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Dismissal based on the 'Bradford factor' does not necessarily constitute discrimination (BE)

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Summary

On 10 January 2017, the Labour Court of Mons ruled that in the case of a collective dismissal, an employer may use absenteeism measured by the Bradford factor as a criterion for selecting employees for redundancy, without breaching anti-discrimination law.

Legal background

Council Directive 2000/78/EC of 27 November 2000 prohibits discrimination on the grounds of religion or belief, disability, age or sexual orientation. Discrimination based on health does not fall within its scope of application.

However, the Act of 10 May 2007 which transposes this directive into Belgian law also prohibits discrimination based on current and future state of health. Further, Collective Bargaining Agreement No. 95 (the 'CBA 95') promotes equal treatment during all stages of the employment relationship based on criteria that include an employee's medical history.

Facts

Faced with a decline in production, the defendant, a packaging company, decided to carry out a collective dismissal. A social plan was agreed with the employees representatives, which led to the signing of four collective bargaining agreements (the 'CBAs'). These set out the criteria for selecting the employees to be dismissed. In total, 32 employees were made redundant.

After implementation of the redundancy plan, one of the affected employees challenged his dismissal and asked the employer to provide the reasons for it. The employer said the dismissals were caused by restructuring and he was dismissed because of his extremely high absence rate compared to the other employees in his department. In this respect, the employer claimed, the dismissal decision conformed with the CBAs agreed within the framework of the social plan, which provided that the absenteeism of employees, measured using the 'Bradford factor', was one of the criteria for redundancy. The Bradford factor is often used in human resource management as a means of measuring worker absenteeism. The theory is that short, frequent and unplanned absences are more disruptive than longer absences. When there is a high rate of short, frequent and unplanned absences, the Bradford factor increases and so does the risk of business disruption.

The employee filed an action before the Labour Tribunal of Charleroi, arguing that he had been abusively dismissed and that he was the victim of discriminatory treatment contrary to the Act of 10 May 2007. The Labour Tribunal dismissed the case and so the employee filed an appeal before the Labour Court of Mons. The plaintiff claimed that he had been abusively dismissed, this time relying on CBA 95 for his claim for damages, based on anti-discrimination legislation.

Judgment

As to the claim for abusive dismissal, the Court ruled that the dismissal was justified by the needs of the business, which was a valid reason for dismissal under Article 63 of the Act of 3 July 1978 on employment contracts (now replaced by CBA 109 on the reasons for dismissal), since the employee was dismissed within the framework of a restructuring which led to a collective dismissal.

The Court found the applicable CBA had been respected because the absence rate of the employee was considered only after it was clear that none of the other three criteria set out in the CBA applied (these are: that there were no other suitable jobs within the company, there was no mutual consent to end the contract and

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there was no access to unemployment benefits with additional company allowances).

As to the claim of discrimination, the Court first recalled that the goal of CBA 95 was to promote equal treatment during all stages of the employment relationship. This includes the conditions for dismissal.

An employer is not allowed to distinguish between employees based on the criteria set out in CBA 95, including medical history if the criteria are not related to the activity or nature of the company. This is the case except where required by law.

Finally, the Court referred to the Bradford factor as way of measuring absenteeism – particularly, short, frequent and unplanned absences. According to the applicable CBA, the employer calculated the employee's Bradford factor over a reference period of two years before the collective dismissal. The criterion was also agreed by the employee representatives. Long-term absences and those due to serious illnesses were not considered.

According to the Court, companies are entitled to select a group of employees for redundancy based on efficiency criteria. An employer does not abuse an employee's rights by dismissing based on low productivity or a high rate of absence for reasons of illness or incapacity.

Finally, the Court found that the defendant had complied with the criteria set out in the applicable CBA. The absence rate based on the Bradford factor, was the fourth and last of the criteria used. His absenteeism was the highest of all the employees in the department and so the most disruptive for the company. The Court concluded that the dismissal was not discriminatory and that the claim based on CBA 95 was unfounded.

Commentary

This was the first time a Belgian court has taken such a firm stance the Bradford factor as a selection criterion for collective redundancies.

Four years earlier, on 7 January 2013, the Bradford factor was mentioned in a judgment by the Labour Court of Brussels. An employee had been dismissed due to her frequent absences and the impact these had on the department she was working in. The difference with this case is that it concerned an individual dismissal, for which no redundancy criteria had to be established. The Bradford factor was mentioned as one of the reasons for the dismissal. The Court held that, while the factor could be a useful way to assess absenteeism, it was not relevant to the case and so the attempt to use it as grounds for dismissal failed.

The situation may be different for collective redundancies. General criteria must be established for selecting employees to be made redundant and it is quite common for companies to use the Bradford factor as a criterion. The Labour Court of Mons found that a high absence rate clearly impacts the functioning of a company and therefore, using the Bradford factor as a last criterion for redundancy is non-discriminatory. It allows a company to base its selection on the efficiency of its employees. It must be noted that long-term absences and absences due to serious illness were excluded.

However, this judgment should not be seen as giving free rein to employers to dismiss employees based on the Bradford factor for the following reasons: first, this judgment concerned a collective redundancy. It is uncertain whether using the Bradford factor for an ordinary dismissal would be so easily accepted, as illustrated by the judgment of the Labour Court of Brussels.

Second, even for collective dismissals, acceptance of the Bradford factor would depend on the circumstances. In the case at hand, absenteeism was assessed over a two-year period, long-term sickness was excluded and the criterion was only be used as a last resort.

Third, it is the first time, to the author's knowledge, that a Belgian court has ruled on the application of the Bradford factor in collective dismissals. We cannot presume that other Belgian courts will follow suit. Whether they do will depend on how suitable they find the Bradford factor for assessing how disruptive absenteeism is on a business. While the Labour Court of Mons seems to consider that a high Bradford factor is sufficient, other courts may require further proof that a high absence rate has actually disrupted a business.

Comment from other jurisdiction

Italy (Caterina Rucci, Bird & Bird): The so called 'Bradford factor' could never be used in Italy, since the law provides for mandatory selection criteria for collective dismissals, whilst the trade unions may propose alternative criteria (normally distance from retirement), but certainly absenteeism could not be applied as a selection criterion: the right to sick leave is recognized by law. It has been debated in the past whether an exception could be made for temporary suspension or the reduction of working hours with state support, but for now the selection criteria laid down by law apply.

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