, not all jobs can be made subject to a mobility clause.

Judgment

The Court of Appeal of Poitiers dismissed her claim and the Supreme Court upheld this decision on 14 February 2018, ruling that "*the employment contract included a mobility clause covering establishments located in France, and this provided a precise definition of the geographical scope of application.*" It found that the employer had a justified need to transfer the employee because of a sizeable and lasting reduction in the business activity to which she was assigned. Therefore, the effect on her on her family life was justified by the task at hand and proportionate to the aim pursued.

Commentary

Under French law, an employment contract can validly contain a mobility clause allowing the employer to impose a change to the workplace of the employee. According to case law, a mobility clause must be in writing and define precisely its geographical scope of application, failing which it will be considered void. Consequently, a mobility clause allowing the employer to unilaterally extend its scope of application is unenforceable.

In this decision, the Supreme Court reaffirms its previous case law[1] according to which the geographical scope set by a mobility clause must be sufficiently precise and that this condition is fulfilled if the mobility clause applies to establishments located in France. The novelty of this decision is that the mobility clause in dispute covered both current and future establishments in France, which meant that the employee was consenting to mobility without knowing in advance where she might be sent. This called into question the precision of the clause. However, the Supreme Court found sufficient precision in this case.

Finally, a mobility clause is only valid if it is justified by the nature of the employee's duties and the interests of the company. In this case, one could assume that the Supreme Court would have been less lenient if the employee's transfer had not been justified by the need for a reduction of activity at the La Rochelle site.

Pushing the Supreme Court's reasoning a little further, one could envisage an international mobility clause covering several EU countries. However, in our view, contrary to the position in the case at hand, whereby a clause including future, unspecified locations was found to be valid, the requirement for precision set by previous case law would imply a need to list the

relevant countries. Indeed, even if this were done, the Supreme Court would be likely to be more restrictive in assessing the enforceability of an international mobility clause, as the impact on the employee's private and family life would most probably be high, as the family would need to change their country of residence.

In conclusion, a validly drafted national or international mobility clause does not guarantee its enforceability against an employee. It may only be enforceable if there is no disproportionate impact on the employee's right to private and family life.

Comments from other jurisdictions

Finland (Janne Nurminen, Roschier Attorneys Ltd.): According to the Finnish Employment Contracts Act (55/2001), the workplace agreed in the employment contract constitutes an essential condition of the employment relationship. In principle, it is extremely difficult for an employer to make any kind of unilateral modification to an essential condition of the employment contract. In practice, the place of work is usually defined widely in the employment contract and refers to current and future establishments. However, relocating the employee to, for example, another city by a unilateral decision based on a broadly-worded contract would probably not be justified under Finnish labour law, as it would likely constitute an essential change to the employment contract.

However, the employer may unilaterally change an essential condition of the employment contract if this is necessary to avoid termination. In this case, the employer must explain to the employee in a sufficiently clear way, the grounds for the termination, the condition to be changed and the date of its entry into force, as well as the consequences if the employee does not accept the new condition. The fact that the employer is permanently reducing its business in a specific location has been interpreted as justified grounds for terminating the employment contract and, thus, a justification for unilateral modification of the place of work, provided that the applicable notice period is followed. The Finnish case on the importance of complying with the appropriate procedure when unilaterally amending material terms of employment, as an alternative to termination (EELC Case report 2017/8) reflects what the Finnish courts would have held in a similar case.

Subject: Terms of employment

Parties: Ms X – v – Mind Company

Court: *Cour de Cassation* (Supreme Court)

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1 Supreme Court, 13 March 2013, No. 11-28.916.

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