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Redundancy declared void based on directive's horizontal effect as regards collective redundancy thresholds (SP)

CONTRIBUTOR Sonia Cortés*

Summary

A Spanish Supreme Court decision issued on 17 October 2016 (no. 848/2016) declares employee terminations void because the employer failed to respect the proper collective redundancy procedures based on the thresholds provided by EU Directive 98/59. The thresholds in the Directive refer to the number of employees at the establishment, whereas thresholds under Spanish law refer to the whole company. In implementing the Directive, Spanish law had aimed at being more favourable to employees, but this did not happen on the facts of this case.

Facts

The company, Zardoya Otis, had a total workforce of 3,100 employees at many workplaces throughout Spain. The workplace in Mungia (in the Basque Country) had 77 employees. The company terminated 27 employees and transferred the others to other workplaces.

The works council brought legal proceedings against the company for failure to follow the collective redundancy procedure, including consultation, given that the number of terminated employees exceeded the threshold in Directive 98/59 (the 'Directive'), based on the number of employees at the establishment.

The company argued that the number of terminated employees did not exceed the threshold provided for by Spanish law, which was 30 employees out of the total of 3,100 employees in the company, given that only 27 were terminated.

Both the first instance court and the High Court of Justice in the Basque Country ruled that the redundancy was void for failure to follow the correct collective redundancy procedure, based on applying the threshold in the Directive.

The company appealed to the Supreme Court, based on infringement of Spanish law (namely Section 51.1 of the Spanish Workers' Statute and Section 9.3 of the Spanish Constitution) and previous Supreme Court rulings, arguing that the reference unit for the purposes of determining whether terminations constitute a collective redundancy should refer to the undertaking as a whole, rather than the specific workplace. The company referred to the Supreme Court's 2009 decision of 18 March 2009, in which the Supreme Court ruled that the relevant reference unit was the company as a whole (i.e. based on Spanish law). The company argued that the Directive does not have horizontal effect and that the company should not be liable for the incorrect implementation of the Directive, since it had simply followed the provisions of Spanish law.

Judgment

The dispute is therefore whether the threshold for a collective redundancy should refer to employees in the whole company, as provided for by Spanish law, or at the affected workplace, as provided for by Directive 98/59.

Following recent European Court of Justice rulings in *Wilson* (C-80/14, 30 April 2015), *Rabal Cañas* (C-80/14, 13 May 2015) and *Lyttle* (C-182/13, 13 May 2015), the Spanish Supreme Court applied the threshold in the Directive and determined that the company had failed to implement collective redundancy procedures. This meant the terminations were void and the employees entitled to reinstatement.

The Supreme Court stated that in its 2009 ruling it had already referred to the fact that the Directive's thresh-

* Sonia Cortés is a partner with Abdón Pedrajas & Molero, www.abdonpedrajas.com. Special thanks to Isabel Ruano, associate at Abdón Pedrajas & Molero.

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olds could be more protective than Spanish law in the event of a large number of terminations involving one sole workplace. The Court acknowledged that in implementing the Directive, Spain did not opt for either of the two possible threshold options provided for in section 1.1 of the Directive, but rather adopted a hybrid system that mixes both thresholds and criteria, i.e. either, (i) over a period of 30 days, "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". Further, Spain chose the 'undertaking' as the reference unit rather than the Directive's 'establishment'.

The Supreme Court also acknowledged the ECJ interpretation 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 Article 1.1.a of Directive 98/59 for the purposes of 'collective redundancies' is reached*."[1] It further acknowledged the ECJ's interpretation that "*the fact that the legislature offers Member States a choice between the options set out in Article 1.1.a.1 and a. 2 of Directive 98/59 indicates that the term 'establishment' cannot have a completely different meaning depending on which of the two alternatives proposed the Member State concerned chooses*."[2]

Based on this, the Supreme Court declared that the Mungia work site qualified as an 'establishment' based on the Directive and on national law: (i) from a quantitative point of view, since an 'establishment' normally employs more than 20 employees and (ii) from a qualitative view point, as "*an 'establishment', in the context of an undertaking, may consist of a distinct entity, having a certain degree of permanence and stability, which is assigned to perform one or more given tasks and which has a workforce, technical means and a certain organisational structure allowing for the accomplishment of those tasks*."[3] The Supreme Court acknowledged that to qualify as a collective redundancy required a minimum degree of relevance – which it was deemed to have in the case of Mungia, as 27 out of 77 employees were being made redundant.

The Supreme Court stated that Directives have no direct effect, as they are addressed to Member States, whilst this case involves litigation between private parties. But given that the Directive had been incorrectly implemented and its terms are clear, strict and unconditional, the Court felt it had a duty to interpret national law in a way that was consistent with the Directive (known as the 'principle of uniform interpretation'). As referred to in the ECJ *Faccini Dori* Case (C-91/-2), "*when applying national law, whether adopted before or after the directive, the national court that has to interpret that law must do so, as far as possible, in the light of the wording and the purpose of the directive so as to achieve the result it has in view*."[4] The Supreme Court further referred to the principle of direct effect (as opposed to horizontal effect), that has been applied in four discrimination cases[5].

The Supreme Court found that the Directive was clear in defining an 'establishment', rather than the undertaking as a whole, as the workplace. It provided extensive references to ECJ case law backing this up and particularly referred to the case of *Wilson*, in which the ECJ declared that the Directive required reference to dismissals made at each separate worksite.

The Court further stated that it was possible to apply the principle of uniform interpretation this case because the Spanish Workers' Statute (implementing the Directive) does not explicitly exclude the workplace as the reference unit, for example, with reference to employee representation rights.

The Supreme Court thus dismissed the appeal and confirmed the first instance judgment, holding that the redundancy was collective because the thresholds provided for by the Directive had been exceeded. It declared the redundancies void.

Commentary

Under Article 1 of the Directive, "*'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 or (ii) or, over a period of 90 days, at least 20, whatever the number of workers normally employed in the establishments in question.*"

Spanish law provides that there is a collective redundancy where more than 30 employees are made redundant in companies exceeding 300 employees. In this particular case, the Company terminated 27 employees at a workplace employing 77 employees, and had 3,100 employees overall. Therefore, the case should have been treated as a collective redundancy under the Directive, but not under Spanish law.

1. European Union Court of Justice, *Rabal Cañas*, dated 13 May 2015 (C-392/13).
2. European Union Court of Justice, *Wilson*, dated 30 April 2015 (C-80/14).
3. European Union Court of Justice, *Wilson*, dated 30 April 2015 (C-80/14).
4. European Union Court of Justice *Faccini Dori* case, dated 14 July 1994 (C-91/92). Also *Marleasing* (C-106/89), *Pfeiffer* (C-397/01), *Kükükdeveci* (Case 555/07), *Mon Car* (C-12/2008) and *Dansk Industri* (C-441/14).
5. *Mangold*, 19 January 2010; *Kükükdeveci*, 13 September 2011; *Prigge* and *Dansk Industri*.

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The Supreme Court provided extensive references to ECJ case law regarding what is meant by an 'establishment'. In the case of *Wilson*, the British employment tribunals had taken the view that the stores the affected employees worked in were separate 'establishments' on the basis that the dismissals were carried out by two large retail groups whose activities took place in different locations, with each one, in most cases, employing fewer than 20 employees. The ECJ declared that the term 'establishment' as used in Article 1(1)(a)(ii) of Directive 98/59 must be interpreted in the same way as it was in Article 1(1)(a)(i). Thus, Article 1(1)(a)(ii) should not preclude national legislation that lays down an obligation to inform and consult workers in the event of the dismissal of at least 20 workers from a particular establishment within an undertaking, rather than only where the total number of dismissals across all establishments or some of them reaches the threshold of 20 workers. The ECJ declared that it was for the referring court to establish whether that is the case in light of the facts.

In particular, in the *Rockfon* case (C-449/93, EU:C:1995:420) the Court decided that the term 'establishment' in Article 1(1)(a) of Directive 98/59 must be interpreted as designating the unit to which the workers made redundant are assigned to carry out their duties and that it is not essential in order for there to be an 'establishment' that the unit has a management that can independently carry out collective redundancies. Further, in the judgement in *Athinaïki Chartopoïïa* (C-270/05, EU:C:2007:101), the Court held that *"an 'establishment' may consist of a distinct entity, having a certain degree of permanence and stability, which is assigned to perform one or more given tasks and which has a workforce, technical means and a certain organisational structure allowing for the accomplishment of those tasks"* [6], but that the entity did not need to have any legal, economic, financial, administrative or technological autonomy[7]. Based on this, the ECJ declared in *Wilson* that the term 'establishment' in Article 1(1)(a)(ii) of Directive 98/59 must be interpreted in the same way as Article 1(1)(a)(i) of the Directive.

In declaring that the Directive threshold should apply, the Supreme Court's ruling means that collective redundancies in Spain should apply both the Directive thresholds and the Spanish thresholds – thus resulting in a complex and ultimately much more protective scenario for employees.

However, the defendant company could now consider whether it is feasible to sue Spain for failure to properly implement the Directive and claim back-pay and the salaries of the reinstated employees over the two years the proceedings have taken.

Comments from other jurisdictions

Austria (Magdalena Ziembicka, Barnert Egermann Illigasch Rechtsanwälte GmbH): By Austrian law implementing Directive 98/59, a 'collective redundancy' occurs if the following thresholds are reached over a period of 30 days: (i) at least five redundancies in establishments employing more than 20 but under 100 workers; (ii) at least 5% of the number of workers in establishments employing at least 100 but under 600 workers; (iii) at least 30 redundancies in establishments employing 600 workers or more; or (iv) at least five redundancies of workers who have reached the age of 50. The relevant provisions refer to the term 'establishment', as specified in the Directive. If the employer fails to follow the collective redundancy procedures (prior notification to the competent employment authority and adhering to the 'cooling-off' period following notification), the terminations are deemed void.

Therefore, Austria has chosen the option under Article 1(1)(a)(i) of the Directive and simultaneously – as permitted in Article 5 of the Directive – introduced more protective provisions for employees by lowering the threshold for establishments employing under 600 workers and providing an additional threshold for older workers. In any event, the provisions are at least as favourable to the workers as provided by the Directive.

Since the term 'establishment' within the meaning of the Directive 98/59 must be interpreted uniformly, it is likely that an Austrian court would also have classified the affected workplace as an 'establishment' and would, therefore have referred to the number of workers employed at the workplace rather, than in the whole company. Provided the terminations had been declared over a period of 30 days, an Austrian court would have concluded that there had been a collective redundancy and declared the redundancies void, as the company failed to follow the appropriate procedures. Unlike in the Spanish case, it would have been possible to base the ruling solely on the Austrian law implementing the Directive.

6. Paragraph 27 of *Chartopoïïa* and paragraph 49 of *Wilson*.
7. Paragraph 28 of *Chartopoïïa* and 51 of *Wilson*.

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