JUDGMENT OF THE COURT (Second Chamber)
12 October 2004 *

In Case C-55/02,

ACTION under Article 226 EC for failure to fulfil obligations,

brought on 22 February 2002,

Commission of the European Communities, represented by J. Sack and M. França, acting as Agents, with an address for service in Luxembourg,

applicant,

v

Portuguese Republic, represented by L. Fernandes and F. Ribeiro Lopes, acting as Agents, with an address for service in Luxembourg,

defendant,

* Language of the case: Portuguese.

THE COURT (Second Chamber),

composed of C.W.A. Timmermans, President of the Chamber, C. Gulmann, F. Macken, N. Colneric (Rapporteur), and J.N. Cunha Rodrigues, Judges,

Advocate General: A. Tizzano,
Registrar: R. Grass,

having regard to the written procedure,

after hearing the Opinion of the Advocate General at the sitting on 11 March 2004,

gives the following

Judgment

1 By its application, the Commission of the European Communities asks the Court to declare that, by restricting the concept of collective redundancies to redundancies for structural, technological or cyclical reasons, and by failing to extend that concept to dismissals for any reason not related to the individual workers concerned, the Portuguese Republic has failed to fulfil its obligations under the EC Treaty and under Articles 1, 6 and 7 of Council Directive 98/59/EC of 20 July 1998 on the approximation of the laws of the Member States relating to collective redundancies (OJ 1998 L 225, p. 16).

Legal background

The relevant provisions of Community law

2 Council Directive 75/129/EEC of 17 February 1975 on the approximation of the laws of the Member States relating to collective redundancies (OJ 1975 L 48, p. 29), as amended by Council Directive 92/56/EEC of 24 June 1992 (OJ 1992 L 245, p. 3), was repealed with a view to its being consolidated by Directive 98/59 ('the Directive'). At that point no new period for transposition was prescribed.

3 The second recital in the preamble to the Directive states that 'it is important that greater protection should be afforded to workers in the event of collective redundancies while taking into account the need for balanced economic and social development within the Community'.

4 According to the third recital in the preamble to the Directive, 'despite increasing convergence, differences still remain between the provisions in force in the Member States concerning the practical arrangements and procedures for such redundancies and the measures designed to alleviate the consequences of redundancy for workers'.

5 Under the fourth recital in the preamble, 'these differences can have a direct effect on the functioning of the internal market'.

6 The seventh recital in the preamble states that 'this approximation must ... be promoted while the improvement is being maintained within the meaning of Article 117 of the Treaty'.

7 Under the eighth recital in the preamble, 'in order to calculate the number of redundancies provided for in the definition of collective redundancies within the meaning of this Directive, other forms of termination of employment contracts on the initiative of the employer should be equated to redundancies, provided that there are at least five redundancies'.

8 Under the ninth recital in the preamble, the Directive 'applies in principle also to collective redundancies resulting where the establishment's activities are terminated as a result of a judicial decision'.

9 Article 1 of the Directive is worded as follows:

'1. 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;

(b) "workers' representatives" means the workers' representatives provided for by the laws or practices of the Member States.

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.

2. This Directive shall not apply to:

(a) 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;

...'.

10 Article 2 of the Directive lays down a procedure for consulting and informing workers' representatives.

11 The first paragraph of Article 2(2) of the Directive provides:

'These consultations shall, at least, cover ways and means of avoiding collective redundancies or reducing the number of workers affected, and of mitigating the consequences by recourse to accompanying social measures aimed, inter alia, at aid for redeploying or retraining workers made redundant.'

12 Articles 3 and 4 of the Directive set out the rules governing the procedure for collective redundancies.

13 Article 3(1) of the Directive provides:

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

However, Member States may provide that in the case of planned collective redundancies arising from termination of the establishment's activities as a result of a judicial decision, the employer shall be obliged to notify the competent public authority in writing only if the latter so requests.

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.'

14 Under Article 4 of the Directive:

'1. Projected collective redundancies notified to the competent public authority shall take effect not earlier than 30 days after the notification referred to in Article 3(1) without prejudice to any provisions governing individual rights with regard to notice of dismissal.

Member States may grant the competent public authority the power to reduce the period provided for in the preceding subparagraph.

2. The period provided for in paragraph 1 shall be used by the competent public authority to seek solutions to the problems raised by the projected collective redundancies.

...

4. Member States need not apply this Article to collective redundancies arising from termination of the establishment's activities where this is the result of a judicial decision.'

15 Article 6 of the Directive states:

'Member States shall ensure that judicial and/or administrative procedures for the enforcement of obligations under this Directive are available to the workers' representatives and/or workers.'

16 Article 7 of the Directive is worded as follows:

'Member States shall forward to the Commission the text of any fundamental provisions of national law already adopted or being adopted in the area governed by this Directive.'

The relevant provisions of domestic law

17 Article 53 of the Portuguese Constitution provides:

'Workers shall be guaranteed security of employment. Dismissals without good cause or for political or ideological reasons shall be prohibited.'

18 The Directive was transposed into the Portuguese legal order by Decree-Law No 64-A/89 of 27 February 1989 concerning the legal rules governing the termination of individual contracts of employment and the conclusion and expiry of fixed-term contracts of employment (*Diário da República* I, Series I, No 48, of 27 February

1989, 'the LCCL'). Law No 32/99 of 18 May 1999 (*Diário da República* I, Series I-A, No 115, of 18 May 1999) amended the rules on collective redundancies, laid down in the legal rules governing the termination of individual contracts of employment and the conclusion of fixed-term contracts of employment, approved by that decree-law.

19 Article 3 of the LCCL, headed 'Forms of termination of contracts of employment', forms part of Chapter I of that law, itself headed 'General principles'. It provides:

'(1) Dismissals without just cause shall be prohibited.

(2) A contract of employment may be terminated by:

(a) expiry;

(b) rescission by agreement of the parties;

(c) dismissal decided on by the employer;

(d) cancellation, with or without cause, on the employee's initiative;

(e) cancellation by either party during the probationary period;

(f) job losses for structural, technological or cyclical reasons'.

20 Article 4 of the LCCL, headed 'Causes of expiry', forms part of Chapter II of that law, which is headed 'Expiry of the contract of employment'. It provides:

'Contracts of employment shall expire in accordance with the general provisions of law, in particular:

...

(b) Where, after the contract has been concluded, it becomes absolutely and definitively impossible for the worker to perform his duties or for the employer to benefit from them'.

21 Article 6 of the LCCL, concerning the death of an individual employer or the winding-up of a corporate employer, also forming part of Chapter II of that law, provides:

'(1) The death of an individual employer shall cause the contract of employment to expire, save where the deceased's heirs continue the activity for which the worker was engaged or where the undertaking is transferred, in which case Article 37 of the legal rules on individual contracts of employment, approved by Decree-Law No 49408 of 24 November 1969, shall apply.

(2) Where the contract expires by virtue of the provisions of the previous paragraph, the worker shall be entitled to compensation corresponding to one month's pay for each year or part of a year of service, paid out of the undertaking's assets.

(3) The winding-up of an employer which is a collective body, where the establishment is not to be transferred, shall cause the contracts of employment to expire in accordance with the terms provided for in the previous paragraphs.'

22 Chapter V of the LCCL deals with the termination of contracts of employment on the basis of job losses for objective structural, technological or cyclical reasons relating to the undertaking. This chapter contains two sections, the first headed 'Collective redundancy' and the second 'Termination of the contract of employment for job losses not included in collective redundancy'.

23 Article 16 of the LCCL, headed 'Definition', which is the first article in Section I, provides:

'"Collective redundancies" means the termination, on the employer's initiative, of individual contracts of employment, affecting simultaneously or in succession, at least two workers in a period of three months where the undertaking employs up to 50 persons or at least five workers where the undertaking employs more than 50 persons, provided that such termination is based on the definitive closure of the undertaking, of one or more departments or on staff reductions effected for structural, technological or cyclical reasons.'

24 In addition, Section I of Chapter V of the LCCL provides, in particular, for the communications and consultations to be effected by the employer, in Articles 17 and 18, the action to be taken by the competent national authority, in Article 19, workers' rights, in Article 23, and the consequences of unlawful redundancies, in Article 24.

25 Section II of Chapter V of the LCCL concerns, inter alia, the reasons for job losses, in Article 26, the conditions for termination of the contract of employment, in Article 27, the communications to be made by the employer, in Article 28, the procedure to be followed, in Article 29, termination of the contract of employment, in Article 30, and workers' rights, in Article 32.

26 In accordance with Article 27(1)(b) and (c) of the LCCL, termination of the contract of employment is subject, in particular, to the condition that it should be impossible in practice to maintain the employment relationship and that there should exist no fixed-term contracts for duties corresponding to those of the job lost.

27 In Chapter VIII of the LCCL, headed 'Special cases of termination of the contract of employment', Article 56, concerning situations where the employer is placed in compulsory liquidation or is insolvent, provides:

'(1) A judicial declaration that the employer is insolvent or placed in compulsory liquidation shall not terminate the contracts of employment, since the administrator of the assets of the undertaking in liquidation must continue to satisfy in full the obligations under those contracts for workers, until such time as the establishment is definitively closed.

(2) Nevertheless, before the definitive closure of the establishment, the administrator may cancel the contracts of employment of those employees whose services are not essential to the running of the undertaking, in accordance with the rules set out in Articles 16 to 25.'

28 Article 172 of the Portuguese Code of Special Procedures in judicial settlements and compulsory liquidation, approved by Decree-Law No 132/93 of 23 April 1993 (*Diário da República* I, Series I-A, No 95, of 23 April 1993), and amended by Decree-Law No 315/98 of 20 October 1998 (*Diário da República* I, Series I-A, No 242, of 20 October 1998), provides:

'The employees of the undertaking in compulsory liquidation shall be covered, with regard to the continuation of their contract after the declaration of compulsory liquidation, by the general rules on termination of the contract of employment, without prejudice to the transfer of contracts under the sale of industrial and commercial establishments.'

The pre-litigation procedure

29 Taking the view that the LCCL was in part incompatible with the provisions of the Directive, the Commission initiated the infringement procedure. Having given the Portuguese Republic formal notice to submit its observations, the Commission sent a reasoned opinion to that Member State on 29 December 2000 requesting it to take the measures necessary to comply therewith within a period of two months from the date of its notification.

30 Considering that the information supplied by the Portuguese authorities showed that the infringement indicated in the reasoned opinion still subsisted, the Commission decided to bring the present action.

Concerning the action

31 The Commission takes the view that the concept of collective redundancies in Portuguese law does not cover all the cases of collective redundancies mentioned in

the Directive. As a result, the provisions of Portuguese law are more restricted in ambit than those of the Directive.

32 The Commission states that the definition of 'collective redundancies', set out in Article 16 of the LCCL, does not, for example, include the case of redundancies made by an employer for reasons not related to the individual workers in cases of a declaration of compulsory liquidation, liquidation procedures similar to those just mentioned, compulsory purchase, fire or other case of force majeure, or in the case of termination of an undertaking's activity following the death of the trader.

33 The Portuguese Government maintains that the Commission's action is without foundation, save for the part concerning the transfer of contracts of employment, in the terminal stage of realising the assets in a compulsory liquidation procedure, as a result of the definitive closure of establishments that have not been sold in their entirety. In fact, the situations mentioned by the Commission, in particular circumstances, are not in its view covered by the definition of collective redundancy provided in the Directive and, in other cases, are governed by the rules on collective redundancy established by the Portuguese legislation.

The definition of 'collective redundancy' provided by the Directive

Arguments of the parties

34 The Portuguese Government maintains that no effort was made to define 'redundancy' in the Directive because most of the legal orders of the Member States adopt the common definition of a voluntary act of the employer intended to bring to an end the employment relationship and communicated to the worker.

35 It contends that the Directive does not provide that any termination whatsoever of a contract of employment for reasons not related to the individual worker is to be classified as 'redundancy'.

36 It submits, moreover, that it is impossible to apply the entire body of rules laid down by the Directive to situations in which the expiry of contracts of employment on the definitive termination of the undertaking's activities is not contingent on the will of the employer. That fact confirms that such situations are not classified as collective redundancies. The Directive was not intended to apply to such situations.

37 According to the Portuguese Government, there is a dilemma, the horns of which are the full application of the Directive and its exclusion. Since many serious obligations provided for by the Directive do not apply in certain situations where the definitive termination of the undertaking's activities is not contingent on the employer's will, it must be concluded that the Directive in its entirety does not apply to such situations.

38 The Commission acknowledges that the Directive does not define the concept of 'redundancy'. In its view, however, the lack of a definition does not authorise the Member States to exclude from the Directive's ambit situations such as those subject to a body of rules on the expiry of contracts of employment in Portuguese law.

39 According to the Commission, it is a flagrant breach of Community law for the Portuguese Government, faced with the supposed 'dilemma' of a choice between 'the full application of the Directive and its exclusion', to opt for non-application of the Directive.

40 It remarks that, apropos of cases of compulsory purchase, fire or other cases of force majeure, the Portuguese Government gives evidence of misunderstanding the protective rules introduced by the Directive, probably as a result of a selective reading of Sections II, 'Information and consultation', and III, 'Procedure for collective redundancies', of the Directive.

41 In this regard, the Commission maintains, inter alia, that it is quite consistent for the consultation of workers' representatives to cover means of mitigating the consequences of redundancy by considering accompanying social measures aimed at redeploying or retraining workers made redundant, even if it was not possible to avoid the definitive closure of the undertaking and therefore the termination of the contracts of employment.

42 According to the Commission, the Portuguese Government has put forward an interpretation of the collective redundancies procedure that renders pointless the various provisions of the Directive. That is particularly so with regard to the obligation laid down in Article 3 of that directive, which requires employers to notify in writing the competent public authority of any projected collective redundancies. Both an employer whose undertaking has been destroyed by fire and the heirs of a deceased trader are in a position to perform that obligation.

Findings of the Court

43 Pursuant to Article 1(1)(a) of the Directive, 'collective redundancies' means dismissals effected by an employer for one or more reasons not related to the individual workers concerned provided that certain conditions concerning numbers and periods of time are satisfied.

44 The Directive does not give an express definition of 'redundancy'. That concept must, however, be given a uniform interpretation for the purposes of the Directive.

45 It follows both from the requirements of the uniform application of Community law and the principle of equality that the terms of a provision of Community law which make no express reference to the law of the Member States for the purpose of determining its meaning and scope must normally be given an autonomous and uniform interpretation throughout the Community; that interpretation must take into account the context of the provision and the purpose of the legislation in question (Case C-287/98 *Linster* [2000] ECR I-6917, paragraph 43, and Case C-40/01 *Ansul* [2003] ECR I-2439, paragraph 26).

46 In this case, Article 1(1)(a) of the Directive, unlike Article 1(1)(b) thereof which expressly provides that 'workers' representatives' means the workers' representatives provided for by the laws or practices of the Member States, does not make any express reference to the law of the Member States so far as the definition of 'redundancy' is concerned.

47 In addition, it follows from the title of, and from the third, fourth and seventh recitals in the preamble to, the Directive that the objective pursued by the latter is to further the approximation of the laws of the Member States relating to collective redundancies.

48 By harmonising the rules applicable to collective redundancies, the Community legislature intended both to ensure comparable protection for workers' rights in the different Member States and to harmonise the costs which such protective rules entail for Community undertakings (Case C-383/92 *Commission* v *United Kingdom* [1994] ECR I-2479, paragraph 16).

49 Accordingly, the concept of 'redundancy', as mentioned in Article 1(1)(a) of the Directive, may not be defined by any reference to the laws of the Member States, but has instead meaning in Community law.

50 The concept has to be interpreted as including any termination of contract of employment not sought by the worker, and therefore without his consent. It is not necessary that the underlying reasons should reflect the will of the employer.

51 That interpretation of the concept of 'redundancy' for the purposes of the Directive follows from the aim pursued by the latter and from the background to the provision at issue.

52 The second recital in the preamble to the Directive makes it clear that that act is designed to strengthen the protection of workers in the case of collective redundancies. According to the third and seventh recitals in the preamble to the Directive, it is chiefly the differences remaining between the provisions in force in the Member States concerning the measures apt to mitigate the consequences of collective redundancies which must form the subject-matter of a harmonisation of laws.

53 The objectives referred to in the Directive would be attained only in part if the termination of a contract of employment that was not contingent on the will of the employer were to be excluded from the body of rules laid down by the Directive.

54 As regards the background to the provision at issue, the ninth recital in the preamble to the Directive and the second paragraph of Article 3(1) thereof make it clear that the Directive applies, as a rule, also to collective redundancies caused by termination of the establishment's activities as a result of a judicial decision. In that situation, the termination of contracts of employment is the result of circumstances not willed by the employer.

55 In that context, it has to be added that in its original version, namely Directive 75/129, the Directive had provided in Article 1(2)(d) that it did not apply to workers affected by the termination of an establishment's activities where that was the result of a judicial decision. That article provided an exception to the rule laid down by Article 1(1)(a), which stated, in terms the same as those used in the equivalent provision of Directive 98/59, that for the purposes of that directive 'collective redundancies' means dismissals effected by an employer for one or more reasons not related to the individual workers concerned. That exception would not have been needed had the concept of 'redundancy' taken the form of a willed act of the employer.

56 As the Advocate General has correctly noted in points 46 and 47 of his Opinion, redundancies are to be distinguished from terminations of the contract of employment which, on the conditions set out in the last paragraph of Article 1(1) of the Directive, are assimilated to redundancies for want of the worker's consent.

57 The interpretation offered in paragraph 50 above cannot be gainsaid by arguing that full application of the Directive is, for example, impossible in some circumstances in which the definitive termination of the undertaking's activity is not contingent upon the employer's will. In any case, application of the Directive in its entirety is not to be excluded for those circumstances.

58 In accordance with the first paragraph of Article 2(2) of the Directive, the purpose of consulting the workers' representatives is not only to avoid collective redundancies or to reduce the number of workers affected, but also, inter alia, to mitigate the consequences of such redundancies by recourse to accompanying social measures aimed, in particular, at aid for redeploying or retraining workers made redundant. It would run counter to the spirit of the Directive to narrow the ambit of that provision by giving a restrictive interpretation of the concept of 'redundancy'.

59 Considerations of the same kind hold good so far as the obligations laid down in Article 3 of the Directive to notify the competent public authority are concerned. Those obligations, adapted where appropriate in accordance with the power granted to the Member States by the second paragraph of Article 3(1), could quite well be performed by an employer in cases where contracts of employment have to be terminated because of circumstances not contingent on his will. A contrary interpretation would deprive workers of the protection given by that provision and by Article 4 of the Directive.

60 It follows from all the foregoing considerations that termination of a contract of employment cannot escape the application of the Directive just because it depends on external circumstances not contingent on the employer's will.

Legal assessment of the Portuguese legislation

61 All the situations mentioned in paragraph 32 above that the Portuguese Government has acknowledged are classified as 'expiry of the contract' in the Portuguese legal order fall within the ambit of the Directive, for they are covered by the definition of 'redundancy' for the purposes of that act.

62 It matters little that in Portuguese law those situations are not classified as redundancies but as the expiry by operation of law of the contract of employment. They are in point of fact terminations of the contract of employment against the will of the worker, and are therefore redundancies for the purposes of the Directive.

63 In consequence, the Portuguese Republic has not properly transposed Article 1(1)(a) of the Directive.

64 The allegation relating to failure to fulfil obligations under Article 6 of the Directive is also well founded. Nothing indicates that the Portuguese Republic, even though adopting a more restrictive interpretation of 'redundancy' than that given in the Directive, has nevertheless taken care that there should be available to workers in all the situations of collective redundancy within the meaning of the Directive administrative and/or judicial procedures in order to enforce the obligations laid down by the Directive.

65 In so far as the action concerns Article 7 of the Directive, it has to be stated that the Commission has not explained how the Portuguese Republic is supposed to have infringed that provision.

66 As a result, it must be held that, by restricting the concept of collective redundancies to redundancies for structural, technological or cyclical reasons, and by failing to extend that concept to dismissals for any reason not related to the individual workers concerned, the Portuguese Republic has failed to fulfil its obligations under Articles 1 and 6 of the Directive, and the remainder of the action must be dismissed.

Costs

67 Under Article 69(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs, if they have been applied for. Since the Commission has applied for an order for costs against the Portuguese Republic and since the latter has been largely unsuccessful, it must be ordered to bear the costs.

On those grounds, the Court (Second Chamber) hereby:

1. **Declares that, by restricting the concept of collective redundancies to redundancies for structural, technological or cyclical reasons, and by failing to extend that concept to dismissals for any reason not related to the individual workers concerned, the Portuguese Republic has failed to fulfil its obligations under Articles 1 and 6 of Council Directive 98/59/EC of 20 July 1998 on the approximation of the laws of the Member States relating to collective redundancies;**

2. **Dismisses the remainder of the action;**

3. **Orders the Portuguese Republic to pay the costs.**

Signatures