Reports of Cases

JUDGMENT OF THE COURT (Third Chamber)

18 October 2012*

(Reference for a preliminary ruling — Directive 98/59/EC — Protection of workers — Collective redundancies — Scope — Closure of an American military base — Information and consultation of workers — Time at which the consultation obligation arises — Lack of jurisdiction of the Court)

In Case C-583/10,

REFERENCE for a preliminary ruling under Article 267 TFEU from the Court of Appeal (England & Wales) (Civil Division) (United Kingdom), made by decision of 6 December 2010, received at the Court on 13 December 2010, in the proceedings

United States of America

v

Christine Nolan,

THE COURT (Third Chamber),

composed of R. Silva de Lapuerta, acting as President of the Third Chamber, K. Lenaerts, E. Juhász (Rapporteur), G. Arestis and J. Malenovský, Judges,

Advocate General: P. Mengozzi,

Registrar: L. Hewlett, Principal Administrator,

having regard to the written procedure and further to the hearing on 18 January 2012,

after considering the observations submitted on behalf of:

— Ms Nolan, by M. Mullins QC, and M. De Savorgnani, Barrister,

— the European Commission, by J. Enegren, acting as Agent,

— the EFTA Surveillance Authority, by F. Cloarec and X. Lewis, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 22 March 2012,

gives the following

* Language of the case: English.

Judgment

1 This reference for a preliminary ruling concerns the interpretation of Article 2 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 reference was submitted in a dispute between the United States of America and Ms Nolan, a civilian employee of an American army base in the United Kingdom, concerning the obligation to consult staff before carrying out redundancies, in accordance with United Kingdom legislation implementing Directive 98/59.

Legal context

EU law

3 According to recitals 3 and 4 of Directive 98/59:

‘3 ... 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 ... these differences can have a direct effect on the functioning of the internal market ...’.

4 Recital 6 of that directive states:

‘... the Community Charter of the fundamental social rights of workers, adopted at the European Council meeting held in Strasbourg on 9 December 1989 by the Heads of State or Government of 11 Member States, states, inter alia, in point 7, first paragraph, first sentence ...:

“7. The completion of the internal market must lead to an improvement in the living and working conditions of workers in the European Community ...”

...’

5 By virtue of Article 1(2)(b) of Directive 98/59, the latter does not apply to workers employed by public administrative bodies or by establishments governed by public law or, in Member States where that concept is unknown, by equivalent bodies.

6 Article 2 of that directive 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.

...

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 of 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.

...'

7 Article 3 of that directive provides:

'1. 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.

...'

8 Article 4(1) of Directive 98/59 provides:

'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.'

9 According to Article 5 of that directive, the latter does 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

10 In the United Kingdom, the Trade Union and Labour Relations (Consolidation) Act 1992 ('the 1992 Act') is regarded as constituting the transposition of Directive 98/59.

11 Section 188 of that Act, concerning the duty to consult, provides:

'(1) Where 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.

1A) The consultation shall begin in good time and in any event:

(a) where the employer is proposing to dismiss 100 or more employees as mentioned in subsection (1), at least 90 days, and

(b) otherwise, at least 30 days

before the first of the dismissals takes effect.

...

(2) The consultation shall include consultation about ways of:

(a) avoiding the dismissals,

(b) reducing the numbers of employees to be dismissed, and

(c) mitigating the consequences of the dismissals,

and shall be undertaken by the employer with a view to reaching agreement with the appropriate representatives.

...

...

(4) For the purposes of the consultation the employer shall disclose in writing to the appropriate representatives:

(a) the reasons for his proposals,

(b) the numbers and descriptions of employees whom it is proposed to dismiss as redundant,

(c) the total number of employees of any such description employed by the employer at the establishment in question,

(d) the proposed method of selecting the employees who may be dismissed,

(e) the proposed method of carrying out the dismissals, with due regard to any agreed procedure, including the period over which the dismissals are to take effect, and

(f) the proposed method of calculating the amount of any redundancy payments to be made (otherwise than in compliance with an obligation imposed by or by virtue of any enactment) to employees who may be dismissed.

...

(7) If in any case there are special circumstances which render it not reasonably practicable for the employer to comply with a requirement of subsection (1A), (2) or (4), the employer shall take all such steps towards compliance with that requirement as are reasonably practicable in those circumstances. ...'

The dispute in the main proceedings and the question referred

12 About 200 civilians were employed at the American Reserved Storage Activity military base ('the RSA military base') at Hythe (United Kingdom), at which watercraft and other equipment were repaired. Those staff were represented by the Local National Executive Council.

13 Following an audit at the beginning of 2006 concerning the functioning of that military base, a report was submitted on 13 March 2006, which showed that the decision to close that base had been taken. That decision, taken in the United States by the Secretary of the US Army, then approved by the Secretary of Defense, determined that the RSA military base would cease operations at the end of September 2006.

14 The American authorities communicated that decision to the United Kingdom military authorities, informally, at the beginning of April 2006. The closure of the RSA military base was made public in the media on 21 April 2006. 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.

15 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.

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

17 Ms Nolan brought proceedings against the United States of America before the Southampton Employment Tribunal, arguing that the employer had failed to consult staff representatives. By its judgment on liability, that tribunal found omissions in consulting those representatives and found in favour of Ms Nolan. By its judgment on the remedy, the tribunal adopted a protection measure covering all persons who, on 29 June 2006, were United Kingdom nationals and were part of the civilian staff of the RSA military base.

18 The United States of America appealed before the Employment Appeal Tribunal, which, in essence, confirmed the decisions at first instance.

19 The United States of America appealed to the Court of Appeal (England & Wales) (Civil Division), which, considering that an interpretation of the provisions of Directive 98/59 was necessary in order for it to deliver judgment, decided the suspend the proceedings and refer the following question to the Court of Justice for a preliminary ruling:

'Does the employer's obligation to consult about collective redundancies, pursuant to Directive 98/59, 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?'

The jurisdiction of the Court of Justice

Observations submitted to the Court

20 The Court invited the parties to the main proceedings, the Government of the United Kingdom, the European Commission and the EFTA Surveillance Authority to give their opinion, in writing, as to whether a dismissal, such as that at issue in the main proceedings, terminating an employment relationship between a United Kingdom national and a non-member State, in this case the United States of America, falls within the scope of Directive 98/59, having regard, in particular, to Article 1(2)(b) of the latter.

21 In reply to that question, Ms Nolan argues that the United Kingdom, by transposing Directive 98/59, caused workers employed by foreign States, including the United States of America, to fall within the scope of the transposed national legislation. Thus, such workers fell within the scope of that national legislation, irrespective of whether they fell within the category of workers excluded from the application of Directive 98/59 by Article 1(2)(b) of that directive.

22 Ms Nolan, referring to the judgments in Case C-28/95 *Leur Bloem* [1997] ECR I-4161 and Case C-43/00 *Andersen og Jensen* [2002] ECR I-379, considers that the Court has jurisdiction to interpret Directive 98/59, even if her situation is not directly governed by EU law, given that the United Kingdom legislature, when it transposed that directive into national law, chose to align its domestic legislation with EU law.

23 Ms Nolan argues that the notable aspects of the case in the main proceedings have been recognised by the national courts, that the United States of America have not claimed State immunity in respect of their actions and they have not raised 'special circumstances' within the meaning of Section 188(7) of the 1992 Act. She adds, in the alternative, that her employment relationship has not in any way been excluded from the scope of Directive 98/59, in that she was not employed by a 'public administrative body or establishment governed by public law' and it has never been claimed, in the main proceedings, that such was the case.

24 The United States of America argue that, first, according to recitals 4 and 6 of Directive 98/59, the latter concerns the functioning of the internal market and, moreover, it is clear from Article 1(2)(b) of that directive that it does not concern all cases of dismissal. They consider that application, in the main proceedings, of Directive 98/59 or of the national legislation transposing that directive would be incompatible with the clear wording of the directive and with principles of public international law, in particular the principle of *jus imperii* and that of the 'comity of nations'.

25 The United States of America therefore consider that a dismissal such as that at issue in the main proceedings does not fall within the scope of Directive 98/59, given that that dismissal results from a strategic decision, adopted by a sovereign State, concerning the closure of a military base.

26 The Commission doubts the applicability in this case of Directive 98/59, given that Ms Nolan's employer was the United States Army, an emanation of a sovereign State. It emphasises, however, that the closure of a military base may have the same effect, on the civilian staff of the latter, as the decision to close a commercial undertaking.

27 The Commission considers that, in the area of the protection of the rights of workers, in the interests of a coherent approach, Directive 98/59 and Council Directive 2001/23/EC of 12 March 2001 on the approximation of the laws of the Member States relating to the safeguarding of employees' rights in the event of transfers of undertakings, businesses or parts of undertakings or businesses (OJ 2001 L 82, p. 16) should be interpreted as having the same scope. Referring to Article 1(1)(c) of Directive 2001/23, the latter repealing Council Directive 77/187/EEC of 14 February 1977 on the approximation of the laws of the Member States relating to the safeguarding of employees' rights in the event of transfers of undertakings, businesses or parts of undertakings or businesses (OJ 1977 L 61, p. 26), and to the judgment in Case C-108/10 *Scattolon* [2011] ECR I-7491, paragraphs 56 and 57, the Commission argues that Directives 98/59 and 2001/23 both apply to public undertakings carrying on an economic activity, but that, by contrast, they do not apply to an administrative reorganisation of public administrative authorities, or the transfer of administrative functions between public administrative authorities.

28 The Commission notes that it is primarily for strategic reasons that the United States of America have decided to close the RSA military base and dismiss the local civilian staff working there. Since those dismissals are acts of a public authority resulting from an administrative reorganisation, the Commission considers that it is not possible to extend the protection under Directive 98/59 to the employees concerned, even if they may be regarded as carrying on an economic activity. The Commission concludes that the dismissal at issue in the main proceedings does not fall within the scope of Directive 98/59.

29 The EFTA Surveillance Authority argues that the Employment Appeal Tribunal took the view that the United Kingdom has chosen to transpose Directive 98/59 without excluding the workers employed by public administrative bodies or by establishments governed by public law referred to in Article 1(2)(b) of the latter, and notes that many cases concerning the legislation transposing that directive have been brought by trade unions representing workers employed by public administrations or bodies. The EFTA Surveillance Authority adds that the referring court has stated that the lawyer representing the United States of America acknowledged that the limitation of the scope of Directive 98/59, laid down in Article 1(2) of the latter, did not extend to workers employed by a foreign sovereign State.

30 The EFTA Surveillance Authority considers that it is possible to read Article 1(2) of Directive 98/59 as referring only to public administrations and public law bodies in Member States and that, therefore, that limitation in scope does not apply to public administrations and public law bodies in non-member States. That approach is based on the logic that, whilst Member States give public employees protection equivalent to that under Directive 98/59, it is not certain that the laws of non-member States guarantee such protection in similar circumstances.

31 Moreover, according to the EFTA Surveillance Authority, it follows from the judgment in Joined Cases C-297/88 and C-197/89 *Dzodzi* [1990] ECR I-3763, paragraphs 36 and 37, that, in this case, the Court of Justice has jurisdiction to give a preliminary ruling, since the United Kingdom legislature applies Directive 98/59, by means of the national legislation transposing that directive, to workers employed by public administrations, thereby guaranteeing, in principle, the same protection for the latter and private sector workers. In those circumstances, the EFTA Surveillance Authority considers that the dismissal in question falls within the scope of Directive 98/59 and that, even if that dismissal were excluded from the scope of that directive, the Court of Justice, taking account of the circumstances of the present case, should reply to the question referred, which concerns the interpretation of that directive.

Findings of the Court

32 In order to rule on the question whether a dismissal, such as that at issue in the main proceedings, terminating an established employment relationship between a national of a Member State and a non-member State, following the closure of a military base belonging to the latter and located on the territory of that Member State, falls within the scope of Directive 98/59, it is in the first instance necessary to interpret the wording of Article 1(2)(b) of that directive.

33 By virtue of that provision, which provides an exclusion from the scope of Directive 98/59, the latter does not apply to workers employed by public administrative bodies or by establishments governed by public law (or, in Member States where that concept is unknown, by equivalent bodies).

34 Given that armed forces fall within the public administration or equivalent body, it is clear from the wording of Article 1(2)(b) of Directive 98/59 that the civilian staff of a military base is covered by the exclusion laid down by that provision.

35 Secondly, it should be noted that that assessment is corroborated by the objective and the general system of that directive.

36 Directive 98/59 was preceded by 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), one of the functions of Directive 98/59 consisting in codifying that directive.

37 During the legislative procedure concerning Directive 75/129, the Commission set out, in its proposal for a Council directive concerning the approximation of the laws of the Member States on collective redundancies [COM(72) 1400], of 8 November 1972, the circumstances which made legislation in that area necessary. In particular, the Commission found that major differences in the protection of workers in the event of dismissal have a direct effect on the functioning of the common market, since they create a disparity of conditions of competition which has an influence on undertakings, where the latter have posts to be filled.

38 Moreover, it should be noted that Directive 98/59 was adopted on the basis of Article 100 of the EC Treaty (now Article 94 EC), enabling the approximation of the laws of the Members States having a direct impact on the establishment or functioning of the common (internal) market.

39 It should also be noted, as regards the objective pursued by Directive 98/59, that, according to recitals 4 and 6 thereof, the directive is aimed at improving the protection of workers and the functioning of the internal market.

40 Consequently, it must be held that Directive 98/59 forms part of the legislation concerning the internal market.

41 Whilst the size and functioning of the armed forces does have an influence on the employment situation in a given Member State, considerations concerning the internal market or competition between undertakings do not apply to them. As the Court of Justice has already held, activities which, like national defence, fall within the exercise of public powers are in principle excluded from classification as economic activity (*Scattolon*, paragraph 44 and case-law cited).

42 With regard to the opinion of the EFTA Surveillance Authority, according to which it is possible to read Article 1(2) of Directive 98/59 as referring only to public administrations of Member States and not to those of non-member States, it is sufficient to point out that the wording of that provision does not in any way lay down such a distinction between Member States and non-member States.

43 Therefore, it must be held that, by virtue of the exclusion laid down by Article 1(2)(b) of Directive 98/59, the dismissal of staff of a military base does not, in any event, fall within the scope of that directive, irrespective of whether or not it is a military base belonging to a non-member State. In those circumstances, it is not necessary specifically to take into account the fact that, in this case, it was a military base belonging to a non-member State, that question having implications in international law (in the context of the employment of staff of an embassy of a non-member country, see Case C-154/11 *Mahamdia* [2012] ECR, paragraphs 54 to 56).

44 According to Ms Nolan and the EFTA Surveillance Authority, even if the situation at issue in the main proceedings does not fall within the scope of Directive 98/59, the Court of Justice does, in this case, have jurisdiction to give a preliminary ruling, given that the national legislature applies that directive, by means of the national legislation transposing it, to employees of public administrations.

45 The Court has repeatedly held that it has jurisdiction to give preliminary rulings on questions concerning EU provisions in situations where the facts of the cases being considered by the national courts were outside the scope of EU law but where those provisions of EU law had been rendered applicable by domestic law due to a reference made by that law to the content of those provisions (see, to that effect, Case C-482/10 *Cicala* [2011] ECR I-14139, paragraph 17 and case-law cited).

46 The Court has already held that where, in regulating situations outside the scope of the EU measure concerned, national legislation seeks to adopt the same solutions as those adopted in that measure, it is clearly in the interest of the European Union that, in order to forestall future differences of interpretation, provisions taken from that measure should be interpreted uniformly (see, to that effect, Case C-310/10 *Agafiței and Others* [2011] ECR I-5989, paragraph 39 and case-law cited).

47 Thus, an interpretation by the Court of provisions of EU law in situations outside its scope is justified where those provisions have been made applicable to such situations by national law in a direct and unconditional way in order to ensure that internal situations and situations governed by EU law are treated in the same way (see, to that effect, *Cicala*, paragraph 19 and case-law cited).

48 In those circumstances, it needs to be verified whether an interpretation by the Court of Justice of Directive 98/59 is required in the main proceedings on the ground that it is clear from sufficiently precise indications that the provisions of that directive were made applicable by national law in a direct and unconditional way to situations, such as those at issue in this case, which do not fall within the scope of that directive.

49 In that respect, it is clear from the order for reference that, if the United States of America had so decided in the preliminary phase of the main proceedings, they could have relied on their immunity as a sovereign State and avoided the main proceedings.

50 It should be added that, according to the national court, under Section 188(7) of the 1992 Act, a non-member State has the possibility of invoking 'special circumstances', by reason of which that non-member State is not required to carry out the obligatory consultations in the case of collective redundancies, in accordance with Section 188, sub-sections (1A), (2) and (4) of the 1992 Act.

51 It follows that the documents before the Court do not contain sufficiently precise indications that national law made the solutions adopted by Directive 98/59 automatically applicable in a situation such as that in the main proceedings.

52 Accordingly, it cannot be considered that the provisions of Directive 98/59, referred to by the question posed, have been, as such, made applicable in a direct and unconditional way by national law to a situation such as that in the main proceedings.

53 It is true that it is in the interests of the Union to safeguard the uniformity of the interpretations of a provision of an EU measure and those of national law which transpose it and make it applicable outside the scope of that measure.

54 However, such is not the case where, as in the case in the main proceedings, an EU measure expressly provides a case of exclusion from its scope.

55 If the EU legislature states unequivocally that the measure which it has adopted does not apply to a precise area, it renounces, at least until the adoption of possible new EU rules, the objective seeking uniform interpretation and application of the rules of law in that excluded area.

56 Therefore, it cannot be stated or presumed that there was an interest of the Union that, in an area excluded by the EU legislature from the scope of the measure which it adopted, there should be a uniform interpretation of the provisions of that measure.

57 It follows from the whole of the above considerations that, having regard to the subject-matter of the question raised by the Court of Appeal, the Court of Justice does not have jurisdiction to reply to that question.

Costs

58 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:

The Court of Justice of the European Union does not have jurisdiction to reply to the question referred by the Court of Appeal (England & Wales) (Civil Division) (United Kingdom), by decision of 6 December 2010.

[Signatures]