Reports of Cases

JUDGMENT OF THE COURT (Seventh Chamber)

22 February 2024*

(Reference for a preliminary ruling – Social policy – Collective redundancies – Directive 98/59/EC – Article 2(1) – Point at which the obligation to provide information and hold consultations arises – Number of actual or projected redundancies – Article 1(1) – Voluntary terminations of employment contracts before redundancies – Method for calculating the number of redundancies)

In Case C-589/22,

REQUEST for a preliminary ruling under Article 267 TFEU from the Tribunal Superior de Justicia de las Islas Baleares (High Court of Justice, Balearic Islands, Spain), made by decision of 29 August 2022, received at the Court on 23 September 2022, in the proceedings

J.L.O.G.,

J.J.O.P.

v

Resorts Mallorca Hotels International SL,

THE COURT (Seventh Chamber),

composed of F. Biltgen (Rapporteur), President of the Chamber, N. Wahl and M.L. Arastey Sahún, Judges,

Advocate General: P. Pikamäe,

Registrar: A. Calot Escobar,

having regard to the written procedure,

after considering the observations submitted on behalf of:

– J.L.O.G. and J.J.O.P., by J.L. Valdés Alias, abogado,

– Resorts Mallorca Hotels International SL, by M. Sánchez Rubio, abogado,

– the Spanish Government, by I. Herranz Elizalde, acting as Agent,

* Language of the case: Spanish.

– the European Commission, by I. Galindo Martín and B.-R. Killmann, acting as Agents,

having decided, after hearing the Advocate General, to proceed to judgment without an Opinion,

gives the following

Judgment

1 This request for a preliminary ruling concerns the interpretation of Article 1(1) and Article 2(1) 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 J.L.O.G. and J.J.O.P., of the one part, and Resorts Mallorca Hotels International SL, of the other part, regarding the validity of their dismissals.

Legal context

European Union 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 that directive, which forms part of Section II thereof, entitled 'Information and consultation', 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.

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.

…'

Spanish law

5 Article 51 of the Estatuto de los Trabajadores (Workers' Statute) follows from Real Decreto Legislativo 2/2015, por el que se aprueba el texto refundido de la Ley del Estatuto de los Trabajadores (Royal Legislative Decree 2/2015 approving the consolidated text of the Law on the Workers' Statute) of 23 October 2015 (BOE No 255 of 24 October 2015, p. 100224, entitled 'Collective redundancies', provides:

'1. For the purposes of the [Workers' Statute] "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 undertakings 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 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.

2. Collective redundancy must be preceded by a period of consultation with the workers' legal representatives for a maximum period of 30 calendar days or 15 days in the case of undertakings with fewer than 50 workers. Consultation with workers' legal representatives must include, as a minimum, consideration of the possibilities of avoiding or reducing collective redundancy and of

mitigating the consequences thereof by recourse to social support measures, such as outplacement or vocational training or retraining to improve employability. …'

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

6 The respondent in the main proceedings is engaged in the management and operation of hotels.

7 On 25 September 2019, the respondent in the main proceedings informed the Juzgado de lo Mercantil de Palma (Commercial Court, Palma de Majorca, Spain) that it had commenced negotiations for refinancing or entry into an arrangement with creditors. At that date, the respondent in the main proceedings employed 43 members of staff working at its central offices.

8 Between the months of August and December 2019, the number of hotels managed and operated by the respondent in the main proceedings fell from 20 to 7. Amongst the 13 hotels that it had ceased to manage, 7 belonged to various companies of the Grupo Globales group.

9 On 30 December 2019, the respondent in the main proceedings signed an agreement with the companies that own those seven hotel establishments and with Amla Explotaciones Turísticas SA ('Amla Explotaciones'), which also belonged to Grupo Globales. That agreement provided that, with effect from 1 January 2020, the leases of those establishments, which had been operated until then by the respondent in the main proceedings, would be terminated, the operation of those establishments would be transferred to Amla Explotaciones and all the employment contracts of the staff of those establishments in force on 31 December 2019 would be transferred to Grupo Globales, which would thus be subrogated as the employer in those contracts.

10 In view of those circumstances, the respondent in the main proceedings, in a document drawn up on an ad hoc basis, asked all the staff at its central offices whether they were willing to be interviewed by the management of Grupo Globales to fill 10 job vacancies that the new operator might have, due to the increased workload in its common services, after acquiring the seven hotel establishments.

11 On 30 December 2019, following those interviews, nine workers signed a document of identical content, indicating their wish to leave the respondent in the main proceedings with effect from 14 January 2020. On 15 January 2020, those nine workers signed contracts of employment with Amla Explotaciones. Those contracts contained a clause which recognised the length of service, category and remuneration that they benefited from at the respondent in the main proceedings and indicating that those conditions were recognised on a personal basis, and in no case involved a subrogation of an undertaking, since their engagement had been preceded by the termination of their employment relationship with the previous employer.

12 In January 2020, the respondent in the main proceedings employed no more than 32 workers at its central offices. The 11 workers who ceased to work there included the 9 workers who had signed the notice of voluntary departure on 30 December 2019.

13 On 31 January 2020, the two appellants in the main proceedings and the seven other workers, who were then employees of the respondent in the main proceedings, were notified of their objective dismissal for organisational and production reasons. Following those nine dismissals, the staff at the central offices of the respondent in the main proceedings was reduced to 23 workers.

14 The appellants in the main proceedings brought an action against their dismissals before the Juzgado de lo Social nº 2 de Palma (Social Court No 2, Palma de Majorca, Spain) submitting that the respondent in the main proceedings should have carried out a procedure for collective redundancy and acted fraudulently in artificially encouraging voluntary departures of some workers in order to avoid having to carry out that procedure.

15 That action having been rejected on the ground that the number of dismissals did not meet the thresholds at which the procedure for collective redundancy became obligatory, the appellants in the main proceedings brought an appeal before the referring court.

16 Before that court, the respondent in the main proceedings submitted that the voluntary departures could not be included for the purpose of calculating the number of dismissals or terminations to be treated as equivalent to dismissals and that, since those voluntary departures could not be taken into account, the defined thresholds at which the procedure for collective redundancy became obligatory had not been reached. According to the respondent in the main proceedings, its decision to dismiss nine employees for objective reasons had not taken account of the result of the interview process, which was transparent and voluntary, by which the employees who considered it to be in their interests accepted the proposal of voluntary departure. On the contrary, that decision was taken in response to the reality that prevailed at the date of its adoption and responded to the analysis of its organisational and production requirements after Grupo Globales had recruited some of the staff.

17 The referring court, despite referring to the Court's case-law, in particular the judgments of 10 September 2009, *Akavan Erityisalojen Keskusliitto AEK and Others* (C-44/08, EU:C:2009:533), of 11 November 2015, *Pujante Rivera* (C-422/14, EU:C:2015:743), and of 21 September 2017, *Ciupa and Others* (C-429/16, EU:C:2017:711), is uncertain as to whether, in a situation such as that at issue in the main proceedings, first, an employer who contemplates, in a crisis situation, the departure of a number of workers, which is likely to exceed, and which has in fact exceeded, the thresholds laid down for collective redundancy, without however complying with the information and consultation obligations, infringes the effectiveness of Directive 98/59 and, secondly, the purportedly voluntary departure of nine workers before the dismissals of the appellants in the main proceedings and other workers must be treated as equivalent to those dismissals and counted for the purpose of the calculation of the number of dismissals laid down in Article 1(1)(a) of that directive.

18 In those circumstances, the Tribunal Superior de Justicia de las Islas Baleares (High Court of Justice, Balearic Islands, Spain) decided to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:

'(1) Should Article 2 of [Directive 98/59], read in the light of the case-law of the [Court] set out in the judgment of 10 September 2009, *Akavan Erityisalojen Keskusliitto AEK and Others* (C-44/08, EU:C:2009:533), be interpreted as meaning that the consultation and notification requirements, which underpin the effectiveness of the Directive, arise as soon as an undertaking, as part of a restructuring process, projects a number of terminations of employment contracts which may exceed the collective redundancy threshold, irrespective of the fact that, ultimately, the number of assimilable dismissals or terminations does not reach that threshold on account of measures taken by the employer, without prior consultation with the workers' representatives, to reduce that number?

(2) Does the provision in the final subparagraph of Article 1(1) of [Directive 98/59], which states that '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', in the context of a crisis in which a reduction in the workforce, including through dismissals, is expected, cover worker redundancies proposed by an undertaking, which although not sought by the workers, were accepted by them on receipt of a firm offer of immediate employment at another undertaking, when it was the employer who arranged for its employees to have the option of being interviewed by that other undertaking with a view to their possible recruitment?'

Consideration of the questions referred

The first question

19 By its first question, the referring court asks, in essence, whether Article 2(1) of Directive 98/59 must be interpreted as meaning that the consultation obligation that it lays down arises at the time when the employer, in the context of a restructuring plan, contemplates or plans a reduction of employment positions, the number of which may exceed those fixed as giving rise to the concept of 'collective redundancies', within the meaning of Article 1(1)(a) of that directive, or only at the time when, after having adopted measures involving the reduction of that number, the employer became certain that it would in fact have to dismiss a number of workers greater than those fixed by the latter provision.

20 With a view to replying to that question, it should be recalled, first of all, that, as regards the obligation for the employer to carry out consultations provided for in Article 2 of that directive, the Court has repeatedly held that the obligations of consultation and notification arise prior to any decision by the employer to terminate contracts of employment (judgments of 27 January 2005, *Junk*, C-188/03, EU:C:2005:59, paragraph 37, and of 10 September 2009, *Akavan Erityisalojen Keskusliitto AEK and Others*, C-44/08, EU:C:2009:533, paragraph 38).

21 The achievement of the objective set out in Article 2(2) of Directive 98/59 of avoiding terminations of contracts of employment or reducing the number of such terminations would be jeopardised if the consultation of the workers' representatives were to take place after the employer's decision to terminate the employment contracts (see, to that effect, judgments of 27 January 2005, *Junk*, C-188/03, EU:C:2005:59, paragraph 38, and of 10 September 2009, *Akavan Erityisalojen Keskusliitto AEK and Others*, C-44/08, EU:C:2009:533, paragraph 46).

22 According to the Court's case-law, the consultation procedure laid down in Article 2 of Directive 98/59 must be started by the employer once a strategic or commercial decision compelling it to contemplate or to plan for collective redundancies has been taken (judgments of 10 September 2009, *Akavan Erityisalojen Keskusliitto AEK and Others*, C-44/08, EU:C:2009:533, paragraph 48, and of 21 September 2017, *Ciupa and Others*, C-429/16, EU:C:2017:711, paragraph 34).

23 In that regard, it should be observed that the cases that gave rise to the judgment of 21 September 2017, *Ciupa and Others* (C-429/16, EU:C:2017:711), and to the judgment of 10 September 2009, *Akavan Erityisalojen Keskusliitto AEK and Others* (C-44/08, EU:C:2009:533),

related to economic decisions which were not directly concerned with terminating specific employment relationships but which might, nevertheless, have had repercussions on the employment of a number of workers.

24 Admittedly, the Court considered, first, that a premature triggering of the obligation to hold consultations could lead to results contrary to the purpose of Directive 98/59, such as restricting the flexibility available to undertakings when restructuring, creating heavier administrative burdens and causing unnecessary uncertainty for workers about the safety of their jobs (judgment of 10 September 2009, *Akavan Erityisalojen Keskusliitto AEK and Others*, C-44/08, EU:C:2009:533, paragraph 45). It found, secondly, that in order to conduct consultations in accordance with their objectives, namely with a view to avoiding terminations of employment contracts or reducing the number thereof and mitigating the consequences, the factors which are of relevance with regard to the collective redundancies contemplated must be defined. However, where a decision deemed likely to lead to collective redundancies is merely contemplated and where, accordingly, such collective redundancies are only a probability and the relevant factors for the consultations are not known, those objectives cannot be achieved (see, to that effect, judgment of 10 September 2009, *Akavan Erityisalojen Keskusliitto AEK and Others*, C-44/08, EU:C:2009:533, paragraph 46).

25 However, it also stated that, since, in accordance with the first subparagraph of Article 2(2) of Directive 98/59, the consultations must cover, inter alia, the possibility of avoiding or reducing the collective redundancies contemplated, a consultation which began when a decision making such collective redundancies necessary had already been taken could not usefully involve any examination of conceivable alternatives with the aim of avoiding them (judgment of 10 September 2009, *Akavan Erityisalojen Keskusliitto AEK and Others*, C-44/08, EU:C:2009:533, paragraph 47).

26 In the present case, it is apparent from the request for a preliminary ruling that, between August 2019 and the end of December 2019, the number of hotels managed and operated by the respondent in the main proceedings fell from 20 to 7. In particular, on 30 December 2019 it concluded an agreement pursuant to which the management of 7 of those 13 establishments was terminated and transferred, with effect from 1 January 2020, to Amla Explotaciones.

27 In view of the extent of the change in the management and operation activity thus undertaken and the consequences that were reasonably foreseeable for the workload at its central offices, the decision to commence discussions on the termination of the management and operation of those seven establishments may be regarded as a strategic or commercial decision which compelled the respondent in the main proceedings to contemplate or to plan for collective redundancies, within the meaning of the case-law referred to in paragraph 22 of this judgment, which, however, it is for the referring court to ascertain.

28 In that regard, first, it should be emphasised that the respondent in the main proceedings knew that the transfer of the management of those establishments would entail an increased workload for Amla Explotaciones requiring the engagement of 10 new workers, which was the reason why it asked the members of its staff working at its central offices if they would be willing to be interviewed by the managers of Grupo Globales. It could, therefore, envisage that it would face a reduction in the workload of the same or similar extent to the increase in the workload that Amla Explotaciones would experience.

29 Secondly, the request for a preliminary ruling indicated that the decision of the respondent in the main proceedings to dismiss nine employees was a response to the analysis of its organisational and production requirements after the transfer of the management and operation of the seven establishments in question to Amla Explotaciones and the departure of nine of its workers to the latter. Taking that decision into account, the respondent in the main proceedings should reasonably have anticipated needing to reduce significantly the number of its workers at its central offices in order to bring that number into line with the volume of its activity and the remaining workload.

30 Consequently, since the decision to transfer the management and operational activity of seven hotels to Amla Explotaciones necessarily implied, for the respondent in the main proceedings, that collective redundancies were contemplated, it was incumbent upon it, in so far as the conditions defined in Article 1(1) of Directive 98/59 were satisfied, to carry out the consultations provided for in Article 2 of that directive.

31 That conclusion is all the more compelling since the purpose of the obligation to hold consultations, laid down in Article 2 of the directive – namely to avoid terminations of contracts of employment or to reduce their number and to mitigate the consequences – and the objective that the respondent in the main proceedings pursued in the present case in asking its workers whether they were willing to be interviewed by Amla Explotaciones – namely to enable a number of its workers to enter a contractual relationship with the latter and, consequently, to reduce the number of individual dismissals – overlap to a great extent. Since a decision resulting in the significant reduction of the number of hotels managed and operated by the respondent in the main proceedings was likely to result in an equally significant reduction in its activity and workload at its central offices and, therefore, in the number of workers that it required, the voluntary departure of a certain number of workers to the company which took over a part of its transferred activity was obviously capable of making it possible to avoid collective redundancies.

32 Having regard to the foregoing considerations, the answer to the first question is that Article 2(1) of Directive 98/59 must be interpreted as meaning that the consultation obligation that it lays down arises at the time when the employer, in the context of a restructuring plan, contemplates or plans a reduction of employment positions, the number of which may exceed those fixed in Article 1(1)(a) of that directive, and not when, after having adopted measures involving the reduction of that number, the employer became certain that it would in fact have to dismiss a number of workers greater than those fixed by the latter provision.

The second question

33 Having regard to the answer given to the first question, there is no need to answer the second question.

Costs

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

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

Article 2(1) 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 meaning that the consultation obligation that it lays down arises at the time when the employer, in the context of a restructuring plan, contemplates or plans a reduction of employment positions, the number of which may exceed those fixed in Article 1(1)(a) of that directive, and not when, after having adopted measures involving the reduction of that number, the employer became certain that it would in fact have to dismiss a number of workers greater than those fixed by the latter provision.

[Signatures]