EELA EUROPEAN EMPLOYMENT LAWYERS ASSOCIATION

SUMMARY

2021/2 Warning strike timing (HU)

This case involved an employer who claimed that a trade union organised an unlawful warning strike. The Curia (the highest judicial authority in Hungary) found that the trade union violated its obligation to cooperate with the employer according to Act No. 7 of 1989 on Strikes. The Curia and also the Regional Courts made some clear points on the question of the timing of a warning strike. The employer must be notified of a planned strike in sufficient time, which requirement also applies in the case of warning strikes. The time can be considered as sufficient if the employer is able to fulfil its rights to protect its property, prevent damage resulting from the strike, to carry out its duties to protect life and property, and to organise work accordingly. Failing this obligation, the warning strike is unlawful. The notice shall state the date and time that such action will commence.

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Legal background

Act No. 7 of 1989 on Strikes (the 'Strike Act') contains the applicable main rights and obligations during strike action. According to the Strike Act it is possible to organise a so-called warning strike in Hungary. The ability to organise a warning strike exists in only a few other EU Member States, for example Bulgaria, Cyprus, Estonia, Germany, Lithuania, Poland and Romania. Parties have to conduct conciliation procedures before strike action and must try to harmonise their positions. A warning strike may be held during conciliation procedures, but it may not exceed two hours. The Strike Act also determines that, in the course of exercising the right to strike, employers and employees shall cooperate with each another. The abuse of the right to strike is forbidden. A strike – such as a warning strike – is unlawful if one of the parties violates the obligation of cooperation.

Facts

There were two 'representative' trade unions (they had the possibility to conclude collective agreements) at the employer's car company. The employer had started a longer conciliation procedure with these two trade unions on the question of wages. The employer and one of the trade unions concluded an agreement on wages. The employer continued conciliation with the litigating trade union's strike committee. The idea of strike action came up during conciliation on 23 November 2016. By specifically referring to the parties' obligation to cooperate, the employer requested to be notified of a strike 48 hours in advance. The trade union sent an email to the employer's executives at 10:31pm on 23 November. It informed the employer that the conciliation had been unsuccessful and, therefore, there would be a warning strike between 00:30-2:30am on 24 November. According to the notice, nearly 80 people went on strike in the given period (around 1,200 people were working during that night shift).

The employer stated that the warning strike was unlawful. The employer argued that it had a legitimate interest in fulfilling its obligations to take action during a strike. If the strike is unannounced or unexpected, then measures cannot be taken to mitigate the possible consequences and damages. Therefore, according to the employer, the defendant had violated the duty to cooperate and abused the right to strike. As the employer discussed, a notice sent to executives overnight just two hours before the warning strike, is illegal and violates the duty to cooperate.

According to the trade union, the warning strike did not cause any disruption to the employer's operations. The defendant argued that the notice period was sufficient because of the small number of employees (80 out of 1,200) participating in the strike and only three areas of the company were affected, confirming the fact that the employer had sufficient time

to prepare for the strike. The trade union stated that 1 hour and 59 minutes should have been sufficient for the employer as daily absences – because of illness or any other reasons – can routinely be handled for a higher number of employees.

Judgment

The Curia found that the Strike Act does not contain any rules regulating when exactly a strike has to be announced prior to its commencement and how precisely this announcement should be done. The Hungarian Constitutional Court had already examined this question [30/2012. (VI. 27.) order] before, but it did not find the applicant's argument that lacked precise rules on the timing and mode of announcing a strike well-grounded.

The Curia explained that notification is part of the obligation to cooperate, although it is not separately named. Therefore, the party who exercises the right to strike shall inform the other party of all relevant circumstances in a timely manner and in such a manner to exercise its rights and fulfil its obligations. The announcement of a warning strike just two hours before the strike commences fails to comply with the general principle of law requiring the parties to cooperate, no matter whether the strike in fact caused any disadvantage to the employer. The number of participants in the strike and the relatively low number of areas directly affected by the strike were also irrelevant. Therefore, the impact of the strike and the number of concerned workers is not necessary to establish the legality or illegality of the strike.

Commentary

The timing of a strike and the prior notice about it to the employer touches upon the broader question of how to set reasonable conditions that have to be fulfilled in order to render a strike lawful, which conditions should not, at the same time, place a substantial limitation on the means of action open to trade unions. Based on the above decision, it seems that Hungarian courts follow a process-based and not a damages-based approach. The Curia importantly concluded that no matter whether due to its timing and selection of affected areas the warning strike did not in fact cause any disadvantage to the employer, a strike is still an extraordinary measure in collective labour law, and as such it should always meet a minimum criteria. It is also important to note that the ILO's Committee on Freedom of Association held in case No. 2509 (Romania; complaint date: 30 July 2006) that a 48-hour strike notice was a reasonable term.

Comments from other jurisdictions

Germany (Nina Stephan, Luther Rechtsanwaltsgesellschaft mbH): In Germany, the right to strike is a constitutional right (Article 9(3) of the German Constitution, 'Grundgesetz') and a

legitimate instrument for trade unions to enforce the conclusion of collective bargaining agreements. A warning strike according to case law of the German Federal Labour Court (BAG) means a brief suspension of work in connection with ongoing collective bargaining and is also part of the right to strike. This shall apply at least if the strike serves to enforce the commencement of collective bargaining or to revive stalled collective bargaining. However, strikes are only legally permissible if they are conducted in a legitimate form. Otherwise, the party affected by the strike may be entitled to claim damages against the party that initiated it.

According to German law, the legal requirements for a strike are:

It is initiated by a collective bargaining party, i.e. trade union(s).
The subject of the strike is an aim that can be regulated by collective bargaining.
There is no obligation to keep the peace, i.e. there is no collective bargaining agreement that is (still) effective.
The strike must be reasonable. This especially means that the strike may only be initiated after all possible options for negotiation have been explored (so-called ultima ratio principle). This also includes, among other things, to attempt to negotiate.

These requirements are also applicable to warning strikes according to established case law. Already in 1988, the BAG found that warning strikes are not privileged compared to other forms of strike action.

Besides this, the decision to strike must be made public so that the employer has the possibility of becoming aware of the decision. Furthermore, it is essential that the decision indicates its author and when, where and to what extent the strike shall start. However, according to German case law, there is no obligation to notify the employer in advance of a strike, and in particular not for warning strikes. This means that in Germany strikes can also be initiated by surprise. It is therefore not unlikely that the German courts would have denied a violation of the law here due to lack of proper notice.

Having said this, especially for services of general interest, the German legal literature demands an obligation to inform the employer with sufficient notice prior to a strike. However, there is still neither a legal provision nor respective jurisdiction providing for such prerequisite.

United Kingdom (Richard Lister, Lewis Silkin LLP): As indicated in the report, the UK is not one of the countries whose law governing industrial action incorporates the concept of 'warning strike', but it is commonplace for employers and trade unions to engage in conciliation

procedures to resolve collective disputes on a voluntary basis. These are often conducted through Acas (Advisory, Conciliation and Arbitration Service), a publicly funded independent organisation that aims to promote better employment relations.

In addition, UK legislation prescribes quite onerous balloting and notification procedures for those organising strikes and other forms of industrial action. These include, in advance of the ballot, a requirement to provide the employer with certain detailed and specific information to the employer about the employees who are to be balloted and induced to strike. Then, after the ballot has taken place, the union must notify the employer and those balloted of the outcome as soon as reasonably practicable and provide certain categories of information about the result. Finally, official notice of the strike or other action must be given to the employer at least 14 days before it is due to start (seven days if the parties agree).

The purpose of these notification requirements has been described by the Court of Appeal as follows: "... to enable an employer to know which part or parts of its workforce were being invited to take industrial action, in order that the employer could (first) try to dissuade them and (secondly, and so far as unsuccessful in its first aim) make plans to avoid or minimise disruption and continue to communicate with the relevant part or parts of the workforce" (National Union of Rail Maritime and Transport Workers – v – London Underground Ltd [2001] IRLR 228).

Subject: Collective Agreements, Unions, Other Fundamental Rights

Parties: Car manufacturer company as plaintiff, trade union as defendant

Court: Curia (Hungarian Supreme Court)

Date: 19th September 2019

Case number: EH 2020.01.M1

Creator: Curia (Hungarian Supreme Court)
Verdict at: 2019-09-19
Case number: EH 2020.01.M1