2016/33

Supreme Court clarifies rules on redundancy selection methods (NO)

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Summary

The basic rule in Norwegian law is that an employer planning to reduce headcount must apply the rules for selecting those to be dismissed (based on seniority, qualifications, personal circumstances, etc.) to the entire workforce within the relevant legal entity. However, there are circumstances under which the employer may limit the pool of employees within which to apply those rules. In this case, the employer was justified in limiting that pool to one employee, thereby avoiding the need to make a selection.

Background

Under Norwegian employment law, the termination of employment in a redundancy situation must be objectively justified on the basis of the circumstances of the undertaking (Working Environment Act, Section 15-7).

There are no statutory rules regarding the selection of employees to be made redundant, but it follows from case law that the selection of redundant employees must be based on justifiable selection criteria, such as seniority, formal and actual qualifications, suitability and individual circumstances.

Further, it follows from case law that it is not always the employee whose position is to be eliminated who must be dismissed. The general rule is that an employer must consider all of its employees within the same legal entity in the selection process. As a consequence, employees are normally entitled to be considered for all of the positions in the company that they are qualified for.

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Facts

The defendant in this case was a company that sells sports equipment through a number of chains, with about 100 stores throughout Norway. The company employed a total of approximately 2,000 workers. It decided to close down the department responsible for sales to clubs and companies. The judgment does not reveal many details about this department, but it would seem that it consisted of one stand alone office and was seen more or less as a store (even though it was not open to the general public). Be this as it may, the department/store employed only one employee, the plaintiff. He spent all of his working time there, never working in other stores or departments. He was offered an alternative position. He turned down the offer, even though the position offered to him was 'suitable' within the meaning of the Working Environment Act, because it carried a lower salary. Accordingly, the plaintiff was declared redundant and dismissed.

The plaintiff sued the defendant, claiming compensation for having been unjustly selected for redundancy.[1] It was common ground that the employer had a legitimate need to close the department and reduce its workforce. The issue was whether the employer was justified in limiting the redundancy selection to the department that was being closed down. The plaintiff argued that, according to settled case law[2], the employer should have considered its entire workforce when selecting the person(s) to be made redundant, in which case another employee would have been, or might have been, selected and he would have been transferred to another department within the company. The issue of whether the plaintiff would have lost his job if the employer had considered the entire workforce, in other words, what the selection criteria would have been in that case, was not litigated, because it was common ground that the employer had not made an attempt to include any other departments in the selection process. The issue, therefore, was restricted to whether or not the employer was justified in not comparing the plaintiff to other employ-

1. The plaintiff could have asked the court to declare that his dismissal was void and that his employment with the defendant therefore continued. He elected to claim monetary compensation instead, having found new employment soon after his dismissal. However, his new employer dismissed him shortly afterwards, whereupon he adjusted his claim against the defendant, now also claiming a preferential right to a vacancy that had meanwhile arisen. However, this aspect was not at issue at the Supreme Court level and is not dealt with here.
2. Contrary to what is often the case in Norway, the company was not bound by a collective agreement with rules on redundancy selection.

doi: 10.5553/EELC/187791072016001002016

ees within the company with a view to selecting someone for redundancy.

The court of first instance, the Kristiansand City Court, ruled in favour of the plaintiff. This judgment was overturned on appeal, by the Agder Court of Appeal. The plaintiff brought the case before the Supreme Court.

Judgment

The Supreme Court began by referring to the general rule that an employer must consider all of its employees in the selection process. It went on to point out that an employer can decide to deviate from this general rule if that is justified. Whether this is the case has to be assessed in each individual case. Relevant factors in an overall assessment are:

- previous practice of limitation in the selection process, if any;
- an agreement with employee representatives, if any;
- the size of the company;
- the practical issues of considering all employees in the selection process;
- the company's financial status and operational challenges;
- the company's need to maintain necessary expertise;
- securing the company's further operations; and
- whether the workforce reduction is a one-time measure or part of a larger reorganisation strategy.

On the one hand, the Court stated that an employer must have compelling reasons for limiting the pool of employees within which to select the employee(s) to be made redundant. On the other hand, the Court pointed out that the Working Environment Act should not be interpreted as imposing disproportionately cumbersome processes on the employer, thereby undermining the job security of the remaining employees.

In its evaluation of the above factors, the Court first pointed to the fact that the employer had a long and consistent practice of considering employees at its individual stores separately in previous workforce reductions. This was relevant because in those previous cases, the employer had not consulted the employee representatives regarding the limitation of the pool of potentially redundant employees to a single store and those representatives had not raised an objection to that practice. For this reason, the Court put no emphasis on the fact that the limitation in this case to one department had not been discussed, let alone agreed, with the employee representatives. Further, the company size and organisation were of importance as the employer had approximately 2,000 employees at approximately 100 different stores across a significant geographic area. The stores were not divided into different divisions and there was, in the court's view, no other logical method to limit the redundancy selection other than by limiting the selection to individual stores. The employees worked at the specific store which employed them, and the store was their main connection to the employer.

The Court also considered that the employer had not conducted only one workforce reduction. Rather, the process was part of a continuing effort to adapt to the market situation and competition. Such reoccurring processes involving a great number of employees require significant resources and time, which can be critical for the employer's ongoing business. At the time the employer selected the plaintiff for dismissal, it was in a critical financial situation.

Further, the Supreme Court pointed out that there had been no discrimination. The employer's established practice of limiting redundancy selection to individual stores meant that the plaintiff had not been considered in previous workforce reductions in other stores. The Court also mentioned that there were differences in the kind of business conducted in the 'store' (department) that was closed (sales to clubs and companies) and the business conducted in other stores (sales to individual consumers). Although this was not decisive, the Court stated that this made it less natural to include other stores in the selection process.

Finally, the Court referred to the fact that the employee had been offered another position, which satisfied the requirement of "other suitable work within the undertaking", as provided in Section 15-7 (2) of the Working Environment Act, even though the position in question was compensated with a much lower salary and totally different work tasks.

The Supreme Court concluded that the employer was justified in limiting the selection of employees to be made redundant to the one employee at the store in question.

Commentary

The Supreme Court's decision is in our opinion in line with former case law and does not expand the scope for deviations from the general rule. Nevertheless, this decision provides useful and updated information on relevant factors to be considered when limiting selection.

Employers who are planning redundancies must still carefully evaluate the situation and weigh all relevant factors before limiting the pool of employees amongst whom there is to be a redundancy selection to any group less than their entire workforce. If there are employee representatives, it is recommended that any deviations from the general rule are discussed and agreed with them first.

In two recent decisions from Hålogaland Court of Appeals (of 15 April 2016) and Gulating Court of Appeals (of 19 May 2016), the employers in both cases

doi: 10.5553/EELC/187791072016001002016

made similar limitations in the selection process and referred to the Supreme Court's decision in the case described here. However, in both cases the Courts of Appeal rejected the use of a limited selection process (on different grounds), and thereby confirmed that employers must have weighty arguments for limiting the selection of employees to be made redundant.

Comments from other jurisdictions

The Czech Republic (Natasa Randlová, Randl Partners): The Norwegian rules for selecting redundant employees seem to me impractical and tough, not only on the employer, but also on employees. If my understanding is correct, employers may be forced to select redundant employees and dismiss employees whose jobs are not redundant and whose work is still necessary for the employer. As a result, experienced trained employees may be dismissed and other employees assigned new jobs that they are not used to doing or may not want to do. It seems to me that neither party could be satisfied by this arrangement. It imposes a high level of uncertainty on all employees, as they could be considered for redundancy even if their particular job is necessary for the employer, they work well and comply with their work obligations. Considering all the above, the limitation on the set of employees to be considered for dismissal to a particular store or department made by the court in this case seems reasonable.

In the Czech Republic the rules for selecting redundant employees are much more liberal. According to case law, an employee who works in a post that no longer exists is redundant. If there is more than one similar same position and only some of them are cancelled the employer is free to choose which of the employees working in the same role should be selected for redundancy. The court is not even entitled to consider the employer's decision about the employees to be made redundant, subject to the proviso that the court can look at whether a decision was discriminatory.

Finland (Kaj Swanljung and Janne Nurminen, Roschier): Under Finnish employment law, the basic rule is that selection criteria for redundancy must be applied to all employees affected by the redundancy, but only to those employees. For this reason, the employer cannot dismiss an employee whose position is not becoming redundant (i.e. whose work does not in reality cease) and transfer a redundant employee to this position. Having said that, because of the protected position of shop stewards and other employee representatives and the fact that they must be the last remaining employees, a 'substitute termination' of this kind may be deemed to take place vis-à-vis employee representatives.

Germany (Paul Schreiner and Jana Hunkemöller, Luther Rechtsanwaltsgesellschaft mbH): In contrast to Norway, only those employees of a business who are interchangeable because of their work, abilities and education need be brought into the redundancy selection. Employees who have special knowledge – so called high performers ('*Leistungsträger*') – may be excluded from the selection process. These are employees whom the business needs to retain to keep its expertise. If there are vacancies in the business or the company group, these must be offered to those employees who would be dismissed if the Works Council objected to the termination.

By Section 1 paragraph 3 of the German Dismissal Protection Act ('*Kündigungsschutzgesetz*') sets out the statutory criteria for redundancy selection in Germany. Those are age, seniority, maintenance obligations and severe disabilities and these must be balanced carefully.

Romania (Andreea Suciu, Noerr): In my view, the selection criteria imposed by the Norwegian case law shifts the focus from a redundancy for business operations to a dismissal for reasons related to the employee. It also seems as if the employer has the ability to dismiss 'undesirable' employees during a redundancy process based on (justifiable) selection criteria, such as suitability and individual circumstances. Further, this approach creates insecurity among all employees, rather than limiting it to those whose positions are to be eliminated.

As far as Romanian law on selection criteria is concerned, this changed for the better in 2011 when it was amended to the effect that, in case of mass redundancies, social selection criteria would no longer prevail (e.g. seniority, age, legal obligations to provide support or severe disability) and performance related criteria could be used for selection. Thus, if the employer intends to eliminate one of two identical positions, it is entitled to retain the best performing employee. Employers have welcomed this amendment, as the right to keep their best employees is a prerequisite for continuation and recovery of the business.

Subject: redundancy selection

Parties: A – v – Gresvig Detaljhandel AS

Court: Hojesteret (Supreme Court)

Date: 8 December 2015

Case number: HR-2015-2449-A, (case no. 2015/828)

Publication: http://www.domstol.no/no/Enkelt-domstol/-Norges-Hoyesterett/Avgjorelser/Avgjorelser-2015/Avdeling---Sivile-saker/oppsigelse-ved-nedlegging-av-avdeling

doi: 10.5553/EELC/187791072016001002016