EELA EUROPEAN EMPLOYMENT LAWYERS ASSOCIATION

SUMMARY

2018/26 Unilateral changes to employment terms and conditions treated as redundancy in employment law (PL)

In 2017, the ECJ delivered its judgment in the Socha case (C-149/16). This judgment, about the Collective Redundancy Directive (98/59/EC), highlights the contradictions between the Directive and Polish law and demonstrates some of consequences such a judgment can lead to.

Introduction

In 2017, the ECJ delivered its judgment in the *Socha* case (C-149/16). This judgment, about the Collective Redundancy Directive (98/59/EC), highlights the contradictions between the Directive and Polish law and demonstrates some of consequences such a judgment can lead to.

First, we will set out the key characteristics of relevant EU and Polish law, following which we will consider the *Socha* judgment and its fallout for Poland, explaining just how seriously national practice can be affected by ECJ case law.

Collective Redundancy Directive

The procedures and practical arrangements regarding collective redundancies are governed by Directive 98/59/EC. The Directive covers the obligations on employers in relation to the competent authorities of the EU Member States, as well as the obligations of Member States towards the EU.

Article 1(1)(a) of the Directive defines a collective redundancy as "dismissals effected by an

employer for one or more reasons not related to the individual workers concerned", where certain quantitative requirements must be met. Nonetheless, the Directive applies to any termination, either unilaterally or with mutual consent, that is not related to an individual worker. Note that it does not include the expiry of employment contracts (Article 1(2)(a)).

Polish Employment Law

Collective Redundancies

In Poland, the Collective Redundancy Directive has been transposed by means of the Employment Termination Act (ETA).[1] Insofar as relevant for this article, it applies to the employer who is employing at least 20 employees, including the termination of fixed-term contracts (in contrast to what it says in Article 1(2)(a) of the Directive). Article 1(1) of the ETA expressly provides that the provisions of the act apply if an employer employing at least 20 employees terminates employment relationships for reasons not attributable to employees, by notice given by the employer, as well as by an agreement between the parties, if in the period not exceeding 30 days the redundancy covers at least: 1) 10 employees, when the employer employs less than 10 employees, 2) 10% of employees, when the employer employs at least 100, however less than 300 employees, 3) 30 employees when the employer employs at least 300 employees or more – further called the "collective redundancy". Article 1(2) of the ETA provides that the numbers referring to the employees referred to in paragraph 1, include employees with whom employment relationship is terminated under the collective redundancy regime, on the initiative of the employer under the agreement between the parties, if it concerns at least 5 employees. Article 1(2) of Directive 98/59/EEC clearly reserves that it does not apply to redundancies effected under the fixed term contracts of employment concluded either for limited period of time or for specific tasks except where such redundancies take place prior to the date of expire or completion of such contracts.

Dismissals for personal (individual) reasons not attributable to employees are governed by the Polish Labour Code (LC).

There are various differences between dismissal under the ETA and the LC. For example, the LC provides employees who have been unfairly dismissed with the option to claim either reinstatement or compensation. By contrast, employees dismissed under the ETA have fewer options. As the ETA provides for union consultation in line with the Directive, if the union's consent has been obtained, the only remaining basis for a claim is whether the procedures in relation to the social plan have been properly followed.

A second difference is that an employee whose contract has ended under the ETA regime is

entitled to severance of up to a three months' salary. Article 8(1) of ETA differentiates the amount of monetary compensation (severance payment) depending on the duration of employment. An employee is entitled to severance payment in connection with the collective redundancy amounting to 1) one month remuneration, if the employee was employed by a given employer for less than two years; 2) two-month remuneration, if the employee was employed by a given employer for 2 to 8 years; 3) three-month remuneration if the employee was employed by an employer for more than 8 years. The severance payments are determined in accordance with the rules applicable to the calculation of cash equivalent for holiday leave (Article 8(3) of ETA). The amount of the severance payment cannot exceed the amount of 15 times the minimum remuneration determined on the basis of separate laws applicable on the date of termination of employment (article 8(4) of ETA).

An employee dismissed under the LC is not entitled to severance unless the dismissal was procedurally incorrect and hence wrongful, in which case, s/he may claim compensation of between two weeks and three months' salary.

Lastly, the role of the unions under ETA is noticeably larger than under the LC. The ETA requires, in principle, that the employer and the unions reach agreement on a social plan (although there are provisions for situations in which they fail to do so). Under the LC, the unions do have the right to advise an employer about proposed dismissals, but their advice is non-binding.

Unilateral amendments

The LC provides various options for changing employment contracts unilaterally (after a notice period). For example, an employer can change salary and working time unilaterally and the employees can either accept or refuse the change. If an employee refuses, his or her employment contract terminates following the notice period but the employee can challenge this in the same way as if s/he had been dismissed unfairly. For this reason, employers cannot be too cavalier about changing employment conditions.

Another option for employers is to make temporary, minor changes to non-significant provisions, as these kinds of changes cannot be challenged by employees. Even better, of course, the employer could try to obtain the consent of the employees.

ECJ Socha judgment

The employer in the *Socha* judgment was Falkiewicz Specialist Hospital. It notified its employees of some amendments to their pay and conditions of work, as the hospital had been

operating at a loss for several years. For that reason, payments to employees needed to be partially reduced. The amendments were intended to save the hospital from liquidation. In particular, the period for obtaining a length of service award was changed.

The Polish court was uncertain as to whether the hospital had genuinely intended to amend the employment contract or had wished to terminate the employment of the three employees who refused to accept the notice of amendment. Therefore, the Polish court referred the following question to the ECJ:

"Must Articles 1(1) and 2 of Directive [98/59], read in conjunction with the principle of the effectiveness of law, be interpreted as meaning that an employer who on account of a difficult financial situation issues notices of amendment of pay and working conditions in relation to employment contracts (notice of amendment) only as regards conditions of remuneration is required to apply the procedure arising from that directive, and also to consult on those notices with company trade union organisations, even though national law – Articles 1, 2, 3, 4, 5 and 6 of the [ETA - author] – contains no rules on notices of amendment of employment contract conditions?"

The crucial point in the proceedings concerned the interpretation of the earlier *Pujante Rivera* case (C-422/14). In that case, the ECJ had found that the Directive must be interpreted as meaning that the fact that an employer - unilaterally and to the detriment of the employee - makes significant changes to essential elements of his employment contract for reasons not related to the individual employee concerned falls within the definition of 'redundancy' for the purpose of the first subparagraph of Article 1(1)(a) of the Directive.

In the case at hand, the hospital took the view that it had only made minor changes, in order to prevent decisions that would lead to termination of the employment contracts. But according to the ECJ, the hospital should have taken into account the possibility that some employees would not accept the changes, and therefore their employment contract would be terminated. On that basis, the hospital should have started a consultation procedure when it was considering the changes, with the aim of avoiding any terminations – which, of course, is the idea behind consultation procedures.[2]

Implications of judgment

In the case of *Dansk Metalarbeiderforbund* (C-284/83), the ECJ held that the (then applicable) directive did not apply to the resignation of workers, even after the employer had suspended payment of their salaries (paragraphs 8-11). But this approach seems no longer sustainable, as

under the new ruling, employees who decide to terminate their employment contract (by refusing an offer) do so within the scope of the Directive.

The consequences of this approach are significant in Poland. The judgment makes clear that written notice of a unilateral amendment could trigger a consultation procedure within the meaning of Article 2 of the Directive, even though no dismissal is planned and the possibility that a unilateral amendment to pay or other essential terms leads to termination if an employee refuses the offer is at best notional.[3]

This gives rise to various questions. In a number of cases, the ECJ has distinguished between 'redundancies' and 'termination (...) for reasons (...) related to the individual worker.' This distinction (in Article 1(1)(a)) is crucial to how the Directive is applied, but it remains unclear how a notice of amendment should be treated. The intended change may have nothing to do with dismissal, yet could conceivably still lead to it. Does this really mean that it should be treated as a 'redundancy' within the scope of the Directive?

As the ECJ held in *Pujante Rivera* (C-422/14), it is for the national courts to classify the scope of amendments made by employers. The *Socha* judgment clarifies that minor changes may now also count under the Directive, which could be problematic in relation to very minor amendments. By Article 42(3) of the LC, a subsequent termination following a *minor* amendment is considered to be made with mutual consent and is therefore not regulated under ETA - but this now turns out to be in conflict with EU law.

The ECJ also impacts the consultation procedure with the unions. Prior to the judgment, individual dismissals following a unilateral amendment only required a non-binding union consultation, but if the amendment needs to be treated as a (potential) collective redundancy within the scope of the Directive, that would mean it is in principe necessary – except in a situation where quantitative criteria for the redundancies were not met – to reach agreement with the unions. The unions will therefore have a bigger role from now on.

Another important difference lies in the severance pay to which an employee is entitled. As discussed, the maximum severance under the ETA amounts to 15 months' salary versus a maximum of three months under the LC. The consequences are therefore enormous.

Moreover, there are differences between the EU and Polish definition of collective redundancy. Whereas the Directive counts terminations of employment contracts for one or more reasons not related to the worker, the ETA counts only dismissals for which the only

reason is not to do with the intent and behaviour of the individual worker.

Furthermore, as termination of employment contracts in case of a collective dismissal cannot take place earlier than after the applicable notification and consultation requirements have been met, timing issues may come into play as well.

As mentioned before, since an employer must offer new working conditions before an employment contract can be terminated, One must look at the employer's intentions and decide whether the real aim is to change the terms of the contract or terminate the employment. In terms of the latter, under Polish case law, the ETA applies to any dismissals arising from this.[4] In the same way, the Polish Supreme Court has held that while a reorganisation to improve economic efficiency could qualify as a collective redundancy, the fact that the employee rejected another job led to the conclusion that the termination in question was not within the scope of ETA.[5]

Conclusion

It seems to me that with this decision, far from improving the position of employees, the Supreme Court may have removed a layer of employee protection in practice. It has introduced a rule that the employee's right to ETA-based (and, hence, higher) severance compensation is dependent on whether s/he agrees to any changes to be made by the employer, regardless of the nature of those changes. This could enable employers to offer 'bad' unilateral amendments and while the labour courts are then required to work out the 'real' reason for redundancy, employees may struggle to prove that they had no choice but to reject the unilateral amendments and that the ultimate motive was to initiate a termination. Higher compensation may be available under the ETA, but that doesn't mean it will be easy to obtain.

The judgments of the ECJ presented in this article show how problematic the intervention of the ECJ can be in matters regulated by national labour law regulations in individual Member States.

1 Journal of Laws of 2003, item 844; 2016, item 1474; 2017, item 2181; 2018, item 1608.

2 Compare Akavan Erityisalojen Keskusliitto AEK et al., C-44/08).

3 Compare AET, C-44/08, in which a consultation procedure also had to be started before the actual decision to make people redundant was taken.

4 Judgments of Polish Supreme Court: 16 November 2000, I PKN 79/00, OSNAPiUS 2002, No. 10, item 240; 16 November 2001, I PKN 521/00, OSNP 2003, No 10., item 244.

5 Judgment of Polish Supreme Court of 14 December 2016, II PK 281/15. This judgment was discussed in M. Wujczyk, 'Supreme Court rules on scope of collective redundancy procedure', EELC 2017/48.

Creator: European Court of Justice (ECJ)
Verdict at: 2017-09-21
Case number: C-149/16