Case 215/83

Commission of the European Communities
v
Kingdom of Belgium

'Collective redundancies'

Summary

Member States — Obligations — Implementation of directives — Failure to fulfil obligations — Justification — Not permissible
(EEC Treaty, Art. 169)

The Member States must fulfil their obligations under Community directives in every respect and may not plead provisions, practices or circumstances existing in their internal legal system in order to justify a failure to comply with those obligations.

OPINION OF ADVOCATE GENERAL
SIR GORDON SLYNN
delivered on 6 March 1985

My Lords,

This is an action brought by the Commission under Article 169 of the EEC Treaty for a declaration that the Kingdom of Belgium has failed to fulfil its obligations under the Treaty by not adopting within the time prescribed all the provisions necessary fully to implement Council Directive 75/129 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).

The provisions of Directive 75/129 break down into three sections: Section I (Article 1) lays down definitions and defines the scope of the Directive, Section II (Article 2) lays down a procedure for consultation with the workers' representatives, and Section III (Articles 3 and 4) lays down the procedure for effecting collective redundancies under which employers must notify the competent public authority of any collective redundancies which they are planning and under which those projected redundancies cannot as a rule take effect earlier than 30 days after such notification. The competent public authority is to use this suspensory period to seek solutions to the problems raised by the projected collective redundancies.

In Section IV (entitled 'Final Provisions'), Article 5 preserves the right of Member States to apply or introduce provisions which are more favourable to workers than those of the directive. Article 6 provides that the Member States shall bring into force the laws, regulations and administrative provisions needed in order to comply with the directive within two years following its notification and shall forthwith inform the Commission thereof, sending it the texts of the measures adopted.

It appears that the directive was notified to the Belgian Government on 19 February 1975, so that it should have been complied with by 19 February 1977.

The Belgian Government sought to give effect to the directive by two sets of measures: on the one hand, Collective Labour Agreement No 24 which was concluded on 2 October 1975 and was given the force of law by a Royal Decree of 21 January 1976 and, on the other hand, the Royal Decree of 24 May 1976. The former concerns the procedure for informing and consulting with the workers' representatives, whereas the latter concerns notification to the public authority and the suspensory period during which the projected collective redundancies cannot take effect.

The Commission alleges that in a number of respects the scope of the above Belgian measures is narrower than that laid down in the directive. The Application groups the alleged shortcomings under three heads:

(1) The causes of collective redundancies:

(a) Whereas Article 1 (1)(a) of the directive provides that 'collective redundancies' means 'dismissals effected by an employer for one or more reasons not related to the individual workers concerned', the Belgian legislation mentioned above refers to 'dismissals for economic or technical reasons', which is narrower.

(b) The Commission maintains that the directive applies to redundancies caused by the closure of an undertaking whereas in Belgian law these remain governed by separate legislation (Law of 28 June 1966 and Royal Decree of 20 September 1967) which has not been amended so as to comply with the directive and which does not satisfy its requirements, in particular in relation to the consultation procedure envisaged in Article 2 and the collective redundancies procedure in Articles 3 and 4.

(2) The minimum numbers qualifying as 'collective redundancies':

Article 1 (1) (a) of the directive also defines collective redundancies by reference to the number of redundancies over a given period. The Member States are given a choice between (a) over a period of 30 days, at least (i) 10 redundancies in establishments normally employing more than 20 and less

than 100 workers, (ii) 10% of the number of workers in establishments normally employing at least 100 but less than 300 workers, (iii) 30 in establishments normally employing 300 workers or more, or (b) over a period of 90 days, at least 20 redundancies, whatever the number of workers normally employed in the establishments in question. The Belgian legislation referred to 10% of the number of workers employed over a continuous period of 60 days, save in regard to undertakings employing between 20 and 59 workers. The Belgian legislation therefore fell short of the standard required by the directive because, for example, between 30 and 99 redundancies in an undertaking employing 1 000 persons would not qualify as collective redundancies under the Belgian legislation, although they would under the directive.

In the course of the present proceedings, the Belgian Government adopted further implementing measures designed to meet the Commission's objections: Collective Labour Agreement No 24 bis of 6 December 1983 amending Collective Labour Agreement No 24, Royal Decree of 7 February 1984 giving the force of law to Agreement No 24 bis, and Royal Decree of 26 March 1984 amending the Royal Decree of 24 May 1976. By these amendments, the Belgian legislation adopts verbatim the definition of the reasons for collective redundancies given in Article 1 (1)(a) of the directive, adopts the definition of the minimum number of redundancies given in Article 1 (1)(a) of the directive (except only that it extends the period of 30 days to 60 days, which is more favourable to the workers) and extends its ambit to include white-collar workers in the building industry. This meets objections 1 (a) and 2 in full, and 3 (a) in part. The Commission does not now pursue these parts of its claim. It maintains the rest of its claims.

(3) Excluded categories of employment:

Article 1 (2) of the directive provides that the directive does not apply to four categories of employment: (a) employment under contracts concluded for limited periods or specific tasks, except where the redundancies take place prior to the expiry of the contract or the completion of the task; (b) employment in public bodies and the like; (c) the crews of sea-going vessels and (d) workers affected by the termination of an establishment's activities where that is the result of a judicial decision. The Commission alleges that the Belgian legislation provides more far-reaching exemptions than those allowed by the directive in three respects: (a) it excludes undertakings in the building industry; (b) it excludes undertakings which employ port workers, and (c) it excludes undertakings which employ ship repairers.

As to objection 1 (b), redundancies arising from the closure of undertakings, the Commission fears that the case of redundancies arising from the closure of undertakings will continue to be governed by the Law of 28 June 1966 and its implementing Decree of 20 September 1967 and will remain outside the scope of the rules implementing the directive.

To this objection the Belgian Government has put forward two defences. First, it says that the vast majority of collective redundancies due to closure of an undertaking come about as the result of a judicial decision, and are therefore outside the scope of the directive by virtue of Article 1 (2)(d) thereof, which provides: 'This

directive shall not apply to . . . workers affected by the termination of an establishment's activities where that is the result of a judicial decision.'

While it is undoubtedly true that a proportion of closures result from judicial decisions, the Belgian Government has been unable to provide any statistics showing what proportion. In these circumstances, it seems to me that this argument cannot be relied on as a justification for not amending national law to fit the directive.

Secondly, it is said that the Belgian courts may extend the 1976 legislation implementing the directive to the case of collective redundancies arising from closures. The Commission contests this, and says that in practice the Law of 28 June 1966 and the Royal Decree of 20 September 1967 continue to be applied to redundancies due to closures of undertakings. It is, however, common ground that no Belgian court has yet done so.

Again it seems to me that the arguments either way are hypothetical, but it cannot be a defence to rely on possible future interpretations by the national courts: a Member State is under an obligation to enact provisions which provide a clear and certain implementation of the directive, unless this has already been achieved.

The Royal Decree of 26 March 1984 and Collective Labour Agreement No 24 bis of 6 December 1983 amend, respectively, the Royal Decree of 24 May 1976 and Collective Labour Agreement No 24 of 2 October 1975, by adopting verbatim the directive's definition of collective redundancies as dismissals 'for one or more reasons not related to the individual workers concerned'. On the face of it, this looks like a compliance with the directive. The problem is that Belgium has left in force parallel legislation specifically governing the case of collective redundancies arising from closures. There is no authoritative ruling or clear principle that the recent legislation implementing the directive overrides the earlier legislation specifically dealing with closures and the presumption, it seems to me, must be that the latter can be, or at least may be capable of being, relied on (as the Commission contends that it has in fact been relied on). To the extent that the earlier legislation specifically dealing with closures does not comply with the directive, then it seems to me that there has been a failure to fulfil obligations under the Treaty.

It is clear that that legislation does fall short in several respects. The Belgian Government does not deny this, and only argues that it provides guarantees which are similar and have operated to the satisfaction of the parties and the trade unions, with whom a consensus on such matters is necessary. Thus, for instance, whilst it is true that Article 11 of Collective Labour Agreement No 9 of 9 March 1972 provides for the works council to be informed and consulted in advance ('préalablement'), the official commentary thereto shows that this only means 'before the decision is made public and enforced', not at the earlier stage where the employer is 'contemplating collective redundancies' as required by Article 2 (1) of the directive. Similarly, although Articles 4 and 5 of the Royal Decree of 20 September 1967 require an employer who decides to close an undertaking to provide the

workers' representatives and public authorities with certain information, it fails to mention among that information the reasons for the redundancies, the number of workers to be made redundant and the period over which the redundancies are to be effected, as required by the directive; and again those Articles relate to a decision which has been taken, not one which is contemplated. Finally, and perhaps of most importance, the Royal Decree of 1967 contains no provision corresponding to Article 4 of the directive which stipulates that projected collective redundancies may not take effect until at least 30 days after notification of the competent public authority. Even if the view be taken that Article 11 of Collective Agreement No 9 provides for advance consultation of the workforce in a manner substantially conforming to the directive, as was argued, the Belgian legislation specifically concerning the closure of undertakings still falls short of the directive's requirements in several respects. In my view, compliance with the directive requires that it should either be brought into line or unambiguously excluded from the area covered by the 1976 implementing legislation as amended.

As to objection (3), concerning the excluded categories of employment, Article 5 of Collective Labour Agreement No 24, as amended, and Article 3 of the Royal Decree of 24 May 1976, as amended, in substantially identical terms exclude from their ambit: (1) undertakings which employ workers under contracts of employment concluded for limited periods of time or for specific tasks except where such redundancies take place prior to the date of expiry of the contract or the completion of the task, (2) undertakings which employ port workers, ship repairers, ...; (3) undertakings in the building industry in so far as their manual workers ('ouvriers') are concerned. The first of these exclusions corresponds exactly to that laid down in Article 1 (2)(a) of the directive, but there is nothing in the directive which allows the exclusion of port workers, ship repairers and manual building workers as categories.

The Belgian Government gave an explanation of the reasons for excluding manual workers in the building industry, by reference to the particular conditions of the industry and the distinction between 'site-workers', i.e. those employed for a particular job, and 'permanent employees'. It argued that manual workers in the building industry receive other benefits to compensate them for the fact that the rules relating to collective redundancies do not apply and that it would not be opportune to apply the general rules on collective redundancies to them. However, in my view, what may be opportune to a particular sector of industry cannot change what is required of a Member State by the Treaty as a matter of law.

According to the Belgian Government, ship repairers and port workers were legitimately excluded from the Belgian legislation because the directive itself does not apply to 'collective redundancies effected under contracts of employment concluded for limited periods of time or for specific tasks except where such redundancies take place prior to the date of expiry or the completion of such contracts' and in Belgium, port workers and ship repairers are mostly engaged on a day-to-day basis or for a specific piece of work and their conditions of employment are determined by a series of collective agreements. The collective agreements applying to port workers, which dispense with the need for written contracts of employment, reflect the fact that they are normally employed for a specific task and, hence, a specific period of time, although nothing prevents the conclusion of contracts

of employment of undetermined duration. Port workers benefit from a special system of employment and other forms of protection which are not compatible with the rules on collective redundancies. Given the small number of persons employed under contracts of undetermined duration, the concept of collective redundancy is inapplicable to them. If this is correct, it simply means that in most cases ship repairers and port workers in Belgium will come within the exclusion in Article 1 (2)(a) of the directive, an exclusion which is already fully transposed in the first of the exclusions laid down in the Belgian implementing law.

It follows that no useful purpose can be served by the other two exclusions, consistent with the directive. They are only permissible to the extent to which they come within Article 1 (2)(a) of the directive. In so far as they do not do so, they are contrary to the directive. In so far as they do so, the matter is already governed by the first exclusion and they are superabundant and can only serve to cause confusion.

Accordingly, I am of the opinion that although the Belgian Government has taken substantial steps to comply with the directive, and although some of the matters relied on are points of detail, the Commission is entitled to the declaration it now seeks and to its costs against Belgium.