Reports of Cases

OPINION OF ADVOCATE GENERAL
MENGOZZI
delivered on 22 March 2012 [1]

Case C-583/10

The United States of America
v
Christine Nolan

(Reference for a preliminary ruling from the Court of Appeal (England and Wales) (Civil Division) (United Kingdom))

(Directive 98/59/EC — Admissibility — Protection of workers — Collective redundancies — Information and consultation of workers — Closure of a US military base — Scope — Time at which the obligation to consult arises)

I – Introduction

1. By the present reference for a preliminary ruling, the Court of Appeal (England and Wales) (Civil Division) (United Kingdom) ('the Court of Appeal') seeks clarification regarding the 'trigger point' for the obligation, laid down in Council Directive 98/59/EEC of 20 July 1998 on the approximation of the laws of the Member States relating to collective redundancies, [2] to consult workers' representatives in the context of a collective redundancy contemplated by an employer.

2. The reference has been made in the context of a dispute between the United States of America ('the United States') and Christine Nolan, a civilian employee of a US military base in the United Kingdom, concerning the obligation under the Trade Union and Labour Relations (Consolidation) Act 1992, transposing Directive 98/59 at national level, [3] to begin in good time consultations with the civilian workforce of the base before proceeding with the collective redundancies of 30 June 2006.

3. To be precise, it appears from the information provided by the referring court that a decision to close the military base by the end of September 2006 had been made by the Secretary of the US Army and approved by the Secretary of Defense no later than 13 March 2006. The British military authorities were informally notified of the decision in April 2006 and the decision was reported by the media on 21 April 2006. On 24 April 2006, the commanding officer of the base called a meeting of the workforce partly in order to explain the decision to close the base and partly to apologise for the way in which the news about the closure had been made public.

1 — Original language: French.

2 — OJ 1998 L 225, p. 16.

3 — The difference in date between the implementing Act in the United Kingdom (1992) and the adoption of Directive 98/59 (1998) is explained by the fact that Directive 98/59 merely 'codifies' 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).

4. On 9 May 2006, the United Kingdom Government was formally notified that the base would be returned to the United Kingdom of Great Britain and Northern Ireland on 30 September 2006.

5. In June 2006 the US authorities gave the representatives of the civilian workforce at the military base a memorandum stating that all personnel — that is to say, almost 200 employees — would have to be made redundant. At a meeting on 14 June 2006, the US authorities informed the representatives of the civilian personnel that they considered the starting date for the consultations to be 5 June 2006.

6. The formal decision to terminate the employment contracts was taken at the headquarters of the US army in Europe in Mannheim, Germany. Dismissal notices were issued on 30 June 2006, specifying termination of employment on 29 or 30 September 2006.

7. In those circumstances, Ms Nolan — a representative of the personnel concerned — brought liability proceedings against the United States before the Southampton Employment Tribunal, which upheld the claim, finding in particular that the employer had neglected to consult the workers' representatives in good time and had failed to explain the reasons why the consultations had been delayed until 5 June 2006 and had not been started before the decision of 13 March 2006 or, in any case, on or after 24 April 2006 or, again, at the latest by 9 May 2006, the date of the official notification. The Tribunal also upheld a claim for compensation lodged by Ms Nolan.

8. The appeal brought by the United States before the Employment Appeal Tribunal was dismissed.

9. The United States then appealed to the Court of Appeal.

10. After considering the arguments put forward by the United States, which had been relied upon before the Employment Appeal Tribunal, the Court of Appeal found that they had to be rejected. However, another plea in law concerned the implications of the judgment handed down by the Court of Justice in *Akavan Erityisalojen Keskusliitto AEK and Others* [4] ('*Akavan*') after the Employment Appeal Tribunal decision had been delivered, and the Court of Appeal took the view that *Akavan* raised certain issues regarding the interpretation of Directive 98/59 which should be clarified before judgment is given.

11. In those circumstances, the national court decided to stay proceedings and to refer the following question to the Court for a preliminary ruling:

'Does the employer's obligation to consult about collective redundancies, pursuant to Directive 98/59/EC, arise (i) when the employer is proposing, but has not yet made, a strategic business or operational decision that will foreseeably or inevitably lead to collective redundancies; or (ii) only when that decision has actually been made and he is then proposing consequential redundancies?'

12. Written observations have been submitted by Ms Nolan, the European Commission and the EFTA Surveillance Authority. Those parties also presented oral argument at the hearing on 18 January 2012.

4 — Case C-44/08 [2009] ECR I-8163.

II – Assessment

A – *Applicability of Directive 98/59 and the Court's jurisdiction to reply to the question referred*

13. Although the Commission proposed that a reply be given to the question referred, it nevertheless expressed doubt — and even reservations — as to the applicability of Directive 98/59 in the case of collective redundancies in a military base, all the more when, despite being located on the territory of a Member State, it comes under the authority of a non-Member State. In its written observations, the Commission based its doubts on Article 1(2)(b) of Directive 98/59, which excludes from the scope of that directive workers employed by public administrative bodies or by establishments governed by public law (or, in Member States where this concept is unknown, by equivalent bodies), which led the Commission to consider that the exclusion could encompass military bases. In reply to a written question from the Court and in the course of the hearing, the Commission argued that, in any case, applying Directive 98/59 to a situation such as that in the case before the referring court would have no practical effect because the reasons which have led a non-Member State to decide to close a military base relate to the exercise of an act of State — *jus imperii* — and, as such, cannot be the subject of prior consultation with workers' representatives. In their reply to that written question, the United States expressed essentially the same opinion.

14. Those observations are not entirely unfounded and, in particular, I understand perfectly the general legal interest in identifying the precise scope of Article 1(2)(b) of Directive 98/59, a provision which the Court has not yet had occasion to interpret.

15. However, it seems to me to be in no way necessary, or even appropriate, to engage in that debate in order to determine whether, in the light of all the circumstances of the present case, the Court has jurisdiction to reply to the question referred.

16. In that connection, it should be borne in mind that Directive 98/59 effects only partial harmonisation of the rules for the protection of workers in the case of collective redundancies,[5] Article 5 thereof stating expressly that the directive does not affect the right of Member States to apply or to introduce laws, regulations or administrative provisions which are more favourable to workers.

17. Consequently, Member States remain free to apply the national rules for the protection of workers in the case of collective redundancies to situations which are not, strictly speaking, covered by Directive 98/59. Accordingly, under Article 5 of Directive 98/59, a Member State could perfectly well extend the scope of workers' protection in such cases to workers employed by public administrative bodies or by establishments governed by public law for the purposes of Article 1(2)(b).

18. That seems, moreover, to have been the approach taken by the United Kingdom legislature when implementing Directive 98/59, as the Employment Appeal Tribunal and the referring court emphasised in their respective decisions.

19. First, it is clear from the grounds of the decision of the Employment Appeal Tribunal — in particular, from paragraphs 71 and 84, as quoted by Ms Nolan and the EFTA Surveillance Authority in their respective replies to the written question from the Court — that the United Kingdom chose, pursuant to Article 5 of Directive 98/59, not to exclude the bodies listed in Article 1(2)(b) from the scope of that directive.

5 — See, as regards Directive 75/129, as amended by Directive 92/56, Case C-383/92 *Commission* v *United Kingdom* [1994] ECR I-2479, paragraph 25, and as regards Directive 98/59, Case C-12/08 *Mono Car Styling* [2009] ECR I-6653, paragraph 35, and *Akavan*, paragraph 60.

20. Secondly, according to the referring court, the only relevant case in which an employer may be relieved of the consultation obligations laid down in Section 188 of the Trade Union and Labour Relations (Consolidation) Act 1992 is that provided for in Section 188(7), that is so say, where there are special circumstances which render it not 'reasonably practicable' for the employer to meet such obligations. The referring court observed that the United States had not, however, relied on that exception in the main proceedings. [6]

21. What is more, neither the referring court nor the Employment Appeal Tribunal took the view that the situation of civilian employees of a military base of a non-Member State in the United Kingdom could be cast outside the ambit of Section 188 of the Trade Union and Labour Relations (Consolidation) Act 1992 by operation of other specific exclusions under the Act, such as those provided for under Sections 273(2) and 274, concerning persons in Crown employment. Within the framework laid down by Article 267 TFEU, under which judicial functions are divided between the national courts and the Court of Justice, it is not for the Court to call into question the way in which national law has been applied in a given situation.

22. Lastly, the referring court also emphasised that the question of State immunity, which had been raised by the United States before the Southampton Employment Tribunal — albeit out of time, because it was first raised in the context of Ms Nolan's claim for compensation and not earlier in the course of the liability proceedings — was not a ground of appeal before the referring court [7] and could not in any case be assessed independently of the exception provided for under Section 188(7) of the Trade Union and Labour Relations (Consolidation) Act 1992, which was not relied upon in the main proceedings. [8] It is thus clear from the file that application of the obligation to consult workers' representatives, laid down by the United Kingdom legislation implementing Directive 98/59, is in no way deprived of effect in circumstances such as those of the case before the referring court. [9]

23. It therefore appears, even assuming that a military base — and, furthermore, a military base belonging to a non-Member State — is treated as having the same status as a public administrative body, or an establishment governed by public law, for the purposes of Article 1(2)(b) of Directive 98/59, that the legislature of the United Kingdom intended to bring within the scope *ratione personae* of the Trade Union and Labour Relations (Consolidation) Act 1992 situations which fall outside the scope of Directive 98/59, while at the same time complying, as regards the steps to be taken in those situations, with the approach laid down in the directive, that is to say, maintaining specifically the need for the employer to consult the workers' representatives in good time before proceeding with a collective redundancy.

24. As it is, it has consistently been held that, where national legislation has adopted, for internal situations, the same approach as that provided for under European Union ('EU') legislation, the Court retains jurisdiction to reply to questions referred by a national court concerning the interpretation of provisions of that EU legislation, or of concepts used therein, so as to ensure that it is interpreted uniformly, whatever the circumstances in which those provisions are to apply. [10]

6 — See paragraph 42 of the order for reference. The question whether such an exemption clause is compatible with Directive 98/59 is not the subject of the present proceedings.

7 — See the order for reference, paragraph 29.

8 — See the order for reference, paragraph 42.

9 — Incidentally, even if Directive 98/59 alone is considered, I do not share the Commission's view that the application of that directive would be deprived of all practical effect because the workers' representatives could not in any case be consulted on the reasons leading the United States to close one of its military bases. It must be borne in mind that, under Article 2(2) of Directive 98/59, the consultations are to cover not only ways and means of avoiding or reducing collective redundancies, but also ways and means of *mitigating the consequences*. Accordingly, the effects flowing from application of the Directive, albeit partial, could still be significant.

10 — See inter alia, to that effect, Joined Cases C-297/88 and C-197/89 *Dzodzi* [1990] ECR I-3763, paragraph 37; Case C-43/00 *Andersen og Jensen* [2002] ECR I-379, paragraph 18; Case C-3/04 *Poseidon Chartering* [2006] ECR I-2505, paragraph 16; Case C-203/09 *Volvo Car Germany* [2010] ECR I-10721, paragraph 25; and Case C-546/09 *Aurubis Balgaria* [2011] ECR I-2531, paragraph 24.

25. Moreover, that approach was taken by the Court in *Rodríguez Mayor and Others* [11] in relation to a reference for a preliminary ruling on the interpretation of Directive 98/59 in a situation where the national legislature had decided to define the concept of collective redundancies so as to cover cases, involving the termination of employment contracts, which do not fall within the scope of that directive, whilst excluding from that concept the case before the national court, which it considered ought to be covered by that concept.

26. I certainly do not see what considerations could lead the Court to opt for a different line of reasoning in the present case.

27. Besides, there is nothing in the case-file here to suggest that the referring court is free to depart from the Court's interpretation of Directive 98/59. [12] On the contrary, the referring court has stated on several occasions that it is its duty to construe Section 188 of the Trade Union and Labour Relations (Consolidation) Act 1992, so far as is possible, in a manner consistent with Directive 98/59 as interpreted by the Court of Justice. [13]

28. Accordingly, I propose that the Court reply to the question referred.

B – *The question referred*

29. The Court is asked to determine the 'trigger point' for the employer's obligation of prior consultation in the case of collective redundancy.

30. More specifically, the referring court is uncertain whether that obligation arises when the employer is planning to make a strategic or operational decision which, foreseeably or inevitably, will lead to collective redundancies or only when that decision has actually been made and the employer is planning to proceed with the consequential redundancies.

31. While Ms Nolan argues that the first possibility alone enables the effectiveness of Directive 98/59 to be preserved, the position adopted by the Commission and the EFTA Surveillance Authority is more measured. In essence they both argue, in the light of *Akavan* and the facts of the case before the referring court, that the employer's obligation to begin consultations concerning collective redundancies arises when a strategic or commercial decision is taken which compels the employer to contemplate or to plan collective redundancies.

32. I would agree with that interpretation of Directive 98/59.

33. First of all, it should be borne in mind that, under Article 2(1) of Directive 98/59, an employer who is contemplating collective redundancies must begin consultations with the workers' representatives in good time with a view to reaching an agreement.

34. Under Article 2(2) of Directive 98/59, those consultations are to cover not only ways and means of avoiding collective redundancies or reducing the number of workers affected, but also of mitigating the consequences through accompanying social measures designed, inter alia, to facilitate the redeployment or retraining of workers who have been made redundant.

11 — Case C-323/08 [2009] ECR I-11621, paragraph 27.

12 — See, to that effect, *Poseidon Chartering*, paragraph 18, and *Volvo Car Germany*, paragraph 27.

13 — See, for example, paragraphs 45 and 60 of the order for reference.

35. The employer's obligations under Directive 98/59 must therefore arise at a time when there is still a possibility of preserving the effectiveness of such consultations, in particular the possibility of avoiding or reducing collective redundancies or, at least, mitigating the consequences. [14] Accordingly, consultations must not be launched too late. That would be the case if the employer began consultations after the decision to terminate the employment contracts had already been taken. [15]

36. It follows — as the Court observed, in particular, in paragraph 41 of *Akavan* — that the obligation laid down in Article 2 of Directive 98/59 is deemed to arise where the employer is contemplating collective redundancies or is drawing up a plan for collective redundancies. [16]

37. However, in the same judgment, which the referring court quotes at length, the Court also had occasion to clarify the scope of an employer's consultation obligations in a situation where there is a group of undertakings and the decision on collective redundancies is made, not directly by the employer, but by the undertaking controlling the employer, as envisaged by Article 2(4) of Directive 98/59. [17]

38. As emerges from the reasoning followed by the Court in *Akavan*, the Court was well aware that a situation of that kind required caution in determining the trigger point for the consultation obligation.

39. Above all, the Court stressed in that judgment that the obligation should not be triggered prematurely. Accordingly, echoing the concerns of the United Kingdom Government in that case, the Court observed in paragraph 45 that premature triggering of the obligation to hold consultations could lead to results contrary to the purpose of Directive 98/59: it could, for instance, reduce the flexibility with which undertakings were able to handle restructuring; it could create heavier administrative burdens and lead to unnecessary uncertainty for workers about the safety of their jobs. In paragraph 46, still in relation to the difficulties which could arise as a result of the premature triggering of consultations with workers' representatives, the Court added, in essence, that the *raison d'être* for such consultations, and their effectiveness, presuppose that the factors to be taken into account in the course of those consultations have been determined, and that cannot be done if those factors are not known.

40. Nor, the Court went on to observe, should the consultation obligation laid down in Article 2 of Directive 98/59 be triggered too late. In the context of the adoption of a strategic or commercial decision by a company controlling the employer, the Court held — in paragraph 47 of *Akavan* — that a consultation which begins when a decision making collective redundancies necessary has already been taken cannot usefully involve any examination of conceivable alternatives with the aim of avoiding redundancies. In paragraph 48, the Court concluded that the obligation to consult the workers' representatives arises within a group of undertakings when a strategic or commercial decision is taken *which compels the employer to contemplate or to plan for collective redundancies*.

41. To sum up, either the prospect of a collective redundancy arises directly from the employer's choice, in which case, in accordance with paragraph 41 of *Akavan*, the obligation to hold consultations arises when the employer contemplates collective redundancies or draws up a plan for collective redundancies, or the prospect of such redundancy results, not directly from a choice made by the employer, but from a choice made by another entity, in which case, in accordance with paragraph 48 of *Akavan*, the employer's obligation to hold consultations will arise when that other entity adopts a strategic or commercial decision which compels the employer to contemplate or to plan for collective redundancies.

14 — See, to that effect, *Akavan*, paragraph 38.

15 — See, to that effect, Case C-188/03 *Junk* [2005] ECR I-885, paragraphs 36 and 37, and *Akavan*, paragraph 38.

16 — *Akavan*, paragraph 41 and the case-law cited.

17 — Article 2(4) provides that 'the obligations laid down in paragraphs 1, 2 and 3 shall apply irrespective of whether the decision regarding collective redundancies is being taken by the employer or by an undertaking controlling the employer'.

42. I would add, although it is clearly implied by the previous points, that it also follows from *Akavan* that, in a situation where a subsidiary of a group of companies is the 'employer' within the meaning of Directive 98/59, it is still for that 'employer' to hold consultations with the workers' representatives, whether or not collective redundancies are contemplated or planned for as a result of a decision (strategic or commercial) of the parent company. [18] However, in order to achieve the purpose of consultations with the workers' representatives, the subsidiary whose employees will be affected by the contemplated redundancies must be known beforehand. [19] Lastly, the Court also made it clear that a decision by the parent company which has the effect of compelling one of its subsidiaries to terminate the contracts of employees affected by the collective redundancies can be taken only on the conclusion of the consultation procedure within that subsidiary, failing which the subsidiary, as the employer, is liable for the consequences of failure to comply with that procedure. [20]

43. In relation to the main proceedings, it must be observed that, although the military base within which collective redundancies were contemplated was known, the referring court did not specify which of the entities mentioned in the order for reference (the commanding officer of the military base; the headquarters of the US army in Europe in Mannheim, which sent the redundancy notices; or even — albeit unlikely — the Secretary of the US Army), must be regarded as the 'employer' which had the obligation to hold consultations pursuant to Directive 98/59 and the Trade Union and Labour Relations (Consolidation) Act 1992.

44. The explanation seems to be that, in the main proceedings, the term 'employer' is construed rather vaguely as designating in a general way the armed forces of the United States. This may have something to do with the difficulty encountered by the referring court in interpreting the employer's obligations. Going back to the question referred, *in the light of the facts as stated by the referring court*, that court appears to refer to different entities as the 'employer'. Thus, 'the employer who is proposing, but has not yet made a strategic or operational decision', referred to in alternative (i) of the question, is in all probability not the same as 'the employer who is proposing consequential redundancies', referred to in alternative (ii).

45. Nevertheless, it is fairly clear from the order for reference that, as the Commission and the EFTA Surveillance Authority have mentioned in their written observations, the main proceedings relate to the second situation referred to in point 41 above, that is to say, where the employer — probably the commanding officer of the military base or the USAREUR Headquarters of the Deputy Chief of Staff in Mannheim — did not directly come up with the idea of the collective redundancies, but where such redundancies arise as a result of a decision made 'far above the head of the local commander', as the referring court observes. [21]

46. I do not think that, in view of the choice made by the United Kingdom legislature when transposing Directive 98/59 into national law, there is any obstacle to applying the Court's reasoning in *Akavan* concerning the consultation obligations which arise for a subsidiary company — the 'employer' within the meaning of that directive — as a result of a strategic or commercial decision, to the situation of a military base where the collective redundancy of its civilian employees is contemplated as a result of a decision restructuring military activities which has been taken at a higher level and which entails the closure of that base.

47. At this stage, in relation to the second possibility set out in point 41 above, the only question remaining is whether, in the main proceedings, a strategic decision was made compelling the employer to contemplate or to plan for collective redundancies.

18 — See *Akavan*, paragraph 62.

19 — *Akavan*, paragraph 64.

20 — *Akavan*, paragraph 71.

21 — See the base commander's memorandum referred to in paragraph 21 of the order for reference.

48. The division of powers between the Court of Justice and the national courts which characterises the preliminary ruling procedure implies, of course, that it is for the referring court to determine that question. The referring court will therefore have to satisfy itself, in the light of the criterion indicated above, whether — as the lower courts in essence found — the consultations which began on 5 June 2006 were started too late in that they had no prospect of achieving the objective sought by Directive 98/59 and the United Kingdom legislation implementing that directive.

49. In my view, the method to be used by the referring court should be to identify which of the events mentioned in the order for reference which occurred before 5 June 2006 was in the nature of a strategic decision and exerted compelling force on the employer for the purposes of giving effect to the consultation obligation, and the date on which that decision was made.

50. When that has been done, the referring court will be able to judge whether the consultations with the workers' representatives of the military base on 5 June 2006 were initiated 'in good time', for the purposes of Article 2 of Directive 98/59 and Section 188 of the Trade Union and Labour Relations (Consolidation) Act 1992.

51. The above reply means that, on the facts, neither of the two alternatives contemplated in the question referred is to be preferred. The consultations would have been premature if, as suggested in alternative (i), the employer should have initiated them even though no 'strategic or operational decision' had been taken. In other words, what it is important to know is whether, when such a decision is made, it compels the employer to contemplate collective redundancies or not. On the other hand, the consultations would have been initiated late if the strategic decision had been made without leaving the employer any time in which to contemplate collective redundancies, whereas — as appears from the chronology of the events giving rise to the main proceedings, as set out in the order for reference — the consultations were deferred for a number of weeks after the decision had been made.

52. Accordingly, given the facts of the case before the referring court, I suggest that the Court reply as follows to the question referred: Directive 98/59 must be interpreted as meaning that an employer's obligation to conduct consultations with the workers' representatives arises when a strategic or commercial decision which compels him to contemplate or to plan for collective redundancies is made by a body or entity which controls the employer. It is for the referring court to identify, in the light of the facts of the main proceedings, which of the events mentioned in the order for reference which occurred before the date on which the consultations with the workers' representatives of the establishment in question actually started, was in the nature of a strategic decision and exerted a compelling force on the employer for the purposes of giving effect to the consultation obligation, and the date on which that decision was made.

III – Conclusion

53. In the light of all the foregoing, I propose that, in answer to the question referred for a preliminary ruling by the Court of Appeal (England and Wales) (Civil Division) (United Kingdom), the Court state as follows:

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 meaning that an employer's obligation to conduct consultations with the workers' representatives arises when a strategic or commercial decision which compels him to contemplate or to plan for collective redundancies is made by a body or entity which controls the employer.

It is for the referring court to identify, in the light of the facts of the main proceedings, which of the events mentioned in the order for reference which occurred before the date on which the consultations with the workers' representatives of the establishment in question actually started was in the nature of a strategic decision and exerted compelling force on the employer for the purposes of giving effect to the consultation obligation, and the date on which that decision was made.