

## Case Reports

2017/47

# Termination of employment contract for economic reasons may not be lawful if employees have been working overtime (SL)

CONTRIBUTOR Petra Smolnikar\*

## Summary

212

In February 2017, a female worker was served notice of termination of her employment contract for economic reasons (*odpoved pogodbe o zaposlitvi iz poslovnih razlogov*). The reasons for the termination were: (i) a substantial decrease in orders, (ii) reduced realisation and (iii) reduced demand for particular products. In particular, the company had lost one of its clients in the automotive industry. The worker brought an action claiming that (i) the reason for the termination was not logical (this included challenging the arguments made in the termination letter because the business results in 2012, when the notice was served, were better than in 2011); (ii) the employer continuously requested employees to work overtime (but note that the overtime was within the statutory limits); and (iii) she had been discriminated against and the working conditions were poor in various respects. The first and second instance courts denied her claim and found the termination lawful.

## Facts

In Slovenia, employers may terminate an employment contract, *inter alia*, for business or economic reasons. This is set out in Article 89/1(1) of the Slovenian Employment Relationship Act (*Zakon o delovnih raz-*

*merih*, the ‘ERA-1’ – which was Article 88 of the previous Employment Relationship Act, the ‘ERA’). Under the ERA-1, along with Article 4 of ILO Convention no. 158, termination is lawful when there are significant reasons for it. The ERA-1 provides that it is lawful to terminate employment where there is no longer a need for the work to be performed for business, economic, organisational, technological, structural or similar reasons. The reasons must relate to the employer and the nature of the employer’s work, its organisation, technologies, and any changes and difficulties in circumstances or there must be a need for example, for reorganisation, rationalisation or modernisation of production. However, the reasons should not be related to the worker or his or her personal circumstances.

The question is, how do the courts consider the business reasons provided by the employer? Do they accept the reasons provided or can they investigate them?

## Judgment

The court of first instance rejected the worker’s claim. It found that orders had indeed gone down and that the employer had started reducing the number of machine operators for rubber products. It also found that the worker had not been discriminated against because the termination had been lawful. The worker appealed.

The court of second instance rejected the appeal and confirmed the judgment of the court of first instance. It held that there was a lawful business reason (i.e. reduction in demand and decreased orders) which sufficed to make the termination lawful. The court agree that it was irrelevant to investigate the other circumstances of the termination. The worker appealed the judgment.

The Supreme Court (*Vrhovno sodišče Republike Slovenije*), repealed the judgments of the labour courts and reverted the case back to the court of first instance for further examination. The Supreme Court noted firstly that the decrease in the value of sales in 2012 in comparison to those in 2011 was relevant, as was the decrease in the hours needed to produce a particular product, the changes to the structure of products and the reduction in the number of employees needed to do the work. Secondly, it noted that the worker’s continuous performance of overtime work in 2011 and 2012, up until the termination date, was relevant – even though the previous courts had failed to address this or deemed it irrelevant. It noted that every case must be assessed in

\* Petra Smolnikar is the founder and managing partner of PETRA SMOLNIKAR LAW, in Ljubljana, Slovenia: <http://petrasmolnikarlaw.eu>.

light of all the circumstances, including whether the employer is able to redeploy the worker or the termination is the only possible outcome. The issue of overtime relates to this: i.e. whether the employer could have found another way of working, for example, by reducing or eliminating overtime by employing new people or setting new shifts and keeping the existing workers. In such circumstances, termination would not be lawful. The burden of proof of this lies with the employer.

## Commentary

The Supreme Court's judgment provides further guidance for employers in relation to termination for business reasons.

The Supreme Court stressed that a relevant factor is whether the employer could have taken other measures, for example, reducing or stopping overtime or organising the work differently – and in this way, preserving the employee's contract. Prior to the adoption of the ERA-1 in 2013, there was a legal requirement to assess whether a worker could be redeployed under changed working conditions or on other tasks, or could be retrained. If so, the employer was obliged to offer the employee a new employment contract, instead of terminating the employment. The current Supreme Court judgment affirms that changes to working conditions and processes must be considered when assessing if a termination is lawful – and this trend demonstrates the Court's aim of preserving employment as far as possible.

The Supreme Court judgment also accords with established practice. For example, the courts do not generally examine the economic circumstances that have led to a termination and do not interfere with the employer's discretion to make its own decisions about reorganising the business. That said, in order to assess overall whether the employer acted lawfully, the courts should consider the surrounding circumstances, for example, has the employer taken on new workers while simultaneously terminating others – or implemented continuous overtime whilst terminating certain workers – as occurred in the case at hand. Clearly, in these examples, the need for work still exists and so in principle, the existing workforce should be able to carry it out.

## Comments from other jurisdictions

*Italy (Caterina Rucci, Bird & Bird)*: Under Italian case law, some courts have started to deem a termination ungrounded if the company is still profitable. This is however, a very debatable and risky interpretation of the case law.

*Hungary (György Bálint and Gabriella Ormai, CMS Legal)*: In the case of termination for economic reasons and especially in case of redundancy, the circumstances serving as grounds for termination are strictly assessed by the Hungarian courts.

Generally, the burden of proof is on the employer to give reasons for terminations or the cancellation of positions. The reasons could be the outsourcing of the activity; a requirement for a skill that the employee does not have or cannot acquire in a reasonable timeframe (e.g. a foreign language); or the closing of a branch of the business. If those circumstances can be proven by the employer, the employee will not have good grounds for a claim.

When a new employee is hired, either immediately or shortly following termination of someone else in the same position who was made redundant but had been employed under the same circumstances (e.g. full-time) and had the same skills etc., the first employee may challenge the termination. Excessive overtime work performed by the employee made redundant may also be taken into account by the court and that may even call the employer's decision into question. In such a case, the employer must explain why the employee was asked to do excessive hours immediately before the termination if it wants to avoid a successful claim for unlawful termination against it.

But note that the courts may not question the merits of decisions made by the employer from a purely business perspective. Even the termination of a profitable market branch or plant may serve as proper grounds for termination for business/economic reasons.

The court will also take into account that employers generally have no obligation to offer new suitable positions for employees (with the exception of employees of protected age before retirement, employees receiving state rehabilitation benefits or, in the case of a female employee or single father, up to their child becoming three years old). Therefore, if a position is terminated or there needs to be a reduction in the workforce, the employer normally has the right to terminate the affected employees without offering them new positions.

All in all, termination for business/economic reasons is a complex issue in the Hungarian courts, which demands employers to be accountable for their work organisation and to plan any redundancies thoroughly.

**Subject:** Termination of employment contract for economic reasons and overtime

**Parties:** not disclosed

**Court:** *Vrhovno sodišče, delovno-socialni oddelek* (Supreme Court, employment/social department)

**Date:** 21 February 2017

**Case number:** VIII Ips 182/2016

**Internet publication:** “[www.sodisce.si](http://www.sodisce.si)” → “napredno iskanje” → “iskanje po sodni praksi” → enter case number in “iskanje po opravilni št. ali št. dokumenta”