SUMMARY

ECJ 11 November 2015, case C-422/14 (Christian Pujante Rivera - v - Gestora Clubs Dir, SL. and Fondo de Garantía Salarial), Collective redundancies

Facts

The defendants in the main proceeding was a company called Gestora. As at 3 September 2013, it had 126 employees, of whom 114 were employed on a permanent basis and 12 on fixed-term contracts. Between 16 and 26 September 2013, Gestora terminated the contracts of 10 of its employees on objective grounds. One of the persons dismissed was Mr Pujante Rivera, who, on 17 September 2013, received notification that his contract was to be terminated for economic and production reasons. During the 90-day period preceding that last of those redundancies on objective grounds, which took place on 26 September 2013, the following contracts were terminated:

17 on the ground that the agreed contract term had expired (contract of less than 4 weeks' duration);
1 on the ground that the task forming the subject of the services contract had been completed;
2 voluntary redundancies;
1 dismissal for disciplinary reasons, recognised as 'unfair' for the purpose of ET and made the subject of an award of damages; and
1 contract terminated at the worker's request under Article 50 of the Ley del Estatuto de los Trabajadores (the Spanish Workers' Statute), which provides that substantial adverse changes in working conditions imposed unilaterally by the employer allow the employee to resign with compensation.

The worker who requested that her contract be terminated received notification on 15 September 2013 of a change to her working conditions, namely a 25% reduction of her salary, on the same objective grounds as those relied on in the various other terminations that occurred between 16 and 26 September 2013. Five days later, the worker concerned agreed to enter into a contract terminating the employment relationship. However, in a subsequent administrative conciliation procedure, Gestora recognised that the change to her employment contract, of which the employee had been given notification, exceeded the statutory limits and agreed to termination of that contract on the basis of Article 50 ET, with compensation being payable.

During the 90-day period following the last of those redundancies on objective grounds, there were five further contract terminations in consequence of the expiry of fixed-term contracts of less than four weeks' duration and three voluntary redundancies.

National proceedings

Mr Pujante Rivera brought proceedings against Gestora and the Employees Guarantee Fund before the referring Court, the Juzgado de lo Social No 33 de Barcelona (Labour Court No 33, Barcelona). He challenged his redundancy on objective grounds, claiming that it is invalid because Gestora should have applied the collective redundancy procedure under Article 51 ET. According to Mr Pujante Rivera, if account is taken of the number of contract terminations which occurred in the 90-day periods before and after his own redundancy, the numerical threshold set out in Article 51(1)(b) ET was reached, given that, apart from the five voluntary redundancies, all the other employment contract terminations constitute redundancies or contract terminations that may be equated to redundancies.

ECJ's findings

Article 1 (1)(a) of the collective redundancies Directive 98/59 defines "collective redundancies" as "dismissals effected by an employer for one or more reasons not related to the individual workers concerned where [.....] the number of redundancies is at least ....." a certain number, depending on how many workers the establishment in question "normally" employs. The first question is whether this means that workers employed under a contract concluded for a fixed term or a specific task must be regarded as forming part of the workers 'normally' employed, within the meaning of that provision, at the establishment concerned (§ 24).
In its judgment in Rabal Cañas (C 392/13, summarised in EELC 2015-3), the Court held that Article 1(1) of Directive 98/59 must be interpreted as meaning that, for the purposes of

establishing whether 'collective redundancies', within the meaning of that provision, have been effected, there is no need to take into account individual terminations of contracts of employment concluded for limited periods of time or for specific tasks, when those terminations take place on the date of expiry of the contract or the date on which the task was completed. It follows that workers whose contracts are terminated on the lawful ground that they are temporary are not to be taken into account in determining whether there is a 'collective redundancy' within the meaning of Directive 98/59 (§ 25-26).
The issue here is not whether non-extension of a fixed-term contract counts for the purpose of determining the number of redundancies but whether fixed-term employees count for the purpose of determining the number of workers "normally employed" in an establishment (§ 27).
Directive 98/59 cannot be interpreted as meaning that the methods of calculating thresholds, and therefore the thresholds themselves, are within the discretion of the Member States, as such an interpretation would allow the latter to alter the scope of that directive and thus to deprive it of its full effect (§ 31).
As it refers to 'establishments normally employing' a given number of workers, the first subparagraph of Article 1(1)(a) of Directive 98/59 does not make any distinction on the basis of the length of time for which such workers are employed. Thus, it cannot be concluded at the outset that persons employed under a contract concluded for a fixed term or a specific task cannot be regarded as workers 'normally' employed by the establishment concerned (§ 32-33).
Any interpretation to the effect that workers employed under a contract concluded for a fixed term or a specific task are not workers 'normally' employed by the establishment concerned is liable to deprive all the workers employed by that establishment of the rights conferred on them by the directive and thus undermine its effectiveness. Accordingly, in the main proceedings, the 17 workers whose contracts expired in July 2013 must be regarded as 'normally' employed at the establishment concerned since, as the referring court observed, those workers had been employed each year for a specific task (§ 35-36).
It should also be added that this conclusion is not called into question by the argument that it would be contradictory if workers whose contracts have been terminated on the lawful ground that those contracts are temporary were not afforded the protection guaranteed by Directive 98/59 and, at the same time, those workers were taken into account for the purpose of determining the number of staff 'normally' employed by an establishment. The reason for that difference is to be found in the different purposes pursued by the EU legislature. Thus, first, the EU legislature considered that persons employed under a contract concluded for fixed term and whose contracts end in due course with the expiry of the fixed period do not need the same protection as that enjoyed by permanent employees. Second, by making the application of the rights conferred on workers by the first subparagraph of Article 1(1)(a) of

Directive 98/59 subject to quantitative criteria, the EU legislature intended to take account of the overall number of employees of the establishments in question in order to avoid imposing an excessive burden on employers that is disproportionate to the size of their establishment. However, for the purpose of calculating the number of employees of an establishment as regards the application of Directive 98/59, the nature of the employment relationship is irrelevant (§ 37-40).

By its second question, the referring court seeks to ascertain, in essence, whether, in order to establish whether there is a 'collective redundancy', within the meaning of the first subparagraph of Article 1(1)(a) of Directive 98/59, thus giving rise to the application of the directive, the condition laid down in the second subparagraph of that provision that 'there [be] at least five redundancies' must be interpreted as relating solely to redundancies or as covering terminations of employment contracts that may be assimilated to redundancies (§ 42).

It is clear from the wording of Article 1(1) of Directive 98/59 that the conditions laid down in the second subparagraph of that provision concerns only 'redundancies', not contract terminations which may be assimilated to redundancies. As the second subparagraph Article 1(1) of Directive 98/59 sets out the method of calculating 'redundancies' as defined in the first subparagraph of Article 1(1)(a) and the latter provision establishes the 'redundancy' thresholds below which the directive is not applicable, any other reading which has the effect of extending or restricting the scope of the directive would deprive the condition in question, namely that 'there [be] at least five redundancies', of any effectiveness (§ 43-44).

By its third question, the referring court seeks to ascertain, in essence, whether Directive 98/59 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 the definition of 'redundancy' in the first subparagraph of Article 1(1)(a) of the directive or constitutes the termination of an employment contract that may be assimilated to such a redundancy for the purpose of the second subparagraph of Article 1(1) of the directive (§ 47).

Directive 98/59 does not give an express definition of the concept of 'redundancy'. None the less, in the light of the aim pursued by the directive and the context of the first subparagraph of Article 1(1)(a) thereof, it must be regarded as a concept of EU law which cannot be defined by reference to the laws of the Member States. In the present case, that concept must be interpreted as encompassing any termination of an employment contract not sought by the worker, and therefore without his consent (§ 48).

With regard to the main proceedings, given that it is the worker who sought the termination of her employment contract on the basis of Article 50 ET, she may, prima facie, be regarded as having consented to the termination. However, the fact none the less remains that the

termination of that employment relationship arises from the change made unilaterally by her employer to an essential element of the employment contract for reasons not related to that individual worker. First, having regard to the objective of Directive 98/59, which is, inter alia, to afford greater protection to workers in the event of collective redundancies, a narrow definition cannot be given to the concepts that define the scope of that directive, including the concept of 'redundancy'. It is clear from the order for reference that the remuneration of the worker in question was reduced unilaterally by the employer for economic and production reasons and, as the person concerned did not accept the reduction, that resulted in the termination of the employment contract and the payment of damages calculated on the same basis as damages awarded in the case of unfair dismissal. Second, according to the Court's case-law, by harmonising the rules applicable to collective redundancies, the EU legislature intended both to ensure comparable protection for employees' rights in the different Member States and to harmonise the costs which such protective rules entail for EU undertakings. It follows that concept of 'redundancy' directly determines the scope of the protection and the rights conferred on workers under that directive. That concept therefore has an immediate bearing on the costs which such protection entails. Accordingly, any national legislative provision or any interpretation of that concept to the effect that, in a situation such as that in the main proceedings, the termination of an employment contract is not a 'redundancy' for the purpose of Directive 98/59 would alter the scope of the directive and thus to deprive it of its full effect (§ 50-54).

Ruling

The first subparagraph of Article 1(1)(a) of Council Directive 98/59/EC [.....] must be interpreted as meaning that workers employed under a contract concluded for a fixed term or a specific task must be regarded as forming part of the workers 'normally' employed, within the meaning of that provision, at the establishment concerned.
In order to establish whether there is a 'collective redundancy', within the meaning of the first subparagraph of Article 1(1)(a) of Directive 98/59, thus giving rise to the application of the directive, the condition laid down in the second subparagraph of that provision that 'there [be] at least five redundancies' must be interpreted as relating not to terminations of employment contracts that may be assimilated to redundancies but only to redundancies sensu stricto.
Directive 98/59 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 the definition of 'redundancy' for the purpose of the first subparagraph of Article 1(1)(a) of the directive.

EELA EUROPEAN EMPLOYMENT LAWYERS ASSOCIATION

Creator: European Court of Justice (ECJ)
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