SUMMARY

2010/72: Failure to inform works council means management may not close down plant (FR)

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Facts

SNC Raffinerie des Flandres, a TOTAL subsidiary, ('SNC Flandres') operates a refinery near Dunkirk, in the North of France. At the relevant time it employed 364 people. On 7 September 2009 management informed the refinery's works council that production would be stopped temporarily for economic reasons, as there was insufficient demand for the refinery's products. The announcement was no more than that: an announcement, not an invitation to consult with the works council. Production was indeed stopped one week later and the employees were instructed to perform maintenance and security work only. The idea was to resume refining operations as soon as the market improved, so management said.

On 2 February 2010, corporate headquarters of TOTAL issued a press release to the effect that,

although no final decision had been made on the refinery's future, it would cease refining crude oil and that a certain inspection procedure, which by law must be carried once every six years, and which had to be completed before October 2010 in order to avoid the refinery losing its operating licence, would not be carried out.

On 8 March 2010 the central works council for the relevant part of the TOTAL organisation was informed that the refinery would cease operating as a refinery, that the plant would be transformed into a training centre for TOTAL employing 240 people and that alternative jobs would be found for (almost all of) the remaining staff. The central works council was invited to consult regarding this decision.

The works council protested, arguing that the decision to close down the refinery had effectively already been made in September 2009 and that by law the works council should have been invited to consult at that time. Management disputed this, stating that in September 2009 there was no more than a decision to suspend production temporarily, which is not a decision requiring consultation. The works council did not accept this explanation and on 25 March 2010 issued summary (*référé*) proceedings in which it applied for temporary injunctive relief consisting mainly of a court order to resume refining operations. The works council was joined as plaintiff by the central works council, two unions and 161 individual employees.

The provision of law on which the plaintiffs based their claim is Article L 2326-6 of the Labour Code (*Code du travail*), which provides that a company's works council shall be consulted on issues concerning the organisation, management and business of the company as well as, in particular, measures likely to affect the volume or structure of the workforce, the working hours, the terms of employment, the working conditions or vocational training.

Court of first instance

The issue was whether the decision that had been made in September 2009 was truly no more than a decision to suspend refining operations temporarily, as management asserted, or whether it was effectively a decision to close down the refinery, as the plaintiffs argued. In the former case, there was no issue concerning the organisation, management or business of the company, let alone a measure likely to affect the volume or structure of the workforce, as provided in said Article L 2326-6.

In a judgment delivered on 22 April 2010, the court of first instance in Dunkirk agreed with the plaintiffs that the decision taken in September 2009 was a decision as provided in said Article

L 2326-6 and that therefore, given that the works council (and the central works council) had not been consulted on it, it was manifestly illegal (*manifestement illicite*). In such a case the court, in summary proceedings, has significant power to order that measures be taken to cease the illegal situation. However, the court declined to order the resumption of refining operations, since resuming refining activity would not alter the fate of the staff and would even appear to exceed what is permissible in *referé* proceedings. As a result, TOTAL and its subsidiary SNC Flandres were merely ordered to resume the consultation procedure and to pay the plaintiffs damages.

Court of Appeal

The works council and the unions appealed the ruling before the Court of Appeal of Douai. On 30 June 2010, this court not only confirmed the court of first instance's finding that management's decision of September 2009 was manifestly illegal; it went further, by ordering the defendants, on pain of a penalty of € 100,000 per day, to resume within a period of fifteen days from notification of the judgment, the activity of refining at the refinery, which by this time had been suspended for almost nine months.

The Court of Appeal held that the temporary cessation of activity in September 2009 was in fact a permanent cessation, proved by the decision to cancel the inspection of its facilities, which had to be carried out before October 2010 in order to allow the refinery to retain its exploitation permit. This had affected the refinery's staff, its structure and employment conditions within the meaning of Article L. 2323-6 of the Labour Code and Article 4 of Directive 2002/14/EC, which provides that the information and consultation must cover '*decisions likely to lead to substantial changes in work organisation or in contractual relations*".

The Court concluded by stating that under such circumstances, failure to consult the Central Works Council and the works council in September 2009 was illegal and that the only way to put an end to the illegal situation was to order the resumption of activity at the refinery.

Commentary

French law grants courts in summary (*referé*) proceedings considerable power with regard to measures aimed at putting an end to a 'manifestly illegal' situation (*trouble manifestement illicite*). In this decision the court goes even further, by ordering the resumption of an activity that had been suspended for nearly nine months.

In the past, *référé* judges have had the opportunity to suspend the implementation of important projects pending proper consultation with staff representatives. For example, they ordered management of Gaz de France to summon their European Works Council to an extraordinary meeting, meanwhile suspending management's decision on a merger project pending that council's opinion on the project.[1] In a more recent case, the *référé* judge ordered Dunlop Tires to stop a restructuring project, involving 820 job cuts, until the European Works Council consultation was complete and this council was provided with full information and accurate documents on the project.[2]

However, the TOTAL decision is more surprising, since the *référé* judge goes much further, by ordering the resumption of an activity that had been suspended for several months. In other words, by ordering the resumption of activity, the judge undid a measure already applied by management, as it were, reviving the situation that had existed before the management's unlawful decision in September 2009. In fact, this is not the first time a *référé* judge has undone a measure that had already been implemented. In a 2002 decision, Honeywell was ordered to put on hold a merger project and to reinstate 37 employees who had been transferred pursuant to the merger, pending the resumption of an information and consultation procedure with the company's Central Works Council.[3]

In the TOTAL case, the court based its decision on breach of both the French Labour Code and Article 4 of Directive 2002/14/EC. Article 4 of this directive provides that information and consultation shall cover "*decisions likely to lead to substantial changes in work organisation or in contractual relations*". Although it does not provide for any sanction in case of breach of such obligation, Article 8(2) provides that '*Member States shall provide for adequate sanctions to be applicable in the event of infringement of this Directive by the employer or the employees' representatives. These sanctions must be effective, proportionate and dissuasive*".

So, was the sanction imposed on TOTAL effective, proportionate and dissuasive? That it is dissuasive is undeniable; surely employers will think twice in future before by-passing their works council. However, the proportionality and effectiveness of the sanction can be questioned.

In its arguments, TOTAL highlighted the damages that resumption of its refining activity would cause, namely losses of several million Euros per month, in a context in which the activity was already in serious economic difficulties and, secondly, the need to inspect its facilities, which had stood idle for several months, before considering any resumption. The Court of Appeal of Douai, however, seems to have completely ignored the technical delays that such resumption would entail, by ordering TOTAL to resume the refinery's activity within fifteen days of service of its decision.

Finally, the effectiveness of a sanction such as the one imposed on TOTAL is also questionable. If the decision to temporarily stop production in September 2009 were a permanent and irreversible decision, as claimed by the appellants and accepted by the Court of Appeal of Douai, the resumption of activity would be unlikely to have any positive effect on the information and consultation procedure with staff representatives, since, in any case, TOTAL would be perfectly free to permanently cease the activity of the refinery once the information and consultation procedure has been conducted.

All these factors combine to give the impression that the Court of Appeal of Douai may have gone too far by imposing such a severe sanction. The sanction seems harsh even by the standards of French labour law, which provides that the absence of, or poor quality of, consultation with a works council is a criminal offence, namely that of *délit d'entrave* (obstruction)[4]. However, this should not lead to the annulment of the measure taken in breach of the consultation requirements. This was highlighted by a 1998 Supreme Court decision, in which it was held that the absence of consultation with the works council, punishable as a *délit d'entrave*, could not lead to the invalidity or annulment of the employer's decision.[5]

In the meantime, TOTAL has appealed to the Supreme Court. Naturally we will keep our readers informed of the sequel to this fascinating saga.

Comments from other jurisdictions

Austria (Andreas Tinhofer): In Austria, the most the works council could have done in such a situation would be to sue the employer for failure to inform and consult and to delay the measure by a maximum of four weeks. It is very rare in practice that works councils resort to either of those two remedies.

There is no means by which to order an employer to undo a management measure that has already been implemented. The employer (or the management) risks an administrative fine only if the works council is not informed on a planned mass redundancy on time (the maximum fine amounting to € 2,180). Even in such cases the works council would need to initiate proceedings against the employer, which in practice rarely happens.

Measures entailing 'changes in the establishment' (*Betriebsänderungen*) give the works council under certain circumstances the right to ask for a so-called 'social plan' in order to avoid, remedy or mitigate the negative effects on the workforce. A social plan can be enforced before a special conciliation committee set up to hear each individual case, at the employment court. Incomplete or delayed information will be taken into account when the committee decides

upon the compensation package. The managerial measure itself, however, may not be questioned by the conciliation committee or the employment court.

Germany (Paul Schreiner): In Germany there are a couple of sanctions an employer can face and neither of these would have allowed a court to order the employer to resume production.

In general, an employer is under a duty to consult with its works council if it decides to stop production. If the decision also involves negative consequences for the employees, a social plan must be concluded, providing benefits for the employees. Whether the works council can claim injunctive relief for the employer's failure to consult with it is a matter of hot dispute. About half of the labour courts in Germany grant injunctive relief, whilst the other half disallows such claims, on the grounds that an individual employee can claim damages if the employer fails to conclude a social plan. However, injunctive relief can only be granted so long as the intended measure of the employer has not been implemented. The question under German law would rather be whether the production had genuinely ceased in the case at hand – and it seems that it had since the refinery could not resume production without further measures.

Moreover, failure by an employer to consult with the works council constitutes a misdemeanour under s121 of the Works Council Constitution Act (*Betriebsverfassungsgesetz*, BetrVG).

The Netherlands (Peter Vas Nunes): Had a Dutch court delivered this judgment, it would not be considered out of the ordinary. In fact, court orders against companies to revoke a decision and to undo everything that has been done to implement it, on account of failure by management to consult adequately and in a timely fashion with the works council, are fairly routine.

Spain (Ana Campos): According to Spanish Law, failure to consult with employees' representatives would have constituted two infractions, because the closing of a business activity requires an administrative authorisation, which will not be granted if the employee

representatives' consultation and participation rights have not been complied with. The fines range from € 626 to € 6,250 for the lack of consultation and from € 6,251 to € 187,515 for closing the company without authorisation. In addition, failure to follow the procedures for the collective termination of employment contracts would result in such terminations being void, and entail the reinstatement of the employees with back pay. We are not aware of any case in Spain in which a company was obliged to reopen and reinitiate activities.

Footnotes

1 Cass. soc., 16 January 2008, No 07-10597 *Gaz de France*.

2 Court of Appeal of Versailles, 27 January 2010, No 09-07384 *Goodyear Dunlop Tires France Co.*

3 Cass. soc., 25 June 2002, No 00-20939 *Honeywell*.

4 *Délit d'entrave* carries a fine of 18 750.

5 Cass.soc. 5 May 1998 No 96-13498.

Subject: Information and consultation

Parties: *Comité d'Etablissement de la Raffinerie des Flandres et al – v – SNC Raffinerie des Flandres et al*

Court: *Cour d'appel de Douai*

Date: 30 June 2010

Case number: 1179/10 RG 10/03260

Hard copy publication: not available

Internet publication: not available

Creator: Cour d'appel de Douai
Verdict at: 2010-06-30

Case number: 1179/10 RG 10/03260