Reports of Cases

OPINION OF ADVOCATE GENERAL
BOBEK
delivered on 11 June 2020[1]

Case C-300/19

UQ
v
Marclean Technologies, SLU,
joined parties:
Ministerio Fiscal,
Fondo de Garantía Salarial

(Request for a preliminary ruling from the Juzgado de lo Social nº 3 de Barcelona (Social Court No 3, Barcelona, Spain))

(Reference for a preliminary ruling — Social policy — Collective redundancies — Directive 98/59/EC — Article 1(1)(a) — Reference period to calculate the number of redundancies)

I. Introduction

1. Council Directive 98/59/EC of 20 July 1998 on the approximation of the laws of the Member States relating to collective redundancies,[2] aims at offering enhanced protection to workers by granting them (and their associations) certain specific rights in case of collective redundancies. That directive applies when the conditions set out in Article 1 thereof are satisfied. One of those conditions concerns the number of dismissals that take place over a given period (of 30 or 90 days, depending on the choice made by each Member State).

2. The questions submitted in the present case concern the method to be used in order to identify that period. Put simply, how should that period be calculated, when a (former) worker and his or her (former) employer disagree on whether there has been a sufficient number of redundancies to trigger the application of Directive 98/59?

1 Original language: English.

2 OJ 1998 L 225, p. 16.

II. Legal framework

A. EU law

3. Article 1(1) of Directive 98/59 states:

'For the purposes of this Directive:

(a) "collective redundancies" means dismissals effected by an employer for one or more reasons not related to the individual workers concerned where, according to the choice of the Member States, the number of redundancies is:

(i) either, over a period of 30 days:

– at least 10 in establishments normally employing more than 20 and less than 100 workers,

– at least 10% of the number of workers in establishments normally employing at least 100 but less than 300 workers,

– at least 30 in establishments normally employing 300 workers or more,

(ii) or, over a period of 90 days, at least 20, whatever the number of workers normally employed in the establishments in question;

…

For the purpose of calculating the number of redundancies provided for in the first subparagraph of point (a), terminations of an employment contract which occur on the employer's initiative for one or more reasons not related to the individual workers concerned shall be assimilated to redundancies, provided that there are at least five redundancies.'

4. Article 2 of Directive 98/59 provides:

'1. Where an employer is contemplating collective redundancies, he shall begin consultations with the workers' representatives in good time with a view to reaching an agreement.

…'

5. Article 3 of Directive 98/59 provides:

'1. Employers shall notify the competent public authority in writing of any projected collective redundancies.

…

This notification shall contain all relevant information concerning the projected collective redundancies and the consultations with workers' representatives provided for in Article 2, and particularly the reasons for the redundancies, the number of workers to be made redundant, the number of workers normally employed and the period over which the redundancies are to be effected.

…'

6. Article 5 of Directive 98/59 provides:

'This Directive shall not affect the right of Member States to apply or to introduce laws, regulations or administrative provisions which are more favourable to workers …'

B. National law

7. Article 51(1) of the Ley del Estatuto de los Trabajadores (Workers' Statute, 'the ET') provides:

'For the purposes of the present law, "collective redundancy" shall mean the termination of employment contracts on economic, technical, organisational or production grounds where, over a period of 90 days, the termination affects at least:

(a) 10 workers in undertakings employing fewer than 100 workers;

(b) 10% of the number of workers in an undertaking employing between 100 and 300 workers;

(c) 30 workers in undertakings employing more than 300 workers.

…

For the purpose of calculating the number of contract terminations for the purposes of the first subparagraph of this paragraph, all other terminations of an employment contract during the period of reference which occur on the employer's initiative for other reasons not related to the individual workers concerned which are different from the grounds provided for in Article 49(1)(c) of this Law shall also be taken into account, provided that at least five employees are affected.

When, in successive periods of 90 days and in order to circumvent the requirements of this article, an undertaking terminates contracts under Article 52(c) of this Law, the number of terminations being lower than the thresholds indicated, and when there are no new grounds justifying such action, those new terminations shall be deemed to be effected in circumvention of the law and shall be declared null and void.'

8. Article 122(2) of Ley 36/2011 reguladora de la jurisdicción social (Law governing the social courts) states that a termination of a contract is void 'where there has been an abuse of law in circumvention of the provisions laid down for collective redundancies'.

III. Facts, national proceedings and the questions referred

9. The applicant in the main proceedings started working for the undertaking Marclean Technologies, SLU on 31 October 2016. On 28 May 2018, she became temporarily unable to work. On 31 May 2018, she was dismissed.

10. Marclean Technologies eventually recognised the unfairness of her dismissal, but claimed that it was a result of the fall in its trading activity and breaches of contract by the worker. It would appear that other workers were dismissed for the same reasons.

11. The applicant received compensation corresponding, in the view of the undertaking, to that due in cases in which the dismissal is declared unfair by court order. On 11 June 2018, the applicant brought an action for dismissal against Marclean Technologies before the Juzgado de lo Social nº 3 de Barcelona (Social Court No 3, Barcelona, Spain). She sought a declaration as to the nullity or, in the alternative, unfairness of the dismissal. The applicant claimed that her dismissal formed part of covert

collective redundancies. In that connection, she referred to the fact that, between 31 May and 14 August 2018, seven people had ceased working for the undertaking (four for reasons not attributable to the individual workers concerned, two on account of resignation and one because of the expiry of a temporary contract). Subsequently, on 15 August 2018, a further 29 people left the undertaking. As they had all submitted a letter of resignation on 26 July 2018, the undertaking took the view that they had all resigned voluntarily.

12. On 15 August 2018, Marclean Technologies ceased its trading activities entirely. On 16 August 2018, all 29 people, having left that undertaking the previous day, were taken on by another undertaking, Risk Steward, SL.

13. The referring court considers the latter terminations of employment as not being sought by the worker, and are thus '*redundancies*' within the meaning of Article 1(1)(a) of Directive 98/59. However, in so far as they took place subsequent to the dismissal of the applicant, the referring court is unsure whether they may be taken into account in order to establish whether *collective redundancies* have taken place.

14. According to the referring court, following a judgment of the Tribunal Supremo (Supreme Court, Spain) of 11 January 2017, the national case-law interprets Article 51(1) of the ET as follows. Only terminations of employment which took place in the 90 days *prior* to the date of the individual dismissal at issue are taken into account to establish the existence of collective redundancies. Terminations taking place in the 90 days *subsequent* to that date can be considered only if the employer has acted abusively.

15. Therefore, harbouring doubts as to the method required in order to identify the relevant period to be taken into account to determine whether terminations of employment qualify as collective redundancies within the meaning of Article 1(1)(a) of Directive 98/59, the Juzgado de lo Social nº 3 de Barcelona (Social Court No 3, Barcelona), decided to stay the proceedings and refer the following questions to the Court of Justice for a preliminary ruling:

'(1) Must Article 1(1)(a)(i) and (ii) of [Directive 98/59] be interpreted as meaning that the reference period of 30 or 90 days laid down as a condition for the existence of collective redundancies must always be calculated retrospectively from the date of the individual dismissal at issue?

(2) May Article 1(1)(a)(i) and (ii) of [Directive 98/59] be interpreted as meaning that the reference period of 30 or 90 days laid down as a condition for the existence of collective redundancies may be calculated prospectively from the date of the individual dismissal at issue without the need for subsequent terminations to be regarded as abusive?

(3) May the reference periods in Article 1(1)(a)(i) and (ii) of [Directive 98/59] be interpreted in such a way as to permit account to be taken of dismissals or terminations taking place within 30 or 90 days of the dismissal at issue as falling at some point within those periods?'

16. Written observations in the present proceedings have been submitted by the Polish Government and the European Commission.

IV. Analysis

17. By its three questions, which it is appropriate to examine together, the referring court asks the Court to clarify the manner in which the reference period of 30 or 90 days laid down in Article 1(1)(a)(i) and (ii) of Directive 98/59 must be calculated.

18. Before turning to that specific issue, I wish to recall that the applicability of Directive 98/59 presupposes the existence of 'collective redundancies' within the meaning of Article 1(1)(a) thereof. That provision sets out three cumulative conditions: (1) the terminations of employment contracts must be '*redundancies*', (2) the *number* of redundancies must reach a certain quantitative threshold, and (3) the threshold must be reached *within a certain period of time*.

19. As far as the *first* condition is concerned, redundancies for the purposes of Article 1(1)(a) of Directive 98/59 are 'dismissals effected by an employer for one or more reasons not related to the individual workers concerned'.[3] As the Court has explained in *Pujante Rivera*, that means 'any termination of an employment contract not sought by the worker, and therefore without his consent'.[4] There is also a redundancy when the termination of an employment results from the 'employer — unilaterally and to the detriment of the employee — [making] significant changes to essential elements of his employment contract for reasons not related to the individual employee concerned'.[5]

20. With regard to the *second* condition, in order to calculate the total number of redundancies over the reference period, *other* terminations of the employment contract on the employer's initiative may be assimilated to redundancies pursuant to the last paragraph of Article 1(1) of Directive 98/59, when certain conditions are met. The phrase 'on the employer's initiative' implies, as the Court has explained, a 'direct manifestation of the will of the employer consisting in taking the initiative'.[6] Those terminations of contract are thus different from redundancies 'for want of the worker's consent'.[7]

21. It will be for the referring court to determine, in the light of those principles, whether the terminations of employment of the other workers, having left the undertaking in the relevant period, were 'redundancies' (or can be assimilated to redundancies) within the meaning of Directive 98/59, and whether the total amount of those reached the required threshold.

22. Turning now to the *third* condition of 'collective redundancies' for the purposes of Article 1(1)(a) of Directive 98/59, how should the relevant time period in which the redundancies must have occurred be calculated?

23. Article 1(1)(a) of Directive 98/59 gave Member States the possibility to choose the length of the time period in which all redundancies must be 'aggregated' with a view to checking whether the threshold set out in that provision is met. Member States are able to choose between a period of 30 days (subparagraph (i)), or one of 90 days (subparagraph (ii)).

24. It seems that the Kingdom of Spain has chosen to combine the two options set out in Article 1(1)(a)(i) and (ii) of Directive 98/59.[8] In doing so, it would appear that that Member State has thus expanded the concept of 'collective redundancies'.

25. In accordance with Article 5 of Directive 98/59, that directive 'shall not affect the right of the Member States to apply or to introduce laws, regulations or administrative provisions which are more favourable to workers'. The Court also confirmed, in *Confédération Générale du travail and Others*, that the 'thresholds laid down in Article 1(1) of Directive 98/59 constitute … minimum provisions from which Member States may derogate … by provisions more favourable to employees'.[9]

3 See also judgment of 12 October 2004, *Commission* v *Portugal* (C-55/02, EU:C:2004:605, paragraph 66).

4 Judgment of 11 November 2015, *Pujante Rivera* (C-422/14, EU:C:2015:743, paragraph 48 and the case-law cited).

5 See judgments of 11 November 2015, *Pujante Rivera* (C-422/14, EU:C:2015:743, paragraph 55); of 21 September 2017, *Ciupa and Others* (C-429/16, EU:C:2017:711, paragraph 27); and of 21 September 2017, *Socha and Others* (C-149/16, EU:C:2017:708, paragraph 25).

6 Judgment of 10 December 2009, *Rodríguez Mayor and Others* (C-323/08, EU:C:2009:770, paragraph 40).

7 Judgment of 12 October 2004, *Commission* v *Portugal* (C-55/02, EU:C:2004:605, paragraph 56).

8 See Article 51 of the ET, cited above in point 7 of this Opinion.

9 Judgment of 18 January 2007 (C-385/05, EU:C:2007:37, paragraph 45).

26. The crux of the present case lies not with the potential combination of both time periods, but with the *method* that should be used to calculate the reference periods set out in Article 1(1)(a) of Directive 98/59.

27. The terms used in Article 1(1)(a) of Directive 98/59 are concepts of EU law. Their meaning and scope must, therefore, be given an autonomous and uniform interpretation, which must take into account the context of the provision and the purpose of the legislation in question. This ensures that Member States do not alter the scope of the directive.[10] As a consequence, the calculation of the period of 30 or 90 days, set out in Article 1(1)(a) of Directive 98/59, cannot be made dependent on rules of national law.

28. Nevertheless, that does not clarify how the reference period in which other dismissals can be taken into account for the purposes of Article 1(1)(a) of Directive 98/59 is to be determined. Different interpretations are, at least in theory, possible. The referring court itself suggested three different methods for calculating the reference period. The Polish Government, in its observations, proposed another.

29. The first two methods suggested by the referring court consist in determining the relevant period either only retrospectively, or only prospectively, from the date of the individual dismissal. Thus, only redundancies taking place prior or subsequent to, respectively, the dismissal at issue can be counted towards the required thresholds.

30. Neither of these two interpretations is convincing.

31. To begin with, no such limitation of the reference period is provided for in the *wording* of Article 1(1)(a) of Directive 98/59. That provision refers, quite generally, to '*a* period of 30 days' and to '*a* period of 90 days'.[11] It seems to me that, in the ordinary sense of those terms, that means *any* period of 30 or 90 days.

32. Next, the only caveat which could be inferred from the logic and the *context* is that those periods should be consecutive, with no suspension or interruption being possible. First, no other provisions of the same directive provide for such a possibility. Second, the overall purpose of the directive is to catch certain types of behaviour on the part of employers within a specific period, which must be to a reasonable degree foreseeable and ascertainable.

33. Those two interpretations would also seem to conflict with the *objective* of the legislation at issue. Directive 98/59 aims at affording greater protection to workers in the event of collective redundancies.[12] Limiting the redundancies relevant, for the purposes of Directive 98/59, only to those that took place either before or after an individual dismissal would hardly contribute to achieving that objective. Indeed, under such a 'one-sided' approach less dismissals are caught by Article 1(1)(a) Directive 98/59, thus considerably reducing the scope of that instrument.

34. Furthermore, such an *ex ante* and rigid determination of the reference period is likely to produce arbitrary results for the workers concerned. If the reference period were calculated only *retrospectively* (in other words, backwards) from the date of the individual dismissal at issue, it would mean that whatever happened after that cut-off date could not be taken into account. That would be the case,

10 See, inter alia, judgment of 11 November 2015, *Pujante Rivera* (C-422/14, EU:C:2015:743, paragraph 31 and the case-law cited).

11 Emphasis added.

12 See recital 2 of the directive. See also, more generally, Opinion of Advocate General Szpunar in *Plessers* (C-509/17, EU:C:2019:50, points 38 to 41).

even if, for example, all the dismissals which would be relevant for deciding whether the respective threshold has been met took place subsequently. The same would be true, but in a reverse manner, if the reference period were calculated only *prospectively*, not allowing for the taking into account of the amount or type of dismissals which occurred before the dismissal of the individual worker in question.

35. Thus, I find no support in the Directive 98/59 for calculating the reference period under Article 1(1)(a) only retrospectively or only prospectively with regard to the worker concerned who brings an action before a national court.

36. Moreover, in my view, both of the minimal periods under that provision are *objective* by their nature. Its calculation and the running of that period are not dependent on any condition of abuse on the part of the employer. Article 1(1)(a) of that directive does not distinguish between abusive and non-abusive dismissals. Thus, although a potential abuse in the form of concealing the real nature of dismissals may possibly be indirectly discussed under the first or the second conditions of the applicability of Article 1(1)(a),[13] it has no impact on the length or the running of the reference period at issue.

37. Next, for similar reasons, I also find the approach suggested by the Polish Government to be incorrect. That government submits that the point of reference for the start of the relevant period of 30 or 90 days must be the first dismissal *executed in accordance with the employer's plan* to proceed to collective redundancies. So long as a dismissal falls within the period of 30 or 90 days, determined by reference to the employer's plan, it forms part of the collective redundancies and the worker concerned should benefit from the protections offered by Directive 98/59.

38. The Polish Government thus interprets Article 1(1)(a) of Directive 98/59 in the light of Articles 2 to 4 thereof. The latter provisions lay down certain obligations, in particular of information and consultation, for employers contemplating collective redundancies. In that regard, the Polish Government also points out that, in *Junk*, the Court held that the employer must comply with those obligations to inform, consult and notify *before* any decision to execute collective redundancies is taken.[14]

39. However, such an approach would be problematic, if not outright dangerous. Dismissals that constitute redundancies for the purposes of Directive 98/59 must be determined *objectively*, solely on the basis of the criteria laid down in Article 1 thereof. Whether or not dismissals of workers are part of a plan conceived beforehand by the employer might be of some evidentiary relevance, but it is certainly not decisive in this context. Once the number of collective redundancies effected by an employer reaches the threshold provided for in Directive 98/59, the rules of that instrument become applicable, *regardless of the subjective intention* of the employer.

40. The interpretation proposed by the Polish Government would lead to a paradoxical result. The workers' enjoyment of the rights provided for in Directive 98/59 would be made dependent on the employer's compliance with the obligations set out therein. An employer that, wilfully or by negligence, does not communicate the required information to the authorities and to the workers' representatives, would in practice deprive its workers of the protection afforded by Directive 98/59. Such an interpretation is clearly at odds with the objective of offering 'greater protection to workers'.[15]

41. In the light of the foregoing above, I am of the view that the correct interpretation of Article 1(1)(a) of Directive 98/59 is the third one suggested by the referring court, and also advocated by the Commission.

13 See above, points 18 to 20 of this Opinion.

14 Judgment of 27 January 2005 (C-188/03, EU:C:2005:59, paragraphs 36 to 38).

15 See recital 2 of Directive 98/59 and judgment of 7 August 2018, *Bichat and Others* (C-61/17, C-62/17 and C-72/17, EU:C:2018:653, paragraph 38).

42. The protection for a worker under Directive 98/59 will be triggered, including the access to the judicial and/or administrative procedures for the enforcement of the rights guaranteed under that directive pursuant to Article 6, if the worker was dismissed within a consecutive 30 or 90 day period, however calculated, in which the number of redundancies reaches the required threshold.

43. Depending on the facts of each specific case, the reference period could thus lie fully before, fully after or partly before and partly after the dismissal at issue. The only two conditions are that (i) those 30 or 90 days are consecutive, and (ii) the worker invoking his or her rights under the directive was dismissed within that period.

44. Finally, I wish to stress that the interpretation just suggested concerns the method of calculating the minimal period provided under Article 1(1)(a) of Directive 98/59, whichever of the two options is chosen by the Member State at issue. The same is not necessarily true for the modalities and ways of calculating any longer or extra periods of protection, provided by national law pursuant to Article 5 of that directive, so long as any such extra protection does not result, in fact, in lowering the minimal standard of protection guaranteed by Article 1(1)(a).

V. Conclusion

45. I propose that the Court answer the questions referred for a preliminary ruling by the Juzgado de lo Social nº 3 de Barcelona (Social Court No 3, Barcelona, Spain) as follows:

– Article 1(1)(a) of Council Directive 98/59/EC of 20 July 1998 on the approximation of the laws of the Member States relating to collective redundancies must be interpreted as referring to any period of 30 or 90 consecutive days which includes the dismissal of the worker at issue.