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ECJ 7 August 2018, case C-61/17 (Bichat), Collective redundancies

Miriam Bichat – v – Aviation Passage Service Berlin GmbH & Co. KG, German case

Legal background

Article 2(4) of Directive 98/59/EC (on collective redundancies) provides that the obligation imposed by the Directive shall apply irrespective whether the decision regarding the collective redundancies is being taken by the employer or by an undertaking controlling the employer. The provisions of Article 2(4) have been implemented by means of the German Protection against Dismissal Law (*Kündigungsschutzgesetz)*.

Facts

Ms Bichat (and two of her colleagues) were employed by APSB, to provide assistance to passengers at Berlin-Tegel Airport (Germany). APSB worked exclusively for GlobeGround Berlin GmbH (GGB). As it was making a loss, GGB terminated its contracts with APSB in stages and rehired these services outside the group. The outside service providers did not take on any staff from APSB.

On 22 September 2014, during a general meeting of APSB, GGB – as the only shareholder with voting rights – adopted a decision to cease APSB's activities as from 31 March 2015 and to dissolve the organisation.

In January 2015, APSB informed the works council of the contemplated collective redundancy and consulted with them. APSB did not take into account the works council's view that the alleged losses were fictitious (according to the works council). At the end of January 2015, APSB informed the employees that their employment would end on 31 August 2015.

The initial challenges to the collective redundancy were successful (it is not clear why), meaning that APSB was obliged to execute it again (for the same reasons). During subsequent challenges in court, the *Landesarbeitsgericht* Berlin-Brandenburg considered that the applicability of the Directive depended on the meaning of the phrase: "undertaking controlling the employer". If this were to be interpreted broadly, the dismissals could be void, whereas a narrow (and formal) interpretation would (likely) lead to the opposite conclusion. It therefore decided to stay proceedings and ask preliminary questions.

Question

Must the first subparagraph of Article 2(4) of Directive 98/59 be interpreted as meaning that the term 'undertaking controlling the employer' covers only an undertaking linked to that employer by shareholdings or voting rights, or whether it also covers an undertaking with a decisive contractual or factual influence over the employer?

Consideration

The phrase "undertaking controlling the employer" is not defined, nor does it refer to national legislation. It must therefore be interpreted autonomously and uniformly throughout the EU. As a preliminary point, the concept of 'control' as intended in the Directive refers to a situation in which an undertaking may adopt a strategic or commercial decision compelling the employer to contemplate or plan for collective redundancies (*Akavan*, C-44/08). Having said that, the wording of Article 2(4) alone does not make clear when an undertaking 'controls' the employer.

Observing the origins of the provision and the objective of the legislation, it seems that the provision aims to fill a gap in earlier legislation and clarify the obligations of employers who are part of a group of undertakings. Against a background of increasing presence of groups, it aimed to promote the protection of workers. Consequently, employers were obliged to start consultations either after its own decision or that of the controlling undertaking. This corresponds to the aim of consultations, which is to avoid dismissals or mitigate their consequences.

While the protection is broad, the criteria must still respect EU law and its principles, such as the principle of legal certainty. In those circumstances, it follows from the origins and objective of the provision that the

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term "undertaking controlling the employer" covers all undertakings which, by virtue of belonging to the same group or having a shareholding that gives them the majority of votes in the general meeting and/or the decision-making bodies within the employer, are able to require the latter to adopt a decision contemplating or planning for collective redundancies.

Situations also falling within that notion include an undertaking that does not have a majority of the votes, but still can exercise decisive influence compelling the employer to contemplate or plan for collective redundancies. This could be seen through the voting results of company bodies showing a relatively low level of participation by members at general meetings or the existence of pacts between members within the employer, for example.

However, the mere existence of a common interest between the employer and the other undertaking does not necessarily mean an undertaking controls the employer within the meaning of the Directive. In addition, a simple contractual relationship which does not involve decisive influence on dismissal decisions, is not sufficient to establish 'control' within the meaning of the Directive.

The ECJ noted that any extensive definition would require the national court to carry out complex investigations into the nature and intensity of the various interests involved with the employer. This could lead to uncertain results, so undermining the principle of legal certainty. For that reason (amongst others), the ECJ ruled in favour of a broad interpretation.

Ruling

The first subparagraph of Article 2(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 interpreted as meaning that the term 'undertaking controlling the employer' covers all undertakings linked to that employer by shareholdings in the latter or by other links in law which allow it to exercise decisive influence in the employer's decision-making bodies and compel it to contemplate or to plan for collective redundancies.

ECJ 6 September 2018, case C-527/16 (Alpenrind), Free movement, Social Insurance

Salzburger Gebietskrankenkasse, Bundesminister für Arbeit, Soziales und Konsumentenschutz (interested parties: Alpenrind GmbH and others), Austrian case

Questions

1. Must Article 5(1) of Regulation No 987/2009, read together with Article 19(2) thereof, be interpreted as meaning that an A1 certificate issued by the competent institution of a Member State under Article 12(1) of Regulation No 883/2004 is binding not only on the institutions of the Member State in which that activity is carried out, but also on the courts of that Member State?
2. a. Must Article 5(1) of Regulation No 987/2009, read together with Article 19(2) thereof, be interpreted as meaning that an A1 certificate, issued by the competent institution of a Member State under Article 12(1) of Regulation No 883/2004, binds both the social security institutions of the Member State in which the activity is carried out and the courts of that Member State so long as that certificate has not been withdrawn or declared invalid by the Member State in which it was issued, even if the competent authorities of the latter Member State and the Member State in which the activity is carried out have brought the matter before the Administrative Commission which held that that certificate has been incorrectly issued and must be withdrawn?
   b. Must Article 5(1) of Regulation No 987/2009, read together with Article 19(2) thereof, be interpreted as meaning that an A1 certificate issued by the competent institution of a Member State under Article 12(1) of Regulation No 883/2004, binds both the social security institutions of the Member State in which the activity was carried out and the courts of that Member State, if necessary, with retroactive effect, even though that certificate was issued only after that Member State determined that the worker was subject to compulsory insurance under its legislation?
3. Must Article 12(1) of Regulation No 883/2004 be interpreted as meaning that, in the case of a worker

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