SUMMARY

ECJ 9 July 2015, Case C-229/14 (Ender Balkaya - v - Kiesel Abbruchund Recycling Technik GmbH), Collective redundancies

Facts

The limited liability company (GmbH) Kiesel Abbruch closed down its operations and dismissed all of its employees, including Mr Balkaya, without giving notice of the projected redundancies as required by the German rules on collective redundancy. Those rules, which are contained in Article 17 of the *Kündigungsschutzgesetz* ("KSchG") transpose Directive 98/59 and apply where, over a period of 30 days, more than five workers are made redundant in establishments normally employing more than 20 workers. Mr Balkaya was given notice of termination on 7 January 2013. On that date, Kiesel Abbruch employed 19 workers, not counting:

(i) a director, Mr L, who was not also a shareholder; and

(ii) Ms S, a trainee office assistant, whose entire remuneration was funded by the government in the context of a requalification training programme. Kiesel Abbruch did not pay her a salary.

National proceedings

Mr Balkaya challenged the validity of his dismissal on the basis that, at the time he was dismissed, Kiesel Abbruch normally employed 21 (i.e. more than twenty) workers. The court referred two questions to the ECJ. It noted that Article 17(5)(1) KschG provides that in establishments of one legal person (such as a GmbH) "the member or the body that is

responsible for the legal representation of that person" (i.e. the directors) shall not be regarded as workers for the purpose of the collective redundancy rules. The court also noticed that German law clearly distinguishes the status of director as an officer appointed by the general meeting of shareholders, on the one hand, from the rights and obligations vis-à-vis the company, as determined by the director's service contract on the other. According to German case law, such a service contract is not a contract of employment.

ECJ's findings

The concept of 'worker', referred to in Article 1(1)(a) of Directive 98/59, cannot be defined by reference to the legislation of the Member States but must be given an autonomous and independent meaning in the EU legal order. Otherwise, the methods for calculation of the thresholds laid down in that provision, and therefore the thresholds themselves, would be within the discretion of the Member States, which would allow the latter to alter the scope of that directive and thus to deprive it of its full effect (§ 33).
The essential feature of an employment relationship is that, for a certain period of time, a person performs services for and under the direction of another person, in return for which he receives remuneration. It is clear from the settled case law of the Court that the nature of the employment relationship under national law is of no consequence as regards whether or not a person is a worker for the purposes of EU law (§ 34-35).
The fact that a person is a member of the board of directors of a capital company is not enough in itself to rule out the possibility that that person is in a relationship of subordination to that company (see Danosa C 232/09 and Commission - v - Italy, C 596/12). It is necessary to consider the circumstances in which the board member was recruited; the nature of the duties entrusted to that person; the context in which those duties were performed; the scope of the person's powers and the extent to which he or she was supervised within the company; and the circumstances under which the person could be removed. A member of a board of directors of a capital company who, in return for remuneration, provides services to the company which has appointed him and of which he is an integral part, who carries out his activities under the direction or supervision of another body of that company and who can, at any time, be removed from his duties without such removal being subject to any restriction, satisfies, prima facie, the criteria for being treated as a 'worker' within the meaning of EU law (§ 37-39).
The Court rejects the submission made by Keisel Abbruch and the Estonian government that a director, such as the one in question in the main proceedings, does not need the protection afforded by Directive 98/59 in the event of collective redundancies. In that regard, it must be held, first, that there is nothing to suggest that an employee who is a board member of a

capital company, in particular, a small or medium sized company such as that at issue in the main proceedings, is necessarily in a different situation from that of other persons employed by that company as regards the need to mitigate the consequences of his dismissal, and, inter alia, to alert, for that purpose, the competent public authority so that it is able to seek solutions to the problems raised by all the projected collective redundancies. Second, it must be observed that a national law or practice, which does not take into account the board members of a capital company in the calculation provided for in Article 1(1)(a) of Directive 98/59 of the number of workers employed, is liable not only to affect the protection afforded by that directive to those members, but, above all, to deprive all the workers employed by certain establishments, normally employing more than 20 workers, of the rights which they derive from that directive and it thus undermines its effectiveness (§ 45-47).
The concept of 'worker' in EU law extends to a person who serves a traineeship or periods of apprenticeship in an occupation that may be regarded as practical preparation related to the pursuit of the occupation in question, provided that the periods are served under conditions of genuine and effective activity as an employed person, for and under the direction of an employer. The Court has stated that that conclusion cannot be invalidated by the fact that the productivity of the person concerned is low, that he does not carry out full duties and that, accordingly, he works only a small number of hours per week and thus receives limited remuneration. In the second place, it is also clear from the Court's case law that neither the legal context of the employment relationship under national law, in the framework of which the vocational training or internship is carried out, nor the origin of the funds from which the person concerned is remunerated and, in particular, in the present case, the funding of that remuneration through public grants, can have any consequence in regard to whether or not the person is to be regarded as a worker (§ 50-51).

Ruling

Article 1(1)(a) of Directive 98/59 [.....]must be interpreted as precluding a national law or practice that does not take into account a member of the board of directors of a capital company, such as the director in question in the main proceedings, who performs his duties under the direction and subject to the supervision of another body of that company, receives remuneration in return for the performance of his duties and does not himself own any shares in the company when calculating the number of workers employed, as stipulated by that provision.]
Article 1(1)(a) of Directive 98/59 must be interpreted as meaning that it is necessary to regard as a worker for the purposes of that provision a person, such as the one in question in the main proceedings, who, while not receiving remuneration from his employer, performs real

work within the undertaking in the context of a traineeship — with financial support from, and the recognition of, the public authority responsible for the promotion of employment — in order to acquire or improve skills or complete vocational training.

Creator: European Court of Justice (ECJ)
Verdict at: 2015-07-09
Case number: C-229/14