

Employment & Benefits - Poland

Termination of post-employment non-compete agreement

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On March 12 2014,⁽¹⁾ the Supreme Court confirmed that it is possible to terminate a post-employment non-compete agreement with notice on condition that the agreement includes prerequisites for such termination.

Facts

An employee was employed by a company from February 7 2008 to April 7 2010. The parties to the employment contract concluded a post-employment non-compete agreement for two years from the date of cessation of employment. The agreement provided for minimum statutory compensation – that is, 25% of the employee's remuneration received before termination in the period corresponding to the period of the non-compete obligation. The employer was to be released from the obligation to pay compensation if it served the employee with a unilateral release from the non-compete obligation.

This release was served on April 7 2010 and the employer refused to pay the compensation, indicating that the employee was no longer bound by the non-compete obligation. The employee filed suit before the labour court for payment of compensation.

Decision

The Supreme Court held that a post-employment non-compete agreement can be terminated by mutual consent, upon notice or by unilateral contractual rescission. However, unilaterally releasing the employee from the non-compete obligation resulting in the elimination of the obligation to pay compensation, does not constitute appropriate legal reasoning for such termination.

Pursuant to the Supreme Court's ruling, it is possible to terminate a post-employment non-compete agreement with notice on condition that the agreement includes prerequisites for such termination.

Comment

The rules under which a post-employment non-compete agreement can be concluded are set out in the Labour Code. A post-employment non-compete agreement is valid provided that several requirements are met. In particular, the post-employment non-compete agreement must:

- be in writing;
- specify the duration of the non-compete covenant; and
- specify the definition of 'non-compete'.

The Labour Code has no rules on early termination of a post-employment non-compete agreement. The termination of a post-employment non-compete agreement is quite complex and has caused heated discussion both in case law and among Polish legal commentators. Pursuant to the majority of the Supreme Court's rulings, three possibilities exist to effectively terminate a post-employment non-compete agreement:

- by mutual consent;
- upon notice; or
- by unilateral rescission of the agreement.

If a post-employment non-compete agreement is terminated in one of these ways, neither the employer nor the employee is bound by the post-employment non-compete agreement and the obligation to pay compensation.

Termination by mutual consent

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Irrespective of whether the agreement provides for this possibility, the parties to an employment contract are entitled to conclude an agreement terminating the post-employment non-compete agreement. The agreement can be concluded at any time – that is, during the period of employment and after its cessation.

If the post-employment non-compete agreement is silent with regard to the manner of its termination and the employee does not consent to its mutual termination, the employer must pay compensation for the entire period indicated in the post-employment non-compete agreement, unless the employee has breached the non-compete covenant.

Termination upon notice

A post-employment non-compete agreement may be terminated upon notice. To this end, it must include a clear stipulation to that effect and must indicate the prerequisites for such termination – that is, the circumstances under which the employer will be entitled to terminate the agreement upon notice. The Supreme Court explained that the prerequisites set forth in the agreement should be distinguished from the specific grounds that justify the termination notice, which are to be indicated in such notice. The agreement should also indicate the notice period.

However, due to the Supreme Court's different rulings on the prerequisites or grounds for termination of a post-employment non-compete agreement upon notice, in practice, this manner of termination is much more problematic than the unilateral contractual rescission right.

Termination by unilateral withdrawal

The post-employment non-compete agreement may provide the employer with a unilateral contractual rescission right which allows it to rescind the agreement. To that end, the post-employment non-compete agreement must specify the period during which the employer will be entitled to exercise this right. Initially, the Supreme Court allowed this right to be exercised only up until the end of the employment period (ie, it needed to be exercised before the post-employment non-compete agreement entered into force). However, in more recent rulings, employers were also allowed to rescind a post-employment non-compete agreement following termination of the employment contract (provided that the post-employment non-compete agreement included such stipulation). Grounds for rescission in the post-employment non-compete agreement itself and in the rescission notice need not be included.

Termination as result of the occurrence of a condition

In several judgments, the Supreme Court has ruled in favour of another manner of terminating post-employment non-compete agreements. The court stated that termination may be made conditional on a future and uncertain event. In such case, the post-employment non-compete agreement should provide that if a condition occurs which permits termination, the agreement will terminate by operation of law from the date of the occurrence of such condition. For example, the Supreme Court ruled that if a resolution is adopted to release a given employee from a non-compete obligation (following revocation from the company's management board), this may constitute such a condition.

Summary

From the employer's perspective, a unilateral right to terminate or rescind the post-employment non-compete agreement should be included in the agreement. More than one manner of termination of the post-employment non-compete agreement may be included in a given agreement. If any such provision is lacking, the employer will be bound to pay compensation for the entire period of the post-employment non-compete agreement, even if the non-compete obligation is no longer needed or practical. Naturally, a unilateral right to terminate or rescind the post-employment non-compete agreement can be granted not only to the employer, but also to the employee. However, in practice – and bearing in mind the purpose of the non-compete agreement – it is very unusual to grant the employee such rights.

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Endnotes

(1) II PK 151/13.

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