2016/17

Court order for reinstatement not satisfied by placing employee on garden leave (LI)

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Summary

An employer was ordered to reinstate an employee they had wrongly dismissed. The employer reinstated him, putting him back on the payroll, but simultaneously placed him on involuntary garden leave. The employee sought and got a second court order that this was not real reinstatement. The employer was ordered to allow the employee to return to the office and perform his habitual work there on pain of a penalty of € 100 for each day of non-compliance. The employer challenged this penalty, but without success.

Facts

Mr U was a senior executive at a company called UAB Samsonas. He was dismissed. He challenged the dismissal successfully. The court ordered the employer to reinstate him. The bailiff served the order on the employer on 4 February 2015. That same day, the employer "reinstated" Mr U by putting him back on the payroll. However, he was prohibited from coming in to the office and performing his work. He was suspended ("garden leave"). The reason for the suspension was none other than the reason he had been dismissed, which the court had found to be a wrongful reason. The bailiff, acting on Mr U's instructions, applied to the court for an order against the employer to allow Mr U to come in to the office in order to perform his normal duties there, as before his dismissal. On 10 March 2015, the court granted this request, rejecting the employer's argument that suspension is not incompatible with reinstatement and that Mr U's rights had not been violated, merely restricted. The court ordered the employer to allow Mr U to perform his work in the usual manner on pain of a penalty of € 100 for each day of non-compliance. The employer appealed without success. He appealed to the Supreme Court.

Judgment

The central question for the Supreme Court was whether an enforceable judgment to reinstate an employee to his office may be considered exercised where the employer issues an order to reinstate, but simultaneously suspends the employee from his duties for the same reasons as the dismissal which a court held to be unlawful.

The Supreme Court held that enforcement of a judgment for wrong dismissal and an order for reinstatement implies that the employment relationship existing before the dismissal should be reinstated with the meaning of the actual notion of the employment contract as laid down in Article 93 of the Labour Code. That Article provides, *inter alia*, that the employer shall provide the employee with the work as agreed in the employment contract. If the employment is partly restored, for instance where the employer pays salary without granting the work agreed in the employment contract, the judgment for reinstatement is considered fulfilled partially. In this case, where the employer, in issuing an order to reinstate the employee to his office, ordered the suspension of the employee's duties based on the same factual grounds as the dismissal, which had been recognized as unlawful, the courts needed to assess whether the employer had sought to avoid execution of the judgment and whether the employer's behavior was not an abuse of the employee's statutory right.

The Supreme Court held that the lower instance courts had performed this assessment correctly. It agreed with Mr U that his employer had not fully complied with the judgment to reinstate him to his former office. The Court emphasized that the suspension was based on the same cause and arguments as the order to dismiss which had been recognized illegal, therefore the penalty to the employer had been imposed justly.

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Commentary

I have difficulty with this judgment. An order to reinstate an employee who has been dismissed goes against the basic freedom to decide whether or not to enter into an agreement with a certain person. Obligating an employer, not only to enter into a new employment contract with a former employee (which is what a reinstatement order does), but also to actually admit that former employee to its premises and to provide him with work, seems to me to breach an employer's fundamental rights.

On a more practical level, the Supreme Court did not hold that suspension of an employee as such is prohibited. It merely held that in this particular case suspension did not constitute full compliance with the order for reinstatement. The employer in this case could have resolved the situation by suspending the employee for a different reason than the reason it had given for the previous dismissal. Had the employer done that, I consider it likely that the courts would have found in its favour.

Comments from other jurisdictions

Belgium (Isabel Plets): The two main elements of this judgement do not exist in Belgian labour law. The first is that reinstatement is normally not a sanction for unfair or irregular dismissal, except where a 'protected' employee (a (candidate) employee representative in a works council or a health and safety committee) is dismissed. With this one exception, the sanction for an irregular or unfair dismissal is purely financial. The sanction can take the form of a severance payment and/or other compensation.

The second element that is alien to Belgian law is that involuntary garden leave is not possible. Garden leave can only be applied if both parties agree.

Germany (Nina Stephan): In contrast to Lithuanian legislation, an employee in Germany is not only entitled to reinstatement in the case of a wrongful dismissal, but is also entitled to continued employment during an action against unfair dismissal. Apart from that, the decision of the Supreme Court of Lithuania corresponds to German legislation in several respects.
First, an employee's claim for continued employment implies employment under unchanged working conditions. Moreover, German legislation does not allow the employer to suspend an employee, even with continued payment of his monthly salary, unless the employer's reasons for a release trump the employee's right to work.
Often, a claim can take several years until the highest court has delivered judgement. An employee who has not worked for several years in his trained occupation, will lose his competences and it becomes increasingly difficult for him to find employment. As a result, actions against unfair dismissals without the opportunity of continuous working experience would make it impossible to find a new job. Because of that, continuous employment is necessary for the professional future and the career of a person.
Furthermore, German legislation allows the employee to enforce the right of continued employment. Where an employer continues to violate an employee's rights, the German courts have consistently recognized the legitimacy of threatening financial sanctions for each day of non-compliance.
This applies irrespective of whether the employer suspends the employee again for the same reason or for a different reason. A unilateral suspension which prohibits the employee from performing his work is only possible in exceptional cases. It is a strong breach of the personal rights of an employee, which German legislation tries to protect. Therefore, the court usually will order coercive measures, regardless of the reason of suspending the employee contrary to his obligation, to help the employee enforce his rights.

Latvia (Andis Burkevics): Latvian law also provides that an employee whose dismissal has been anulled by a court must be reinstated in his/her previous position. In practice, this means that the employee's employment continues on the same terms and conditions as before, there being no need for a new contract.

It is likely that a Latvian court, as in the judgment reported above, would have ruled that suspension from work for the same reason that the employee was wrongfully dismissed is illegal. However, in that case, the employee in Latvia would have to challenge the legality of the order suspending him/her from work. It is unlikely that, in circumstances where the employee has been reinstated in his/her previous work (i.e. the judgment has been enforced) and on the same day suspended from work (for whatever reason), the employee could claim that the employer has in fact failed to comply with the judgment ordering reinstatement.

Further, Latvian labour law provides that if an employer has delayed the execution of a judgment regarding reinstatement of an employee in his/her previous work, the employee shall be paid average earnings for the whole period of delay from the date of the judgment until the day of its execution.

Also, freedom to enter or to not enter into a contract is not absolute and can be restricted if needed in the interest of protection a weaker party, i.e. the employee. For example, the Latvian Supreme Court has held that the Latvian State Labour Inspectorate has the right to impose on a company a penalty for concluding a self-employment service contract with a person in circumstances where the relationship was *de facto* one of employment (even though the individual in question had not objected to his self-employed status).

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Romania (Andreea Suciu): It is interesting to see that Romania is not the only jurisdiction that allows reinstatement of employees in case a court holds their dismissal to be void.

The Romanian Labour Code provides that the court which ordered cancellation of a dismissal shall, if so requested, order reinstatement of the employee in his or her previously held position (*restitutio in integrum*). In such a case, the employer must reinstate the employee, even though it may be hard to resume the employment relationship without resentments and confrontations.

The Romanian Constitutional Court has, in the course of many years, ruled several times that a court order to reinstate an employee does not impede in any way the employer's right to property. Moreover, without reinstatement, a violation of an employee's right to work would not be remedied and there would be no way to ensure employment security.

What the Labour Code has failed to regulate is the scenario where a reinstatement is objectively impossible, for example where, prior to the final court ruling, the employment terminates by law, the employee loses the requirements needed to legally exercise his previously held position, or the company or the relevant branch has ceased to exist. Thus, in the absence of any express legal provisions, the doctrine and the courts have no other option but to turn to the provisions of the Romanian Civil Code as well as to ILO Convention No. 158 and to the European Convention on Human Rights, which essentially reveal that, in case reinstatement becomes impossible, one should consider granting an equivalent position and/ or compensation.

It is undeniable that the provision of the Romanian Labour Code which obliges the court to a *restitutio in integrum* (in place since 1973) flagrantly contradicts the needs of the current practice. If and when the Labour Code will be aligned to the needs of the practice and to the legislation of most EU countries is unknown.

The Netherlands (Peter Vas Nunes): Ever since 1940, Dutch law has accepted that a dismissal may be void. In many jurisdictions, void dismissal is an alien concept, but the Dutch have got so used to it after over seven decades that they find it perfectly normal.

Where a court finds a dismissal to be void, the employment relationship continues. The employer must continue to pay the employee his full salary and continue to abide by the other terms of the employment contract (paid leave, pension, company car, etc.). Moreover, if the employee demands to return to his work (either because he really wants to resume work or because he thinks this will strengthen his negotiating position in the event the employer offers a settlement), the employer is as a rule obligated to comply. Until the law on dismissal was amended with effect from 1 July 2015, court rulings obligating an employer to actually take back an employee they had dismissed, although by no means exceptional, were infrequent. This was because in most cases the court considered that forcing an employer to continue working with someone they did not want to work with is usually not a very practical solution. What happened in most cases was that the court terminated the employment relationship and, where the employer was the party responsible for the breakdown of the working relationship, awarded the employee substantial compensation. That way, both parties got something they wanted: the employer got rid of the employee and the latter got compensation. This practical approach was possible thanks to a combination of two factors: (i) the courts had the ability to terminate an employment contract for any "serious" reason, which, in practice, gave the courts discretionary power; and (ii) the courts had the discretionary ability to award employees severance compensation, which in practice meant that employees were usually awarded something in the region of one to two months of salary per year of employment.

All this has changed. The courts have lost the power to terminate an employment contract for any reason they deem "serious", the law now listing eight defined reasons for termination, which in practice means that employers' applications for termination must be turned down more frequently. Moreover, the courts have also lost their ability to award discretionary compensation, the law now setting a standard amount that is significantly lower than what the courts used to award.

The result of all this is that the situation described in the Lithuanian case reported above, where the employer is stuck with an unwanted employee, occurs more often than it used to before 1 July 2015. This has raised considerable protest and there is pressure in Parliament to consider amending the law so as to regain at least some of the flexibility that was lost last year.

Subject: dismissal, suspension

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