Reports of Cases

JUDGMENT OF THE COURT (Fifth Chamber)

13 May 2015 *

(Reference for a preliminary ruling — Social policy — Collective redundancies — Directive 98/59/EC — Article 1(1)(a) — Meaning of 'establishment' — Method of calculating the number of workers made redundant)

In Case C-182/13,

REQUEST for a preliminary ruling under Article 267 TFEU from the Industrial Tribunal (Northern Ireland), Belfast (United Kingdom), made by decision of 26 March 2013, received at the Court on 12 April 2013, in the proceedings

Valerie Lyttle,

Sarah Louise Halliday,

Clara Lyttle,

Tanya McGerty

v

Bluebird UK Bidco 2 Limited,

THE COURT (Fifth Chamber),

composed of T. von Danwitz, President of the Chamber, C. Vajda, A. Rosas, E. Juhász (Rapporteur) and D. Šváby, Judges,

Advocate General: N. Wahl,

Registrar: I. Illéssy, Administrator,

having regard to the written procedure and further to the hearing on 20 November 2014,

after considering the observations submitted on behalf of:

— Bluebird UK Bidco 2 Limited, by D. Reade QC,

— the United Kingdom Government, by L. Christie, acting as Agent, T. Ward QC, and J. Holmes, Barrister,

— the Hungarian Government, by M. Fehér and K. Szíjjártó, acting as Agents,

* Language of the case: English.

— the European Commission, by J. Enegren, R. Vidal Puig and J. Samnadda, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 5 February 2015,

gives the following

Judgment

1 This request for a preliminary ruling concerns the interpretation of Article 1(1)(a)(ii) 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).

2 The request has been made in proceedings between Ms V. Lyttle, Ms S.L. Halliday, Ms C. Lyttle and Ms T. McGerty and their former employer, Bluebird UK Bidco 2 Limited ('Bluebird'), concerning the lawfulness of their dismissal.

Legal context

EU law

3 According to recital 1 in the preamble to Directive 98/59, that directive consolidated 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).

4 As set out in recital 2 of Directive 98/59, 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 European Union.

5 Recitals 3 and 4 of that directive state:

'(3) Whereas, 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;

(4) Whereas these differences can have a direct effect on the functioning of the internal market'.

6 Recital 7 of the directive emphasises the need to promote the approximation of the laws of the Member States relating to collective redundancies.

7 Article 1 of the directive, entitled 'Definitions and scope', provides:

'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;

…

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;

…'

8 Under Article 2 of the directive:

'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.

2. 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.

…

3. To enable workers' representatives to make constructive proposals, the employers shall in good time during the course of the consultations:

(a) supply them with all relevant information and

(b) in any event notify them in writing of:

(i) the reasons for the projected redundancies;

(ii) the number and categories of workers to be made redundant;

(iii) the number and categories of workers normally employed;

(iv) the period over which the projected redundancies are to be effected;

(v) the criteria proposed for the selection of the workers to be made redundant in so far as national legislation and/or practice confers the power therefor upon the employer;

(vi) the method for calculating any redundancy payments other than those arising out of national legislation and/or practice.

The employer shall forward to the competent public authority a copy of, at least, the elements of the written communication which are provided for in the first subparagraph, point (b), subpoints (i) to (v).

…'

9 Article 3(1) of the directive provides:

'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.'

10 Article 4(1) and (2) of the directive is worded as follows:

'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.'

11 Article 5 of the directive 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 or to promote or to allow the application of collective agreements more favourable to workers.'

United Kingdom law

12 Directive 98/59 was transposed into the legal system of Northern Ireland by Part XIII of the Employment Rights (Northern Ireland) Order 1996 and by Part IV, Chapter II of the Trade Union and Labour Relations (Consolidation) Act 1992 so far as concerns England and Wales and Scotland.

13 Article 216 of the Employment Rights (Northern Ireland) Order 1996 provides that '[w]here an employer is proposing to dismiss as redundant 20 or more employees at one establishment within a period of 90 days or less, the employer shall consult about the dismissals all the persons who are appropriate representatives of any of the employees who may be affected by the proposed dismissals or may be affected by measures taken in connection with those dismissals.'

The dispute in the main proceedings and the questions referred for a preliminary ruling

14 At the beginning of 2012, Bonmarché operated 394 stores selling women's clothing across the United Kingdom and employed 4 000 people. For administrative purposes, Bonmarché regarded its stores in Northern Ireland and its single Isle of Man store as constituting one region ('the Northern Ireland region') for the purposes of its business in the United Kingdom. At the beginning of 2012, there were 20 stores in the Northern Ireland region, employing 180 people.

15 The claimants in the main proceedings were employed by Bonmarché at four different stores. Those stores were situated in different towns, Lurgan, Banbridge, Omagh and Belfast, and each employed fewer than 20 staff.

16 Each store was treated as an 'individual cost centre', whose budget was decided on by the head office in Great Britain. It was also the head office that decided on the stock and the sales promotion priorities of each store, and that provided or organised the provision of the articles offered for sale. Nevertheless, each branch manager could influence the amounts and types of goods provided. The store managers were responsible for achieving the objectives of their respective stores. Within the limits of the budgetary provision allocated to staffing hours, which was decided on centrally, the branch manager had discretion as to the number of full-time and part-time staff who would be employed.

17 Bonmarché became insolvent and the company was transferred to Bluebird on 20 January 2012. Immediately after that transfer, Bluebird began a business restructuring process entailing the closure of many stores, including those in which the claimants in the main proceedings worked.

18 Following the dismissals effected in 2012 by Bluebird, Bonmarché was left with only 265 stores in the United Kingdom, employing 2 900 staff. The number of stores situated in the Northern Ireland region went from 20 to 8 and the number of staff employed decreased from 180 to 75 employees.

19 The claimants in the main proceedings were dismissed, together with other employees, on 12 March 2012. The dismissal process was not preceded by any consultation procedure as referred to in Directive 98/59.

20 The order for reference states that Ms V. Lyttle, Ms S.L. Halliday, Ms C. Lyttle and Ms T. McGerty were assigned to the following local units to carry out their duties: the Lurgan, Banbridge, Omagh and Ann Street, Belfast stores, respectively.

21 The claimants in the main proceedings brought an action contesting the validity of their dismissals before the referring tribunal.

22 That tribunal considers that it is possible to construe Article 1(1)(a)(ii) of Directive 98/59 as meaning that the figure 20 referred to there refers to the number of employees within a particular establishment, but that it is also possible to consider that that figure refers to persons dismissed across the employer's entire undertaking. It states that a purposive interpretation is appropriate in the circumstances and that, according to the judgment in *Rockfon* (C-449/93, EU:C:1995:420), Directive 75/129, which was replaced by Directive 98/59, had to be given an interpretation that would cover the largest possible number of redundancy-related dismissals.

23 In those circumstances, the Industrial Tribunal (Northern Ireland), Belfast, decided to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:

'(1) In the context of Article 1(1)(a)(ii) of [Directive 98/59], does "establishment" have the same meaning as it has in the context of Article 1(1)(a)(i) of that Directive?

(2) If not, can "an establishment", for the purposes of Article 1(1)(a)(ii) [of that Directive], be constituted by an organisational sub-unit of an undertaking which consists of or includes more than one local employment unit?

(3) In Article 1(1)(a)(ii) of the Directive, does the phrase "at least 20" refer to the number of dismissals across all of the employer's establishments, or does it instead refer to the number of dismissals per establishment? In other words, is the reference to "20" a reference to 20 in any particular establishment, or to 20 overall?'

Consideration of the questions referred

24 By those questions, which it is appropriate to examine together, the referring tribunal asks, in essence, first, whether the term 'establishment' in Article 1(1)(a)(ii) of Directive 98/59 is to be interpreted in the same way as the term 'establishment' in Article 1(1)(a)(i) of that directive and, secondly, whether Article 1(1)(a)(ii) of Directive 98/59 is to be interpreted as precluding national legislation that lays down an obligation to inform and consult workers in the event of the dismissal, within a period of 90 days, of at least 20 workers from a particular establishment of an undertaking, and not where the aggregate number of dismissals across all of the establishments or across some of the establishments of an undertaking over the same period reaches or exceeds the threshold of 20 workers.

25 It is apparent from the order for reference and the observations submitted to the Court that, when transposing Directive 98/59, the United Kingdom opted for the threshold for its application set out in Article 1(1)(a)(ii) of that directive. Under the applicable national law, where an employer is proposing to shed at least 20 jobs at an establishment within a period of 90 days, he is required to comply with a procedure for informing and consulting workers in connection with that proposal.

26 It should be stated from the outset in this connection that, in accordance with the case-law of the Court, the term 'establishment', which is not defined in Directive 98/59, is a term of EU law and cannot be defined by reference to the laws of the Member States (see, to that effect, judgment in *Rockfon*, C-449/93, EU:C:1995:420, paragraph 25). It must, on that basis, be interpreted in an autonomous and uniform manner in the EU legal order (see, to that effect, judgment in *Athinaïki Chartopoiïa*, C-270/05, EU:C:2007:101, paragraph 23).

27 The Court has already interpreted the term 'establishment' or 'establishments' in Article 1(1)(a) of Directive 98/59.

28 In paragraph 31 of the judgment in *Rockfon* (C-449/93, EU:C:1995:420), the Court observed, referring to paragraph 15 of the judgment in *Botzen and Others* (186/83, EU:C:1985:58), that an employment relationship is essentially characterised by the link existing between the worker and the part of the undertaking or business to which he is assigned to carry out his duties. The Court therefore decided, in paragraph 32 of the judgment in *Rockfon* (C-449/93, EU:C:1995:420), that the term 'establishment' in Article 1(1)(a) of Directive 98/59 must be interpreted as designating, depending on the circumstances, the unit to which the workers made redundant are assigned to carry out their duties. It is not essential in order for there to be an 'establishment' that the unit in question is endowed with a management that can independently effect collective redundancies.

29 It is apparent from paragraph 5 of the judgment in *Rockfon* (C-449/93, EU:C:1995:420) that the Kingdom of Denmark — the Member State of the court which made the request for a preliminary ruling in that case — had opted for the approach set out in Article 1(1)(a)(i) of the directive.

30 In the judgment in *Athinaïki Chartopoiïa* (C-270/05, EU:C:2007:101), the Court further clarified the term 'establishment', inter alia by holding, in paragraph 27 of that judgment, that, for the purposes of the application of Directive 98/59, an 'establishment', in the context of an undertaking, may consist of

a distinct entity, having a certain degree of permanence and stability, which is assigned to perform one or more given tasks and which has a workforce, technical means and a certain organisational structure allowing for the accomplishment of those tasks.

31 By the use of the words 'distinct entity' and 'in the context of an undertaking', the Court clarified that the terms 'undertaking' and 'establishment' are different and that an establishment normally constitutes a part of an undertaking. That does not, however, preclude the establishment being the same as the undertaking where the undertaking does not have several distinct units.

32 In paragraph 28 of the judgment in *Athinaïki Chartopoiïa* (C-270/05, EU:C:2007:101), the Court held that since Directive 98/59 concerns the socio-economic effects that collective redundancies may have in a given local context and social environment, the entity in question need not have any legal autonomy, nor need it have economic, financial, administrative or technological autonomy, in order to be regarded as an 'establishment'.

33 Consequently, according to the case-law of the Court, where an 'undertaking' comprises several entities meeting the criteria set out in paragraphs 28, 30 and 32 above, it is the entity to which the workers made redundant are assigned to carry out their duties that constitutes the 'establishment' for the purposes of Article 1(1)(a) of Directive 98/59.

34 That case-law is applicable to the present case.

35 The meaning of the terms 'establishment' or 'establishments' in Article 1(1)(a)(i) of Directive 98/59 is the same as that of the terms 'establishment' or 'establishments' in Article 1(1)(a)(ii) of that directive.

36 The fact, noted during the hearing before the Court, that the term 'establishment' is used in the plural inter alia in the English, French, Italian and Spanish versions of that provision is of no account. In those language versions, the term 'establishments' is used in the plural in both Article 1(1)(a)(i) and (a)(ii). In addition, as the Advocate General observed in point 53 of his Opinion, a number of other language versions of Article 1(1)(a)(ii) of Directive 98/59 use that term in the singular, which precludes the interpretation that the threshold provided for in the latter provision refers to all the 'establishments' of an 'undertaking'.

37 The option in Article 1(1)(a)(ii) of Directive 98/59, with the exception of the difference in the periods over which the redundancies are made, is a substantially equivalent alternative to the option in Article 1(1)(a)(i).

38 There is nothing in the wording of Article 1(1)(a) of Directive 98/59 to suggest that a different meaning is to be given to the terms 'establishment' or 'establishments' in the same subparagraph of that provision.

39 In the judgment in *Athinaïki Chartopoiïa* (C-270/05, EU:C:2007:101) the Court did not examine whether the Hellenic Republic had opted for the approach set out in Article 1(1)(a)(i) or (a)(ii) of Directive 98/59. The operative part of that judgment refers to Article 1(1)(a) without drawing a distinction between the options set out in points (a)(i) or (a)(ii) of that provision.

40 The fact that the legislature offers Member States a choice between the options set out in Article 1(1)(a)(i) and (a)(ii) of Directive 98/59 indicates that the term 'establishment' cannot have a completely different meaning depending on which of the two alternatives proposed the Member State concerned chooses.

41 Furthermore, such a major difference would be contrary to the need to promote the approximation of the laws of the Member States relating to collective redundancies, a need that is emphasised in recital 7 of Directive 98/59.

42 As regards the question raised by the referring tribunal as to whether Article 1(1)(a)(ii) of Directive 98/59 requires that account be taken of the dismissals effected in each establishment considered separately, interpreting that provision so as to require account to be taken of the total number of redundancies across all the establishments of an undertaking would, admittedly, significantly increase the number of workers eligible for protection under Directive 98/59, which would correspond to one of the objectives of that directive.

43 However, it should be recalled that the objective of that directive is not only to afford greater protection to workers in the event of collective redundancies, but also to ensure comparable protection for workers' rights in the different Member States and to harmonise the costs which such protective rules entail for EU undertakings (see, to that effect, judgments in *Commission* v *United Kingdom*, C-383/92, EU:C:1994:234, paragraph 16; *Commission* v *Portugal*, C-55/02, EU:C:2004:605, paragraph 48; and *Confédération générale du travail and Others*, C-385/05, EU:C:2007:37, paragraph 43).

44 Interpreting the term 'establishment' in the manner envisaged in paragraph 42 above would, first, be contrary to the objective of ensuring comparable protection for workers' rights in all Member States and, secondly, entail very different costs for the undertakings that have to satisfy the information and consultation obligations under Articles 2 to 4 of that directive in accordance with the choice of the Member State concerned, which would also go against the EU legislature's objective of rendering comparable the burden of those costs in all Member States.

45 It should be added that that interpretation would bring within the scope of Directive 98/59 not only a group of workers affected by collective redundancy but also, in some circumstances, a single worker of an establishment — possibly of an establishment located in a town separate and distant from the other establishments of the same undertaking — which would be contrary to the ordinary meaning of the term 'collective redundancy'. In addition, the dismissal of that single worker could trigger the information and consultation procedures referred to in the provisions of Directive 98/59, provisions that are not appropriate in such an individual case.

46 It should be recalled, however, that Directive 98/59 establishes minimum protection with regard to informing and consulting workers in the event of collective redundancies (see judgment in *Confédération générale du travail and Others*, C-385/05, EU:C:2007:37, paragraph 44). Article 5 of that directive gives Member States the right to apply or to introduce laws, regulations or administrative provisions which are more favourable to workers or to promote or to allow the application of collective agreements more favourable to workers.

47 In connection with that right, Article 5 of Directive 98/59 inter alia allows Member States to grant the protection provided for in that directive not only to workers at one establishment, within the meaning of Article 1(1)(a) of the directive, who have been or who will be made redundant, but also to all workers affected by redundancy in an undertaking or in a part of an undertaking of the same employer, the term 'undertaking' being understood as covering all of the separate employment units of that undertaking or of that part of the undertaking.

48 Although the Member States are therefore entitled to lay down more favourable rules for workers on the basis of Article 5 of Directive 98/59, they are nevertheless bound by the autonomous and uniform interpretation given to the EU law term 'establishment' in Article 1(1)(a)(i) and (ii) of that directive, as set out in paragraph 33 above.

49 It follows from the foregoing that the definition in Article 1(1)(a)(i) and (a)(ii) of Directive 98/59 requires that account be taken of the dismissals effected in each establishment considered separately.

50 The interpretation that the Court has given to the term 'establishment', recalled in paragraphs 28, 30 and 32 above, is supported by the provisions of Directive 2002/14/EC of the European Parliament and of the Council of 11 March 2002 establishing a general framework for informing and consulting employees in the European Community (OJ 2002 L 80, p. 29), Article 2(a) and (b) of which also establishes a clear distinction between the term 'undertaking' and the term 'establishment'.

51 In the present case, on the basis of the information available to the Court set out in paragraph 16 above, it appears that each of the stores at issue in the main proceedings is a distinct entity that is ordinarily permanent, entrusted with performing specified tasks, namely primarily the sale of goods, and which has, to that end, several workers, technical means and an organisational structure in that the store is an individual cost centre managed by a manager.

52 Accordingly, such a store is capable of satisfying the criteria set out in the case-law cited in paragraphs 28, 30 and 32 above relating to the term 'establishment' in Article 1(1)(a) of Directive 98/59; this is, however, a matter for the referring tribunal to establish in the light of the specific circumstances of the dispute in the main proceedings.

53 In those circumstances, the answer to the questions referred is that, first, the term 'establishment' in Article 1(1)(a)(ii) of Directive 98/59 must be interpreted in the same way as the term in Article 1(1)(a)(i) of that directive and, secondly, that Article 1(1)(a)(ii) of Directive 98/59 must be interpreted as not precluding national legislation that lays down an obligation to inform and consult workers in the event of the dismissal, within a period of 90 days, of at least 20 workers from a particular establishment of an undertaking, and not where the aggregate number of dismissals across all of the establishments or across some of the establishments of an undertaking over the same period reaches or exceeds the threshold of 20 workers.

Costs

54 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the referring tribunal, the decision on costs is a matter for that tribunal. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Fifth Chamber) hereby rules:

The term 'establishment' in Article 1(1)(a)(ii) 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 in the same way as the term in Article 1(1)(a)(i) of that directive.

Article 1(1)(a)(ii) of Directive 98/59 must be interpreted as not precluding national legislation that lays down an obligation to inform and consult workers in the event of the dismissal, within a period of 90 days, of at least 20 workers from a particular establishment of an undertaking, and not where the aggregate number of dismissals across all of the establishments or across some of the establishments of an undertaking over the same period reaches or exceeds the threshold of 20 workers.

[Signatures]