Momentum

Labour

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COLLECTIVE DISMISSALS: THE RECENT EUROPEAN COURT OF JUSTICE RULING OF 13 MAY 2015 ON COLLECTIVE DISMISSALS[1] AND ITS IMPACT ON PORTUGUESE LABOUR LAW

This ruling concerns the interpretation 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]. In this decision, the facts may be summarised as follows:

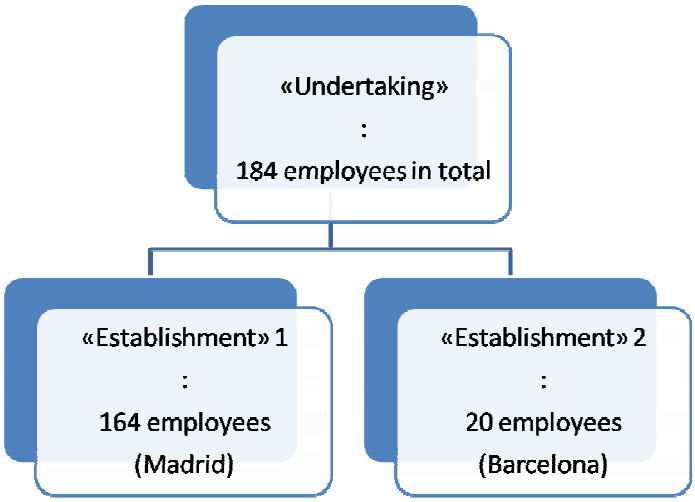
- In July 2012, *Nexea* (the «undertaking») had two establishments: one located in Madrid and another in Barcelona, employing 164 and 20 people, respectively;
- Rabal Cañas worked as a skilled employee for *Nexea* at the company's Barcelona establishment;
- In December 2012, Rabal Cañas and 12 other employees of the Barcelona establishment were informed of their dismissal, on economic grounds, which made it necessary for *Nexea* to close this establishment and transfer the remaining staff to Madrid.

Nexea did not qualify the dismissal as a collective redundancy. This opinion was based on the assumption that the Directive does not preclude national

[1] Case No. C-392/13, *Andrés Rabal Cañas vs. Nexea Gestión Documental SA and Fondo de Garantia Salarial* available at http://curia.europa.eu/juris/document/document.jsf?doclang=EN&text=&pageIndex=1&part=1&mode=lst&docid=164259&occ=first&dir=&cid=401890.

[2] Available at http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:31998L0059&from=EN.

legislation from defining the concept of «collective redundancies» using as sole reference unit the concept of «undertaking» *(i.e., Nexea* – including both «establishments» of Madrid and Barcelona) and not of «establishment» (referring only to the «establishment» in Barcelona)[3].



In question was the interpretation of Article 1(1) of Directive 98/59/EC which sets out the following: *"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,*

[3] Special highlight should be given to the fact that the ECJ specified that the terms «undertaking» and «establishment» are different and that an «establishment» normally constitutes a part of an «undertaking». The ECJ clarified, however, that this does not preclude the fact of the term «establishment» being the same as «undertaking» where the «undertaking» does not have several distinct units (ECJ judgement, § 46).

– *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"* (our underlining).

Therefore, the main issue the ECJ had to ascertain was to verify whether Article 1(1)(a) of the Directive should be interpreted as precluding national legislation that introduces the concept of «undertaking» and not of «establishment» as the sole reference unit – just as in the Statute of Spanish Workers (*Estatuto de los trabajadores,* Article 51[4]) – where the effect of the application of that criterion is to preclude the information and consultation procedure provided for in the Directive, when the dismissals in question would have been considered «collective redundancies», under the definition of that Directive, had the «establishment» been used as the reference unit.

And in this regard, the ECJ answered affirmatively: *"national legislation that introduces the undertaking and not the establishment as the sole reference unit is contrary to Article 1(1) of Directive 98/59 where the effect of the application of that criterion is to preclude the information and consultation procedure provided for in Articles 2 to 4 of that directive, when the dismissals in question would have been considered «collective redundancies», under the*

[4] An updated version of the Spanish Statute of Workers may be consulted at http://www.boe.es/buscar/act.php?id=BOE-A-1995-7730 (Spanish version).

definition in Article 1(1)(a) of that directive, had the establishment been used as the reference unit"[5].

Notwithstanding the importance of the position hereby assumed by the ECJ, it is our understanding that a similar question would not be at stake under Portuguese Law, given the wide scope of the national collective dismissal legislation. According to the Portuguese Labour Code[6], a collective dismissal is understood as the termination of employment contracts by the employer, simultaneously or successively over a 3 month period, affecting at least 2 or 5 employees, depending on whether it relates to a «micro» or «small» undertaking, on the one hand, or to a «medium» or «large» undertaking, on the other, and whenever such termination is due to the closure of one or various sectors or equivalent structures or to a reduction of employees due to market, structural or technological reasons[7]. And for this purpose, Article 100 of the PLC defines what should be considered as a «micro» (with less than 10 employees), «small» (between 10 and less than 50 employees), «medium» (between 50 and less than 250 employees) and «large» undertaking (250 or more employees).

Accordingly, the confrontation, on the one hand, between the minimum threshold of the Directive (depending on a minimum of 20 employees to be

[5] § 54 of ECJ ruling, with our underlining. Nevertheless, in what specifically regards the Spanish legislation and the case under assessment, the ECJ's decision did not have a special repercussion: the Court attested that the dismissal did not reach the threshold required under the Directive since the Barcelona establishment did not employ more than 20 employees during the period concerned; therefore, the thresholds foreseen in the Directive were not reached. Particular reference should also be given to the fact that the minimum legal thresholds of article 51 of the Spanish Statute of Workers were also not reached, although for such purpose and in light of the Spanish legal system, the relevant concept would be the concept of «undertaking» and not of «establishment» (§ 55 and § 56 of ECJ ruling).

[6] Amended by Laws No. 105/2009, of 14 September, 53/2011, of 14 October, 23/2012, of 25 June, 47/2012, of 29 August, 69/2013, of 30 August, 27/2014, of 8 May, 55/2014 of 25 August and 28/2015, of 4 April. See also Rectification No. 38/2012, of 10 July (hereinafter "PLC").

[7] Article 359, No. 1 of PLC.

employed) and the circumstance of the PLC applying the collective dismissal regime to undertakings carrying out a dismissal of more than only 2 or 5 employees (depending on the size of the undertaking – employing up to 49 or 50 or more employees, respectively) shows that it is irrelevant to this equation to verify whether Portuguese legislation refers to «undertaking» or to «establishment» as the sole reference unit . The minimum threshold to apply the collective dismissal regime is so reduced that it is capable of safeguarding the fears of fraud that the use of «undertaking» instead of «establishment» as the sole reference unit might raise.

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