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Termination protection applicable to state officials upon termination of their official relationship (BG)

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Summary

The Bulgarian Supreme Administrative Court has held that not only employees working under an employment relationship but also state officials enjoy special protection against termination.

Background

According to Article 333 of the Bulgarian Labour Code, certain categories of employees are protected from termination of the employment relationship. This protection is based on the employee's health, family status, position occupied and other related factors. Protection against termination serves a social function by creating relative job security for certain categories of employees, such as the following:

- pregnant women, women in an advanced stage of in vitro treatment, and mothers of children who are three years of age or younger;
- disabled workers;
- employees with an illness listed in a Ministry of Health Ordinance;
- employees on a leave permitted by the employer;
- trade union leaders;
- employees who are elected representatives on the matters of health and safety at work;
- elected employee information and consultation representatives; and
- employees who are members of special negotiation bodies, a European Works Council, European company, or European cooperative society.

In order to dismiss a protected employee, the employer must obtain advance authorization from the Labour Inspectorate and, in the case of union leaders, the relevant trade union. If the employer violates this special procedure and dismisses a protected employee without the required permission, the employee is entitled to challenge the dismissal under a special procedure.

On the other hand, the relationship between persons engaged in an official relationship (appointment) with a state authority is not governed by the Labour Code but by the Law on State Officials.

Facts

By an order dated 2 July 2020, the mayor of the Sofia Municipality unilaterally terminated the appointment of one of its officials, the Head of Municipal Revenues (Ovcha Kupel Department). The termination took place as the position was made redundant.

The official then appealed the order before the Pernik Administrative Court. The Court held that, on the date of termination, the official suffered from a disease which had been included in Ordinance No. 5 from 20 February 1987, issued by the Ministry of Health listing specific diseases which entitle employees suffering from such diseases to enjoy special protection upon termination of their employment relationship. Consequently, the Court ruled that the official enjoyed such special protection and a termination should have complied with Article 333 of the Bulgarian Labour Code, even though the Law on State Officials did not contain explicit provisions in this regard.

No prior permission was sought from the Labour Inspectorate prior to the termination of the legal relationship, despite the evidence that the state official was suffering from cancer. On that basis, the Court held that the appellant's relationship had been terminated in breach of the substantive legal provisions. Therefore, the disputed order was unlawful and the Court revoked it.

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Judgment

The Sofia Municipality appealed this judgment before the Supreme Administrative Court.
The Supreme Administrative Court upheld the decision by the Pernik Administrative Court. It pointed out that compliance with the principle of equal treatment and the prohibition of discrimination in employment and upon the exercise of the right to work shall be ensured. These principles are set out in the Law on Protection Against Discrimination and the Equality Framework Directive 2000/78/EC. Also, the Court highlighted that the ECJ judgment in case C-406/15 (Milkova), should have been taken into account. After the publication of that ECJ judgment, there has been consistent case law according to which persons appointed by state authorities who fall into the categories under Article 333 of the Labour Code also benefit from the special protection. Prior to termination of their legal relationship, the opinion of the Labour Expert Medical Commission (where applicable) and a permission of the Labour Inspectorate should have been obtained.

Commentary

The decision of the Supreme Administrative Court is in accordance with EU laws and principles as well as with previous national case law. The Court established that the provisions regulating the special protection of employees set out in the Labour Code shall also apply to state officials, even though there are no special provisions in this regard in the Law on State Officials.
This is an important clarification since it ensures the application of the equal treatment principle between persons engaged in an employment relationship and in an official relationship with a state authority.

Comments from other jurisdictions

Denmark (Christian K. Clasen, Norrbom Vinding): In a Danish context, the Bulgarian case is very interesting; however, a similar issue is unlikely to occur in Denmark for several reasons. One of the reasons is that Danish state officials work in employment relationships. As a result, they enjoy protection against termination in line with other employees, including protection against discrimination covered by Directive 2000/78/EC.
Further, it is not required that the employer obtains authorization – neither from authorities nor trade unions – in order to dismiss an employee enjoying protection under the Directive. Thus, according to Danish legislation, the employer is not required to follow any special procedure when dismissing an employee covered by the Directive.
In addition, no predetermined illnesses entitle employees to protection under the prohibition against discrimination according to Danish law. As a result, an employee suffering from cancer does not enjoy special protection against dismissal, unless the illness is covered by the concept of disability.
By comparison, the Board of Equal Treatment has held that an employee diagnosed with cancer was not suffering from a disability within the meaning of the Anti-Discrimination Act. The employer dismissed the employee because she had had 153 sick days within 12 months. According to a doctor's statement, the employee was recovering and the prognosis was good. The Board of Equal Treatment referred to the ECJ judgment in case C-335/2011 (Ring) and C-337/2011 (Skouboe Werge) of 11 April 2013 stating that the concept of 'disability' in the Directive must be interpreted as including a limitation which may hinder the full and effective participation of the person concerned in professional life on an equal basis with other workers and the limitation is a long-term one.
On that basis, the Board of Equal Treatment found that the complainant's cancer and its consequences had not led to or would lead to long-term functional limitations. Consequently, she did not enjoy special protection against termination. The case illustrates that a disease such as cancer is not per se covered by the concept of disability under Danish law and, therefore, the protection against dismissal. Instead, it depends on a concrete assessment.

Germany (Frank Schmaus and Tolga Topuz, Luther Rechtsanwaltsgesellschaft mbH): In a German court, a dismissal for operational reasons issued to a severely disabled lifetime civil servant would also be declared inadmissible. However, a German court would leave open the question of whether the provisions of Section 168 of the Social Code Book Nine (SGB IX) applicable to employees, according to which a dismissal of a severely disabled person requires the prior consent of the Integration Office as supervisory authority, also applies to lifetime civil servants.
The German court would instead base its decision on the fact that German civil service law does not provide for the unilateral termination of lifetime civil servants – except in cases of serious misconduct. Therefore, a German lifetime civil servant cannot be dismissed from their civil service on the grounds that their workplace has ceased to exist or has become superfluous, as was the case in the Bulgarian judgment at issue. The level of labour law protection for lifetime civil servants in Germany is higher than for salaried employees, so that there is no need for recourse to dismissal protection provisions, which are, in principle, only applicable to salaried employees.
The reason for this privileged treatment of lifetime civil servants lies in the historically shaped and constitutionally laid down principles of professional civil service (Article 33 Section 5 of the Basic Law, 'GG'). According to the German understanding, lifetime civil servants

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have a 'special status relationship' with the state, which obliges them, among other things, to be loyal (obedient) to their employer and thus to the state. In return for their loyalty, the state grants the lifetime civil servant protection and welfare, which also includes '*de facto* non-terminability'.
Although a lifetime civil servant cannot be dismissed 'for operational reasons', in the case of incapacity for work due to illness, it is possible to retire the lifetime civil servant under certain conditions, although this is only possible if the lifetime civil servant can no longer be employed in any other way (Section 44 of the Federal Civil Servants Act, 'BBG', Section 26 of the Civil Servants Status Act, 'BeamtStG'), which is in fact rarely the case. In this context, the question arises whether it is not nevertheless appropriate to require the consent of the Integration Office for reasons of equal treatment. However, the case law of the lower courts to date upholds the inapplicability of Section 168 SGB IX (Higher Administrative Court of North Rhine-Westphalia, decision on retiring a lifetime civil servant of 13 September 2012, ref. 1 A 644/12; Higher Administrative Court of Berlin-Brandenburg, decision on termination of civil service relationship of 7 June 2021, ref. OVG 4 S 47/20). It remains to be seen how this case law will develop in the future.

Greece (Effie Mitsopoulou, Effie Mitsopoulou Law Office): Under Greek law, similarly to the Bulgarian Labour Code, certain categories of employees are protected from termination of the employment relationship. Protection against termination covers the following categories of employees:

- mothers for a period of 18 months after the date of birth and fathers for a period of six months;
- disabled workers;
- employees on annual leave;
- members of the board of a trade union/federation;
- employees who are elected representatives for health and safety issues; and
- employees who are members of a special negotiating body (SNB) and/or a European Works Council (EWC).

Up until recently, in order to dismiss a trade union member, an employee representative or a SNB or an EWC member, the employer had to obtain authorization from the special trade union members protection committee before a court. The new Labour Law, enacted in June 2021, no longer requires the employer to obtain such authorization. It adds to the existing reasons of termination one more reason for a valid termination of an employee: that of serious cause.
All the above protection rules apply uniformly to employees of both the private and the public sector.

United Kingdom (Richard Lister, Lewis Silkin LLP): It is interesting to learn that state officials are not expressly covered by the Bulgarian Labour Code and that it has taken a court ruling to clarify and confirm their protection in relation to termination of employment.

In the UK, so-called 'Crown servants' (a rather archaic term) are treated under the law as a special category of worker. They have traditionally been regarded as 'appointed' rather than 'employed', with their appointment being 'at will' and terminable by the Crown without notice. It was nonetheless established by a decision of the UK Court of Appeal some years ago that, depending on the circumstances, there may be a contract of employment between the Crown and its 'servant' (*McLaren – v – Home Office* [1990] ICR 824).
Regardless of the contractual position, however, most statutory employment protection rights in the UK have been expressly extended to Crown servants (including the right to claim unfair dismissal). They are also classified as employees for taxation purposes.

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