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Entry fee to access a collective agreement does not constitute discrimination (BG)

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Summary

The Bulgarian Supreme Court of Cassation has held that it is not discriminatory to require an accession fee to a collective agreement for employees who are not members of a union, provided that this does not exceed the (direct and indirect) financial obligations of members.

Legal background

Article 4 of the Bulgarian Law on Protection from Discrimination prohibits any direct or indirect discrimination based on a discriminatory characteristic. Article 8(3) of the Bulgarian Labour Code prohibits any direct or indirect discrimination based on, *inter alia*, membership of trade unions and other social organisations and movements.

The Law on Protection from Discrimination defines 'direct discrimination' as any less favourable treatment of a person on the basis of any grounds set out by the law than the treatment another person is receiving, received, or would receive in comparable similar circumstances.

Article 57(2) of the Labour Code provides that employees who are not members of a trade union which is a party to a collective bargaining agreement concluded with their employer may accede thereto by written application to the employer or to the management of the trade union which concluded the agreement. The Labour Code further allows for entry fees to collective bargaining agreements in Article 57(3) but, nevertheless, the question remains as to whether an entry fee only for non-members of a trade union is discriminatory.

Facts

The case at hand concerned an employee of the Bulgarian Ministry of Internal Affairs who objected to a requirement to pay an entry fee to a collective bargaining agreement (CBA) made between the Ministry of Internal Affairs and trade unions. The CBA provided that employees must pay upon accession an entry fee of 20% of the minimum wage for the respective year, for each year of effect of the CBA. The entry fee, however, was not applicable to employees who were part of a relevant trade union. Nevertheless, employees who were members of the trade union had some financial obligations towards the trade union.

The employee argued that the employees who were not members of the trade union were not treated equally as compared to the members of the trade union which had concluded the CBA and thus direct discrimination on the basis of membership in the trade union had occurred.

The courts of first and second instance ruled in favour of the employee, holding the clause in the CBA concerning the entry fee null and void due to its discriminatory nature. The employer then appealed to the Supreme Court of Cassation (SCC).

Judgment

The SCC overturned the decision of the court of second instance and held that in principle the clause for payment of an entry fee for accession to a CBA does not by itself represent direct discrimination. Direct discrimination on the basis of membership in a trade union however may be present in respect of employees who are not members of the trade union in the event that the entry fee is disproportionate as compared to the financial obligations of the members of the trade union which had concluded the CBA.

The SCC acknowledged that the employees who were members of the trade union had financial obligations towards the trade union, they had participated in the negotiations and the conclusion of the CBA and had indirectly financed the preparation of the CBA. Due to

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the latter, they were not in a similar position or similar circumstances as compared to the other employees who were not members of the trade union. Therefore, discriminatory treatment shall be established only when the entry fee exceeds the amount of the financial obligations of the members towards the trade union.
Due to the fact that the court of second instance had not compared the amounts of the entry fee and the financial obligations of the members of the trade union in order to establish whether the entry fee was disproportionate in amount, the SCC overturned the judgment of the second instance court and further instructed the court of second instance to review the case anew and to establish whether the *in casu* entry fee was disproportionate.

Commentary

Regardless of the fact that discrimination based on membership of a trade union is explicitly prohibited in the Bulgarian legislation, this is the only judgment by the Bulgarian SCC dealing with this matter. Thus, clarification has been provided by the SCC's line of reasoning on how to establish such cases of discrimination in the event of an entry fee for accession to a CBA. As noted by the Court, the entry fee does not represent discrimination *per se*. The law explicitly allows for entry fees for accession to CBAs, but such could be discriminatory in the event that their amount is disproportionate. This judgment by the SCC may serve as a guide in similar cases due to the fact that the SCC explicitly stated that it is mandatory to examine the exact amount of the entry fee before ruling it out as discriminatory.

Comments from other jurisdictions

Croatia (Dina Vlahov Buhin, Vlahov Buhin i Šourek d.o.o. in coop. with Schoenherr): In Croatia, the legal background is different, so the issue with discrimination connected with collective bargaining agreement accession fees would not arise. Generally, there is no possibility for an individual employee, either by law or by practice, to accede to a collective bargaining agreement (CBA), by way of payment or non-payment of an accession fee, regardless of the type of CBA in question (being at the level of an individual employer, at the level of a sector or branch of activity, at the level of several activities or a general collective agreement).
Namely, the parties to the collective agreements are, on the one hand the employer(s) or employers' association(s) and on the other hand the trade union(s) or unions' association(s). If the employer(s) or the employers' association(s) to which the employer belongs, has negotiated and entered into the CBA, the CBA rules apply to all employees employed by that employer, regardless of whether they are trade union members or not. In other words, an employer who has concluded a CBA is obliged to apply it to all employees ('normative concept of a collective agreement', *erga omnes* effect), because otherwise the principle of non-discrimination would be breached.
This normative concept is also visible e.g. in the so-called 'extension of the application of a collective agreement' where the minister responsible for labour may, for the purposes of public interest, extend the application of a CBA to employers who did not take part in its conclusion, or who did not subsequently accede to it.

Germany (Nina Stephan, Luther Rechtsanwaltsgesellschaft mbH): In contrast to Bulgarian law, German law does not recognise an 'entry fee' to access a collective bargaining agreement. In fact, employees who are not bound by a collective bargaining agreement basically have only two options for deriving claims from it. Firstly, if a collective bargaining agreement has been declared generally binding and the employee would in principle be subject to the scope of the collective bargaining agreement if they (and the employer) were bound by it. This is because when a collective bargaining agreement is declared generally binding, it also becomes valid for employers and employees who have not been bound by a collective bargaining agreement up to that point. The Federal Ministry of Labour and Social Affairs is responsible for the declaration and can be granted in a case where there is a public interest in doing so.
In addition, under German law, an employee can also claim collectively agreed benefits if the employment contract refers to the collective bargaining agreement and thus the provisions of the collective bargaining agreement are included in the employment contract.
However, what German collective bargaining law does recognise are so-called exclusions from collective agreements (*Tarifausschlussklauseln*) as well as differentiation and margin clauses (*Spannenklauseln*), which are intended to narrow down (certain) benefits to union members only.
The purpose of these *Tarifausschlussklauseln* (exclusion clauses) is to oblige the employer not to grant certain benefits to non-union members that are granted to union members. Such clauses had already been declared invalid by the Federal Labour Court (*Bundesarbeitsgericht*, 'BAG') in 1967 (decision of 29 November 1967 - GS 1/67), as this would shape employment relationships with non-union members by a collective bargaining agreement , which would exceed the limits of collective bargaining power.
In contrast to this, *Spannenklausen* (differentiation and margin clauses) do not prohibit the employer from granting collectively agreed benefits to non-union members, but they do require the employer to ensure that the entitlement to benefits of the union members always exceeds the entitlement of a non-union member to a certain amount/percentage. However, these clauses have also been considered invalid by case law, at least in the case of a general association collective agreement,

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i.e. collective agreements between an employers' association and a trade union that apply to a large number of employers (see, among others, BAG, judgment dated 23 March 2011 - 4 SZR 366/09). The employer could not be forced to either equalize or unequalize the position of non-union members compared to employees who are bound by collective agreements.

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