

SUMMARY

ECJ 15 January 2014, case C-176/12 (Association de médiation sociale - v - Union locale des syndicats CGI and others), Information and consultation

Facts

Article 27 of the Charter of Fundamental Rights of the EU provides that workers and their representatives must be guaranteed information and consultation. Directive 2002/14 requires the Member States to make arrangements for information and consultation in ‘undertakings’ employing at least 50 employees or in ‘establishments’ employing at least 20 employees. The Directive defines ‘employee’ as any person who is protected as an employee under national employment law, and it requires each Member State to determine the method for calculating said thresholds of 50 and 20 employees.

French legislation provides that “the election of staff representatives is obligatory for all establishments with 11 or more employees”. Where an undertaking or establishment has 50 or more employees, the trade unions must designate a union representative and must create a works council. Article 1111-3 of the *Code du travail* excludes certain categories of persons from the calculation of said 50 and 20 employee thresholds, namely apprentices and other “employees with assisted contracts”.

AMS is a private organisation that aims to reintegrate unemployed persons and others into working life. It offers those persons the opportunity to gain professional training.

In 2010, a local union affiliated with CGT appointed Mr Hichem Laboubi as its representative. AMS challenged this appointment, taking the view that, although in total more than 50 persons were employed at AMS, the vast majority of them were employees with assisted contracts and that fewer than 11 of them were ‘employees’ within the meaning of French

legislation.

National proceedings

AMS brought proceedings before the local *Tribunal d'instance* for the annulment of Mr Laboubi's appointment. The CGT union brought a counter-claim for an order that AMS organise elections for a staff representative body. The court referred a question on a point of law to the *Cour de cassation* (Supreme Court), which referred the question on to the *Conseil constitutionnel* (Constitutional Council). It replied that Article 1111-3 of the *Code du Travail* was not unconstitutional. In the continuation of the proceedings before the *Tribunal d'instance*, the union submitted that Article 1111-3 is contrary to EU law. The court agreed and declared Mr Laboubi's appointment to be valid. AMS appealed to the Supreme Court, which referred questions to the ECJ for a preliminary ruling.

ECJ's findings

Article 1111-3 has the consequence of exempting certain employers from the obligations laid down in Directive 2002/14 and of depriving their employees of the rights granted under that Directive. Although the Member States have a broad margin of discretion in choosing how to achieve their social policy aims, that margin cannot have the effect of frustrating the implementation of a fundamental principle of EU law. Hence, Article 3 of the directive precludes a provision such as Article 1111-3 (§ 23-29).

Article 3 of Directive 2002/14 is sufficiently unconditional and precise to have direct (vertical) effect (§ 30-35).

However, even a clear, precise and unconditional provision of a directive seeking to confer rights or impose obligations on individuals cannot of itself apply in proceedings between private parties. Therefore, the union in this case cannot rely on Article 3 of the Directive 'as such' against AMS (§ 38-40).

In order for Article 27 of the Charter to be fully effective, it must be given more specific expression in EU or national law. This has not happened in a manner relevant to this case, given that Article 3 of Directive 2002/14 does not lay down a specific prohibition on excluding a specific category of persons from the calculation of staff thresholds. In this connection, the facts of the case may be distinguished from those which gave rise to the ECJ's ruling in *Kücükdeveci* in so far as the principle of non-discrimination on grounds of age at issue in that case is sufficient in itself to confer on individuals an individual right which they may

invoke as such. Accordingly, Article 27 of the Charter cannot be invoked in a dispute, such as that in the main proceedings, in order to conclude that Article 1111-3 should not be applied (§ 41-49).

Ruling

Article 27 of the Charter [...] by itself or in conjunction with the provisions of Directive 2002/14 [...] must be interpreted to the effect that, where a national provision implementing that Directive, such as Article 1111-3 of the French Labour Code, is incompatible with European Union law, that article of the Charter cannot be invoked in a dispute between individuals in order to disapply that national provision.

Creator: European Court of Justice (ECJ)

Verdict at: 2014-01-15

Case number: C-176/12