EELA EUROPEAN EMPLOYMENT LAWYERS ASSOCIATION

SUMMARY

# 2017/8 The importance of complying with the appropriate procedure when unilaterally amending material terms of employment, as an alternative to termination (FI)

***<p>Following consultations with its employees in accordance with the Finnish Codetermination Act (334/2007), a company informed the employees that it would close down its current office premises and move its operations, including all of its employees, to another location. An employee, whose employment contract expressly stipulated the location of the old office as the fixed place of work, refused to transfer and did not arrive at the new place of work after the transfer. The company considered the employee's absence unjustified and terminated her employment with immediate effect. The Supreme Court held that an employer can, as an alternative to termination of employment, unilaterally amend material terms of employment provided it notifies the employees sufficiently clearly of the terms being amended, the time when the new terms would come into effect, the grounds for termination, and the consequences of not accepting the amendments.</p>***

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**Facts**

The Company had moved its operations to Kilpilahti in Porvoo and sold its previous office premises in Keilaranta, Espoo, where the employee ('A') had been working. The new offices were within 50 kilometres of the old ones. The move took place between 10 and 12 December 2010. A had been made aware of the change in work location during a briefing held on 15 June 2010. In addition, the Company had the employees sign a document (confirming the new place of work) on 24 June 2010. Further, A had been informed of the change to her workplace by means of an internal memo on 4 October 2010.

A, whose employment contract expressly stipulated the old location as her fixed place of work, had written a statement, dated 26 November 2010, addressed to the Company's management. In the statement she informed them of her refusal to transfer to the new place of work in Porvoo, since, she said, the employer had no right to unilaterally amend the employment contract terms regarding the place of work. A also requested advice from the Company on how to proceed after the Company's office premises had been moved to Porvoo. The Company provided A with a written answer, dated 15 December 2010. A did not arrive at the new office premises after the move on 13 December 2010 – and not even by 3 January 2011, which was the first official working day after the move. The Company considered A's absence from work unjustified and considered her employment terminated with immediate effect, as of 27 December 2010, in accordance with Chapter 8, Section 3 of the Employment Contracts Act (55/2001).

**Judgment**

A had claimed in the district court that the Company was obliged to pay compensation for not observing the notice period and for the groundless termination of employment or, in the alternative, compensation for neglecting its obligations under the Codetermination Act (334/2007). According to A, the Company was not entitled to unilaterally change the place of

work based only on its right to direct and supervise work. Further, A argued that the Company had not terminated her employment and that she had been, in accordance with her employment contract, at the disposal of the Company until 5 January 2011.

The Company asked the court to dismiss A's claims. According to the Company, A had been notified of the change of place of work by means of the notice she was given. As A had not arrived in Porvoo and, in the Company's opinion, had not given a valid reason for her absence, the Company was entitled to terminate A's employment with immediate effect. The Company also considered that the decision to move the office premises within 50 kilometres was within the scope of the employer's right to direct and supervise work.

Both the district court and the Court of Appeal of Helsinki found for the plaintiff. The Supreme Court concurred with the lower courts by confirming in its judgment on 11 November 2016 that the employer's right to direct and supervise work did not entitle it to unilaterally change the employee's place of work. As a rule, a unilateral amendment of material terms of employment is possible only by resorting to the termination grounds identified in Chapter 7 of the Employment Contracts Act (55/2001) and by observing the applicable notice period. In this scenario, an employer may terminate the employee's employment and then offer the employee a new contract with amended terms. Alternatively, the employer may unilaterally notify the employee about the changes, their effective date and the termination grounds clearly enough to enable the employee to understand the purpose of the amendment notice.

In this case, the Company had indisputable grounds for terminating the employee's employment, based on operational changes. However, the Supreme Court highlighted the importance of the appropriate procedure to be used when unilaterally amending material terms of an employment contract on termination grounds, given that the reason for the termination of employment has an impact on, for example, an employee's unemployment benefits and whether the employer is required to re-employ the employee. Further, in order to protect the employee rights, any notification that material terms of an employment contract are going to be amended must include sufficient information about the grounds for termination, the terms subject to amendment and when the amendments take effect, as well what happens if the employee does not accept the employer's 'offer'. In other words, the employee must be given an opportunity to weigh up the options and, if necessary, challenge the grounds for termination.

The Supreme Court's judgment confirmed the view taken by the lower courts: the Company had failed to expressly invoke the termination grounds (operational changes) as the reason for the unilateral change to A's place of work. According to witness statements, the Company had

told employees in the briefing on 15 June 2010 that no amendments to terms of employment or termination of employment would take place. The Company had not even said that the employees would be told about any change to the workplace, as an alternative to termination of employment. Similarly, the document that confirmed the change to the workplace that the employees signed on 24 June 2010, did not include any reference to termination grounds or to the notice period. The Court felt that the signing of that document could not be considered as acceptance of the unilateral change to the place of work. The Supreme Court confirmed that on the facts, the first time the Company mentioned its intention to change the place of work as an alternative to termination of employment, was no earlier than 15 December 2010 – in the Company's answer to A's written refusal to transfer. A's notice period had commenced from this date and ended on 15 June 2011. Consequently, the change regarding the place of work could not have become effective before 15 June 2011 which was the expiry date of A's six-month notice period.

The Supreme Court upheld the judgment by the Court of Appeal of Helsinki, which stated that the Company had no grounds to consider A's employment terminated as of 27 December 2010. Therefore the Company was obliged to pay A compensation for unlawful termination. The compensation awarded was equal to three months' salary, amounting to € 13,989.72. In addition, A was entitled to her salary for the six-month notice period, of € 28,072.70.

**Commentary**

The Supreme Court's judgment provides an interesting perspective on the assessment of redundancy grounds and the applicable procedure. The Finnish Employment Contracts Act implements the Collective Redundancies Directive 98/59. Although the question that was subject to the Supreme Court's ruling did not concern the consultation procedure for collective redundancies, it did concern the scope of the redundancy procedure. A comparable issue had been addressed previously by the ECJ in the case of Pujante Rivera – v – Gestora Clubs Dir SL (C-422/14). One of the preliminary questions in this ruling concerned the relationship between unilateral changes by the employer and the concept of redundancy. The ECJ confirmed in its ruling that a unilateral change by the employer to the material terms of employment to the detriment of the employee on grounds not attributable to the employee, can fall within the definition of 'redundancy' within the meaning of the first subparagraph of Article 1(1)(a) of the Directive.

From a national perspective, the first lesson to be learned from the Supreme Court's judgment is the confirmation it gave to the employer's right to amend material terms of employment based on grounds that would entitle termination of employment. Secondly, the case clarifies quite powerfully the importance of observing the correct procedure when making

amendments to material terms. Although the employer would not intend to terminate the employee's employment, the preconditions and procedure it must follow when proposing material amendments to the employee's terms is identical to that used for a real termination of employment. Thirdly, the case emphasizes the importance of clarity in communicating with employees. To conclude, if an employer wishes to make a unilateral amendment to the terms of employment, as opposed to terminating the employment, it is not only advisable but necessary to provide the employee with a written notice that contains all the required information, including the grounds for termination, the effective date for the changes and the consequences of refusal to comply.

**Comments from other jurisdictions**

Austria (Birgit Vogt-Majarek and Sophie Mantler, Kunz Schima Wallentin Rechtsanwälte GmbH): Based on the facts of the case and taking into account Austrian law and jurisprudence, the Austrian Supreme Court in our opinion would most probably decide that the employer was obliged to pay compensation for the notice period due to the unjustified termination, but would be entitled to terminate the employee based on the employee's refusal to relocate.

Austrian case law

OGH 9 ObA 51/99m, OGH 9 ObA 48/00z.

An extension of daily travel time of 30 minutes is considered reasonable

OGH 6 November 1997, 9 ObA 121/97b and OGH 14 September 1994, 9 ObA 133/94.

OGH 28 March 1996, 8 ObA 2018/96i.

If an employee refuses to work for a significant period without a legitimate excuse, this may justify summary dismissal. In the case at hand, the employee was entitled to refuse to work at the new offices, as the relocation would most likely have been regarded as unreasonable. Hence, the summary dismissal by the employer was unjustified.

However, beneath this background, the employer would have been entitled under Austrian law to terminate the employment relationship for business reasons. These would have been that the old office had closed down, the employee had refused to transfer and the employer could not be prevented from relocating its business premises.

Therefore, on the facts of the case at hand, termination with the option of altered conditions of employment (i.e. a new workplace) would have been possible. However, even if the employee

had agreed to the change, the employer would still have required the prior approval of the works council (if any) or the court and the employee would not have had to start work at the new location until this had been obtained.

Germany (Paul Schreiner and Jana Voigt, Luther Rechtsanwaltsgesellschaft mbH): In Germany, an employer can only unilaterally alter material terms of employment by way of termination with the option of reemployment on altered conditions. If the employee does not accept reasonable changes to the employment conditions the employment will end. The altered conditions will only take effect after the notice period has expired and provided the employee consents to the proposed changes.

Note that even though the employer has the right to instruct the employees about their employment, this only enables the employer to specify the kind of service the employee is obliged to provide. The right to give instructions does not allow the employer to unilaterally alter material terms of employment, i.e. change the contract itself. The material terms are usually remuneration, a job description (e.g. an employee engaged as physician cannot be instructed to work as a receptionist) and working hours.

Slovenia (Petra Smolnikar, Petra Smolnikar Law): By Slovenian law, the place of work can either be at one fixed workplace or at alternative locations and this is an essential condition of the employment contract. If the workplace changes, the only option for the employer is to terminate the employment contract and offer a new one. Note however, that there have been many cases in Slovenia of unlawful termination, where the employer has dismissed an employee for business reasons following a change to the workplace, but the employment contract had already allowed for work at an alternative location – meaning that termination was unjustified.

The employer's option to terminate and offer an amended contract is set in Article 91 of the Slovenian Employment Relationship Act ('odpoved pogodbe o zaposlitvi s ponudbo nove', the 'ZDR-1'). Article 91 does not allow the employer to make essential changes to the contract unilaterally and simply communicate them to the employee. In this respect, Slovenian law is different from Finnish law. Any unilateral communication would be deemed as a proposal to amend the employment contract and for them to be implemented would require the employee to agree to the changes.

Employee protection is further guaranteed via a series of provisions in the ZDR-1, depending on what the employer offers in the new employment contract. First, the new contract must be completed within 15 days following termination. If the employee is offered adequate employment (e.g. with shorter travelling time than before), the employee will have no right to

severance pay, but still retains the right to challenge the termination. If the employee is offered something inadequate (e.g. a new workplace that is longer than a three-hour drive both ways), the employee may insist on proportionate severance pay. As in Finland, the employer must observe the proper procedures when considering termination.

Subject: Miscellaneous; unilateral amendment to material terms of employment

Parties: Neste Jacobs Oy – v – Nana Lahtinen

Court: Korkein oikeus (Supreme Court of Finland)

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