JUDGMENT OF THE COURT (Second Chamber)

27 January 2005 *

In Case C-188/03,

REFERENCE for a preliminary ruling under Article 234 EC from the Arbeitsgericht Berlin (Germany), made by decision of 30 April 2003, received at the Court on 7 May 2003, in the proceedings

Irmtraud Junk

v

Wolfgang Kühnel,

THE COURT (Second Chamber),

composed of C.W.A. Timmermans, President of the Chamber, R. Silva de Lapuerta, C. Gulmann (Rapporteur), P. Kūris and G. Arestis, Judges,

* Language of the case: German.

Advocate General: A. Tizzano,
Registrar: M.-F. Contet, Principal Administrator,

having regard to the written procedure and further to the hearing on 15 July 2004,

after considering the observations submitted on behalf of:

— the Austrian Government, by E. Riedl, acting as Agent,

— the United Kingdom Government, by R. Caudwell, acting as Agent, and T. Ward, Barrister,

— the Commission of the European Communities, by D. Martin and H. Kreppel, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 30 September 2004,

gives the following

Judgment

1 The reference for a preliminary ruling concerns the interpretation of Articles 1 to 4 of 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) ('the directive').

2 That reference has been submitted in a dispute between Mrs Junk and Mr Kühnel, in his capacity as the liquidator of the assets of the company which employed the claimant, concerning Mrs Junk's redundancy.

The legal framework

Community law

3 Articles 1 to 4 of the directive provide:

'*Article 1*

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;

...

Article 2

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 [and] 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;

(v) the criteria proposed for the selection of the workers to be made redundant in so far as national legislation and/or practice confers the power therefor upon the employer;

(vi) the method for calculating any redundancy payments other than those arising out of national legislation and/or practice.

The employer shall forward to the competent public authority a copy of, at least, the elements of the written communication which are provided for in the first subparagraph, point (b), subpoints (i) to (v).

...

Article 3

1. Employers shall notify the competent public authority in writing of any projected collective redundancies.

However, Member States may provide that in the case of planned collective redundancies arising from termination of the establishment's activities as a result of a judicial decision, the employer shall be obliged to notify the competent public authority in writing only if the latter so requests.

This notification shall contain all relevant information concerning the projected collective redundancies and the consultations with workers' representatives provided for in Article 2, and particularly the reasons for the redundancies, the number of workers to be made redundant, the number of workers normally employed and the period over which the redundancies are to be effected.

2. Employers shall forward to the workers' representatives a copy of the notification provided for in paragraph 1.

The workers' representatives may send any comments they may have to the competent public authority.

Article 4

1. Projected collective redundancies notified to the competent public authority shall take effect not earlier than 30 days after the notification referred to in Article 3(1) without prejudice to any provisions governing individual rights with regard to notice of dismissal.

Member States may grant the competent public authority the power to reduce the period provided for in the preceding subparagraph.

2. The period provided for in paragraph 1 shall be used by the competent public authority to seek solutions to the problems raised by the projected collective redundancies.

3. Where the initial period provided for in paragraph 1 is shorter than 60 days, Member States may grant the competent public authority the power to extend the initial period to 60 days following notification where the problems raised by the projected collective redundancies are not likely to be solved within the initial period.

Member States may grant the competent public authority wider powers of extension.

The employer must be informed of the extension and the grounds for it before expiry of the initial period provided for in paragraph 1.

4. Member States need not apply this Article to collective redundancies arising from termination of the establishment's activities where this is the result of a judicial decision.'

National law

4 Under German law, Paragraphs 17 and 18 of the Kündigungsschutzgesetz (Law on Employment Protection), in the version of 25 August 1969 (BGBl. 1969 I, p. 1317), amended by the Law of 23 July 2001 (BGBl. 2001 I, p. 1852) ('the KSchG'), which are applicable in the context of insolvency proceedings, govern collective redundancy procedures.

5 Paragraph 17 of the KSchG provides that, if he intends to effect a number of redundancies within a period of 30 calendar days, an employer is required to:

— provide the works council, in good time, with all relevant information, in particular the reasons for the planned redundancies, the number and categories of workers to be made redundant, the number of workers normally employed, the period over which it is planned to carry out the redundancies and the criteria for selecting the workers to be made redundant;

— notify his intention to the labour office by forwarding to it a copy of the notification sent to the works council and the opinion of the latter on those redundancies.

6 Paragraph 18 of the KSchG provides as follows:

'(1) Redundancies which must be notified under Paragraph 17 may take effect less than one month after the labour office has received the notification only with the latter's consent; consent may be given retroactively with effect from the time at which the application was filed.

(2) In certain cases, the labour office may decide that the redundancies shall take effect not earlier than at most two months after receipt of the notification.

...'

7 Paragraph 102 of the Betriebsverfassungsgesetz (Law on the Organisation of Businesses), in its version of 25 September 2001 (BGBl. 2001 I, p. 2518), amended by the Law of 10 December 2001 (BGBl. 2001 I, p. 3443), ('the BetrVG') provides that an employer who intends to carry out collective redundancies is required to respect the right of the works council to participate and be consulted in the procedure. Termination of contracts of employment announced before the conclusion of this procedure is null and void.

8 Finally, Paragraph 111 et seq. of the BetrVG confers a right of participation on that works council in the event of operational changes, including the case of collective redundancy. An operational change effected without compliance with those provisions is penalised, pursuant to Paragraph 113 of the BetrVG, by an obligation on the employer to remedy the damage through payment of compensation.

The dispute in the main proceedings and the questions referred for a preliminary ruling

9 Mrs Junk was employed as a care assistant and domestic carer by the company AWO Gemeinnützige Pflegegesellschaft Südwest mbH ('AWO'). AWO, which had approximately 430 employees, was engaged in the supply of domestic care services. A works council had been established within the company.

10 On 31 January 2002, AWO lodged a request for the opening of insolvency proceedings on grounds of financial difficulties. With effect from 1 February 2002, it released all of its employees from their obligation to work and did not pay them any remuneration for January 2002. In mid-June 2002, the company still had 176 employees. By the end of August 2002, that number had been reduced to 172.

11 On 5 February 2002, the insolvency proceedings were opened, followed, on 1 May 2002, by the liquidation proceedings. Mr Kühnel was appointed liquidator.

12 By letter of 19 June 2002, which was received the same day, Mr Kühnel informed the chairman of the works council that, as a consequence of the closure of the company, he intended to terminate all remaining contracts of employment, including that of Mrs Junk, in compliance with the maximum three-month period of notice laid down in the insolvency proceedings, that is to say, with effect from 30 September 2002, and to carry out a collective redundancy. Attached to the letter was a list containing the names, addresses, dates of birth and other information relating to the workers to be made redundant.

13 By letter of 26 June 2002, the chairman of the works council informed the liquidator that it was also eager to see the matter resolved swiftly.

14 Mr Kühnel had previously concluded with the works council, on 23 May 2002, a compensation agreement in respect of the cessation of AWO's activities and a social plan within the terms of Paragraph 112 of the BetrVG.

15 By letter of 27 June 2002, which Mrs Junk received on 29 June 2002, Mr Kühnel terminated her contract of employment, with effect from 30 September 2002, on grounds relating to the business.

16 Mrs Junk challenged that redundancy by application lodged with the Arbeitsgericht (Labour Court) Berlin on 17 July 2002.

17 By letter of 27 August 2002, which was received on the same date, Mr Kühnel notified the labour office that 172 employees were to be made redundant with effect from 30 September 2002, in accordance with Paragraph 17(3) of the KSchG. He attached to that notification the opinion of the works council.

18 Mrs Junk submitted before the Arbeitsgericht that her redundancy was ineffective.

19 The Arbeitsgericht takes the view that resolution of the dispute before it turns on the question whether the redundancy in question is invalid under Paragraph 18(1) of the KSchG because of infringements of the provisions governing collective redundancies.

20 The Arbeitsgericht points out that, according to a view which has hitherto been dominant in German law, the provisions applicable in cases of collective redundancies do not refer to the termination of the contracts of employment, but to the date on which the workers actually leave the undertaking, that is to say, generally on the expiry of their periods of notice of redundancy.

21 The Arbeitsgericht notes that Paragraphs 17 and 18 of the KSchG and the German-language version of the directive use the term 'Entlassung'.

22 The Arbeitsgericht stresses the fact that German law draws a distinction between the concept of 'Kündigung' and that of 'Entlassung'. The first corresponds to a unilateral declaration by one of the parties to a contract of employment of its intention to put an end to the employment relationship. The second concept corresponds to the actual cessation of the employment relationship by reason of the termination of the contract of employment decided on by the employer.

23 The Arbeitsgericht concludes that, applied to the provisions governing collective redundancies, the distinction between 'Kündigung' and 'Entlassung' has the effect that the existence of a collective redundancy is not determined by the date on which the contracts of employment are terminated, but by the date on which the individual periods of notice of redundancy expire. In those circumstances, the employer could bring the matter before the works council and proceed with notification to the labour office after termination of the contracts of employment, since he would be doing so before the actual cessation of the employment relationships.

24 The Arbeitsgericht, however, takes the view that, within the terms of the directive, which seeks to protect workers, the concept of 'redundancy' must be construed as coinciding with the termination of the contract by the employer, with the result that the procedure for consultation of the workers' representatives and notification of the competent authority must have been complied with in full before the contracts of employment are terminated.

25 In those circumstances, the Arbeitsgericht Berlin decided to stay proceedings and to refer the following questions to the Court for a preliminary ruling:

'1. Is [the directive] to be interpreted to the effect that "redundancy" ["Entlassung"] within the meaning of Article 1(1)(a) thereof is to be construed as meaning the notice of dismissal ["Kündigung"] as the first act in bringing the employment relationship to an end or does "redundancy" mean the termination of the employment relationship upon expiry of the period of notice?

2. If "redundancy" ["Entlassung"] is to be construed as meaning the notice of dismissal, does the directive require that both the consultation procedure under Article 2 of the directive and the notification procedure under Articles 3 and 4 thereof must have been concluded before the notices of dismissal ["Kündigungen"] are announced?'

The questions submitted for a preliminary ruling

26 The object of the dispute in the main proceedings is to assess the lawfulness of a redundancy in the light of the consultation and notification procedures set out in Article 2 and in Articles 3 and 4 of the directive respectively. For the purposes of that appraisal, it is necessary to determine at what point in time a redundancy occurs, that is to say, the point in time at which the event constituting redundancy takes place.

27 The resolution of the dispute in the main proceedings thus calls for clarification of the content of the concept of 'redundancy' within the meaning of the directive.

28 Article 1(1)(a) of the directive defines 'collective redundancies' but fails to indicate the event triggering redundancy or to refer in this regard to the laws of the Member States.

29 In this connection, the need for uniform application of Community law and the principle of equality require that the terms of a provision of Community law which makes no express reference to the law of the Member States for the purpose of determining its meaning and scope must normally be given an autonomous and uniform interpretation throughout the Community, which must take into account the context of the provision and the purpose of the legislation in question (see, inter alia, Case C-287/98 *Linster* [2000] ECR I-6917, paragraph 43, and Case C-55/02 *Commission* v *Portugal* [2004] ECR I-9387, paragraph 45).

30 That being so, the concept of 'redundancy' referred to in Articles 2 to 4 of the directive must be given an autonomous and uniform interpretation within the Community legal system.

The first question

31 By its first question, the Arbeitsgericht is in substance seeking to ascertain whether Articles 2 to 4 of the directive are to be construed as meaning that the event constituting redundancy consists of the expression by the employer of his intention to put an end to the contract of employment or of the actual cessation of the employment relationship on the expiry of the period in the notices of redundancy.

32 According to the information provided by that court, the term 'Entlassung' used in the German-language version of the directive refers, in German law, to the actual cessation of the employment relationship and not to the expression by the employer of his intention to put an end to the contract of employment.

33 It must be borne in mind in this regard that, according to settled case-law, the necessity for uniform application and accordingly for uniform interpretation of a Community measure makes it impossible to consider one version of the text in isolation, but requires that it be interpreted on the basis of both the real intention of its author and the aim he seeks to achieve, in the light, in particular, of the versions in all languages (see, inter alia, Case 29/69 *Stauder* [1969] ECR 419, paragraph 3; Case 55/87 *Moksel* [1988] ECR 3845, paragraph 15; and Case C-268/99 *Jany and Others* [2001] ECR I-8615, paragraph 47).

34 With regard to the directive, it should be pointed out that, in its versions in languages other than German, the term used in the place of 'Entlassung' either covers at the same time both of the events referred to by the Arbeitsgericht or refers rather to the expression by the employer of his intention to terminate the contract of employment.

35 Next, it must be noted that Article 2(1) of the directive imposes an obligation on the employer to begin consultations with the workers' representatives in good time in the case where he 'is contemplating collective redundancies'. Article 3(1) requires the employer to notify the competent public authority of 'any projected collective redundancies'.

36 The case in which the employer 'is contemplating' collective redundancies and has drawn up a 'project' to that end corresponds to a situation in which no decision has yet been taken. By contrast, the notification to a worker that his or her contract of employment has been terminated is the expression of a decision to sever the employment relationship, and the actual cessation of that relationship on the expiry of the period of notice is no more than the effect of that decision.

37 Thus, the terms used by the Community legislature indicate that the obligations to consult and to notify arise prior to any decision by the employer to terminate contracts of employment.

38 Finally, this interpretation is confirmed, in regard to the procedure for consultation of workers' representatives, by the purpose of the directive, as set out in Article 2(2), which is to avoid terminations of contracts of employment or to reduce the number of such terminations. The achievement of that purpose would be jeopardised if the consultation of workers' representatives were to be subsequent to the employer's decision.

39 The answer to the first question must therefore be that Articles 2 to 4 of the directive must be construed as meaning that the event constituting redundancy consists in the declaration by an employer of his intention to terminate the contract of employment.

The second question

40 By its second question, the Arbeitsgericht is seeking to ascertain whether an employer is entitled to carry out collective redundancies before the end of the consultation procedure set out in Article 2 of the directive and of the notification procedure set out in Articles 3 and 4 of the directive.

41 It follows already from the answer to the first question that an employer cannot terminate contracts of employment before he has engaged in the two procedures in question.

42 With regard to the consultation procedure, this is provided for, within the terms of Article 2(1) of the directive, 'with a view to reaching an agreement'. According to Article 2(2), this procedure 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 social measures'.

43 It thus appears that Article 2 of the directive imposes an obligation to negotiate.

44 The effectiveness of such an obligation would be compromised if an employer was entitled to terminate contracts of employment during the course of the procedure or even at the beginning thereof. It would be significantly more difficult for workers' representatives to achieve the withdrawal of a decision that has been taken than to secure the abandonment of a decision that is being contemplated.

45 A contract of employment may therefore be terminated only after the conclusion of the consultation procedure, that is to say, after the employer has complied with the obligations set out in Article 2 of the directive.

46 So far as concerns the procedure for notifying the competent public authority, it must be remembered that, in accordance with Article 3 of the directive, the employer is required to notify the competent authority of 'any projected collective redundancies'.

47 Under Article 4(2) of the directive, notification has the purpose of allowing the competent authority to seek solutions to the problems raised by the projected collective redundancies.

48 Article 4(2) states that the competent authority must use the period provided for in Article 4(1) for the purpose of seeking such solutions.

49 The period in question is one of at least 30 days following notification. Under the conditions laid down in the second subparagraph of Article 4(1) and in Article 4(3) of the directive, Member States may grant the competent public authority the power to reduce or extend that period.

50 Under the first subparagraph of Article 4(1) of the directive, collective redundancies, that is to say, termination of the contracts of employment, may take effect only after expiry of the period applicable.

51 That period consequently corresponds to the minimum period which must be available to the competent authority for the purpose of seeking solutions.

52 By setting out an express proviso in regard to provisions governing individual rights with regard to notice of dismissal, the first subparagraph of Article 4(1) of the directive is necessarily contemplating a situation in which contracts of employment have already been terminated, thereby setting such a period in motion. The proviso in regard to the expiry of a period of notice differing from that provided for by the directive would make no sense if no period of notice had started to run.

53 In those circumstances, it must be held that Articles 3 and 4 of the directive do not preclude termination of the contracts of employment during the course of the procedure which they institute, on condition that such termination occurs after the projected collective redundancies have been notified to the competent public authority.

54 The answer to the second question must therefore be that an employer is entitled to carry out collective redundancies after the conclusion of the consultation procedure provided for in Article 2 of the directive and after notification of the projected collective redundancies as provided for in Articles 3 and 4 of that directive.

Costs

55 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Second Chamber) rules as follows:

1. **Articles 2 to 4 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 construed as meaning that the event constituting redundancy consists in the declaration by an employer of his intention to terminate the contract of employment.**

2. **An employer is entitled to carry out collective redundancies after the conclusion of the consultation procedure provided for in Article 2 of Directive 98/59 and after notification of the projected collective redundancies as provided for in Articles 3 and 4 of that directive.**

[Signatures]