JUDGMENT OF THE COURT (Third Chamber)

11 February 2010 *

In Case C-405/08,

REFERENCE for a preliminary ruling under Article 234 EC from the Vestre Landsret (Denmark), made by decision of 16 September 2008, received at the Court on 18 September 2008, in the proceedings

Ingeniørforeningen i Danmark, acting on behalf of Bertram Holst,

v

Dansk Arbejdsgiverforening, acting on behalf of Babcock & Wilcox Vølund ApS,

THE COURT (Third Chamber),

composed of J.N. Cunha Rodrigues, President of the Second Chamber, acting as President of the Third Chamber, A. Rosas, U. Lõhmus, A. Ó Caoimh (Rapporteur) and A. Arabadjiev, Judges,

* Language of the case: Danish.

Advocate General: Y. Bot,
Registrar: C. Strömholm, Administrator,

having regard to the written procedure and further to the hearing on 9 September 2009,

after considering the observations submitted on behalf of:

— Ingeniørforeningen i Danmark, acting on behalf of Mr Holst, by K. Schioldann, advokat,

— Dansk Arbejdsgiverforening, acting on behalf of Babcock & Wilcox Vølund ApS, by P. Knudsen and H. Werner, advokater,

— the Danish Government, by C. Pilgaard Zinglersen and V. Pasternak Jørgensen, acting as Agents,

— the Commission of the European Communities, by N.B. Rasmussen and J. Enegren, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 29 October 2009,

gives the following

Judgment

1 The present reference for a preliminary ruling concerns the interpretation 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).

2 The reference has been made in the context of a dispute between the Danish Association of Engineers (Ingeniørforeningen i Danmark) ('IDA'), acting on behalf of Mr Holst, a former employee of the company Babcock & Wilcox Vølund ApS ('BWV'), and the Confederation of Danish Employers (Dansk Arbejdsgiverforening) ('DA'), acting on behalf of BWV, concerning the dismissal of Mr Holst by BWV.

Legal context

Community legislation

3 Recitals 18, 23 and 28 in the preamble to Directive 2001/34 are worded as follows:

'(18) The purpose of this general framework [for informing and consulting employees adapted to the new European context] is to establish minimum requirements applicable throughout the Community while not preventing Member States from laying down provisions more favourable to employees.

…

(23) The objective of this Directive is to be achieved through the establishment of a general framework comprising the principles, definitions and arrangements for information and consultation, which it will be for the Member States to comply with and adapt to their own national situation, ensuring, where appropriate, that management and labour have a leading role by allowing them to define freely, by agreement, the arrangements for informing and consulting employees which they consider to be best suited to their needs and wishes.

…

(28) Administrative or judicial procedures, as well as sanctions that are effective, dissuasive and proportionate in relation to the seriousness of the offence, should be applicable in cases of infringement of the obligations based on this Directive.'

4 Under Article 1 of Directive 2002/14:

'1. The purpose of this Directive is to establish a general framework setting out minimum requirements for the right to information and consultation of employees in undertakings or establishments within the Community.

2. The practical arrangements for information and consultation shall be defined and implemented in accordance with national law and industrial relations practices in individual Member States in such a way as to ensure their effectiveness.

3. When defining or implementing practical arrangements for information and consultation, the employer and the employees' representatives shall work in a spirit of cooperation and with due regard for their reciprocal rights and obligations, taking into account the interests both of the undertaking or establishment and of the employees.'

5 Employees' representatives are defined in Article 2(e) of Directive 2002/14 as being 'the employees' representatives provided for by national laws and/or practices'.

6 Article 4(1) of Directive 2002/14 provides:

'In accordance with the principles set out in Article 1 and without prejudice to any provisions and/or practices in force more favourable to employees, the Member States shall determine the practical arrangements for exercising the right to information and consultation at the appropriate level in accordance with this Article.'

7 Article 5 of Directive 2002/14 provides:

'Member States may entrust management and labour at the appropriate level, including at undertaking or establishment level, with defining freely and at any time through negotiated agreement the practical arrangements for informing and consulting employees. These agreements, and agreements existing on the date laid down in Article 11, as well as any subsequent renewals of such agreements, may establish, while respecting the principles set out in Article 1 and subject to conditions and limitations laid down by the Member States, provisions which are different from those referred to in Article 4.'

8 Article 7 of the directive provides as follows:

'Member States shall ensure that employees' representatives, when carrying out their functions, enjoy adequate protection and guarantees to enable them to perform properly the duties which have been assigned to them.'

9 Article 8 of Directive 2002/14 is worded as follows:

'1. Member States shall provide for appropriate measures in the event of non-compliance with this Directive by the employer or the employees' representatives. In particular, they shall ensure that adequate administrative or judicial procedures are available to enable the obligations deriving from this Directive to be enforced.

2. Member States shall provide for adequate sanctions to be applicable in the event of infringement of this Directive by the employer or the employees' representatives. These sanctions must be effective, proportionate and dissuasive.'

10 Article 9(4) of Directive 2002/14 states that implementation of the directive is not a sufficient ground for any regression in relation to the situation which already prevails in each Member State and in relation to the general level of protection of workers in the areas to which the directive applies.

11 Under Article 11(1) of Directive 2002/14, Member States were required to adopt the laws, regulations and administrative provisions necessary to comply with that directive not later than 23 March 2005 or to ensure that management and labour had introduced by that date the required provisions by way of agreement, the Member States being obliged to take all necessary steps enabling them to guarantee the results imposed by the directive at all times. The Member States were also required to inform forthwith the Commission of the European Communities of the adoption or implementation of those provisions.

National legislation

The Law on informing and consulting employees

12 Directive 2002/14 was implemented in the Danish legal system by means of Law No 303 of 2 May 2005 on informing and consulting employees (lov om information og høring af lønmodtagere) ('the 2005 Law'), which entered into force on 15 May 2005.

13 The 2005 Law applies to employees who do not come within the scope of application of a collective agreement which is intended, inter alia, to transpose Directive 2002/14.

14 Paragraph 8 of the 2005 Law provides that the employees' representatives who must be informed and consulted in that capacity are to be protected against dismissal or any other adverse alteration of their conditions of employment in the same manner as union representatives in the same or an equivalent professional field.

15 The order for reference indicates that Paragraph 8 refers to the general protection against dismissal for union representatives or employees' representatives contained in virtually all Danish collective agreements, apart from those covering management. That protection means that the employer bears the burden of proving that there are compelling grounds for dismissing a union representative and that it was not possible to avoid that dismissal by, for example, dismissing another worker instead. Such a dismissal can be carried out only if it is absolutely impossible to offer the union representative an equivalent post in the undertaking in which he was elected.

16 As it is possible to transpose Directive 2002/14 by way of collective agreement, Paragraph 3 of the 2005 Law provides that that law is not to apply in the case where the employer's duty to inform and consult the employees results from a collective agreement and the provisions of that agreement are at least equivalent to those contained in Directive 2002/14.

The Law on salaried employees

17 All employees covered by the Law on salaried employees (Funktionærloven) ('the FL') are protected against unfair dismissal under Paragraph 2b of that law, which provides for compensation of up to six months' salary if the dismissal cannot be considered to be reasonable in the light of the situation of the salaried employee or that of the undertaking. The protection consists in an appraisal as to whether or not the dismissal is reasonable.

18 The order for reference indicates that the protection provided in Paragraph 2b of the FL is less extensive than that provided by the requirement of compelling grounds in the case of the dismissal of union representatives covered by collective agreements.

The Cooperation Agreement

19 The Cooperation Agreement (Samarbejdsaftalen) is a cooperation agreement concluded between the two principal labour and employer organisations in Denmark, namely the Danish Confederation of Trade Unions (Landsorganisationen i Danmark) ('LO') and DA. It deals with the organisation and functioning of cooperation committees within undertakings.

20 The Cooperation Agreement is one of a number of measures which transpose Directive 2002/14 by means of a collective agreement. It applies to undertakings which have more than 35 employees and contains provisions providing for the establishment of a cooperation committee consisting of representatives of management and employees, referred to respectively as group A and group B. Group B is made up of representatives of unionised LO-affiliated employees and representatives of other categories of employees.

21 Clause 4 of the Cooperation Agreement provides as follows:

'Any member of the cooperation committee group B who does not already enjoy protection as a union representative and who is discharged from the company must be given six weeks' notice of termination over and above the period of notice provided for by the collective agreement. The total period of notice shall not exceed the period of notice applicable to a union representative for the same trade group or similar trade groups. Where it is desired, and prior to the appointment of members for the cooperation committee, group B may add to its group representatives elected from and among groups that are not represented by the ordinary members or union representatives. The term group shall refer to specific occupational groups or groups with specific training. The groups in question are thus groups which are not directly represented in the cooperation committee but which shall, nonetheless, take their seat in the cooperation committee upon their election.'

22 The order for reference indicates that an amended version of the Cooperation Agreement, which entered into effect on 23 March 2005, made it possible to allow all professional groups covered by an agreement to take part in the cooperation committee, even those professional groups not represented by one of the parties to the Cooperation Agreement. Moreover, it also became possible to supplement the cooperation committee with representatives of specific professional groups or groups with specific training.

23 The order for reference indicates that those amendments were designed to include professional or employee groups not covered by a collective agreement, such as engineers.

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

24 Mr Holst was engaged on 1 July 1984 by BWV under an individual contract of employment as a project engineer. He is a salaried employee and, according to the information provided by the referring court, is covered by the FL.

25 In 2001 Mr Holst was elected as the employees' representative for engineers on BWV's cooperation committee. That committee, which was established pursuant to the Cooperation Agreement, is made up of representatives of management and employees. Within that committee, the employees' representatives included representatives of employees who were members of LO and representatives of other employee groups.

26 On 24 January 2006, together with other employees, Mr Holst was given six months' notice of termination of his employment on grounds of downsizing by BWV. He challenged the grounds for his dismissal.

27 Mr Holst is a member of IDA, which has acted on his behalf before the national court. IDA is not a member of LO and has no collective agreement with BWV either for the professional group of engineers or for any other employee groups. IDA is therefore not a party to the Cooperation Agreement.

28 BWV employs approximately 240 people. It is a member of the Confederation of Danish Industry (Dansk Industri), an employers' association. Dansk Industri is in turn a member of DA.

29 As stated in paragraph 22 of this judgment, as part of the transposition of Directive 2002/14 into the Danish legal system, amendments were made to the Cooperation Agreement in 2005 which, according to the parties to that agreement, correctly transposed the directive.

30 On 8 November 2006, IDA, acting on behalf of Mr Holst, brought an action before the Esbjerg District Court (Byretten i Esbjerg), seeking to have BWV ordered to pay Mr Holst damages in respect of his dismissal, pursuant to the FL. IDA took the view that that dismissal was not based on objective grounds. It further submitted that, as an employees' representative on the cooperation committee, Mr Holst was entitled to more extensive protection against dismissal, pursuant to Article 7 of Directive 2002/14. It stated that he was entitled to such protection irrespective of whether or not he belonged to a group of employees covered by a collective agreement.

31 Dansk Industri, acting at that time on behalf of BWV, submitted that the action ought to be dismissed, arguing inter alia that, at the time of his dismissal, Mr Holst had enjoyed the benefit of the notice to which he was entitled under both the FL and the Cooperation Agreement. That notice, it submitted, was such as to satisfy the requirements of Directive 2002/14, as provided for in Article 7 thereof.

32 The parties to the dispute in the main proceedings agreed to have the case examined by the Vestre Landsret (Western Regional Court) and it was at that stage that DA became the representative of BWV in the proceedings.

33 Taking the view that an interpretation of Directive 2002/14 was necessary in order for it to be able to resolve the dispute, the Vestre Landsret decided to stay the proceedings and to refer the following questions to the Court for a preliminary ruling:

'1. There is disagreement amongst the parties as to whether Directive 2002/14 … has been correctly implemented in the Cooperation Agreement … In that connection, do Community rules preclude implementation of that directive in such a manner that groups of employees are covered by a collective agreement between parties which do not represent the professional group of the persons concerned and where the collective agreement does not cover the professional group of the persons concerned?

2. If Directive 2002/14 has been correctly implemented for [the applicant in the main proceedings] in the Cooperation Agreement …, has Article 7 of the Directive been correctly implemented when it is established that the Cooperation Agreement does not provide for more extensive protection against dismissal for certain professional groups?

3. If [the applicant in the main proceedings] is covered by the [2005 Law], do the requirements of Article 7 of [Directive 2002/14] concerning "adequate protection and guarantees to enable them to perform properly the duties which have been assigned to them" preclude an implementation of Article 7 of [Directive 2002/14] in Paragraph 8 of the [2005 Law], which reads as follows: "The representatives who must be informed and consulted on behalf of the employees shall be protected against dismissal or any other adverse alteration of their conditions of employment in the same manner as union representatives in the same or an equivalent professional field", if the implementation does not provide for more extensive protection against dismissal for professional groups which are not covered by a collective agreement?'

The questions referred for a preliminary ruling

The first question

34 By its first question, the national court asks, in essence, whether Directive 2002/14 must be interpreted as precluding its transposition by way of a collective agreement which results in a group of employees being covered by the agreement in question, even though the employees in that group are not members of the union which is a party to that agreement and their field of activity is not represented by that union.

35 Article 11(1) of Directive 2002/14 states that Member States may leave it to management and labour to introduce the provisions necessary to ensure transposition of that directive, it being understood that the Member States are required to be at all times in a position to guarantee the results imposed by the directive.

36 The role of management and labour in defining and implementing the practical arrangements for information and consultation provided for in Directive 2002/14, and therefore in the transposition of that directive, is not restricted to the task conferred on them by Article 11(1). Recital 23 in the preamble to Directive 2002/14 states that the Member States may allow management and labour to have a leading role by allowing them to define freely, by agreement, the arrangements for informing and consulting employees which they consider to be best suited to their needs and wishes.

37 Article 1(2) of Directive 2002/14 also provides that those practical arrangements are to be defined and implemented in accordance, not only with national law, but also with industrial-relations practices in individual Member States.

38 Similarly, under Article 5 of Directive 2002/14, Member States may entrust management and labour, at the appropriate level, with defining freely and at any time through negotiated agreement the practical arrangements for informing and consulting employees. Under Article 5, those agreements, and agreements existing on the date of transposition of that directive, as well as any subsequent renewals of such agreements, may, while respecting the principles set out in Article 1 and subject to conditions and limitations laid down by the Member States, establish provisions which are different from those referred to in Article 4 of that directive.

39 The power thus granted to the Member States by Directive 2002/14 is in accordance with the Court's case-law that Member States may leave the implementation of the social-policy objectives envisaged by a directive in this area in the first instance to management and labour (see to that effect, inter alia, Case C-187/98 *Commission* v *Greece* [1999] ECR I-7713, paragraph 46, and Case C-306/07 *Andersen* [2008] ECR I-10279, paragraph 25).

40 That possibility does not discharge the Member States from the obligation of ensuring, by appropriate laws, regulations or administrative measures, that all workers are afforded the full protection provided for in Directive 2002/14; that State guarantee must cover all cases where protection is not ensured by other means, and, in particular, where the workers in question are not protected because they are not union members (*Andersen*, paragraph 26).

41 Where the group of persons who may be covered by a collective agreement — as, in particular, in the case of an agreement which has been declared to be of general application — can be completely independent of whether or not those persons are members of a union which is a party to that agreement, the fact that a person is not a member of such a union does not in itself deprive that person of the legal protection conferred by the agreement in question (*Andersen*, paragraph 34).

42 It follows that Directive 2002/14 does not, in itself, preclude a worker who is not a member of a union which is a party to a collective agreement implementing the provisions of that directive from enjoying under that collective agreement the full extent of the protection provided for in the directive, even though he is not a member of such a union.

43 According to the written observations and oral argument submitted to the Court, the parties disagree as to whether or not, under Danish law, an employees' representative such as Mr Holst is covered by the Cooperation Agreement and whether he may rely on the protection provisions thereof before the national courts, notwithstanding the fact that he is not a member of the union which is a party to that agreement.

44 In the context of a reference for a preliminary ruling, however, it is for the national court, and not for the Court of Justice, to ascertain, first, whether Mr Holst is covered by the Cooperation Agreement and/or by other provisions of national law intended to transpose Directive 2002/14; next, whether all employees coming within the scope of the Cooperation Agreement, whether or not they are members of a union, may rely on the protection provisions of that agreement before the national courts, with the result that all workers enjoy the same protection; and, lastly, whether, in the light of the Court's answers to the questions referred, that agreement is such as to guarantee employees coming within its scope effective protection of the rights which are conferred on them by that directive (see, to that effect, *Andersen*, paragraphs 28, 29 and 37).

45 In the light of those considerations, the answer to the first question must be that Directive 2002/14 is to be interpreted as not precluding its transposition by way of a collective agreement which results in a group of employees being covered by the agreement in question, even though the employees in that group are not members of the union which is a party to that agreement and their field of activity is not represented by that union, provided that the collective agreement is such as to guarantee to the employees coming within its scope effective protection of the rights conferred on them by Directive 2002/14.

The second and third questions

46 By its second and third questions, which it is appropriate to consider together, the national court asks, in essence, whether Article 7 of Directive 2002/14 is to be interpreted as requiring that more extensive protection against dismissal be conferred on employees' representatives.

47 As observed by the Advocate General in point 44 of his Opinion, in referring those two questions, the national court based itself on two different scenarios concerning whether, under Danish law, the dismissal of an employees' representative such as Mr Holst, who is not a member of a union which is a party to the Cooperation Agreement, comes within the scope of that agreement or within that of the 2005 Law.

48 Since it is not for this Court, but for the national court, to rule on the applicability of the relevant provisions of the national legislation or of a collective agreement in force in Denmark, the Court of Justice must confine itself to an interpretation of Article 7 of Directive 2002/14 in the light of both the wording and the spirit of that article and, more generally, in that of the objective pursued by that directive.

49 Under Article 7 of Directive 2002/14, Member States are required to ensure that employees' representatives, when carrying out their functions, enjoy adequate protection and guarantees to enable them to perform properly the duties which have been assigned to them.

50 There is, however, nothing whatsoever in the wording or the spirit of Article 7 of Directive 2002/14 to indicate that employees' representatives must necessarily be granted more extensive protection against dismissal in order to ensure compliance with the requirements of that article.

51 Moreover, it follows from both recital 18 in the preamble to and Article 1(1) of Directive 2002/14 that the directive is intended to establish a general framework setting out minimum requirements for the right of employees in undertakings or establishments within the European Union to be informed and consulted.

52 It thus follows both from the actual wording of Article 7 of Directive 2002/14 and from the fact that it provides only for a general framework setting out minimum requirements that the European Union legislature left a broad discretion to the Member States and, subject to the obligation on the Member States to guarantee the results imposed by that directive, to management and labour as regards the protection and guarantees to be adopted in respect of employees' representatives.

53 However, although the Member States, and, therefore, management and labour, enjoy broad discretion in respect of the protection conferred by Article 7, that discretion is not unlimited.

54 According to the information provided to the Court concerning the measures adopted by the Kingdom of Denmark for the purpose of transposing Directive 2002/14, an employees' representative such as Mr Holst, who is not a member of a union which is a party to the Cooperation Agreement, enjoys different protection depending on whether he comes within the scope of the 2005 Law or within that of the Cooperation Agreement. In the event that the latter is applicable, Mr Holst would, as an employees' representative, appear to be entitled to a further six weeks' notice, whereas, in the absence of that agreement, in the case where the 2005 Law is applicable to him, he would appear to be entitled to the same protection as that granted to union representatives in the same professional groups or equivalent groups and, moreover, dismissal could take place only if there are compelling grounds for it.

55 In its written observations, the Commission takes the view that the existence of such differences in the protection granted to employees' representatives in the event of dismissal is not in itself contrary to Directive 2002/14, as protection requirements may,

by their nature, vary according to factors such as the type of undertaking being considered, the Member State concerned and the profession of the representatives in question.

56 Admittedly, the existence of differences between Member States, or even within a single Member State, with respect to the practical arrangements for informing and consulting employees covered by Directive 2002/14, cannot be ruled out, since the directive leaves a broad discretion to the Member States and to management and labour with regard to the definition and implementation of those practical arrangements.

57 Although Directive 2002/14 thus does not require that the protection conferred on employees' representatives by national implementing legislation or by a collective agreement adopted with a view to transposing that directive be identical, that protection must nevertheless comply with the minimum threshold provided for in Article 7 of that directive.

58 In that regard, as has been pointed out by the Commission, it is clear that the dismissal of an employees' representative on grounds of his status or the functions which he performs in his capacity as a representative is incompatible with the protection required by Article 7.

59 An employees' representative who has been the subject of a dismissal decision must therefore be in a position to ascertain, in the context of the appropriate administrative or judicial proceedings, whether that decision was taken on grounds of his status or performance of his functions as a representative and adequate sanctions must be applicable should it transpire that there is a connection between that representative's status or functions and the measure dismissing him.

60 Although, as indicated in paragraph 39 of this judgment, the Member States remain free to allow management and labour to put in place the provisions necessary to achieve transposition of Directive 2002/14, those States must nevertheless ensure that all employees, and, in particular, their representatives, can enjoy the full extent of the protection provided for in the directive.

61 If, in the light of all the relevant rules in the Member State in question, the national legislature adopts a specific measure in order to meet the minimum protection threshold provided for in Article 7 of Directive 2002/14, a collective agreement providing for a different protection measure must, at the very least, be amenable to review by a national court in order to ensure that the protection of employees' representatives guaranteed by that measure also complies, in its totality, with such a minimum threshold.

62 Notwithstanding the discretion left to the Member States and to management and labour in this sphere, a collective agreement providing for a level of protection of employees' representatives which is lower than that considered necessary by the national legislature in implementing legislation designed to bring its domestic law into line with that minimum protection threshold provided for in Article 7 of Directive 2002/14 cannot be held to comply with that threshold. The question whether the protection conferred by a collective agreement is lower than that conferred by implementing legislation must also be examined in the light of all of the relevant national legal rules.

63 In the main proceedings, the observations submitted to the Court at the hearing indicate that the employees' representatives to whom the Cooperation Agreement applies could, in principle, be entitled not only to an extended period of notice but also to protection against unfair dismissal, in their capacity as salaried employees covered by

the FL. It appears therefore that dismissal on grounds of status or functions as an employees' representative could be regarded as constituting unfair dismissal under that law and therefore give rise to sanctions for the employer, as provided for by Article 8 of Directive 2002/14.

64 It is for the national court to establish whether that finding is correct and to ensure, in the event that Mr Holst, who is not and cannot, at the current juncture, be a member of the union which is a party to the Cooperation Agreement, is covered either by the 2005 Law, or by that agreement or the FL, by itself or in conjunction with the agreement, that the provisions which are applicable to him are such as to guarantee effective protection of the rights conferred on him by Directive 2002/14, in particular by Article 7 thereof.

65 As follows from the answer to the first question and from paragraphs 61 and 63 of this judgment, such effective protection cannot be guaranteed if only employees on the cooperation committee who are members of a union which is a party to the collective agreement in question can ensure that their dismissal is not due to their status or functions as employees' representatives.

66 In the light of the foregoing, the answer to the second and third questions must be that Article 7 of Directive 2002/14 is to be interpreted as not requiring that more extensive protection against dismissal be granted to employees' representatives. However, any measure adopted to transpose that directive, whether provided for by legislation or by collective agreement, must comply with the minimum protection threshold laid down in that Article 7.

Costs

67 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national 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 (Third Chamber) hereby rules:

1. **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 must be interpreted as not precluding its transposition by way of a collective agreement which results in a group of employees being covered by the agreement in question, even though the employees in that group are not members of the union which is a party to that agreement and their field of activity is not represented by that union, provided that the collective agreement is such as to guarantee to the employees coming within its scope effective protection of the rights conferred on them by Directive 2002/14.**

2. **Article 7 of Directive 2002/14 must be interpreted as not requiring that more extensive protection against dismissal be granted to employees' representatives. However, any measure adopted to transpose that directive, whether provided for by legislation or by collective agreement, must comply with the minimum protection threshold laid down in that Article 7.**

[Signatures]