EELA EUROPEAN EMPLOYMENT LAWYERS ASSOCIATION

SUMMARY

2018/38 Collective Redundancies: Failure to notify Employment Service cannot be healed by postponing termination (AU)

The Austrian Supreme Court has held that the employer must notify the Employment Service (AMS) when it is contemplating collective redundancies, even if they are carried by mutual agreement. The duty of notification is triggered if the employer proposes a mutual termination agreement to a relevant number of employees, provided the offer is binding and can be accepted by the employees within 30 days. If the employer fails to notify the AMS, any subsequent redundancies (or mutual terminations of employment occurring on the employer's initiative) are void, even if effected after 30 days.

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Facts

The plaintiff was employed at the Austrian branch of an international insurance broker. On 2

October 2013, the managing director informed staff that owing to a decline in sales, redundancies would follow. At this point, no numbers or names were mentioned. In the following weeks, the managing director held talks with the works council and the department heads. In mid-October 2013, he presented a list to the works council containing the names of eight employees to be made redundant. He offered to negotiate a redundancy package with the works council and after several meetings the works council approved the package. During the negotiations one employee resigned, leaving seven to be made redundant.

On 30 October 2013, individual meetings were held with six of the employees in which they were offered an agreement with a severance payment in addition to their statutory entitlements, and a special "early completion bonus" to be paid if they accepted the offer by 20 November 2013. The seventh employee on the list got the same offer in a meeting held at the beginning of November 2013. No one was dismissed at the meetings but it was made clear to them that dismissals would follow if they did not sign up. One employee signed the agreement on 12 November 2013, but the remainder did not.

On 28 November 2013 the employer served notice on two employees and on 19 December 2013, did so to the plaintiff and three other employees. The notice periods of these six employees were to run until 30 June 2014. On 13 November 2013 another employee, who had not been on the list of seven, was offered a mutual termination agreement, which she signed on that date.

The plaintiff brought a claim to the employment court in Vienna, asking that his dismissal be rendered ineffective because the AMS had not been notified.

Background

In Austria, the Collective Redundancies Directive (98/59/EC), has been implemented by amendment of section 45a of the Labour Market Promotion Act (*Arbeitsmarktförderungsgesetz*, the 'AMFG'). If the employer plans to carry out dismissals exceeding a certain number of employees (i.e. a collective dismissal) the Employment Service must be notified in advance. This procedure is generally referred to as the 'redundancy notification procedure' (*Kündigungsfrühwarnsystem*). Its purpose is to give the Employment Service, the employer and the works council time to explore any ways to avoid letting the employees go. Generally speaking, the thresholds that apply are based on the number of employees working in an establishment. Any mutual agreements about how the employment relationships can be ended are taken into account in establishing whether the relevant threshold has been exceeded. The thresholds are:

21-99 employees: at least 5 employees
100-600 employees: at least 5% of the workforce
more than 600 employees: at least 30 employees
irrespective of the size of the establishment: at least 5 employees aged over 50.

If the employer fails to notify AMS at least 30 days before the first dismissal is declared, the collective dismissals are void. A copy of the notification must be forwarded to the works council, which must also be consulted on the matter.

Judgment

The Supreme Court ruled in favour of the plaintiff.

At the start, the Court reiterated the provisions of Austrian law regarding notification to the AMS (section 45a, AMFG). It stressed that the duty to notify was triggered as soon as an employer contemplated terminating the number of employment relationships that reached the relevant threshold, within 30 days. This was necessary to enable the AMS to fulfil its statutory duties in connection with mass redundancies. With reference to established case law (but not the Directive) the Court confirmed that mutual termination agreements count towards the threshold if they are initiated by the employer.

In contrast to the Court of Appeal, the Supreme Court held that the employer had clearly demonstrated its intention to terminate the relevant number of employment relationships within 30 day, when it offered seven employees mutual termination. In view of the Supreme Court, the fact that the employer was willing to pay an early-completion bonus to any employees who signed by 20 November 2013 (i.e. in less than 30 days), was a sufficiently clear indication of that intention. However, as the AMS was not notified, the terminations were void.

Commentary

Article 1(1)(b) of the Directive provides when calculating the number of redundancies, terminations occurring on the employer's initiative for reasons not related to the individuals, must be counted if there are at least five redundancies. With this judgment the Austrian Supreme Court has confirmed earlier decisions (RS0053050) holding that mutual termination agreements initiated by the employer counted towards the threshold. Unlike in the Directive, the Court did not require a minimum number of redundancies.

However, in case of non-compliance with those rules Austrian law explicitly refers only to dismissals (*Kündigungen*), which shall be void if they are declared to the employees concerned before or within 30 days after the AMS has been notified (section 45a(5), AMFG). For this reason, it has been uncertain in practice whether mutual termination agreements could also be declared void. In this decision, the Supreme Court has made it clear for first time that mutual terminations are also void if the notification procedure is not followed (although this guidance was *obiter*, as in the case at hand, the plaintiff had been dismissed).

The decision of the Supreme Court was based on a purposive interpretation of the law. However, the Court did not appear to notice that the plaintiff was dismissed after the 30-day-period during which the terminations were originally intended to occur had passed. In such a scenario, in my view the dismissal of the plaintiff should not be considered void unless the threshold was also exceeded in this new 30-day timeframe, taking into account all (contemplated or effected) terminations on the employer's initiative during this period. After all, the Court confirmed earlier case law to the effect that the employer can lay-off employees in stages, in order not to exceed the threshold.

Comments from other jurisdictions

Bulgaria (Ivan Punev, DKGV): The Bulgarian Labour Code (LC) provides two separate grounds for termination of employment with mutual consent – Article 325(1)(1) and Article 331. The main difference between the two is the following:

The termination under Article 331 is mutual consent termination initiated by the employer with a termination offer provided to the employee (which the employee can decide to accept or reject). The law provides for mandatory payment of compensation to the employee of not less than four times the employee's last gross month's pay (in addition to any other payments due upon termination, e.g. pay until the termination date, pay for unused paid annual leave, etc.). By contrast, termination under Article 325(1)(1) does not provide for severance pay and there are no mandatory rules that the employee can use to initiate it.

The Bulgarian courts and authorities have held in their practice that termination upon mutual consent of the parties pursuant to Article 325(1) does not count towards the threshold for a collective dismissal. Conversely, the termination of employees under Article 331 does count towards those thresholds.

Even so, it should be noted that failure to follow the collective dismissal requirements and procedure (including collective consultations) does not affect the legality of the individual

terminations, though it may result in administrative sanctions for the employer.

Czech Republic (Anna Diblíková, Noerr s.r.o.): The Czech Labour Code seems to be (for once) quite clear on this topic.

In line with the Directive it stipulates that if there are at least five redundancies being carried out, the employer must also count all mutual terminations for the same reasons agreed in the relevant 30- day period. This means that if all the dismissals are done via a mutual termination, the collective redundancy procedure can be avoided. These mutual terminations do not have to be notified to the Czech labour office.

Secondly, Czech labour law does not explicitly declare the terminations are void if the notification obligation towards the Czech labour office is not fulfilled. In line with Article 4(1) of the Directive, breach of this obligation means that the employment relationship continues until the notification obligation has been adhered to. The employee may decide not to insist on this prolongation, with the effect that employment relationship would terminate after lapse of the standard notice period.

Lastly, in contrast to Austrian law, this does not apply to mutual terminations. In those cases, non-compliance with the notification obligation is disregarded and they terminate on the agreed date.

Belgium (Peter Pecinovsky, Van Olmen & Wynant): In Belgium an employer wishing to start a collective redundancy procedure must notify the Director of the sub-regional employment service and send a copy of the notification, including specific data, to the federal employment service. The staff representatives must also be given a copy of the notification. An individual complaint by an employee for non-compliance by the employer is possible, but only where the staff representatives have objected that the employer has failed to comply with its information and consultation obligations within 30 days of the notification. The fact that the teminations may be mutual does not have affect this complaints procedure. The sanction for an incomplete or incorrect notification can be the suspension of the notice term or the reintegration of the employee in the company, if the employee is already no longer working there. However, the employer can refuse to reintegrate the employee and pay additional compensation instead.

Germany (Paul Schreiner and David Meyer, Luther Rechtsanwaltsgesellschaft mbH): According to the German Dismissal Protection Act (KSchG), employers must report collective redundancies to the employment agency to be in compliance with section 17 KSchG. Dismissals without prior notification are regarded void, as in Austria. The employer must notify the relevant German Employment Agency if certain thresholds for dismissals are

exceeded within 30 days. The thresholds are similar, but a bit lower than those in section 45a of the Austrian AMFG.

Due to express legal provisions in section 17(1) KSchG, mutual agreements made on the employer's initiative count as redundancy. This provision directly results from Article 1(1)(b) of Directive 98/59/EC. But unlike in Austria, the 30-day period is not calculated based on the decision of the employer, but the date when notice is given, or rather, the date the mutual agreements are made. This effectively allows the employer to carry out collective redundancies in waves.

However, it is not entirely clear whether mutual termination agreements are void if the notification was either not made or was done incorrectly. The previous case law of the Federal Labour Court considered agreements ineffective unless notification was made (decision of 3 March 1999, 2 AZR 461/98). It stated as well that an employee may forego the protection resulting from missing notification, but not by means of termination agreement itself.

A newer decision by the ECJ (*Junk* decision from Jan 27 2005, C-188/03) has affected the German Court's jurisprudence, and so it is possible that it may abandon its former stance. The issue is that under German labour law, the notification has to be made before a mutual termination agreement is concluded. However, there is no reason that we can see why employees should only be able to forego this after concluding the termination agreement because the employee is expressly agreeing to the termination.

In practice, if the number of dismissals and mutual agreements is likely to exceed the thresholds, the risk can be reduced by issuing a precautionary notification.

Croatia (Dina Vlahov Buhin, Schoenherr): Croatian law expressly provides that redundancies carried out based on mutual termination initiated by the employer fall within the scope of collective redundancies. Specifically, Croatian law states that an employer that (i) within 90 days (ii) will make at least 20 redundancies (including terminations for business reasons and agreements between the employer and the employee proposed by the employer) (iii) out of which at least five employment contracts are for business reasons, must consult with the works council, with a view to reaching an agreement aimed at avoiding redundancies or reducing the number of employees affected.

The employer must also notify the Croatian Employment Service of the consultations at least 30 days before the employees are terminated. Failure to consult with the works council results in the redundancies being void. This is not the case if the employer fails to notify the Croatian

Employment Service about the consultations. In this respect, Croatian courts may have decided the case differently from the Austrian courts (as it seems that the works council was consulted, but the Employment Service not notified).

But the Croatian courts would probably have reached the same conclusion as the Austrian courts with regard to the fact that if an employer contemplates over a certain number of redundancies, it becomes a collective redundancy subject to the consultation and notification procedure prescribed by law, and failure to consult the works council results in the terminations being void. Note that even if the mutual termination agreement does not expressly say it was entered into on the initiative of the employer, this could probably be proved by the parties if there was a claim.

Finland (Janne Nurminen, Roschier, Attorneys Ltd.): In Finland, the Collective Redundancies Directive was implemented in the Act on Co-Determination within Undertakings (334/2007, as amended). According to that Act, the obligation to conduct consultations is triggered when the employer contemplates measures that might result in redundancy, lay-off or a shift to part-time work of an employee on collective grounds. The purpose of the consultations is to discuss, for example, the need for and selection for the redundancies. However, after fulfilling the statutory consultation requirements, the employer may take a decision on the matter unilaterally.

If an employer is considering any such measures, it must issue the invitation for consultations at least five days before the consultations begin. The employer must ensure to invite the public unemployment services and if it is contemplating at least ten redundancies, it must coordinate with the public unemployment services to ensure employment services are available to the affected employees.

Although the Act specifically stipulates that the employer must issue an invitation for consultation when contemplating redundancies, in certain rare situations the employer might try to reach an agreement on termination without doing this first. If so, there will be no invitation to forward to the unemployment services. But failure to notify the public unemployment services does not lead to the redundancies being void. It is regarded as a procedural error within the consultation process, and may result in the right to claim compensation. If this is the only error in the consultation process, the amount awarded would probably be quite small.

Subject: Collective redundancies

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Parties: W*** K*** (employee) – v – C***SA (employer)

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