EELA EUROPEAN EMPLOYMENT LAWYERS ASSOCIATION

SUMMARY

2010/52: Fujitsu penalised for failure by parent company to apply local co-determination rules (FI)

<p>A Finnish subsidiary should have carried out codetermination negotiations before the Dutch parent company made a decision to close down the subsidiary's production facility.</p>

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Facts

In 2000, Fujitsu Siemens Computers Oy, a Finnish subsidiary of the Dutch company Fujitsu Siemens Computers BV, closed its production facility located in Espoo, Finland and made 450 employees redundant. The closing of the facility was preceded by codetermination negotiations. The negotiations were initiated on 14 December 1999 and concluded on 31 January 2000, after a negotiation period of six weeks, the minimum provided by the Finnish Co-determination Act. After conclusion of the negotiations, the subsidiary's board of directors made, on

1 February 2000, a decision to discontinue a major part of its operations.

The executive council of the parent company, consisting of the executive members of its board of directors, had, on 7 December 1999, decided to make a proposal to the full board of directors for the divestiture of the Espoo facility. On 14 December 1999 the parent company's board of directors considered centralisation of the group's production facilities. According to the minutes of the meeting, no specific decision concerning the Espoo facility was made. On

16 February 2000, the parent company's board of directors merely noted the result of the codetermination negotiations without making any decision on the matter.

Trade unions acting as plaintiffs in the matter instituted legal proceedings against the subsidiary, claiming compensation for breach of codetermination obligations. The trade unions stated that on 14 December 1999 at the latest, the parent company had in effect made a decision to close the Espoo factory and that codetermination negotiations should therefore have been carried out before that date. The trade unions' claims were dismissed in the first two instances. The Supreme Court granted them leave to appeal.

Preliminary ruling by the European Court of Justice (C-44/08)

The Supreme Court held that there were inconsistencies between Directive 98/59/EC relating to collective redundancies and Finnish national law and referred the matter to the ECJ, in particular concerning the timing of the employee consultations. The ECJ issued its ruling on 10 September 2009, stating that adoption within a group of undertakings, of strategic decisions or changes of activities which compel the employer to contemplate or to plan for collective redundancies give rise to an obligation on that employer (in this case the Finnish subsidiary) to consult with employee representatives. The obligation to negotiate starts even if the employer lacks all the information it needs to supply to the employee representatives during the negotiations, but the obligation to negotiate does not start as long as the subsidiary, within which collective redundancies may be made, has not been identified. Further, the consultation procedure must be concluded by the subsidiary affected by the collective redundancies before that subsidiary, on the direct instructions of its parent or otherwise, terminates the contracts of employees affected by the redundancies.

Decision by the Finnish Supreme Court

Taking into account, among other things, the preliminary ruling of the ECJ and the Directive, the Supreme Court firstly concluded that a decision made by a parent company concerning its subsidiary in general can constitute a decision of the subsidiary (i.e. the employer) prior to which the subsidiary must initiate codetermination negotiations.

The Supreme Court then considered the kind of decisions by the parent company that generally trigger the codetermination obligation in the subsidiary. It concluded that although

the Finnish Codetermination Act lacks an explicit provision on this, the Act must, in view of the Directive, be interpreted to mean that the obligation to conclude the negotiations before the employer makes a decision, e.g. to close a company or a part of it, also applies to corresponding decisions made by the parent company.

Finally, the Supreme Court assessed whether a decision to close the Espoo factory had been taken at the parent company level before the negotiations were commenced at the Finnish subsidiary. After assessing the evidence and the circumstances, including the parent-subsidiary relationship, as a whole, the Supreme Court concluded that this was the case. The Supreme Court stated, among other things, that it is apparent that a subsidiary does not on its own make decisions on material group-level strategic matters but that such decisions are made on a group level. As there were no further parent-level decisions after the commencement of the codetermination negotiations, the Supreme Court found that the parent company had already on 14 December 1999 made a final decision to close the Espoo factory. The decision meant a significant reduction in the subsidiary's operations resulting in redundancies as a direct consequence. The subsidiary should have conducted the codetermination negotiations before the parent company's decision and, by omitting to do this, it had breached its negotiation obligation by manifest negligence.

If the employer fails to comply with the negotiation procedure set forth in the Codetermination Act, employees who have been made redundant are entitled to compensation. The amount thereof is determined on a case by case basis, taking into account the nature of the non-compliance. In this case, the Supreme Court held that the omission was severe because it deprived the employees of their opportunity to influence the decisions. On the other hand, the fact that full-length codetermination negotiations had been conducted, although too late, was held by the Supreme Court to be a mitigating factor. Balancing these circumstances, the Supreme Court ordered Fujitsu Siemens Computers Oy to pay the plaintiff trade unions a total of close to EUR 2.5 million, corresponding to six months of salary for each redundant employee, which is less than one third of the maximum compensation at that time.[1]

Commentary

This case is a significant precedent for groups of companies contemplating redundancies in their Finnish entities. It emphasises the importance of coordinating cross-border decision-making and recording such decisions carefully both in the Finnish entity and on the parent

company or group level.

While the Finnish Codetermination Act, according to the Supreme Court's decision, provides a more far-reaching obligation than the Directive, the preliminary ruling in C-44/08 is of relevance also for groups of companies contemplating redundancies in other Member States. Directive 98/59/EC imposes on subsidiaries affected by collective redundancies an obligation to conclude the consultation procedure before such subsidiary, on the direct instructions of its parent company or otherwise, terminates the contracts of the employees who are to be affected by the redundancies. Finnish national law requires that such subsidiaries conclude the codetermination negotiations before the subsidiary or its parent company makes an actual decision on matters, such as restructuring or redundancies, which fall within the scope of the codetermination obligation.

Comments from other jurisdictions

Austria (Andreas Tinhofer): It is interesting to learn that the employees concerned were awarded EUR 2.5 million for not having initiated codetermination negotiations with their representatives in good time. In Austria, employers face an administrative fine of up to EUR 2,180 if they do not comply with information and consultation requirements when they are contemplating collective redundancies. In addition, employers can be sued by the works council for non-compliance with the respective requirements. Finally, any defects in or delays to the information and consultation procedures would be considered in a way which is favourable to employees if a social plan (*Sozialplan*) is being enforced before the conciliation board (which is possible only under certain circumstances). In practice, however, the imposition of administrative fines and/or lawsuits through actions brought by works councils is very rare. As it may be assumed that not all employers fully comply with the information and consultation requirements, it is also doubtful that the sanctions for non-compliance have any meaningful deterrent effect.

Germany (Paul Schreiner): In Germany a significant change in the organisational structure of an establishment implies a duty on the employer to consult with the works council on a so-called "reconciliation of interest" and a social plan. The reconciliation of interest is an agreement concluded after the employer has shown the reasons for and consequences of the intended measure and the works council is given the opportunity to give the employer its view. To alleviate the consequences of the measure for employees, a social plan must be concluded, usually providing for redundancy payments.

If the present case had been brought before a court in Germany, the German court would have also had to rule upon the obligation of the employer to negotiate a reconciliation of interest

and in particular, whether the employer could meaningfully consult with the works council if the parent company has already made a decision to take the measures in question. The German Federal Court for Employment Law (*the Bundesarbeitsgericht*) has held that even in such a case "real" negotiations can take place, because the employer's representatives can still use their influence on the parent company to change its decision if the works council can show an alternative measure. Therefore, even if a "final decision" has been made by the parent company, the employer must still negotiate a reconciliation of interest.

If the employer ignores this obligation, the employees are entitled to compensation in accordance with the Works Council Constitution Act. The amount is generally limited to 12 months' salary, with higher amounts possible for long-serving older employees.

The Netherlands (Peter Vas Nunes): Dutch lawyers have been accustomed, for over twenty years, to judgements in which a management decision made at a higher corporate level (e.g. an American parent company) is "attributed" to a lower entity (e.g. a Dutch subsidiary). There are two mechanisms for doing this: (i) the decision is deemed to have been taken by the lower entity (*toerekening*) or (ii) the higher entity is deemed to be a co-employer, along with the lower entity (*mede-ondernemerschap*). In my view, both mechanisms come down to the same thing for practical purposes.

The Finnish judgement reported above is not revolutionary for Dutch lawyers as far as concerns the attribution to the Finnish subsidiary of Fujitsu's decision to close down the local plant. What makes the judgement interesting from a Dutch perspective is that the Finnish subsidiary was ordered to pay the plaintiff unions compensation in the amount of EUR 2.5 million. A Dutch court would not have had the power to award compensation. Instead, it could have ordered Fujitsu to reverse the decision to close down the plant and, if that decision had already been implemented, to actually reopen the plant, rehiring the staff, etc.

United Kingdom (Richard Lister): The ECJ's ruling in this case attracted significant publicity in the UK and it is interesting to see the final outcome in the Finnish Supreme Court. The case is likely to have a major influence on the approach of UK tribunals and courts when considering collective redundancy consultation cases under sections 188 to 198 of the Trade Union and Labour Relations (Consolidation) Act 1992 - particularly in relation to the obligations of subsidiary companies when the parent makes the strategic decision to implement redundancies. On the other hand, there are aspects of the ECJ's judgment that are quite helpful for employers - such as the recognition that a "premature triggering" of the consultation

obligation could defeat the purpose of Directive 98/59/EC by causing unnecessary uncertainty for workers and destabilising the workforce. This is consistent with the approach of UK courts.

Footnote

1 The law changed in 2007 and currently provides a maximum compensation of EUR 30,000 per employee.

Subject: Unions, codetermination

Parties: Trade unions - v - Fujitsu Siemens Computers Oy

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