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Employer's right of selection upon unilateral termination of the employment relationship (BG)

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Summary

The Bulgarian Supreme Court of Cassation in a decision of 2 February 2021 has ruled that in cases where the selection process is not a mandatory part of the termination procedure it is entirely up to the employer to conduct the selection and base its termination decisions on the results of such selection.

Legal background

Pursuant the Bulgarian Labour Code, in the case of closure of part of an enterprise resulting in a reduction of the number of job positions or reduction in the volume of work, provided that the position to be eliminated is the same or similar to other existing positions in the enterprise, the employer shall conduct a mandatory selection process between the employees occupying such identical or similar positions (performing identical or similar functions) based on the simultaneous evaluation of the qualifications and productivity of the employees within the scope of the selection process (other selection criteria are not allowed). When there are no identical or similar positions to the job position to be reduced the selection process is not mandatory and the employer is not obliged to conduct it.

Facts

The appellant had been employed by the opposing party – Bulgartransgas EAD – in the position of supply specialist in a local unit in the city of Blagoevgrad. The local unit had been dissolved into two new units for optimization purposes. It was decided that part of the job positions would be transferred to the new units and the other part would be reduced. As a result, the appellant's employment relationship had been terminated on the grounds of reduction in the positions in the enterprise.

In order for the reduction to take place, a special commission was formed comprising of seven individuals. The commission had the task of conducting the selection procedure for five positions among 13 employees. For the position of supply specialist the selection had been conducted between two individuals – the appellant and one other employee who occupied the position of delivery supplier. During the procedure, the commission found that the job positions of supply specialist and delivery supplier were not similar due to the fact that the Delivery Supplier was responsible, among other things, for organizing and supervising small public procurement procedures, which represented the core obligations under his job description. Therefore, they terminated the selection procedure between the respective employees.

Consequently, the appellant filed several claims against his former employer for unlawful termination, compensation for unemployment due to the unlawful termination and reinstatement to his former job position in the employer's enterprise. He claimed that the employer was obliged to conduct a selection procedure when there are two or more identical or similar job positions in the enterprise, such as the position of supply specialist and delivery supplier.

The first instance court agreed with the employee's arguments and declared that the termination was unlawful. It also reinstated the employee into his former position and awarded compensation for unemployment. The employer appealed the decision and the appeal was successful in the second instance court. The employee then appealed the decision before the Supreme Court of Cassation.

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Judgment

The Supreme Court of Cassation in Decision No. 254 of 2 February 2021 held that the objections raised by the appellant were unfounded.
The Court stated that the position of the employee had not been transferred to the two new units which had been formed after dissolution of the former local unit, since there was no such position under the structural plans of the newly-established units. Also, the Court acknowledged that under the structural plan of the positions in the former enterprise, the job position of the appellant was unique and that there were no other employees in similar positions.
Accordingly, the Court pointed out that the employer's obligation to conduct a selection arises in cases where one or more of the existing identical or similar positions in the enterprise are reduced. The assessment whether the positions are identical or similar shall always be made on the basis of the type and nature of the duties and does not depend on the identity or similarity of the titles of the respective job positions. When determining the group of persons that shall participate in the selection, the differences in the individual job functions shall be taken into account, as well as the fact whether these differences are significant. Significant differences could lead to inequality between the respective employees upon comparison of their qualifications and work.
The Court concluded that the initially envisaged selection between the two concerned employees and the subsequent decision of the employer not to avail itself of its right of selection did not invalidate the termination of the employment relationship. The employer alone has the right to assess whether it will take advantage of the selection procedure set out under Article 329, paragraph 1 of the Bulgarian Labour Code.

As a result, the Supreme Court of Cassation upheld the decision of the second instance court, confirming that the termination was not unlawful.

Commentary

Up until this decision of the Supreme Court of Cassation the prevailing interpretation was that the employer is obliged to complete the selection process and to follow all statutory requirements once it has decided to take advantage of this right upon termination of the employment relationship.
In the decision at hand, the Supreme Court of Cassation for the first time has adopted a different view on this matter and stated that in cases where the selection process is not mandatory it is entirely up to the employer to conduct the selection and base its termination decisions on the results of such selection.

Comments from other jurisdictions

Germany (Othmar K. Traber, Ahlers & Vogel): A selection between comparable employees must also be made in Germany within the framework of the so-called social selection if the Dismissal Protection Act (*Kündigungsschutzgesetz*) applies. The applicability of the Act requires the regular employment of ten full-time employees. Furthermore, the employment relationship of the employee threatened with termination must have existed for longer than six months.
If the number of employees is only to be reduced within a single unit, social selection must be carried out directly based on the Dismissal Protection Act. If employees threatened with termination compete for vacancies in other units of the company, social selection must be made by analogous application. This also applies if the other units are only created as a result of restructuring.
In this respect, the German Supreme Labour Court (*Bundesarbeitsgericht*) has also consistently ruled that social selection must only be made between employees who are comparable. In contrast to the decision of the Supreme Court of Cassation of Bulgaria described above, the German Supreme Labour Court generally takes a mixed approach, which basically takes three aspects into account:

1. Comparability of the employment contract

According to this requirement, employees are comparable if they are interchangeable according to the content of their employment contract. It depends on whether the employee can be unilaterally assigned to the vacant position by the employer. It is not necessary that the previous activity of the employee and the activity of the vacant position are the same.
If the employment contract must be changed, the employee concerned is not included in the social selection of employees competing for the vacant position. They would not be comparable in terms of the employment contract.
This leads to the fact that an employee is not to be included in the social selection if the vacant position does not meet the requirements of the employment contract. The employee's initial certainty that he or she will not have to work at another job or unit against their will is thus accompanied by the shortening of their protection against dismissal.

2. Horizontal comparability

Another aspect to be considered in the comparability of employees to be included in the social selection is that the employees threatened with dismissal must belong to the same hierarchical level, so-called 'horizontal comparability'.
This unwritten requirement of horizontal comparability is intended to avoid a cascade of top-down relocations by employers. This seems necessary because the performance of tasks of a lower level is often not excluded

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by the employment contract. Conversely, the inclusion of employees at lower levels of the hierarchy for vacant positions at higher levels of the hierarchy is excluded.

3. Comparability in terms of qualifications

The employer shall include in the social selection only those employees who, based on their actual skills and knowledge, can fill the position in the vacant job. Nevertheless, comparability is not to be assumed only in the case of complete identity of the activities and functions of the jobs. Comparability is also to be assumed if the employee, because of his or her previous tasks and professional qualifications, can perform the work of the vacant job after a short training period. How long an appropriate training period is depends on the specific activity and task.

If employees were comparable with each other after the employer's assessment, it would be obliged to take four statutory personal characteristics into account to decide which of them must be dismissed in order to achieve the redundancy goals. Therefore, the employer must look at the employees' ages, how long they have been with the firm and the number of responsibilities to pay emoluments. The fourth aspect would be the question of whether an employee must be considered as a severely disabled person or if they had at least applied to be considered as such. There is no concrete way of weighing up these aspects against each other which is provided for in the law, but the employer must consider the applicable aspects in a proper and reasonable way. This assessment will often be challenged by the dismissed employees in connection with a lawsuit against the employer afterwards and the employer then bears the burden of proof for its correct assessment of its decision in terms of the comparability.

It can be concluded that the German jurisdiction focuses more on the individual employee for comparability, whereas the ruling of the Supreme Court of Cassation in Bulgaria probably takes a strictly job-related view, which is based on a comparison of the specific tasks. A consideration of further aspects such as the subjective skills and knowledge of the employees does not seem to take place here.

United Kingdom (Richard Lister, Lewis Silkin LLP):

The decision of the Supreme Court of Cassation in this case would seem to afford Bulgarian employers a significant degree of managerial prerogative in selecting employees for redundancy, apart from the rather limited circumstances in which a mandatory selection process applies. This contrasts sharply with the UK, where the courts have interpreted the law on unfair dismissal as requiring employers to observe sophisticated and quite onerous redundancy selection procedures.

Before applying any selection criteria, UK employers must identify the 'pool' of employees to whom they are to be applied. While there is some flexibility in defining the pool, the employer should bear in mind the following:

- Is there a procedure for identifying the pool which has been agreed by trade union or employee representatives? If so, this should normally be followed.
- Are there other groups of employees doing similar work to the employees within the provisional pool? If so, these employees should also be included in the pool unless there are good reasons to exclude them.
- Are there other employees working at different sites but doing similar work? Just because a particular site is being closed, it does not mean that the pool should necessarily be drawn from the employees working at only that site.
- Are there employees whose jobs are interchangeable with any of those in the pool? If so, again, it may be appropriate to include them unless there is a good reason not to.

Selection criteria should, as far as possible, be objective and care needs to be taken not to fall foul of UK discrimination legislation when applying the criteria. For example, although selection based on attendance is fair on its face and the facts are objectively verifiable, employers should check the reasons for absence to ensure that this criterion does not put women or disabled employees at a particular disadvantage.

In practice, most employers in the UK use a matrix of criteria taking account of a range of issues such as: relevant skills and knowledge; experience; qualifications or training; disciplinary and attendance records; communication skills; and time management/productivity.

Criteria should always be appropriate in the circumstances and there should be a business justification for the use of each criterion. Employers should be especially cautious about using subjective criteria such as 'attitude' or 'team player'. Even if the selection criteria are reasonable in themselves, they must be applied in a reasonable manner. For example, employers should not concentrate on performance which may have been poor for a short period, while ignoring previous sustained good performance.

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