ECLI:EU:C:2017:708

Provisional text

JUDGMENT OF THE COURT (Tenth Chamber)

21 September 2017 (*)

(Reference for a preliminary ruling — Social policy — Collective redundancies — Directive 98/59/EC — Article 1(1) — Concept of 'redundancies' — Assimilation to redundancies of 'terminations of an employment contract which occur on the employer's initiative' — Unilateral amendment by the employer of pay and working conditions)

In Case C-149/16,

REQUEST for a preliminary ruling under Article 267 TFEU from the Sąd Rejonowy dla Wrocławia-Śródmieścia we Wrocławiu (District Court for Wrocław City Centre, Poland), made by decision of 17 February 2016, received at the Court on 14 March 2016, in the proceedings

Halina Socha,

Dorota Olejnik,

Anna Skomra

v

Szpital Specjalistyczny im. A. Falkiewicza we Wrocławiu,

THE COURT (Tenth Chamber),

composed of M. Berger, President of the Chamber, A. Borg Barthet and F. Biltgen (Rapporteur), Judges,

Advocate General: M. Wathelet,

Registrar: A. Calot Escobar,

having regard to the written procedure,

after considering the observations submitted on behalf of:

– Szpital Specjalistyczny im. A. Falkiewicza we Wrocławiu, by I. Walczak-Kozioł, radca prawny,

– the Polish Government, by B. Majczyna, acting as Agent,

– the European Commission, by M. Owsiany-Hornung and M. Kellerbauer, 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) 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 the course of proceedings between, on the one hand, Halina Socha, Dorota Olejnik and Anna Skomra, and, on the other hand, their employer, Szpital Specjalistyczny im. A. Falkiewicza we Wrocławiu (A. Falkiewicz Specialist Hospital in Wrocław, Poland) ('A. Falkiewicz Specialist Hospital'), concerning whether the issuing of notices of amendment to them by A. Falkiewicz Specialist Hospital constitutes 'redundancy' or 'termination of employment contracts on the employer's initiative for one or more reasons not related to the individual workers concerned', which is assimilated to a redundancy.

Legal context

Directive 98/59

3 Article 1 of Directive 98/59, entitled 'Definitions and scope', provides:

'1. For the purposes of this Directive:

(a) "collective redundancies" means dismissals effected by an employer for one or more reasons not related to the individual workers concerned where, according to the choice of the Member States, the number of redundancies is:

(i) either, over a period of 30 days:

– at least 10 in establishments normally employing more than 20 and less than 100 workers;

– at least 10% of the number of workers in establishments normally employing at least 100 but less than 300 workers;

– at least 30 in establishments normally employing 300 workers or more;

(ii) or, over a period of 90 days, at least 20, whatever the number of workers normally employed in the establishments in question;

(b) "workers' representatives" means the workers' representatives provided for by the laws or practices of the Member States.

For the purpose of calculating the number of redundancies provided for in the first subparagraph of point (a), terminations of an employment contract which occur on the employer's initiative for one or more reasons not related to the individual workers concerned shall be assimilated to redundancies, provided that there are at least five redundancies.

2. This Directive shall not apply to:

...

(b) 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).'

4 Article 2 of Directive 98/59 is worded as follows:

'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.

...'

5 Article 5 of the directive provides:

'This Directive shall not affect the right of Member States to apply or to introduce laws, regulations or administrative provisions which are more favourable to workers or to promote or to allow the application of collective agreements more favourable to workers.'

Polish law

6 Article 42(1) of the Kodeks Pracy (Labour Code), adopted by the law of 26 June 1974 (Dz. U. 1974, No 24, item 141), as amended ('the Labour Code'), provides that the provisions on notice of termination of a contract of employment are to apply *mutatis mutandis* to notice of amendment of pay and working conditions arising from a contract. According to Article 42(2), notice of amendment of pay or working conditions is to be considered to have been effected where new terms have been proposed to the employee in writing. Article 42(3) provides that, where the employee refuses to accept the proposed pay or working conditions, the contract of employment is to terminate upon the expiry of the period under the notice. Where the employee has not declared, before the mid-term of the period of notice, that he refuses to accept the proposed conditions, he is to be deemed to have consented to those conditions.

7 Article 1 of the ustawa o szczególnych zasadach rozwiązywania z pracownikami stosunków pracy z przyczyn niedotyczących pracowników (Law laying down special rules on terminating employment relationships with employees for reasons unrelated to the employees) of 13 March 2003 (Dz. U. 2003, No 90, item 844), as amended ('the 2003 Law'), provides:

'1. The provisions of this law shall apply where it is necessary for an employer employing at least 20 employees to terminate the employment relationships for reasons unrelated to the

employees, by the employer issuing notice of termination or pursuant to an agreement between the parties, where, in a period not exceeding 30 days, the redundancy procedure concerns at least:

(1) 10 employees, where the employer employs fewer than 100 employees;

(2) 10% of employees, where the employer employs at least 100, but fewer than 300, employees;

(3) 30 employees, where the employer employs at least 300 or more employees ...'

8 Article 2 of the 2003 Law is worded as follows:

'1. The employer is required to consult on its intention to carry out collective redundancies with the company trade union organisations operating at that employer's establishment.

2. The consultation referred to in paragraph 1 shall cover, inter alia, possibilities of avoiding or reducing the scale of collective redundancies and employee matters related to that redundancy, including, in particular, possibilities of re-skilling or professional training, and also finding other employment for employees who are made redundant.

3. The employer shall inform the company trade union organisation in writing of the reasons for the projected collective redundancies, the number of employees and the professional groups to which they belong, the professional groups of employees covered by the projected collective redundancies, the period over which those redundancies will take place, the proposed criteria for selecting employees for collective redundancy, the order of the redundancies, and the proposals for resolving employee matters related to the projected collective redundancies and, where they cover cash benefits, the employer shall in addition set out the method for calculating those benefits.

...'

9 Article 3(1) of the 2003 Law provides that the employer and company trade union organisations are to conclude an agreement no later than 20 days from the notification referred to in Article 2(3). According to Article 3(2), that agreement is to lay down the rules of procedures in matters concerning employees covered by the projected collective redundancies, and also the employer's obligations in so far as is necessary to resolve other employee matters relating to the projected collective redundancies.

10 Article 5 of the 2003 Law, applicable at the material time, provided:

'1. Where employees are given notice of termination of their employment relationship in connection with collective redundancies, Articles 38 and 41 of the Labour Code are not to apply, subject to paragraphs 2 to 4, and the separate provisions concerning special protection for employees against redundancy or termination of an employment relationship are not to apply, subject to paragraph 5.

2. Where no agreement as referred to in Article 3 is concluded, Article 38 of the Labour Code shall apply where employees are given notice of termination of their employment relationship or of amendment of their pay and working conditions.

...

5. During the period of special protection against redundancy or termination of the employment relationship, the employer may only give notice of amendment of current pay and working conditions to an employee:

(1) who is not more than four years from retirement age, pregnant, on maternity leave, adoption leave, parental leave or paternity leave;

(2) who is a member of the works council of a State undertaking;

(3) who is a member of the board of the company trade union organisation:

...

6. Where a notice of amendment of pay and working conditions results in a reduction in remuneration, employees as referred to in paragraph 5 shall be entitled, until the end of the period of special protection against redundancy or termination of their employment relationship, to a compensatory allowance calculated according to the principles arising from the Labour Code.

7. Where employees are given notice of termination of the employment relationship in connection with collective redundancies, employment contracts concluded for a limited period of time or for the period of performance of a specific task may be terminated by either party on two weeks' notice.'

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

11 The applicants in the main proceedings are employed by A. Falkiewicz Specialist Hospital under contracts of indefinite duration.

12 In August 2015, A. Falkiewicz Specialist Hospital notified the applicants in the main proceedings and other employees of amendments to some of their pay and working conditions and in particular to the period for acquiring the right to the length of service award. That award is paid to employees every five years relative to their length of service. The amount is determined as follows:

– 20 years of service: 75% of the monthly salary;

– 25 years of service: 100% of the monthly salary;

– 30 years of service: 150% of the monthly salary;

– 35 years of service: 200% of the monthly salary; and

– 40 years of service: 300% of the monthly salary.

13 It is apparent from the information in the documents before the Court that the proposed amendment concerned the method of calculating length of service, which would henceforth include only periods of work completed in the service of A. Falkiewicz Specialist Hospital.

14 It is undisputed that failure to accept the amendment of the contractual terms in question could, in respect of the employees concerned, result in the definitive termination of their employment contract.

15 A. Falkiewicz Specialist Hospital submitted before the referring court that the reason for amendment of the contractual terms was organisational changes connected with a reduction in staff and restriction of remuneration costs. The hospital had been operating at a loss for several years and the rationalisation of the pay and working conditions made through the notices of amendment was intended to save the hospital from liquidation.

16 It is also undisputed that, in amending the employment contract conditions, A. Falkiewicz Specialist Hospital did not apply the procedure arising from the 2003 Law.

17 The referring court is uncertain whether A. Falkiewicz Specialist Hospital intended merely to modify certain aspects of the employment contracts of the applicants in the main proceedings or whether it actually intended to terminate the contracts while avoiding being subject to the provisions of Directive 98/59. The referring court is also uncertain whether the unilateral amendment of the contractual terms that are at issue — which if not accepted by the applicants in the main proceedings leads to the termination of their employment contracts — constitutes a 'redundancy' within the meaning of Article 1 of that directive.

18 In those circumstances, the Sąd Rejonowy dla Wrocławia-Śródmieścia we Wrocławiu (District Court for Wrocław City Centre, Poland) decided to stay the proceedings and to refer the following question to the Court of Justice for a preliminary ruling:

'Must Articles 1(1) and 2 of Directive [98/59], read in conjunction with the principle of the effectiveness of law, be interpreted as meaning that an employer who on account of a difficult financial situation issues notices of amendment of pay and working conditions in relation to employment contracts (notice of amendment) only as regards conditions of remuneration is required to apply the procedure arising from that directive, and also to consult on those notices with company trade union organisations, even though national law — Articles 1, 2, 3, 4, 5 and 6 of the [2003 Law] — contains no rules on notices of amendment of employment contract conditions?'

Consideration of the question referred

19 As a preliminary point, it should be noted that, 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 this concept is unknown, by equivalent bodies)'.

20 In the present case, since it is not expressly clear from the order for reference that the Polish legislature intended to extend the application of the rights recognised by Directive 98/59 to workers employed by a public establishment, such as A. Falkiewicz Specialist Hospital, the Court made an informal request to the referring court to explain the reasons that led it to the opinion that interpretation of that directive is necessary in order to resolve the dispute before it.

21 According to the referring court's response, the 2003 Law, which is designed to transpose that directive into Polish law, applies to all persons with the status of worker within the meaning of Article 2 of the Labour Code. The only persons excluded are 'appointed' staff and temporary employees, meaning that the group of entities subject to the 2003 Law is wider than that to which Directive 98/59 applies. Employees of A. Falkiewicz Specialist Hospital have the same legal status as employees of private establishments and are not covered by civil service law. Moreover, hospitals are autonomous bodies which are not subject to State supervision and are funded by income from their own activity. There is, therefore, no basis in national law on which to exclude the hospital staff concerned by the case in the main proceedings from the scope of the 2003 Law.

22 In these circumstances, in the light of the information provided by the referring court, an answer must be given to the question referred for a preliminary ruling.

23 By its question, the referring court asks, in essence, whether Article 1(1) and Article 2 of Directive 98/59 must be interpreted as meaning that an employer is required to engage in the consultations provided for in Article 2 when it intends, to the detriment of the employees, to make a unilateral amendment to the terms of remuneration which, if refused by the employees, will result in termination of the employment relationship.

24 In answering that question, it must be noted from the outset that it is apparent from the second subparagraph of Article 1(1) of Directive 98/59, which makes it clear that that directive only applies when there are at least five 'redundancies', that the directive distinguishes between 'redundancies' and 'terminations of an employment contract which occur on the employer's initiative for one or more reasons not related to the individual workers concerned' (see, to that effect, judgment of 11 November 2015, *Pujante Rivera*, C-422/14, EU:C:2015:743, paragraphs 44 and 45).

25 Regarding the concept of 'redundancy' for the purposes of Article 1(1)(a) of Directive 98/59, the Court has held that that directive must be interpreted as meaning that the fact that an employer — unilaterally and to the detriment of the employee — makes significant changes to essential elements of his employment contract for reasons not related to the individual employee concerned falls within that concept (judgment of 11 November 2015, *Pujante Rivera*, C-422/14, EU:C:2015:743, paragraph 55).

26 It follows that the fact that an employer — unilaterally and to the detriment of the employee — makes a change that is not significant to an essential element of the employment contract for reasons not related to the individual employee concerned, or a significant change to a non-essential element of that contract for reasons not related to the individual employee concerned, cannot be classified as a 'redundancy' within the meaning of that directive.

27 The notice of amendment at issue in the main proceedings merely provides that henceforth only the periods of work completed with the employer will be taken into account when determining the due date for the length of service award, with the result that the notice of amendment concerns only when the right to the length of service award is acquired. In those circumstances and without the Court needing to examine whether the length of service award at issue in the main proceedings constitutes an essential element of the employment contracts of the employees concerned, it is sufficient to note that the notice of amendment at issue in the main proceedings cannot be considered to result in a significant change to those contracts and that that notice does not fall within the concept of 'redundancy' within the meaning of Article 1(1)(a) of Directive 98/59.

28 By contrast, the termination of an employment contract following the employee's refusal to accept a change such as that proposed in the notice of amendment must be considered to be a termination of an employment contract occurring on the employer's initiative for one or more reasons not related to the individual workers concerned, within the meaning of the second subparagraph of Article 1(1) of that directive, so that it must be taken into account when calculating the total number of redundancies.

29 Regarding at what point an employer is obliged to engage in the consultations provided for in Article 2 of Directive 98/59, it must be noted that the Court has 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). It has also held that achievement of the objective, as set out in Article 2(2) of the directive, of avoiding terminations of contracts of employment or reducing the number of such terminations would be jeopardised if the consultation of workers' representatives were to be subsequent to the employer's decision (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).

30 It must be added that the case in the main proceedings, like the case which gave rise to the judgment of 10 September 2009, *Akavan Erityisalojen Keskusliitto AEK and Others* (C-44/08, EU:C:2009:533, paragraph 37), relates to economic decisions which, as is clear from the order for reference, were not directly concerned with terminating specific employment relationships but could, nevertheless, have repercussions on the employment of a number of employees.

31 In paragraph 48 of its judgment of 10 September 2009, *Akavan Erityisalojen Keskusliitto AEK and Others* (C-44/08, EU:C:2009:533), the Court held that the consultation procedure provided for in Article 2 of Directive 98/59 must be started by the employer once a strategic or commercial decision compelling him to contemplate or to plan for collective redundancies has been taken.

32 In the present case, to the extent that A. Falkiewicz Specialist Hospital considered that, in the light of the economic difficulties it faced, it had to make the proposed amendments in order to avoid having to take decisions directly concerned with terminating specific employment relationships, it should reasonably have expected that some employees would not accept the change to their conditions of employment and that, as a result, their employment contract would be terminated.

33 Accordingly, since the decision to issue the notices of amendment necessarily implied that A. Falkiewicz Specialist Hospital contemplated collective redundancies, it should have commenced the consultation procedure provided for in Article 2 of Directive 98/59.

34 That conclusion is all the more compelling since the purpose of the obligation to hold consultations, set out in Article 2 of that directive — namely, to avoid terminations of contracts of employment or to reduce their number and to mitigate the consequences (judgment of 10 September 2009, *Akavan Erityisalojen Keskusliitto AEK and Others*,C-44/08, EU:C:2009:533, paragraph 46) — and the purpose of the notices of amendment, according to the order for reference — namely, to save the hospital from liquidation — overlap to a considerable extent. Where a decision involving the amendment of conditions of employment could help to avoid collective redundancies, the consultation procedure provided for in Article 2 of that directive must begin once the employer intends to make such amendments (see, to that effect, judgment of 10 September 2009, *Akavan Erityisalojen Keskusliitto AEK and Others*,C-44/08, EU:C:2009:533, paragraph 47).

35 In the light of the foregoing considerations, the answer to the question referred is that Article 1(1) and Article 2 of Directive 98/59 must be interpreted as meaning that an employer is required to engage in the consultations provided for in Article 2 when it intends, to the detriment of the employees, to make a unilateral amendment to the terms of remuneration which, if refused by the employees, will result in termination of the employment relationship, to the extent that the conditions laid down in Article 1(1) of that directive are fulfilled, which is for the referring court to determine.

Costs

36 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 (Tenth Chamber) hereby rules:

Article 1(1) and 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 must be interpreted as meaning that an employer is required to engage in the consultations provided for in Article 2 when it intends, to the detriment of the employees, to make a unilateral amendment to the terms of remuneration which, if refused by the employees, will result in termination of the employment relationship, to the extent that the conditions laid down in Article 1(1) of that directive are fulfilled, which is for the referring court to determine.

[Signatures]

* Language of the case: Polish.