Anonymised version

Case C-419/24

Request for a preliminary ruling

Date lodged:

13 June 2024

Referring court:

Cour de cassation (France)

Date of the decision to refer:

12 June 2024

Applicant:

Société Nouvelle de l'Hôtel Plaza SAS

Defendants:

YG

Pôle emploi

WORKING DOCUMENT

[…]

[…] […]

[…]

JUDGMENT OF THE COUR DE CASSATION, CHAMBRE SOCIALE (COURT OF CASSATION, SOCIAL CHAMBER),

OF 12 JUNE 2024

Société Nouvelle de l'Hôtel Plaza, a simplified joint stock company whose registered office is […] [in] Paris, having an establishment […] [in] Nice, has filed appeal No F 22-10.903 against the judgment delivered on 25 November 2021

by the cour d'appel d'Aix-en-Provence (Court of Appeal, Aix-en-Provence, France) […], in the dispute between it and:

1. YG, […]

2. Pôle emploi, […]

respondents in cassation.

YG has lodged a cross-appeal against that judgment.

In support of its action, the appellant in the appeal relies on two grounds of appeal on a point of law.

In support of its action, the appellant in the cross-appeal relies on two grounds of appeal on a point of law.

[…] [matters of procedure and customary wording]

Facts and proceedings

1 According to the judgment under appeal […], Société Nouvelle de l'Hôtel Plaza ('the company') hired YG as a senior project manager on 12 October 1992. The company outsourced the positions of porter and room attendant to an external service provider.

2 In September 2018, the company informed its staff that the hotel would be closing for major renovations. Since the closure meant that the hotel would have to suspend operations for a minimum of 20 months, the company initiated a collective redundancy procedure on economic grounds for all operational staff, with the loss of 29 jobs.

3 As an interim measure, the employee was informed of her dismissal by reasons of redundancy on economic grounds by letter of 22 January 2019. On 29 January 2019, she accepted the professional security contract that had been offered to her, her contract of employment being terminated on 31 January 2019 at the end of the cooling-off period.

4 On 5 December 2018, the employee had filed a claim with the juridiction prud'homale (labour tribunal) for judicial termination of the contract of employment on the ground of fault on the part of the employer, in addition to a claim for payment of various sums of money. Following her dismissal, the employee pursued her claim for judicial termination of the contract, seeking, in the alternative, a declaration that her dismissal was null and void due to the absence of an employment protection plan, in addition to her reinstatement.

5 By judgment of 25 November 2021, the Court of Appeal held that the dismissal was null and void, ordered the company to pay the employee compensation for

Anonymised version

WORKING DOCUMENT

wrongful dismissal, compensation in lieu of notice and paid leave, and ordered repayment of six months of unemployment benefit paid to the employee.

6 In ruling thus, the Court of Appeal held that employees of the company GSF Jupiter, a service provider which has supplied staff for hotel maintenance and cleaning services since 2017, had to be taken into account for the purposes of applying Article L. 1233-61 of the code du travail (Labour Code), as amended by ordonnance No 2017-1718 (Order No 2017-1718) of 20 December 2017. Under the terms of that article, in undertakings with at least 50 employees, where the redundancy plan affects at least 10 employees in the same period of 30 days, the employer is required to draw up and implement an employment protection plan to avoid or limit the number of redundancies.

7 The company has appealed against that judgment.

Wording of the ground of appeal

8 By the first ground of appeal, the company complains that the judgment finds the employee's dismissal was null and void, that it orders the company to pay her compensation for wrongful dismissal, compensation in lieu of notice and payments for leave taken with notice, and that it instructs it to repay six months of unemployment benefit paid to the employee, given that, 'in undertakings with at least 50 employees, where the redundancy plan affects at least 10 employees in the same period of 30 days, the employer is required to draw up and implement an employment protection plan to avoid or limit the number of redundancies; that the threshold of 50 employees for that requirement to apply covers only employees of the undertaking whom it has the power to dismiss and who are eligible for measures under the employment protection plan, and thus excludes staff supplied by an outside undertaking, whose inclusion in the staff numbers of the undertaking provided for in Article L. 1111-2 of the Labour Code applies only when the obligation imposed on the employer is intended to benefit the entire workforce; and that, in finding that the economic redundancy rules were not exempt from the application of Article L. 1111-2 of the Labour Code – which expressly states that the calculation extends to the implementation of all provisions of that code — in order to conclude that staff supplied to the employer had to be taken into account when calculating the threshold of 50 employees required for the introduction of the employment protection plan, the Court of Appeal infringed Articles L. 1233-61 and L. 1111 -2 of the Labour Code'.

Applicable legislation

European Union law

9 According to Article 1(1) of Council Directive 98/59/EC of 20 July 1998 on the approximation of the laws of the Member States relating to collective redundancies, for the purposes of that directive:

Anonymised version

WORKING DOCUMENT

'(a) "collective redundancies" means dismissals effected by an employer for one or more reasons not related to the individual workers concerned where, according to the choice of the Member States, the number of redundancies is:

(i) either, over a period of 30 days:

- at least 10 in establishments normally employing more than 20 and less than 100 workers,

- at least 10% of the number of workers in establishments normally employing at least 100 but less than 300 workers,

- at least 30 in establishments normally employing 300 workers or more;

(ii) or, over a period of 90 days, at least 20, whatever the number of workers normally employed in the establishments in question;

(b) "workers' representatives" means the workers' representatives provided for by the laws or practices of the Member States.

For the purpose of calculating the number of redundancies provided for in the first subparagraph of point (a), terminations of an employment contract which occur on the employer's initiative for one or more reasons not related to the individual workers concerned shall be assimilated to redundancies, provided that there are at least five redundancies.'

National law

10 Under the terms of Article L. 1233-61 of the Labour Code, as amended by Order No 2017-1718 of 20 December 2017, in undertakings with at least 50 employees, where the redundancy plan affects at least 10 employees in the same period of 30 days, the employer is required to draw up and implement an employment protection plan to avoid or limit the number of redundancies.

11 It follows from Article L. 1235-10(1) of that code that where those two cumulative conditions are met, any dismissal in the absence of a decision on the validation or approval of an employment protection plan or when a negative decision has been made is null and void.

12 In accordance with Article L. 1111-2 of the Labour Code, as amended by loi No 2008-789 (Law No 2008-789) of 20 August 2008, which determines which employees are to be taken into account in calculating the staff numbers of an undertaking for the purposes of those provisions of the Labour Code that stipulate a condition relating to staff numbers, staff supplied by an outside undertaking who are present on the premises of the user undertaking and who have worked there for at least a year are included in that calculation.

Anonymised version

WORKING DOCUMENT

13 Although the Social Chamber of the Court of Cassation has ruled on the application of those provisions as regards workplace elections […] [references to national case-law], holding that staff supplied by an outside undertaking had to be taken into account in calculating the staff numbers of the undertaking, where they meet the conditions laid down in Article L. 1111-2, it has not yet ruled on the interpretation of the staff numbers of the undertaking as regards collective redundancies on economic grounds.

Grounds for the reference for a preliminary ruling

14 It is common ground that the company, which has cut 29 of the 39 jobs that made up its workforce, did not draw up or implement an employment protection plan before giving the relevant employees notice of their dismissal.

15 The employee, relying on that failure in order to challenge the validity of her dismissal, submits that as the number of workers normally employed by the company was at least equal to the threshold of 50 persons provided for in Article L. 1233-61 of the Labour Code, the company was required, under that provision, to implement such an employment protection plan before giving notice of dismissal.

16 It is not disputed that on 11 December 2018, when the collective redundancy procedure was initiated, 11 employees of GSF Jupiter were working for the company under a service provision agreement.

17 However, the parties disagree as to whether the persons supplied by GSF Jupiter must be counted in order to determine whether the threshold of 50 persons laid down in Article L. 1233-61 of the Labour Code was attained.

18 In its additional written statement, the company submits that there should be some correspondence between the staff numbers taken into account and the measure represented by the employment protection plan. It notes that a broad interpretation of the concept of staff numbers is justified only when the measures subject to a condition relating to staff numbers are likely to benefit employees – as is the case, for example, when bodies representing staff are set up within the company and supply staff are allowed to vote in the elections. By contrast, the company maintains that since the staff supplied could not be dismissed by the undertaking they work for, and thus were not eligible for the measures under the employment protection plan, they should not be taken into account in calculating the staff numbers required for the implementation of that plan.

19 Nevertheless, the Court of Justice has held that the concept of 'worker', referred to in Article 1(1)(a) of Council Directive 98/59/EC of 20 July 1998, cannot be defined by reference to the legislation of the Member States but must be given an autonomous and independent meaning in the EU legal order. Otherwise, the methods for calculation of the thresholds laid down in that provision, and therefore the thresholds themselves, would be within the discretion of the Member

Anonymised version

WORKING DOCUMENT

States, which would allow the latter to alter the scope of that directive and thus to deprive it of its full effect (judgment of 9 July 2015, *Balkaya*, C-229/14, EU:C:2015:455, paragraph 33).

20 Therefore, it is appropriate to ask the Court of Justice whether staff supplied to an undertaking by an outside undertaking should be considered as having the status of worker normally employed by the user undertaking within the meaning of Article 1(1)(a) of Council Directive 98/59/EC of 20 July 1998.

ON THOSE GROUNDS, the Court,

having regard to Article 267 of the Treaty on the Functioning of the European Union;

REFERS the following question to the Court of Justice of the European Union:

Must Article 1(1)(a) of Council Directive 98/59/EC of 20 July 1998 on the approximation of the laws of the Member States relating to collective redundancies, according to which:

(a) ‘collective redundancies’ means dismissals effected by an employer for one or more reasons not related to the individual workers concerned where, according to the choice of the Member States, the number of redundancies is:

(i) either, over a period of 30 days:

- at least 10 in establishments normally employing more than 20 and less than 100 workers,

- at least 10% of the number of workers in establishments normally employing at least 100 but less than 300 workers,

- at least 30 in establishments normally employing 300 workers or more;

(ii) or, over a period of 90 days, at least 20, whatever the number of workers normally employed in the establishments in question,

be interpreted as meaning that staff supplied to the undertaking by an outside undertaking who are present on the premises and who normally work for the user undertaking when the redundancy procedure is implemented must be considered as workers when calculating the staff numbers provided for by that provision?

STAYS the appeal proceedings pending the decision of the Court of Justice of the European Union;

[…] [procedures for sending the file in the case]

[…] [customary wording and signatures of the members of the formation of the Court]

Anonymised version

WORKING DOCUMENT