



# Update

Momentum



Labour

August 28, 2015

## THE EUROPEAN COURT OF JUSTICE RULING OF JULY 9, 2015, *ENDER BALKAYA V KIESEL ABBRUCH- UND RECYCLING TECHNIK GMBH*, CASE N. C-229/14<sup>[1]</sup>

### Collective dismissals: Shall members of the board of directors and trainees also be taken into account?

In this decision, the ECJ ruled that Article 1 (1) (a) of Directive 98/59/EC of July 20, 1998, on the approximation of the laws of the Member States relating to collective redundancies, must be interpreted as meaning that:

a) *“It precludes a national law or practice that does not take into account, in the calculation provided for by that provision of the number of workers employed, a member of the board of directors of a capital company, such as the director in question in the main proceedings, who performs his duties under the direction and subject to the supervision of another body of that company, receives remuneration in return for the performance of his duties and does not himself own any shares in the company” (emphasis added).*

b) *“It is necessary to regard as a worker for the purposes of that provision a person, such as the one in question in the main proceedings, who, while not receiving remuneration from his employer, performs real work within the undertaking in the context of a traineeship — with financial support from, and the recognition of, the public authority*

---

<sup>[1]</sup> Available on

<http://curia.europa.eu/juris/document/document.jsf?text=&docid=165652&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=514575>.



Update

Momentum

Labour

*responsible for the promotion of employment – in order to acquire or improve skills or complete vocational training” (underlining added).*

Directive 98/59/EC was transposed by Law No. 7/2009, of February 12 (hereinafter “PLC”)<sup>[2]</sup>. According to the PLC, 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 a «small» undertaking, on the one hand, or to a «medium» or a «large» undertaking, on the other, and whenever such termination is due to the closure of one or more sectors or equivalent structures or to a reduction of employees due to market, structural or technological reasons (Article 359, No. 1 of PLC). And, for this purpose, Article 100 of the PLC defines what should be considered as a «micro» (with fewer than 10 employees), «small» (between 10 and fewer than 50 employees), «medium» (between 50 and fewer than 250 employees) and «large» undertaking (250 or more employees).

Pursuant to Article 398, No. 2 of the Portuguese Commercial Companies Code, if an employee of a public limited liability company (“*sociedade anónima*”) is appointed Director (“*administrador*”) of said company, the former employment contract is deemed legally suspended. Most legal doctrine and case-law bases this suspension on the incompatibility on being simultaneously the source and the receiver of the company’s orders. Accordingly, the labour legal framework – including provisions on collective dismissals – is not directly applicable to such category of directors, except in cases where the suspension ends and the employment contract “revives” (in this sense, see the Lisbon Court of Appeal ruling of February 6, 2013, Proc. No. 2848/10.9TTLSB.L1-4<sup>[3]</sup>).

A different understanding has, however, been admitted concerning private limited companies (“*sociedades por quotas*”), where it has often been argued that the performance of management functions (“*gerência*”) might be compatible with an employment contract, depending on how such an

<sup>[2]</sup> Amended by Laws No. 105/2009, of September 14, 53/2011, of October 14, 23/2012, of June 25, 47/2012, of August 29, 69/2013, of August 30, 27/2014, of May 8, 55/2014 of August 25 and 28/2015, of April 4. See also Rectification No. 38/2012, of July 10.

<sup>[3]</sup> Available on

<http://www.dgsi.pt/jtrl.nsf/33182fc732316039802565fa00497eec/5e09469631c1b6cc80257b21003d693a?OpenDocument> (Portuguese version).



activity is carried out (with or without legal subordination) – in this context, see the Supreme Court decision of September 29, 1999, Proc. No. 98S364<sup>[4]</sup>.

Moreover, as a rule, apprenticeship or vocational training agreements are not qualified as employment contracts and only in very specific situations (where expressly foreseen in law) are labour provisions extended to such situations (e.g. Article 4, No. 1, a) of Law No. 7/2009 that applies the regime governing work accidents and occupational illnesses to apprentices or trainees)<sup>[5]</sup>. Therefore, since they are not qualified as employees, the rules on termination of an employment contract are also not applicable in such situations.

In view of the above, national rules on collective dismissals – in particular the reference to “*termination of employment contracts*” (Article 359, No. 1 of PLC – emphasis added) – have not been construed as including other contracts not qualified as such, thus excluding the termination of management functions relating to a director of a public limited liability company or of an apprenticeship or vocational training contract. This ECJ decision suggests, however, a different understanding, to be taken into account in collective dismissals to be carried out in the future.

Rita Canas da Silva  
racs@servulo.com

---

<sup>[4]</sup> Available on <http://www.dgsi.pt/jstj.nsf/954f0ce6ad9dd8b980256b5f003fa814/976eae9a5a67b2c48025696600524d5e?OpenDocument> (Portuguese version).

<sup>[5]</sup> See the Coimbra Court of Appeal’s ruling of June 6, 2013, No. 64/12.4TTGRD.C1, available on <http://www.dgsi.pt/jtrc.nsf/8fe0e606d8f56b22802576c0005637dc/8f80ea166ad0ec1880257ba3003af4d5?OpenDocument> and the Lisbon Court of Appeal of June, 2, 2005, Proc. No. 1598/2005-4, available on <http://www.dgsi.pt/jtrl.nsf/0/d77f01710fee5dc08025708a0035d79e?OpenDocument> and of 8.6.2011, Proc. No. 2924/06.2TTLSB.L1-4, available on <http://www.dgsi.pt/jtrl.nsf/e6e1f17fa82712ff80257583004e3ddc/62cff77d83df5947802578c60055e154?OpenDocument> (Portuguese versions).