Key Issues: **Social policy – collective redundancies**

Case: **Małgorzata Ciupa and Others v II Szpital Miejski**

Reference: **Case C-429/16, CJEU (Tenth Chamber), 21 September 2017**

Legislation: **Directive 98/59/EC**

Ms Ciupa and Others are employed by the Łódź Hospital under full-time employment contracts of unlimited duration. From 2009 the financial losses of the Łódź Hospital increased from year to year. In 2013 it was decided that the Łódź Hospital should become a commercial company, in preference to liquidation, which would have involved the loss of more than 100 jobs. On conversion, it was not intended to reduce jobs, so that the Łódź Hospital would be able to retain its contract with the national health fund for the provision of medical services. After exhausting all savings opportunities not affecting wages, the Łódź Hospital found itself forced to reduce the level of remuneration of its entire workforce. It therefore proposed a temporary 15% pay cut to all employees. About 20% of the employees accepted the cut. The other employees were given a notice of amendment of working and pay conditions on the ground of the '*need to carry out restructuring of the [Łódź Hospital's] personnel costs dictated by the difficult financial situation'*. The letter proposed that the employees, after expiry of the notice period, would receive a pay cut that would apply until 1 February 2015.

Ms Ciupa and Others brought an action before the District Court for Łódź-Śródmieście, Łódź, Poland, seeking for the amendment of their working and pay conditions to be declared inapplicable. The court dismissed the action. The Łódź Hospital, while consulting employees who were members of the trade union organisation within the company individually on the proposed amendment, did not contemplate effecting a collective redundancy, and therefore did not initiate the procedure applicable to redundancies.

According to the referring court, which is hearing the appeal brought by Ms Ciupa and Others, the case-law of the Supreme Court, Poland, on the question of whether the employer is subject to the obligations laid down in the relevant Polish Law when he gives his employees a notice of amendment, is unclear.

Under Polish law, where an employer contemplates effecting collective redundancies, he is required to consult the trade union organisations operating at the establishment. The consultations thus relate to what is '*contemplated*' by the employer, not to the amendments accepted or to the terminations of employment contracts that may follow from refusals by employees. An employer who contemplates giving notices of amendment to his employees must therefore take account of the number of notices in order to determine whether the amendments contemplated are covered by the provisions on collective redundancies and consequently whether he is required to consult the trade unions.

In those circumstances, the Regional Court, Łódź, Labour and Social Insurance Division No VII, Poland decided to stay the proceedings and to refer a following question to the Court of Justice of the European Union (CJEU) for a preliminary ruling.

Consideration by CJEU

It is ultimately for the referring court, which has sole jurisdiction to assess the facts, to determine in the light of all the circumstances of the case whether the temporary reduction of remuneration at issue is to be regarded as a significant change. Howvere, even if the referring court were to consider that the notice of amendment at issue in the main proceedings is not covered by the concept of '*dismissal*', a termination of the contract of employment following the employee's refusal to accept a change such as that proposed in the notice of amendment must be regarded as constituting a termination of an 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 Directive 98/59, so that it must be taken into account for calculating the total number of redundancies.

Consequently, since the decision to issue the notices of amendment necessarily meant for the Łódź Hospital that collective redundancies were contemplated, it was for the hospital, in so far as the conditions defined in Article 1(1) of Directive 98/59 were satisfied, to carry out the consultations provided for in Article 2 of that directive.

That conclusion is all the more compelling in that the purpose of the obligation of consultation laid down in Article 2 of the directive, namely to avoid terminations of employment contracts, or to reduce their number, and to mitigate the consequences, and the objective pursued by the notices of amendment, according to the referring court, namely to avoid individual redundancies, coincide to a large extent. Where a decision entailing an amendment of working conditions may enable collective redundancies to be avoided, the consultation procedure provided for in Article 2 of the directive must start when the employer contemplates making such amendments.

The CJEU held that:

Article 1(1) of Council Directive 98/59/EC must be interpreted as meaning that a unilateral amendment of conditions of pay by the employer, to the detriment of the employees, which, in the event of an employee's refusal, entails the termination of the contract of employment is capable of being regarded as a '*redundancy*' within the meaning of that provision, and Article 2 of that directive must be interpreted as meaning that an employer is required to carry out the consultations provided for in Article 2 where he contemplates effecting such a unilateral amendment of the conditions of pay, in so far as the conditions laid down in Article 1 of the directive are satisfied, which is for the referring court to ascertain.

Why is this decision important?

Employers always need to act cautiously when contemplating the redundancy of any employees. The contemplation of the action can itself give rise to an obligation to consult with the employees in question. This judgment shows that

a unilateral decision by an employer to amend pay and conditions may also require consultation.

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