Anonymised version

Case C-249/24

Request for a preliminary ruling

Date lodged:

4 April 2024

Referring court:

Cour de cassation (France)

Date of the decision to refer:

3 April 2024

Appellants:

RT

ED

Respondent:

Ineo Infracom

[…] JUDGMENT OF THE COURT OF CASSATION, SOCIAL CHAMBER,

OF 3 APRIL 2024

1. RT, […] 84320 Entraigues-sur-la-Sorgue,

2. ED, […] 84300 Cavaillon,

have respectively lodged Appeals Nos. […] against two judgments delivered on 1 February 2022 by the cour d'appel de Nîmes (Court of Appeal, Nîmes) […], in the disputes between them and the company Ineo Infracom, […] 21000 Dijon, respondent in the appeal on a point of law.

The appellants each reply, in support of their appeals, on two grounds of appeal in cassation.

[…] the Social Chamber of the Court of Cassation, […] has delivered the following judgment.

Joinder

1 On account of the connection between them, Appeals Nos. [OMISSIS] have been joined.

Facts and procedure

2 According to the judgments under appeal (Nîmes, 1 February 2022) and the submissions, after the company France Télécom informed it of its decision not to renew the contract covering the Departments of Gard and Lozère, the company Inéo Infracom, pending more lasting solutions, offered to the 82 employees attached to the Sud-Est branch temporary posts in other regions from 1 July 2013, under the long-distance travelling to work regime provided for in the applicable national collective agreement for public works workers of 15 December 1992.

3 It accordingly notified RT and ED of their long-distance duty travel to the Ivry-sur-Seine branch and the Vitrolles branch respectively, from 1 July to 28 September 2013, and informed them that the address to which they were attached for administrative purposes was changing to the city of Nîmes.

4 The employees refused those changes on 28 June 2013 and, contemporaneously with nine other employees, applied to the labour court asking it to terminate their employment contracts.

5 Taking the view that the undertaking's current activity regularly involved the geographical redeployment of site staff as a result of losing or winning contracts and that no reduction in staff was planned, the employer and several representative trade union organisations concluded, on 29 July 2013, an internal mobility agreement. Pursuant to that agreement, two job offers were sent to each of the employees who refused them, on 30 September and 30 December 2013 in the case of RT, and on 27 November 2013 and 20 January 2014 in the case of ED.

6 Having been dismissed, along with nine other employees, on economic grounds on 10 June 2014 pursuant to Article L. 2242-23 of the code du travail (French Labour Code), they brought alternative proceedings before the industrial relations court challenging their dismissal.

7 By judgments of 3 April 2017, a Conseil de prud'hommes (Labour Court, France) ruled that RT's employment contract should be terminated on the ground of fault on the part of the employer, ordered the employer to pay to the employee sums by way of damages and dismissed ED's applications.

8 By judgments of 1 February 2022, the Court of Appeal, setting aside the judgment concerning RT and ruling again, dismissed RT's applications and upheld the judgment concerning ED.

9 In order to come to that ruling, the Court of Appeal held, first, that the mobility agreement signed on 29 July 2013 by the majority of the representative trade union organisations within the undertaking after the enactment of Law No 2013-504 of 14 June 2013 expressly mentioned that it has been negotiated outside the context of any planned staff reduction and the possibility of any fraud was excluded. It inferred from this that the employer had not infringed Articles 1 and 2 of Council Directive 98/59/EC of 20 July 1998 on the approximation of the laws of the Member States relating to collective redundancies, since they were not applicable in the absence of collective redundancies.

Examination of the grounds of appeal

The second ground of appeal

Wording of the ground of appeal

10 The employees criticise the judgments for dismissing their application for a declaration that the redundancies were void and for dismissing their application for payment of sums by way of damages for invalid dismissal and for failing to meet the obligation to implement an employment protection plan, when 'according to Articles 1 and 2 of Directive No 98/59/EC, where an employer is contemplating collective redundancies for one or more reasons not related to the individual workers concerned, he or she must begin consultations with the workers' representatives in good time with a view to reaching an agreement; those consultations must, at least, cover ways and means of avoiding collective redundancies or reducing the number of workers affected, and of mitigating the consequences by recourse to accompanying business measures aimed, inter alia, at aid for redeploying or retraining workers made redundant; Article 27 of the Charter of Fundamental Rights of the European Union establishes the right of "workers or their representatives …, at the appropriate levels [to] be guaranteed information and consultation in good time in the cases and under the conditions provided for by [Union] law and national laws and practices"; Article 21 of the European Social Charter provides that "with a view to ensuring the effective exercise of the right of workers to be informed and consulted within the undertaking, the Parties undertake to adopt or encourage measures enabling workers or their representatives, in accordance with national legislation and practice … to be consulted in good time on proposed decisions which could substantially affect the interests of workers, particularly on those decisions which could have an important impact on the employment situation in the undertaking"; under the fourth paragraph of Article L. 2242-23, of the Labour Code, as amended by Law No 2013-504 of 14 June 2013, "where one or more employees refuse the application to their employment contracts of the terms of the internal mobility agreement mentioned in the first paragraph of Article L. 2242-21, their dismissal is based on economic grounds, shall be declared in accordance with the procedure for an individual redundancy for economic reasons and gives the right to support and redeployment measures which must be envisaged in the agreement adapting

the scope and implementation arrangements of the internal redeployment laid down in Articles L. 1233-4 and L. 1233-4-1"; it is for the national court to verify, taking into account the whole body of rules of national law and applying the methods of interpretation recognised by national law, whether it can arrive at an interpretation of that law that ensures the full effect of Articles 1 and 2 of Directive 98/59/EC and achieves an outcome consistent with the objective pursued by it; where it is impossible to interpret a national rule in a manner consistent with Articles 1 and 2 of Directive No 98/59/EC and Articles 21 of the European Social Charter and 27 of the Charter of Fundamental Rights of the European Union, the national court must disapply that national legislation, since that obligation applies to the national court under Articles 1 and 2 of Directive No 98/59/EC and Articles 21 of the European Social Charter and Article 27 of the Charter of Fundamental Rights of the European Union where the dispute is between an employee and an employer which has the status of a public authority and under Articles 21 of the European Social Charter and 27 of the Charter of Fundamental Rights where the dispute is between an employee and an employer who is a private individual; it follows from this that, notwithstanding the reference in the fourth paragraph of Article L. 2242-23 of the Labour Code to "an individual redundancy for economic reasons", an employer who, for one or more reasons not related to the individual employees concerned, intends to abolish posts in the case of their refusal of the professional or geographical mobility proposals made to them under an internal mobility agreement is required to establish an employment protection plan where the conditions laid down in Article L. 1233-61 of the Labour Code have been fulfilled; in order to state that the provisions of Article L. 1235-10 of the Labour Code on the employment protection plan are inapplicable and that the application for the invalidity of the dismissal is unjustified, the Court of Appeal held that "according to the fourth paragraph of Article L. 2242-23 of the Labour Code, which has since been amended, where one or more employees refuse the application to their employment contracts of the terms of the internal mobility agreement mentioned in the first paragraph of Article L. 2242-21, their dismissal is based on economic grounds, [and] is to be declared in accordance with the procedure for an individual dismissal for economic reasons" and that "the employee was notified of his individual dismissal for economic reasons pursuant to those provisions by letter of 10 June 2014"; it inferred from this that "the employer does not appear to have infringed Article L. 1233-61 et seq. of the Labour Code on the employment protection plan or Articles 1 and 2 of Council Directive 98/59/EC of 20 July 1998 on the approximation of the laws of the Member States relating to collective redundancies, since they were not applicable in the absence of collective redundancies"; in so ruling, when the employer was obliged to implement an employment protection plan guaranteeing that employees be informed and consulted in good time, as well as guaranteeing support and redeployment measures, if the redundancies declared by the employer, irrespective of their status as individual redundancies for economic reasons as laid down in Article L. 2242-23 of the Labour Code, concerned at least ten employees in the same thirty-day period, the Court of Appeal erred in law in its application of the

fourth paragraph of Article L. 2242-23 of the Labour Code, as amended by Law No 2013-504 of 14 June 2013, by refusing to apply Articles L. 1233-3 of the Labour Code, as amended by Law No 2008-67 of 21 January 2008, L. 1233-61 of the Labour Code, as amended by Law No 2012-387 of 22 March 2012, L. 1233-62 of the Labour Code in the version prior to its amendment by Law No 2016-1088 of 8 August 2016, and L. 1235-10 of the Labour Code, as amended by Law No 2013-504 of 14 June 2013, as interpreted in the light of Articles 1 and 2 of Directive No 98/59/EC, 27 of the Charter of Fundamental Rights and 21 of the European Social Charter.'

11 In the alternative, they request that the following questions be referred to the Court of Justice of the European Union:

'Is Article 2 of Directive 98/59/EC of the Council of the European Union of 20 July 1998 to be interpreted as meaning that an employer must begin the consultations provided for in that article if it plans to make a number of individual redundancies for economic reasons owing to the employees' refusal to consent to the amendment of their employment contracts under an internal mobility agreement, where the number of redundancies planned over the same period may be classified as collective redundancies within the meaning of Article 1[a](i) and (ii) of the directive?

Does the informing or consultation of the works council before the conclusion of an internal mobility agreement with representative trade union organisations, pursuant to Article L. 2242-21 et seq. of the Labour Code, relieve the employer of its obligation to inform and consult the staff representatives, in accordance with Article 2(2) to 2(4) of Directive 98/59/EC, in the case of dismissal of employees who have refused the application to their contracts of the terms of that agreement, where the number of planned redundancies exceeds the number of redundancies specified in Article 1(a) of that directive?'

Applicable legislation

European Union law

12 According to Article 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:

'1. For the purposes of this Directive:

(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.'

13 Article 2 of Directive 98/59/EC provides that:

'1. Where an employer is contemplating collective redundancies, he shall begin consultations with the workers' representatives in good time with a view to reaching an agreement.

2. These consultations shall, at least, cover ways and means of avoiding collective redundancies or reducing the number of workers affected, and of mitigating the consequences by recourse to accompanying social measures aimed, inter alia, at aid for redeploying or retraining workers made redundant. Member States may provide that the workers' representatives may call on the services of experts in accordance with national legislation and/or practice.

3. To enable workers' representatives to make constructive proposals, the employers shall in good time during the course of the consultations:

(a) supply them with all relevant information and

(b) in any event notify them in writing of:

(i) the reasons for the projected redundancies;

(ii) the number of categories of workers to be made redundant;

(iii) the number and categories of workers normally employed;

(iv) the period over which the projected redundancies are to be effected; …'

National law

14 Under the first paragraph of Article L. 2242-21 of the Labour Code, as amended by Law No 2013-504 of 14 June 2013, the employer may start negotiations on the conditions of the professional or geographical mobility internal to the company as part of collective measures of common project organisation without downsizing.

15 Under Article L. 2242-22 of the Labour Code, as amended by Law No 2013-504 of 14 June 2013, the agreement resulting from the negotiations provided for in Article L. 2242-21 must contain in particular:

1. Limitations on mobility beyond the geographical area of employment of the employee, as specified in the agreement, with respect for the private and family life of the employee in accordance with Article L. 1121-1;

2. Measures to reconcile work and personal and family life and to take into account situations related to disability and health constraints;

3. Accompanying measures for mobility, in particular training activities as well as aid for geographical mobility, including employer participation in compensation for any loss of purchasing power and transport expenses.

The terms of the collective agreement concluded under Article L. 2242-21 and the present article cannot have the effect of causing a decrease in the level of remuneration or personal classification of the employee and must ensure the maintenance or improvement of the employee's in-service training.

16 According to Article L. 2242-23 of the Labour Code, as amended by Law No 2013-504 of 14 June 2013, the collective agreement resulting from the negotiations provided for in Article L. 2242-21 must be brought to the attention of each of the employees concerned.

The terms of the agreement concluded under Articles L. 2242-21 and L. 2242-22 are applicable to the employment contract. Any terms of the employment contract which are contrary to the agreement are to be suspended.

Where, following a consultation phase enabling the employer to take into account the personal and family constraints of each of the employees potentially concerned, the employer wishes to implement an individual mobility measure provided for in the agreement concluded under this article, it must obtain the employee's agreement in accordance with the procedure laid down in Article L. 1222-6.

Where one or more employees refuse the application to their employment contract of the terms of the internal mobility agreement referred to in the first paragraph of Article L. 2242-21, their dismissal is based on economic grounds, is to be declared in accordance with the procedure for an individual dismissal for economic reasons and gives the right to support and redeployment measures which must be

envisaged in the agreement adapting the scope and implementation arrangements of the internal redeployment laid down in Articles L. 1233-4 and L. 1233-4-1.

17 According to Article L. 2323-6 of the Labour Code, in the version prior to its amendment by Law No 2015-994 of 17 August 2015, the works council must be informed and consulted before any decision by the employer on matters concerning the organisation, management and general running of the undertaking and, in particular, on measures likely to affect the volume or structure of the staff, working hours, conditions of employment, working conditions and professional training.

18 According to the settled case-law of the Court of Cassation (Soc., 5 May 1998, Appeal No 96-13.498, Bull., V, no 219), it follows from a reading of Article L. 2323-2 in conjunction with Article L. 2323-6, (formerly L. 431-5 and L. 432-1) of the Labour Code applicable at the time that the decision taken by the employer must be preceded by consultation of the works council where it relates to one of the matters or measures referred to in the second of those articles, there being no need to distinguish whether the decision at issue is a unilateral decision or takes the form of the negotiation of a universally applicable collective agreement concerning one of the items legally submitted to the opinion of the works council.

Grounds for the reference for a preliminary ruling

19 The Court of Justice of the European Union has ruled (CJEU, judgment of 21 September 2017, *Socha*, C-149/16) that Article 1(1) and Article 2 of Council Directive 98/59/EC of 20 July 1998 on the approximation of the laws of the Member States relating to collective redundancies must be interpreted as meaning that an employer is required to engage in the consultations provided for in Article 2 when it intends, to the detriment of the employees, to make a unilateral amendment to the terms of remuneration which, if refused by the employees, will result in termination of the employment relationship, to the extent that the conditions laid down in Article 1(1) of that directive are fulfilled.

20 Moreover, the Court of Justice of the European Union (CJEU, judgment of 22 April 2009, *Akavan Erityisalojen Keskusliitto AEK and Others*, C-44/08) has stated that the raison d'être and effectiveness of consultations with the workers' representatives presuppose that the factors to be taken into account in the course of those consultations have been determined, given that it is impossible to undertake consultations in a manner which is appropriate and consistent with their objectives when there has been no definition of the factors which are of relevance with regard to the collective redundancies contemplated. Where a decision deemed likely to lead to collective redundancies is merely contemplated and where, accordingly, such collective redundancies are only a probability and the relevant factors for the consultations are not known, those objectives cannot be achieved. It has stated that: '2. Whether the obligation has arisen for the employer to start consultations on the collective redundancies contemplated does not depend

on whether the employer is already able to supply to the workers' representatives all the information required in Article 2(3)(b) of Directive 98/59.'

21 The fourth paragraph of Article L. 2242-23 of the Labour Code, which provides that dismissal based on the employee's refusal of the application to his or her contract of the terms of the mobility agreement negotiated must be declared in accordance with the procedure for an individual redundancy for economic reasons, therefore precludes the application of the provisions of Articles L. 1233-28 to L. 1233-33 of the Labour Code on the procedure for informing and consulting the works council or staff representatives where the employer is contemplating the collective redundancies for economic reasons of at least ten employees in the same thirty-day period.

22 Therefore, the question arises as to whether the dismissals for economic reasons based on the refusal by the employees to consent to the terms of a collective mobility agreement being applied to their employment contract must be regarded as constituting a termination of the employment contract which occurs on the employer's initiative for one or more reasons not related to the individual workers concerned, within the meaning of the second subparagraph of Article 1(1) of Council Directive 98/59/EC, with the result that they must be taken into account for the purpose of calculating the total number of redundancies.

23 If the first question is answered in the affirmative, where the number of planned redundancies exceeds the number of redundancies specified in Article 1(a) of the aforementioned directive, does the informing and consultation of the works council before the conclusion of an internal mobility agreement with representative trade union organisations, pursuant to Article L. 2242-21 et seq. of the Labour Code, relieve the employer of its obligation to inform and consult the staff representatives, in accordance with Article 2(2) and 2(4) of Directive 98/59/EC?

ON THOSE GROUNDS, the Court:

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

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

'1. Is the second subparagraph of Article 1(1) of Council Directive 98/59/EC on the approximation of the laws of the Member States relating to collective redundancies to be interpreted as meaning that dismissals for economic reasons based on the refusal by employees to consent to the terms of a collective mobility agreement being applied to their employment contract must be regarded as constituting a termination of the employment contract which occurs on the employer's initiative for one or more reasons not related to the individual workers concerned, with the result that they must be taken into account for the purpose of calculating the total number of redundancies?

2. If the first question is answered in the affirmative, where the number of redundancies contemplated exceeds the number of redundancies specified in Article 1(a) of the aforementioned directive, is Article 2(2) to 2(4) of Directive 98/59/EC to be interpreted as meaning that the informing and consultation of the works council before the conclusion of an internal mobility agreement with representative trade union organisations, pursuant to Article L. 2242-21 et seq. of the code du travail (French Labour Code), relieve the employer of its obligation to inform and consult the staff representatives?'

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

[…]