JUDGMENT OF THE COURT (Fifth Chamber)
12 February 1985 [1]

In Case 284/83

REFERENCE to the Court under Article 177 of the EEC Treaty by the Højesteret [Supreme Court of Denmark] for a preliminary ruling in the proceedings pending before that court between

(1) **Dansk Metalarbejderforbund,** acting as agent for Ali Altin and Jan Benny Hansen,

and

H. Nielsen & Søn, Maskinfabrik A/S, in liquidation

Intervener:
Lønmodtagernes Garantifond

and between

(2) **Specialarbejderforbundet i Danmark,** acting as agent for Finn Walther Sørensen, Harry Larsen and Erik Sørensen,

and

H. Nielsen & Søn, Maskinfabrik A/S, in liquidation,

Intervener:
Lønmodtagernes Garantifond

on the interpretation of Council Directive No 75/129/EEC of 17 February 1975 on the approximation of the laws of the Member States relating to collective redundancies (Official Journal 1975 L 48, p. 29),

1 — Language of the Case: Danish.

THE COURT (Fifth Chamber)

composed of: O. Due, President of Chamber, C. Kakouris, U. Everling, Y. Galmot and R. Joliet, Judges,

Advocate General: C. O. Lenz
Registrar: H. A. Rühl, Principal Administrator

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gives the following

JUDGMENT

(The account of the facts and issues which is contained in the complete text of the judgment is not reproduced)

Decision

1 By a letter of 15 December 1983, which was received at the Court Registry on 20 December 1983, the Højesteret referred to the Court for a preliminary ruling under Article 177 of the EEC Treaty two questions on the interpretation of Council Directive No 75/129 of 17 February 1975 on the approximation of the laws of the Member States relating to collective redundancies.

2 Those questions were raised in proceedings brought by two trade unions, namely Dansk Metalarbejderforbund and Specialarbejderforbundet Danmark, both acting on behalf of some of their members, against H. Nielsen & Son, Maskinfabrik A/S, in liquidation, (hereinafter referred to as 'the Company'). The Company is supported by the Lonmodtagernes Garantifond [Wage-earners' Guarantee Fund].

* after considering the observations submitted on behalf of
the plaintiff Specialarbejderforbundet i Danmark by Mr J. Bjørst,
the intervener Lønmodtagernes Garantifond by Mr U. Andersen,
the Commission of the European Communities by Mr H. P. Hartvig, acting as Agent,
after hearing the Opinion of the Advocate General delivered at the sitting on 27 November 1984,

3 It appears that in February 1980 the Company informed the staff representatives of its financial difficulties. On 14 March 1980 it informed the bankruptcy court that it was suspending payment of its debts. The two trade unions thereupon asked the company to provide a bank guarantee for the future payment of wages. No such guarantee was forthcoming and on 19 March 1980 the workers stopped work on the advice of their trade unions. On 21 March 1980 the Company informed the competent Danish Employment Office that it was considering dismissing all its workers. On 25 March 1980 it was declared insolvent on its own application. On 26 March 1980 the workers were given due notice of dismissal.

4 The two trade unions claim from the Company special allowances in reliance on Article 102 a (2) of the Danish Law on the Procurement of Employment and Unemployment Insurance. That provision states that if an employer does not give the competent authorities 30 days notice of proposed collective redundancies he must pay the workers an allowance equal to their salary for that period. In the event of the employer's insolvency the Wage-earners' Guarantee Fund is responsible for payment of the allowance.

5 The aforesaid provision of Danish Law is part of the legislation implementing Directive No 75/129, which provides that the Member States must impose certain obligations on employers contemplating collective redundancies. Article 2 (1) of the directive states: 'Where an employer is contemplating collective redundancies, he shall begin consultations with the workers' representatives with a view to reaching an agreement.' Article 3 (1) provides: 'Employers shall notify the competent public authority in writing of any projected collective redundancies.' Under Article 4, the redundancies referred to in Article 3 are to take effect not earlier than 30 days after notification unless the competent authority reduces that period.

6 When the actions came before the Danish Højesteret as the court of last instance, it queried whether the cessation of work by the workers in the circumstances of the case constituted a repudiation of their contract amounting to dismissal attributable to the employer and thereby falling under the directive. It also queried whether the employer ought to have contemplated collective redundancies within the meaning of the directive, on announcing that it was suspending payment of its

debts, since that announcement was followed by the Company's winding-up and the collective redundancy of the workers. The Højesteret therefore referred the following questions to the Court of Justice:

'(1) May a termination of employment which is effected by the employees because the employer has notified the bankruptcy court that he is suspending payment of his debts be treated as dismissal by the employer, with the consequences that the employment falls within the scope of Council Directive No 75/129/EEC of 17 February 1975 on the approximation of the laws of the Member States relating to collective redundancies, provided that the conditions therefor are otherwise satisfied? The reply should be based on the assumption that the employees' termination of their employment was justified under Danish law.

(2) Does Council Directive No 75/129/EEC apply not only where the employer in fact contemplated large-scale redundancies, but also where he ought to have contemplated large-scale redundancies and to have given advance notice thereof but failed to do so?'

First question

7 The purpose of the first question is to ascertain whether, under the directive, termination of a contract of employment by the employees in such circumstances may be treated as dismissal by the employer and as such falling under the directive.

8 The answer to that question must first of all be sought in the wording of the directive. As Specialarbejderforbundet i Danmark, the Guarantee Fund and the Commission point out, Article 1 (1) (a) of the directive states ' "collective redundancies" means dismissal effected by an employer'. No other provision of the directive supports an extension of its scope to termination of employment by the employees.

9 Nevertheless, according to Specialarbejderforbundet i Danmark, the objective of the directive, which is to strengthen the protection of workers in the event of collective dismissal, implies that the termination by the workers of their employment on the ground that payment of their wages is no longer guaranteed should be treated as dismissal effected by the employer.

10 That argument cannot be accepted. The directive does not affect the employer's freedom to effect or refrain from effecting collective dismissals. Its sole object is to provide for consultation with the trade unions and for notification of the competent public authority prior to such dismissals. Article 2 (2) provides that consultation with the trade unions must, at least, cover 'ways and means of avoiding collective redundancies or reducing the number of workers affected, and mitigating the consequences.' Article 4 provides that projected collective redundancies notified to the competent authority are to take effect only after a particular period has elapsed. The competent public authority is to use that period to seek solutions to the problems raised by the projected collective redundancies. As the Guarantee Fund and the Commission rightly observe, to treat termination of their employment by the workers in the manner advocated by Specialarbejderforbundet i Danmark would give the workers the possibility of bringing about dismissals against the will of the employer and without his being in a position to discharge his obligations under Articles 2 and 3 of the directive. It would lead to a result precisely contrary to that sought by the directive, namely to avoid or reduce collective redundancies.

11 For those reasons the reply to the first question must be that the termination by workers of their contract of employment following an announcement by the employer that he is suspending payment of his debts cannot be treated as dismissal by the employer for the purposes of Council Directive No 75/129 of 17 February 1975 on the approximation of the laws of the Member States relating to collective redundancies.

Second question

12 By the second question the national court asks whether the directive applies where, because of the financial state of the undertaking, the employer ought to have contemplated collective redundancies but did not do so.

13 There is nothing in the wording of Articles 2 (1) and 3 (1) of the directive to justify an affirmative reply to the second question. The employer must consult the unions only when he 'contemplates' redundancies and must inform the public authority only of 'projected' redundancies.

14 Specialarbejderforbundet i Danmark contends, however, that the effectiveness of the directive would be impaired if the employer were not obliged, by implication, to foresee collective redundancies as soon as he encounters serious financial difficulties.

15 As the Guarantee Fund and the Commission rightly state, there is no implied obligation under the directive to foresee collective redundancies. It does not stipulate the circumstances in which the employer must contemplate collective redundancies and in no way affects his freedom to decide whether and when he must formulate plans for collective dismissals.

16 Moreover, as the Commission rightly observes, the effect of the interpretation proposed by Specialarbejderforbundet i Danmark would be that any employer who ceased to trade as a result of insolvency and who failed to notify the public authority of any projected collective redundancy would incur the penalties laid down by national law, since he would not have foreseen collective redundancies in sufficient time. Such an interpretation would run counter to the wording of Article 1 (2), which excludes from the scope of the directive collective redundancies caused 'by the termination of an establishment's activities where that is the result of a judicial decision.'

17 For those reasons the reply to the second question must be that Council Directive No 75/129 of 17 February 1975 on the approximation of the laws of the Member States relating to collective redundancies applies only where the employer has in fact contemplated collective redundancies or has drawn up a plan for collective redundancies.

Costs

18 The costs incurred by the Commission of the European Communities, which submitted observations to the Court, are not recoverable. As these proceedings are, in so far as the parties to the main proceedings are concerned, in the nature of a step in the action pending before the national court, the decision on costs is a matter for that court.

On those grounds,

THE COURT (Fifth Chamber),

in reply to the questions referred to it by the Højesteret by letter of 15 December 1983, hereby rules:

(1) **The termination by workers of their contract of employment following an announcement by the employer that he is suspending payment of his debts cannot be treated as dismissal by the employer for the purposes of Council Directive No 75/129 of 17 February 1975 on the approximation of the laws of the Member States relating to collective redundancies.**

(2) **Council Directive No 75/129 of 17 February 1975 on the approximation of the laws of the Member States relating to collective redundancies applies only where the employer has in fact contemplated collective redundancies or has drawn up a plan for collective redundancies.**

Due Kakouris

Everling Galmot Joliet

Delivered in open court in Luxembourg on 12 February 1985.

P. Heim
Registrar

O. Due
President of the Fifth Chamber