Case C-300/19

Request for a preliminary ruling pursuant to Article 98(1) of the Rules of Procedure of the Court of Justice

Date lodged:

12 April 2019

Referring court:

Juzgado de lo Social No 3 de Barcelona (Spain)

Date of the decision to refer:

25 March 2019

Applicant:

UQ

Defendant:

Marclean Technologies, S.L.U.

Subject matter of the main proceedings

The main proceedings concern the classification of the applicant's dismissal.

Subject matter and legal basis of the request for a preliminary ruling

The request for a preliminary ruling seeks to ascertain whether the period of 30 or 90 days within which terminations of employment relationships must take place in order for these to be regarded as collective redundancies is to be calculated on the basis that the individual dismissal forming the subject of the dispute is the end point, the starting point or the midpoint of that period. The legal basis is Article 267 TFEU.

Questions referred for a preliminary ruling

First question: Must Article 1(1)(a)(i) and (ii) of Council Directive 98/59/EC on the approximation of the laws of the Member States relating to collective redundancies be interpreted as meaning that the reference period of 30 or 90

days laid down as a condition for the existence of collective redundancies must always be calculated retrospectively from the date of the individual dismissal at issue?

Second question: May Article 1(1)(a)(i) and (ii) of Council Directive 98/59/EC on the approximation of the laws of the Member States relating to collective redundancies be interpreted as meaning that the reference period of 30 or 90 days laid down as a condition for the existence of collective redundancies may be calculated prospectively from the date of the individual dismissal at issue without the need for subsequent terminations to be regarded as abusive?

Third question: May the reference periods in Article 1(1)(a)(i) and (ii) of Council Directive 98/59/EC on the approximation of the laws of the Member States relating to collective redundancies be interpreted in such a way as to permit account to be taken of dismissals or terminations taking place within 30 or 90 days of the dismissal at issue as falling at some point within those periods?

Provisions of EU law relied on

Council Directive 98/59/EC of 20 July 1998 on the approximation of the laws of the Member States relating to collective redundancies (OJ 1998 L 225, p. 16). Article 1(1)(a)(i) and (ii).

Judgment of the Court of Justice of 13 May 2015, *Rabal Cañas* (C-392/13, ECLI:EU:C:2015:318). Paragraph 51 and point 1 of the operative part.

Judgment of the Court of Justice of 11 November 2015, *Pujante Rivera* (C-422/14, ECLI:EU:C:2015:743). Paragraphs 20 to 22, 48, 49 and 51.

Provisions of national law relied on

Law 36/2011 of 10 October 2011 governing the social courts (BOE No 245 of 11 October 2011, p. 106584). Article 122(1) and (2).

Workers' Statute, the recast text of which was approved by Royal Legislative Decree 2/2015 of 23 October 2015 approving the recast text of the Law on the Workers' Statute (BOE No 255 of 24 October 2015, p. 100224; 'ET'). Article 51(1).

Judgment of the Social Chamber of the Tribunal Supremo (Supreme Court) of 11 January 2017 (ECLI:ES:TS:2017:258).

Order of the Social Chamber of the Tribunal Supremo (Supreme Court) of 27 June 2018 (ECLI:ES:TS:2018:7471A).

Judgment of the TSJ de Cataluña (High Court of Justice, Catalonia) of 6 October 2011 (ECLI:ES:TSJCAT:2011:11703).

Judgment of the TSJ de Cataluña (High Court of Justice, Catalonia) of 16 December 2011 (ECLI:ES:TSJCAT:2011:12358).

Brief statement of the facts and main proceedings

1 The applicant, Ms UQ, started working for the undertaking Marclean Technologies, S.L.U. ('the undertaking') on 31 October 2016, in the role of quality controller. On 28 May 2018, she became temporarily unable to work.

2 All workers engaged by Marclean Technologies, S.L.U. were located on the premises of the undertaking Sandhar Group and carried out quality control work on the parts produced by the latter company.

3 On 31 May 2018, the undertaking sent the applicant worker a letter of dismissal; at the same time as making her redundant, the undertaking recognised the unfairness of the dismissal and subsequently paid the worker compensation corresponding, in the view of the undertaking, to that due in cases in which the dismissal is declared unfair by court order.

4 On 18 June 2018, UQ brought against Marclean Technologies, SLU an action for unfair dismissal in which she sought a declaration as to the nullity or, in the alternative, unfairness of the dismissal.

5 Between 31 May 2018 to 14 August 2018, a total of 7 persons stopped working for the undertaking — 4 for reasons not attributable to the individual workers concerned, 2 on account of resignation and 1 because of the expiry of a temporary contract — and, on 15 August 2018, 29 persons left the company; all of those persons were treated as having resigned and, on 16 August 2018, were taken on by Risk Steward, S.L. Marclean Technologies, S.L.U. ceased trading entirely on 15 August 2018.

6 Being in some doubt about the situation, the court sought from the social security service and the defendant information and documentation which shows that all of the workers who left 'voluntarily' on 15 August 2018 were taken on the following day by Risk Stewward, S.L.. The court therefore takes the view that these were collective redundancies.

Main arguments of the parties to the main proceedings

7 The defendant contends that the applicant's dismissal is not void but the result of the fall in the undertaking's trading activity and breaches of contract by the worker, other workers having been dismissed for the same reasons. The defendant

states that it ceased trading on 15 August 2018 and that, as a result, all workers left the company in August 2018.

8 As regards the making of the request for a preliminary ruling, the applicant is in agreement with that decision, since she takes the view that, if the 90 days are counted from the date of her dismissal, the number of terminations clearly exceeds the limit laid down and these are therefore collective redundancies. The defendant objects because, in its submission, there have been no terminations capable of being taken into account for the purposes of the quantitative limits laid down in Article 51 of the ET.

9 The Public Prosecutor's Office, which is not a party to the proceedings but is intervening because this case raises issues of legality and the protection of workers' rights, after analysing the case-law of the Court of Justice in conjunction with Directive 98/59/EC, the wording of the domestic provision and the case-law of the Tribunal Supremo (Supreme Court), concludes that the Spanish courts' interpretation of Article 51 in relation to how the 90-day period is to be calculated precludes the view that the applicant's dismissal forms part of a round of collective redundancies. It therefore supports the request for a preliminary ruling and has drafted guidelines and proposed questions which the referring court has taken as the basis for its request.

Brief statement of the grounds for the request for a preliminary ruling

10 Article 1(1)(a) of Directive 98/59 states that collective redundancies are 'dismissals effected by an employer for one or more reasons not related to the individual workers concerned'. The directive gives Member States two options in relation to the minimum number of dismissals and the period over which the number of dismissals is to be calculated. In short, the option contained in indent (i) provides for a period of 30 days during which the number of dismissals that must occur depends on the number of workers in the undertaking, while that contained in indent (ii) lays down a period of 90 days during which at least 20 dismissals must take place.

11 The Spanish legislature chose to adopt the most beneficial parts of both options (the period of 90 days from the second option and the number of workers from the first). Thus, Article 51(1) of the ET provides:

'For the purposes of the present law, ''collective redundancy'' shall mean the termination of employment contracts on economic, technical, organisational or production grounds where, over a period of ninety days, the termination affects at least:

(a) 10 workers in undertakings employing fewer than 100 workers;

(b) 10% of the number of workers in undertaking employing between 100 and 300 workers;

(c) 30 workers in undertakings employing more than 300 workers.'

12 For its part, Article 122(2) of Law 36/11 states that a termination of a contract is void 'where there has been an abuse of law in circumvention of the provisions laid down for collective redundancies'.

13 The Tribunal Supremo (Supreme Court), in a judgment of 11 January 2017 given on an appeal in cassation for the unification of case-law, held that, in order to establish whether collective redundancies are present, account is to be taken only of terminations which took place in the 90 days prior to the date of the individual dismissal at issue. In any event, pursuant to Article 51(1) of the ET (which states that, where, in successive periods of ninety days, and with the aim of evading the legislation in question, an undertaking, for economic, technical, organisational or production reasons, terminates the contracts of a lower number of workers than that laid down in that article for reasons which are not new, those new terminations are to be regarded as having been effected in abuse of the law and are to be declared void and ineffective), abuse may be declared to be present in the case of terminations subsequent to the date of the dismissal at issue. The Tribunales Superiores de Justicia (High Courts of Justice) also adhere to that case-law, the only exceptions, whereby those courts allowed account to be taken of terminations which took place after the individual dismissal at issue, having predated the aforementioned judgment of the Tribunal Supremo (Supreme Court).

14 The time limits, or reference periods, laid down in the Directive and in Article 51 of the ET respectively are different, inasmuch as, while the EU provision prescribes two periods — one of 30 and one of 90 days depending on the number of persons affected by the terminations capable of being taken into account —, the domestic provision lays down a single period of 90 days, which is why the national courts have regarded the Spanish legislation as improving on the provisions of the Directive, since a longer period gives workers more guarantees and greater protection. Nonetheless, the situation here is the same as that at issue in *Rabal Cañas*, which is to say that the Spanish provision may be more beneficial than the Directive, provided that it does not entail a loss of the rights which the latter confers.

15 In the judgment in *Rabal Cañas*, the Court of Justice analysed the discrepancy between the Directive and the Spanish provision in relation to the entity to which the numerical thresholds of the persons affected are to be applied — establishment or undertaking —, and concluded that national legislation that introduces the undertaking and not the establishment as the sole reference unit, where the effect of the application of that criterion is to preclude the information and consultation procedure provided for in the Directive, when the dismissals would have been considered 'collective redundancies' had the establishment been used as the reference criterion, must be interpreted as meaning that replacing the term 'establishment' by the term 'undertaking' can be regarded as favourable to workers only if that element is additional and does not mean that the protection afforded to workers is lost or reduced where, the concept of establishment being

taken into account, the number of dismissals required under the Directive for the purposes of 'collective redundancies' is reached.

16 The reason for the request for a preliminary ruling is the same in this case. It falls to be clarified whether the method for calculating the 30- and 90-day periods, more specifically the 90-day period, is to be interpreted in the way in which the Spanish courts interpret it. In other words, the request seeks to ascertain how Article 1(1)(a)(ii) of the Directive ('over a period of 90 days, at least 20, whatever the number of workers normally employed in the establishments in question') is to be properly interpreted, given that, in the 90 days following the date of the applicant's dismissal, there were 35 terminations capable of being taken into account, the undertaking in question having permanently ceased trading.

17 In laying down the reference time periods, the Directive does not specify whether those periods are to be calculated retrospectively or prospectively. The Spanish courts, when interpreting Article 51 of the ET, have stated that the period laid down in that article must as a matter of obligation be calculated retrospectively (which is to say that the individual dismissal at issue is the end point of that period), this being an obligation which is not laid down in any provision and amounts to the introduction of an unjustified restriction on the right to participate and be consulted that is enjoyed by workers' representatives. The EU provision has the objective of facilitating the consultation and participation of workers' representatives and it would not make sense for such consultation and participation to be guaranteed in a situation where a dismissal is regarded as forming part of collective redundancies if it took place in a period of time prior to the individual dismissal at issue but not if it took place in the period following that dismissal.

18 While it is true that the last paragraph of Article 51(1) of the ET seeks to prosecute abusive conduct consisting in staggering dismissals in order to avoid the consultation and participation of workers' representatives, that objective is better achieved if the reference period applies both ways, meaning that the worker can rely on other individual dismissals of which he is likely to be unaware at the time when he is himself made redundant but which, later, when added to his own dismissal, make up the number of contract terminations constituting the existence of genuine collective redundancies. It is important to bear in mind in this regard that the fact that the anti-abuse provision contained in the last paragraph of Article 51(1) of the ET may be relied on in proceedings for the unfair dismissal of a worker shows that the legislature itself already anticipates the possibility that the existence of those subsequent dismissals or terminations may not be known at the time when the worker is made redundant, and entrusts to the court the task of examining whether or not there has been any abuse in connection with subsequent terminations; in other words, there is nothing to stop facts which are new or have newly come to light from being taken into account in the court proceedings.

19 Indeed, a degree of arbitrariness may even come into play if subsequent terminations are not allowed to be taken jointly into account for the purposes of

determining whether there have been collective redundancies: a worker made redundant before those terminations will not be able to rely on them, whereas workers made redundant thereafter who take legal action will be able to.

20 Finally, notwithstanding that the inclusion of an anti-abuse provision in the Spanish legislation might be regarded as an improvement on the content of the Directive, this does not mean that the Directive should cease to be applied on its own terms, inasmuch as the thresholds and reference periods it lays down must be regarded as minima which are untouchable by the Member States. Consequently, if the proposal put forward by the Public Prosecutor's Office is taken as the point of reference, the referring court considers it necessary to ask whether it is only terminations prior to the individual dismissal at issue that are to be regarded as the objective data, subsequent terminations being capable of being taken into account only in the event that it is found that that these have been effected with the intention of avoiding the application of the provisions governing collective redundancies.

21 The second question arises necessarily from the first, since, according to the ET, terminations subsequent to the one at issue may be taken into account only if it is found that the undertaking has acted abusively; the Directive, however, makes no reference to such an assessment. The taking into account of the period subsequent to the date of the dismissal at issue could be regarded as a provision that improves on the content of the Directive, but only if it were ruled out that the Directive, as it is worded and might be interpreted by the Court of Justice of the European Union, does provide for two-way calculation of the reference period.

22 Finally, the third question asks whether the 30 or 90 days have to be counted in their entirety retrospectively or prospectively from the individual dismissal at issue, or whether some may be counted retrospectively and others prospectively from that dismissal, provided that they do not exceed the reference period laid down in the Directive. The court takes the view that the fact that the thresholds and periods laid down by the Directive are untouchable, unless improved on by more favourable provisions, and autonomous means that they must be interpreted autonomously too. Consequently, there is no reason why the reference period should not be regarded as a period the full length of which encompasses either prior or subsequent terminations — a full 30 or 90 days prior or subsequent to the dismissal at issue — or as one that extends in part retrospectively and in part prospectively, which is to say, for example, that account may be taken both of terminations that took place 60 days prior to the worker's dismissal and of those that occurred 30 days thereafter. In other words, there is no reason why, in order to get a full picture of the situation, it should not be necessary to take as the reference period 90 — or 30 — days within which the dismissal at issue would fall at the beginning, in the middle or at the end.