Case C-196/23

Summary of the request for a preliminary ruling pursuant to Article 98(1) of the Rules of Procedure of the Court of Justice

Date lodged:

24 March 2023

Referring court:

Tribunal Superior de Justicia de Cataluña (Spain)

Date of the decision to refer:

20 January 2023

Applicants:

CL

GO

GN

VO

TI

HZ

DN

DL

Defendants:

DB

Fondo de Garantía Salarial (Fogasa)

Subject matter of the main proceedings

Social policy – Protection of workers – Collective redundancies – Charter of Fundamental Rights of the European Union – Directive 98/59/EC – Termination of contracts of employment as a result of the retirement of the employer

Subject matter and legal basis of the request

Protection of workers – Collective redundancies – Charter of Fundamental Rights of the European Union – Articles 27 and 30 – Directive 98/59/EC – Articles 1 and 2 – Case-law of the Court of Justice – Termination of contracts of employment as a result of the retirement of the employer – Period of consultation with workers' representatives – Horizontal effect of Directive 98/59/EC

Questions referred for a preliminary ruling

1) Is legislation such as the Spanish legislation (Article 49(1)(e) of Real Decreto Legislativo 2/2015 por el que se aprueba el texto refundido de la Ley del Estatuto de los Trabajadores (Royal Legislative Decree 2/2015 approving the consolidated text of the Law on the Workers' Statute) of 23 October 2015), which does not establish a period of consultation in situations where contracts of employment in excess of the number laid down in Article 1 of that directive are terminated as a result of the retirement of the natural person employer, compatible with 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?

2) If the answer to the preceding question is in the negative, does Directive 98/59 have direct horizontal effect between individuals?

Provisions of European Union law relied on

Treaty on the Functioning of the European Union: Article 267(b).

Charter of Fundamental Rights of the European Union ('the Charter'): Articles 27 and 30.

Council Directive 98/59/EC of 20 July 1998 on the approximation of the laws of the Member States relating to collective redundancies: Articles 1(1) and 2.

Judgments of the Court of Justice of the European Union of 21 December 2016, *AGET Iraklis* (C-201/15, EU:C:2016:972, paragraphs 27 to 32); of 12 October 2004, *Commission* v *Portugal* (C-55/02, EU:C:2004:605, point 1) of the operative part; of 11 November 2015, *Pujante Rivera* (C-422/14, EU:C:2015:743, point 2) of the operative part; and of 10 December 2009, *Rodríguez Mayor and Others*

(C-323/08, EU:C:2009:770, paragraphs 41 to 44) and points 1 and 2 of the operative part.

Provisions of national law and case-law relied on

Consolidated text of the Law on the Workers' Statute, approved by Royal Legislative Decree 2/2015 of 23 October 2015 ('ET'): Articles 49(1)(g) and 51(1) and (2).

Judgment of the Tribunal Supremo (Supreme Court, Spain) of 17 October 2016, *Rec*. 36/20.

Succinct presentation of the facts and procedure in the main proceedings

1 On 10 July 2020, the applicants brought proceedings against the defendant business and Fogasa (Fondo de Garantía Salarial (Wages Guarantee Fund, Spain)) as a result of their dismissal, which occurred on 6 July 2020.

2 The application sought a declaration that the constructive dismissals of the applicants by the business on 6 July 2020 constituted invalid dismissal, and an order imposing the corresponding legal consequences on the business and, in the alternative, a declaration of unfair dismissal and an order imposing the ensuing legal consequences on the business.

3 On 12 January 2022, the Juzgado de lo Social n.º 1 de Barcelona (Social Court No 1, Barcelona, Spain) delivered a judgment dismissing the claimants' application against the defendant business (in the person of its sole successor in title).

4 On 17 June 2020, with effect from 17 July 2020, the claimants were informed that their employment contracts had been terminated as a result of the retirement of their employer. On 17 July 2020, the claimants were removed from the general social security scheme.

5 The employer retired on 3 August 2020. The employer's retirement entailed the termination of 54 contracts, affecting 8 establishments, including the Alcarrás (Lérida) establishment where the applicants worked. The defendant died on 26 March 2021. His sole heir was DB, who accepted the inheritance on the basis of liability only for the debts of the estate, and it is not possible to reinstate the applicants.

The essential arguments of the parties in the main proceedings

6 The applicants argue that their dismissals are invalid because they were not preceded by a period of consultation as provided for in Article 51 ET, since the retirement of the natural person employer entailed the termination of 54 contracts,

which affected 8 establishments, including the Alcarrás establishment with their 8 employment contracts. Article 2 of Directive 98/59 was infringed because there was no period of consultation with the workers' representatives.

7 The defendants argued that the Spanish legislation is compatible with Directive 98/59 and that, in any event, it has no direct horizontal effect between individuals, without prejudice to the possible existence of State liability.

Succinct presentation of the reasoning in the request for a preliminary ruling

8 It is clear from recital 2 of Directive 98/59 that that directive is designed to strengthen the protection of workers in the event of collective redundancies. Whilst, by harmonising the rules applicable to collective redundancies, the EU legislature sought both to ensure comparable protection for workers' rights in the various Member States and to harmonise the costs which such protective rules entail for EU undertakings, that directive is nevertheless also intended to provide minimum protection with regard to informing and consulting workers in the event of collective redundancies and the Member States remain free to adopt national measures that are more favourable to those workers (Case C-201/15, paragraphs 27 and 32).

9 In its judgment in Case C-55/02, *Commission* v *Portugal*, the Court held that, by restricting the concept of collective redundancies to redundancies for structural, technological or cyclical reasons, and by failing to extend that concept to dismissals for any reason not related to the individual workers concerned, the Portuguese Republic had failed to fulfil its obligations under Articles 1 and 6 of Directive 98/59.

10 Furthermore, in *Rodríguez Mayor and Others* (C-323/08), on whether Directive 98/59 applies where an employer has died, the Court held that Article 1(1) of the directive does not preclude national legislation according to which the termination of the contracts of employment of a number of workers, whose employer is a natural person, as a result of the death of that employer, is not classified as collective redundancy, meaning that different compensation may be established depending on whether the workers lost their jobs as a result of the death of the employer or as a result of a collective redundancy. The Court states in particular that the concept of collective redundancies presupposes the existence of an employer who contemplated such redundancies and who is capable, first, of carrying out, for that purpose, the acts referred to in Articles 2 and 3 of the directive and, second, of effecting, where appropriate, such redundancies. Similarly, according to Article 2(2) of the directive, those consultations are to 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. Lastly, according to Articles 2(3) and 3(1) of that directive, employers are to notify the competent public authority in writing of

any projected collective redundancies and to notify them of the factors and information mentioned in those provisions (paragraphs 41 and 43 and operative part of the judgment cited).

11 Accordingly, in contrast to the situation that gave rise to the judgment in C-323/08, that is to say, the death of the employer, in the scenario before us – the termination of contracts of employment as a result of the employer's retirement – the consultations could have taken place and it was possible at least to mitigate the consequences of those terminations.

12 Specifically, it is necessary to determine whether or not the termination of the applicants' eight contracts of employment (all those at the establishment) as a result of the voluntary retirement of the employer, the natural person defendant, who was succeeded by his sole heir, should have been dealt with as a collective redundancy.

13 The retirement of the employer is a reason for termination of the contract of employment not related to the worker (Article 49(1)(g) ET).

14 Spanish law does not envisage the holding of consultations where the retirement of a natural person employer presupposes the termination of a number of contracts of employment above the threshold under Directive 98/59, and that termination is not subject to the collective redundancy procedure under Article 51 ET, which transposes Directive 98/59.

15 Under Article 51 ET, collective redundancy is confined to situations where there are economic, technical, organisational or production grounds, provided it affects a particular number of workers, but the article does not cover other situations, such as that before us, where contracts of employment are terminated at the initiative of the employer for reasons not related to the wishes of the workers, in which the number of people affected may only be taken into account if any of the dismissals is on economic, technical, organisational or production grounds.

16 The concept of collective redundancies within the meaning of Article 1(1)(a) of Directive 98/59, presupposes:

1) the existence of an employer;

2) who contemplates redundancies;

3) that those redundancies meet the requirements concerning numbers and periods of time;

4) that the employer in question is able to hold a consultation and to negotiate with the workers' representatives.

17 Each and every one of those requirements is satisfied in the specific situation of an employer retiring voluntarily, provided for in Article 49(1)(g) ET. However, in

those circumstances Spanish law does not require a consultation period in order at least to mitigate, if not to prevent, the consequences of termination of the contracts of employment. The first question is referred for a preliminary ruling for that reason.

18 Should the Court find that the Spanish legislation is not compatible with EU law, the question arises as to whether the directive has horizontal effect. Directive 98/59 implements Article 30 of the Charter and, therefore, a fundamental right, namely the right of workers to appropriate protection in the event of dismissal, and also Article 27 of the Charter, which governs workers' rights to be informed and consulted. Accordingly, the question arises as to whether or not, in the event that the national legislation infringes Directive 98/59, that directive has horizontal effect, that is to say, effect between individuals.

19 In that respect, the Supreme Court, Spain held as follows in its judgment of 17 October 2016: 'In addition to regulations, since *Van Duyn* (Case C-41/74), the possible direct effect of EU law has extended – although to a very limited extent – to cover another part of secondary law, with establishment of the test according to which directives may be applied directly in the Member States if they have not been implemented or have been implemented incorrectly. That said, there can be no direct effect in the context of private relations, since "a directive may not of itself impose obligations on an individual and may therefore not be relied upon as such against such a person", even though the Court has in some situations allowed the right "regulated" by a directive to be applied directly, which can potentially be relied upon by and against individuals. It should be noted, however, that: (a) strictly speaking, it is not the "horizontal effect" of the directive that has been established in law, but the "direct effect" of the right regulated by that directive, to the extent that it is a fundamental right of the European Union; and (b) so far as the Chamber is aware, such direct effect has been allowed on only four occasions (the cases *Mangold*, *Kücükdeveci*, *Prigge* and, very recently, *Dansk Industri*), all of which relate to the general principle of non-discrimination on grounds of age, addressed in Directive 2000/98/EC and enshrined in Article 21(1) of the Charter.

20 In countering the unintended consequences of the fact that directives have no "direct" effect between private parties, the principal remedial tool is the principle of interpreting national law in conformity with EU law, which the Court has defined by stating that the court "has to interpret that law …, 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 and thereby comply with the third paragraph of Article 189 of the Treaty" – now Article 288 TFEU. Summarising the foregoing, where the terms of a directive that has not been transposed within the time limit or has been transposed incorrectly are clear, decisive and unconditional, different possibilities present themselves:

(1) it may apply directly in disputes between individuals and the public administration: vertical effect;

(2) where, in contrast, the dispute is between individuals, horizontal effect – the principle of interpreting national law in conformity with EU law comes into play, requiring examination of whether domestic law may be applied in a manner in keeping with the provisions of the directive; and

(3) if national law cannot be interpreted in conformity with EU law, the injured individual has no option but to claim damages from the infringing State.'

21 Ultimately, in the light of the case-law of the Supreme Court, the question arises as to whether, where Spanish legislation infringes Directive 98/59, that directive, as legislation implementing the fundamental rights under Articles 27 and 30 of the Charter, should have direct horizontal effect (between individuals) or whether, as Chamber IV of the Supreme Court holds, if national law cannot be interpreted in conformity with EU law, the injured individual has no option but to claim damages from the infringing State. It is therefore appropriate to refer the second question for a preliminary ruling.