SUMMARY

2015/46 Information and consultation duty exists despite insolvency (RO)

<p>The former Romanian Insolvency Act No. 85/2006 provided that the rules normally applicable in the event of a collective redundancy, such as those relating to notice, information and consultation, do not apply during insolvency. Recently, the Constitutional Court held that the relevant provision of the Insolvency Act is invalid and must therefore be deemed not to exist. This means that insolvent companies must apply the rules on information and consultation, even though this make a reorganisation more time-consuming and more costly and makes it harder to save companies in financial difficulties</p>

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Facts

The defendant in this case was a large, formerly State-owned company that went into administration on 20 July 2012. It proceeded to reorganise and dismiss redundant staff. On 7

February 2013, the company dismissed a number of employees, including the plaintiff, collectively. It did so without informing the employees and consulting with them as required by the Labour Code, which transposes Directive 98/59 on collective redundancies. It believed this was lawful, given that section 86(6) of the Romanian Insolvency Act provides that:

"In derogation from the Labour Code's provisions regarding collective dismissals, after initiating insolvency proceedings, the employment agreements of the debtor's employees can be terminated urgently by the liquidator, without following the collective dismissal procedure, simply granting a 15 working day notice period".

The plaintiff was paid severance compensation equal to 18 months' salary in accordance with the relevant collective agreement.

The plaintiff challenged his dismissal, arguing that it was void on account of failure to observe the information and consultation procedure stipulated in the Labour Code. The company based its defence on said section 86(6) of the Insolvency Act.

In a judgment delivered on 6 June 2013, the court of first instance found in favour of the plaintiff. It held that section 86(6) does not apply and that, as the company had failed to observe the rules on information and consultation under the Labour Code, the dismissal was void. The company was therefore ordered to reinstate the employee retroactively and the plaintiff was ordered to pay back the severance compensation he had received.

International readers may be surprised that an employee would want to be reinstated into an insolvent company. This is less surprising when one takes into account that companies frequently carry on doing business for a long time following a declaration of insolvency. In fact, in this case, the company in question had at one point managed to escape insolvency (though it later became insolvent again).

Both parties appealed. The company repeated its position that the rules on information and consultation in the Labour Code had been set aside by the Insolvency Act. The plaintiff argued that he was entitled to keep his severance compensation despite having been reinstated.

On 24 February 2015, while the appeal was ongoing, the Constitutional Court delivered a judgment on the status of section 86(6) of the Insolvency Law in an unconnected other matter (see below).

Judgment

The Court of Appeal upheld the judgment of the court of first instance, holding that section 86(6) of the Insolvency Act is unconstitutional and therefore inapplicable. It did so, based on a

ruling of the Constitutional Court a few months previously. In that other case, the Constitutional Court interpreted said section 86(6) in the light of Article 41(2) of the Constitution, which reads, "Employees are entitled to social protection". Although the right to social protection does not expressly include information and consultation of employees during collective dismissals, the Constitutional Court considered that social protection must not be considered restrictively but constantly needs to be aligned to economic reality in society.

The Constitutional Court thus concluded that the information and consultation process was a genuine social protection measure, and more specifically, an inherent element of the constitutional right to social protection, in which the legislator had no margin of appreciation. The Constitutional Court construed this generally-worded provision, inter alia, in accordance with Directive 98/59, as interpreted by the Court of Justice of the EU (ECJ) on 3 March 2011 in the Claes case (C-235/10). That case concerned a provision of Luxembourg law that allowed immediate dismissal of employees of an insolvent employer. The ECJ ruled that Articles 1 to 3 of Directive 98/59 "must be interpreted as applying to a termination of the activities of an employing establishment as a result of a judicial decision ordering its dissolution and winding up on grounds of insolvency, even though, in the event of such a termination, national legislation provides for the termination of employment contracts with immediate effect".

Although the method by which the information and consultation process is conducted may need to be adapted in an insolvency situation, the employees cannot be deprived of their right to be informed and consulted with, whatever method is chosen. By simply overruling the Labour Code, the Insolvency Act deprives the employees of a basic constitutional right. Consequently, section 86(6) of the Insolvency Act is unconstitutional. The Court of Appeal, referencing the Constitutional Court's recent judgment, declared section 86(6) to be inapplicable and, hence, the plaintiff's dismissal to have been invalid.

Commentary

What is interesting in this case is that the Constitutional Court put the employee's interests above those of the company, even though the company was in administration. It seems that for the Constitutional Court, the information and consultation rights of employees were more important than the delicate financial position of the company. Thus, even if a company finds itself in administration, it must still observe all the conditions imposed by the Labour Code in cases of collective dismissal (e.g. consultation, notice periods, notification of the competent authorities and possibly compensation). Not even severe economic difficulties can serve to alleviate this obligation.

The Constitutional Court's decision has an immediate and relevant impact on pending litigation initiated under the former Romanian Insolvency Act No. 85/2006. The courts must find dismissals conducted without following the information and consultation procedures unlawful.

Meanwhile a new Romanian Insolvency Act has entered into force, which expressly stipulates that insolvent companies must observe the information and notification procedures imposed by the Labour Code. However the legislator has adapted the information and consultation process to the insolvency situation by reducing the obligations to be observed within the information and notification procedure. The amendments brought by this new Romanian Insolvency Act confirm once again the need for Romanian law to be properly aligned to the legislation and practice of the European Union.

Subject: Collective redundancies

Parties: S.C. Hidroelectrica S.A.

Court: Curtea de Apel Bucureşti (Bucharest Court of Appeal)

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