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Indirect discrimination of trade union members by applying collective bargaining agreement rather than internal legal act (LT)

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Summary

The Lithuanian Supreme Court (the 'Supreme Court') has found that trade union members were discriminated against in a case where an employer granted non-union members more extended annual leave than union members based on their collective bargaining agreement.

Legal background

At the time when the case at hand was decided, the trade union membership characteristic was not directly indicated as a possible discrimination ground in the local laws of the Republic of Lithuania. Thus, the Supreme Court based its decision on International Labour Organization Conventions, European Union legal acts of discrimination, the Lithuanian Constitution, provisions of national laws establishing equal opportunities and case law of the European Court of Human Rights. As a result, since 1 August 2022 local laws have been amended and directly indicate trade union membership as a possible discrimination ground.

Facts

On 19 December 2018, the director of the Public Medical Ambulance Station adopted an internal order which stated that employees were eligible for an extended 30 business days annual leave. On 18 February 2019, unions agreed on a collective bargaining agreement with the employer. For workers with less than 15 years of service, the collective bargaining agreement provided for less extended leave – 27 to 29 business days depending on the length of service. The employer applied the collective bargaining agreement, including the provisions on extended annual leave, to union members, but non-union members received more extended annual leave as per the order. The employees claimed that they were discriminated against based on their union membership. Eventually the case ended up before the Supreme Court.

Judgment

The Supreme Court found that the situation actually fulfilled the criteria for indirect discrimination – the order on the number of extended annual leave days indicated was nominally neutral, but had a negative effect on the rights of some employees (i.e. employees who were members of a union with up to 15 years of employment) and put union members at a disadvantage.

Interpreting the relationship of the collective bargaining agreement with the order of the director in such a way that the members of the trade union were covered by the collective bargaining agreement but not the order of the director, which had established better conditions for non-unionised employees, essentially excluded unionised employees by encouraging employees to be non-unionised with additional days of leave.

The Supreme Court ruled that the provisions of the collective bargaining agreement which had been adopted later than the order, binding the employees who were members of the trade union, did not mean that employees who were members of the trade union could not be subject to the provisions of the employer's internal legal act governing both members and non-members of the trade union regarding employees' extended annual leave time. Interpreting the situation to the contrary would give the employer a significant advantage over the members of the trade union and the trade union itself, as allowing local employer's legislation making employees'

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participation in the trade union futile and the trade union itself ineffective.
The Supreme Court decision argumentation was in accordance with local regulation and with the following European regulation:

i. Article 10 TFEU – in defining and implementing its policies and activities, the Union shall aim to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation.
ii. Article 153 TFEU – with a view to achieving the objectives of Article 151, the Union shall support and complement the activities of the Member States in the field, among others, of representation and collective defence of the interests of workers and employers, including co-determination.
iii. The European Court of Human Right's decision that discrimination means treating differently, without an objective and reasonable justification, persons in similar situations. No 'objective and reasonable justification' means that the distinction in issue does not pursue a 'legitimate aim' or that there is not a 'reasonable relationship of proportionality between the means employed and the aim sought to be realised' (European Court of Human Rights, case of *Andrejeva – v – Latvia*, 18 February 2009, Application no. 55707/00).

Commentary

The order establishing extended annual leave was adopted while collective negotiations were still ongoing for a new collective bargaining agreement. In this way, more extended annual leave was established for some employees than was agreed later in the collective bargaining agreement. Accordingly, after the adoption of the collective bargaining agreement, the Public Medical Ambulance Station refused to apply the order to the members of the trade union. Due to the actions of the employer, trade union members were indirectly discriminated against. While better conditions regarding extended annual leave for trade union members indicated in the collective bargaining agreement are additional benefits for participation in a trade union and do not constitute discrimination against other non-unionised employees. Until 1 August 2022, local laws did not directly indicate that trade union membership could be a possible discrimination ground, therefore the Supreme Court in this case referred not only to local regulation, but also referred to TFEU provisions and the European Court of Human Right's decision of *Andrejeva – v – Latvia* for explaining that indirect discrimination had been established.

Comment from other jurisdiction

Germany (Lea Althof, Luther Rechtsanwaltsgesellschaft mbH): A German court would very likely come to the same result as the Supreme Court here and entitle union members, which are subject to a collective bargaining agreement, to receive the more favourable extended annual leave as established under the employer's commitment towards the employees. Contrary to the situation in Lithuania, it would not be necessary to refer to International Labour Organisation Conventions, European Union legal acts of discrimination or the German constitution. The application of the more favourable internal order would already result from applying the 'favourability principle' (*Günstigkeitsprinzip*) embedded in Section 4(3) of the Collective Bargaining Act (*Tarifvertragsgesetz*, 'TVG'). According to this principle, where collective regulations are in conflict with employment contract regulations, the employee shall always benefit from the more favourable regulation. The relevant 'employment contract regulations' also include general promises made by the employer – like in this case – or claims based on company practice.
By relating to this principle, nearly 20 years ago the German Federal Labour Court (*Bundesarbeitsgericht*, 'BAG') decided in a similar case that an employer's commitment to all its employees, which becomes additional content of each relevant individual employment contract, is protected from deterioration by the favourability principle. Collective bargaining agreements or works agreements basically cannot exclude improvements granted by lower-ranking regulations, such as individual contractual agreements, as long as these regulations do not contain a corresponding reservation for modification (BAG, judgment of 17 June 2003 – 3 ABR 43/02).
As a result, a German court would not have referred to discrimination to resolve the case but would have applied the favourability principle as a conflict of law rule which does not anchor in the prohibition of discrimination.
However, even in other cases, where Section 4(3) of the Collective Bargaining Act does not apply, a German court would ultimately resort to the prohibition of discrimination based on trade union membership. German law has various regulations that explicitly or implicitly prohibit this form of discrimination. The German constitution (*Grundgesetz*, 'GG') enshrines this fundamental rule in Article 9(3) of the |GG. Additionally, Section 75(1) of the Works Constitution Act (*Betriebsverfassungsgesetz*, 'BetrVG') imposes a mutual supervisory duty, both on the employer and the works council, to ensure that no employee is discriminated against on the grounds of trade union activity. Besides, the German Federal Labour Court has developed a general principle of equal treatment under labour law. The principle states that an employer granting a voluntary benefit on

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the basis of abstract rules according to a generalising principle is not allowed to exclude individual employees or groups of employees from this benefit without a valid objective reason.

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