SUMMARY

2012/6: Parent company liable as “co-employer” for unfair dismissal (FR)

<p>A confluence of interests, activities and management between two entities in the same group can result in a co-employment relationship. If such a co-employment relationship exists a Job Preservation Plan drawn up by only one of the entities is unlawful and each co-employer will be required to bear the consequences and pay damages to redundant employees.</p>

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Facts

The BSA Ceramic Products Company ("BSA") is specialized in the manufacture and marketing of ceramics. It was bought by Novoceram in 1989. In 2004, after having become a subsidiary of the Italian company Gruppo Concorde, Novoceram concluded an agreement with BSA that set BSA's product prices. One year later, BSA decided to shut down its production site and, as a result, put a Job Preservation Plan in place. However, BSA became insolvent before the collective redundancy procedure was completed and all its staff were dismissed by the liquidator.

The redundant employees argued that Gruppo Concorde and Novoceram were their co-employers and brought an action on that basis against both companies for unfair dismissal,

seeking damages.

Judgment

The Court of Appeal of Nîmes held on 16 June 2009 that Novoceram did have co-employer status on the basis that there was a confluence of interests, activities and management between BSA and Novoceram.

The Court cited Article L.1233-61 of the Labour Code, pursuant to which an employer company must draw up a Job Preservation Plan if it has at least 50 employees and decides to make at least ten of them redundant within a period of 30 days. In this case, a Job Preservation Plan had been drawn up by BSA, but it had only consulted its own works council about it. Novoceram, being completely unaware of its status as joint-employer, had not consulted its works council. Further, according to the Court of Appeal, the Job Preservation Plan Ð not having been drawn up by both BSA and Novoceram - did not comply with the legal requirements. Consequently, the Court of Appeal held Novoceram liable to pay damages to the redundant employees and to reimburse the Unemployment Agency for unemployment benefits paid to those employees up to a limit of six months.[1]

Novoceram challenged this decision before the Supreme Court. It argued that a confluence of interests, activities and management amongst companies belonging to the same group was insufficient to make them co-employers with BSA and that only the existence of a subordinate relationship between Novoceram and BSA's employees could have resulted in co-employment. The Court of Appeal had based its conclusion that the two companies were co-employers on the fact that BSA's technical director and other executives were seconded to Novoceram; that the two companies had common directors; and that Novoceram executives were present during the consultation procedure with BSA's works council on the proposed redundancy project. However, Novoceram contended that the Court of Appeal had failed properly to demonstrate a subordinate relationship.

Novoceram also argued that even if there were a co-employment relationship, the validity of the redundancies should be assessed at the level of the company that had made the redundancy decision, and not the co-employer.

The French Supreme Court upheld the Court of Appeal's decision, holding that:

"*Since Novoceram had taken control of BSA, the latter had lost all autonomy in the management of its operations and was entirely dependent on Novoceram, which had become its sole client, setting the price of its products and sharing its products, materials, general services, equipment and manufacturing processes. Moreover, the administrative, accounting, financial, commercial,*

technical and legal management of BSA was handled by Novoceram, which also managed BSA's staff. Senior executives of BSA merely implemented decisions made by Novoceram pertaining to its staff, industrial and technical management. Therefore, it could be concluded that there was a confluence of interests, activities and management between the two companies, manifested by the involvement of Novoceram in the management of BSA, which was sufficient to give it the status of co-employer"

The Supreme Court also confirmed that Gruppo Concorde did not have co-employer status, since:

"*It had not replaced BSA in the information procedure of the staff representatives, there were no close links between the two companies, nor was there any involvement in the management of the latter, or confusion between their assets. Therefore, it could be deemed there was nothing to support the notion that there was a confluence of interests, activities and management between these companies and therefore Gruppo Concorde could not be considered as a co-employer and could not, as such, be sued by the dismissed employees*".

In terms of the consequences of the co-employment relationship between Novoceram and BSA, the Supreme Court confirmed the position of the Court of Appeal by holding that: "*Given that the Job Preservation Plan was drawn up at the level of BSA alone, whereas it should have been done by each of the co-employers, the Court of Appeal was correct to rule that the Job Preservation Plan did not meet the requirements of French law" and therefore "As a co-employer, Novoceram must bear the consequences of the termination of the employment contracts, even though BSA had taken the initiative in relation to these redundancies*".

Commentary

De facto co-employment relationship is a legal technique which allows for the involvement of a company which is not the direct employer in the employment relationships with employees of another company in the group, resulting in the joint liability of the two companies. Here, the existence of the co-employment relationship was confirmed by the Supreme Court and Novoceram was required to bear, as co-employer, the financial consequences of redundancies initiated by BSA.

In its decision, the Supreme Court confirmed its intention, as reflected in several 2011 decisions, to use the concept of a "*confluence of interests, activities and management between different entities*" as an additional criterion by which to characterize the existence of a co-employment relationship.[2]

The Supreme Court implies by this that, contrary to past practice - whereby the only criterion for a co-employment relationship was that there was a subordinate relationship between the dominant company and (directly) the employees of the subsidiary - co-employment can now be also deduced from the business relationship at company level.

The Supreme Court appears to have been cautious in assessing whether there is a confluence of interests, activities and management between the two entities. The co-employment relationship between Novoceram and BSA was not simply deduced from the fact that Novoceram was involved in the management of its subsidiary, but was considered in the light of a number of factors that together demonstrated BSA's lack of autonomy.

In particular, the Supreme Court highlights the fact that Novoceram had taken total control of BSA's activities: it had set the price of its products and was providing administrative, commercial, financial, corporate and social support. Novoceram was also involved in the management of BSA's staff and its industrial and technical organisation. Such a high level of involvement, as the Supreme Court commented, had caused BSA to completely lose its autonomy.

That being said, this ruling creates considerable uncertainty for groups of companies, and also concern, in that the financial consequences for co-employers will inevitably be high. The ruling means that, as was the case here, when a situation of co-employment is recognized by the courts, any Job Preservation Plan that has been drawn up without taking into account the co-employment relationship, would inevitably be unlawful. This case certainly involved dire consequences for Novoceram, even though it was a separate legal entity with no direct employment contracts with the redundant employees - and more importantly, it was completely unaware of its status as a joint-employer.

This would explain why the Supreme Court took care to show that lack of autonomy of the subsidiary is a necessary feature of co-employment. But even so, the case shows that companies with subsidiaries in France need to be vigilant in observing corporate governance rules and avoiding direct involvement with their subsidiaries, whether or not it appears that there is any relationship of subordination between them and the employees of the subsidiaries.

Although so far the extended notion of co-employment has been solely used in relation to termination of employment, it should also be borne in mind that co-employment could have heavy financial consequences for de facto co-employers during employment as well. For example, employees could conceivably claim for collective benefits in force within the parent company, if those benefits are more favourable than the ones in place within the subsidiary.

So, parent companies beware!

Comments from other Jurisdictions

Germany (Paul Schreiner): In Germany a comparable concept of co-employership is not known, although it is possible to hold the parent company indirectly liable for a social plan in a group company. In principle, the social plan is concluded between the works council and the employing entity and, in the absence of insolvency, it can only give rise to claims against the employing company. However, this may be different where the financials of the employing company have been influenced by a parent company, i.e. the parent company has taken decisions that resulted in the closure of the employing company and reduced potential benefits for the employees. In such a case, the financial situation in the parent company is taken into account when determining the appropriate volume of a social plan at the level of the employing company.

The Netherlands (Peter Vas Nunes): The Dutch courts have developed a similar concept of "co-employership", but only for works council consultation purposes. A parent company that plans to take a decision impacting on its subsidiary may need to consult with the subsidiary's works council, and failure to do so may result in a court order against the parent company to refrain from taking or to implement a decision. Alternatively, if the decision has already been implemented, it might be required to undo the (consequences of) it. This is far-reaching case law, but the French rules seem to go further. In The Netherlands, once a decision has been validly taken and implemented, there is no longer any co-employership and the parent company has no liability *vis-a-vis* the subsidiary's staff, with the exception of certain bankruptcy situations, in which the parent company has been negligent towards creditors (i.e. not only employees).

Footnotes

1. The payment of damages and reimbursement of the Unemployment Agency are amongst the legal sanctions imposed by the courts on a case by case basis when the redundancy procedure is in breach of French law.

2. Supreme Court, 18 January 2011 n° 09-69199; Supreme Court 8 June 2011 n° 09-41019; Supreme Court 6 July 2011 n° 09-69689; and Supreme Court 28 September 2011 n° 10-12278.

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