EELA EUROPEAN EMPLOYMENT LAWYERS ASSOCIATION

SUMMARY

2021/7 The termination of employment by mutual agreement or by resignation occurring on the employer's initiative to be considered when establishing the actual number of employees collectively dismissed (RO)

The Vaslui Tribunal has recently annulled an individual dismissal decision issued during the state of alert in Romania due to formalities which had not been observed by the employer. While the judge invested with determining the matter limited their analysis to the elements contained in the individual dismissal decision, the judicial assistant ascertained, within a competing opinion, that the dismissal decision should have been annulled for other reasons, namely for the fact that, in reality, the employer had implemented a collective redundancy process without observing the procedure and employees' rights in the event of such dismissal. Relying on the provisions of Directive 98/59/EC of 20 July 1998 on the approximation of the laws of the Member States relating to collective redundancies, the judicial assistant has made an exhaustive analysis of the conditions required for the existence of a collective dismissal.

While the competing opinion does not have the same effect as a court ruling, it is part of the judicial procedure and, from this perspective, the independence and impartiality of all the members of the court and their obedience solely to the law is maintained.

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Legal background

p style="margin-right:-30px">Directive 98/59 (the 'Directive') has been transposed into Romanian law by Law no. 53/2003 – Labour Code.

p style="margin-right:-30px">According to national provisions, collective redundancy means the dismissal, within a period of 30 calendar days, for one or more reasons unrelated to the employee, of:

p style="margin-right:-30px">(a) at least 10 employees, if the employer has more than 20 employees and less than 100 employees;

p style="margin-right:-30px">(b) at least 10% of the employees, if the employer has at least 100 employees, but less than 300 employees;

p style="margin-right:-30px">(c) at least 30 employees, if the employer has at least 300 employees.

p style="margin-right:-30px">Furthermore, when establishing the actual number of employees collectively dismissed, those employees whose individual employment agreements have been terminated on the initiative of the employer for one or more reasons unrelated to the employee shall also be considered, provided that there are at least five such dismissals.

Facts

p style="margin-right:-30px">Mrs. G. (the 'Employee' and/or the 'Claimant') was employed in 2019 by a baking company (the 'Employer' and/or the 'Defendant') as a baker and performed her work at one of the Employer's premises. In March 2020, the Employee was appointed team leader.

p style="margin-right:-30px">Starting in April 2020 and lasting until June 2020, the individual employment agreement of the Employee was suspended during the state of emergency imposed on the territory of Romania in consideration of the economic crisis created by the Covid-19 pandemic. In May 2020, the Employee was given a 20-day notice period and, in June 2020, the Employer issued the decision for the termination of the individual employment agreement concluded with the Employee.

p style="margin-right:-30px">The Employee challenged such dismissal decision, among other reasons, in consideration of the following:

the dismissal decision did not mention the job cut, only the termination of the individual employment contract;
the dismissal decision was not based on a job cut, but on the grounds that her husband, an employee of the Ministry of National Defence, could be infected with the Covid-19 virus, and for this reason her presence at work could have represented a risk of infection for the other employees of the Employer;
the dismissal decision was discriminatory as it was clear from the audio evidence submitted that the dismissal was ordered for refusing to provide information to the Defendant's legal counsel regarding her husband's employment and his activities at work;
the business reasons for dismissal listed by the Employer in the termination decision were not genuine given the expansion of its activity by opening a new store; and
the Employer had argued in bad faith that there were no vacancies which corresponded to the Employee's skills, considering that, in 2020, the Employer purchased the assets of a company with the same object of activity, and, in order to carry out its activity in the newly established premises, the Employer hired qualified bakers and also transferred several people from the department where the Employee worked.

p style="margin-right:-30px">Mrs. G. instituted proceedings against the Employer before the Vaslui Tribunal seeking to have the dismissal decision annulled and to be reinstated in her former position.

Judgment

p style="margin-right:-30px">By a judgment of 23 October 2020, the Vaslui Tribunal admitted her claims and declared that the dismissal decision was issued without observance of the legal provisions, namely that the Employer failed to include the reasons that determined the dismissal, which attracted the sanction of nullity of the measure taken.

p style="margin-right:-30px">The Employer had argued, among other submissions, that before the reorganization process three team leaders for 43 bakers existed in the organizational chart. After the reorganization there were two team leaders for 19 bakers. Thus, 24 bakers left the Employer, out of which 14 were directly subordinated to the Employee. Consequently, the Employee's job was cut as a measure which, on the one hand, reduced costs and, on the other hand, was no longer justified due to the decrease in sales following the current pandemic.

p style="margin-right:-30px">Considering these arguments and also the evidence submitted to the case file, the legal assistant issued a competing opinion in relation to the judge's ruling stating that the Employee's claim had to be admitted for other reasons, namely based on the fact that, in reality, the Employer implemented a collective dismissal without observing the legal procedure and the employees' rights in case of such dismissal.

p style="margin-right:-30px">Therefore, from the decision of the board of directors which approved the reorganization process, it had become clear that 80 positions were cut. Also, from the organizational charts submitted, it resulted that the Employer had more than 300 employees when the reorganization process was implemented. Moreover, from the summary submitted by the Employer, it resulted that 23 employees – including the Claimant – were given a notice period of 20 working days and 57 employees 'requested the termination of the individual employment agreement'. Furthermore, a witness questioned during the case hearing stated that "we were called to resign".

p style="margin-right:-30px">In consideration of the above, the judicial assistant found the provisions of the Romanian Labour Code to be applicable, which state that when calculating the actual number of employees collectively dismissed those employees whose individual employment agreements had been terminated on the employer's initiative for one or more reasons unrelated to the person of the employee shall also be taken into account, provided that there are at least five such dismissals.

p style="margin-right:-30px">The judicial assistant emphasised that the above-mentioned national provisions transpose the requirements of the Directive which provides that for the purpose of calculating the number of collective redundancies, termination of the employment agreements which occur on the initiative of the employer for one or more reasons unrelated to the person of the worker shall be treated as dismissals.

p style="margin-right:-30px">Moreover, the judicial assistant pointed out that the 'employer's initiative', within the meaning of the Directive, may eventually materialize in the termination of the employment agreement as a result of the agreement of the parties or even formally by resignation and that it is essential to determine to whom the initiative belongs.

p style="margin-right:-30px">For this purpose, the judicial assistant indicated that in the case at hand it should not be ignored that within a period of five days from the dismissal notices issued on the same day, 57 other employees were rushing to 'request the termination of their individual employment contract' in the midst of the economic crisis caused by the spread of the Covid-19 virus, thus remaining without a job and without unemployment benefits during the state of alert.

p style="margin-right:-30px">Altogether, the judicial assistant appreciated that the judge should have taken into account the fact that the requests for termination of the individual employment agreements were the result of the employer's initiative who requested certain employees to resign. Regardless of the means of 'persuasion' used by the Employer, it is essential that the 'initiative' to terminate individual employment agreements belonged to the Employer as it expressly resulted from the decision of the board of directors by which 80 jobs were cut.

p style="margin-right:-30px">In conclusion, in the case at hand the Employer had – within the meaning of Directive – taken the initiative to terminate more than 30 individual employment contracts, thus implementing a collective redundancy process without following the procedure provided for by the applicable legislation.

Commentary

p style="margin-right:-30px">Considering the economic crisis in the context of the current pandemic, the notion of collective dismissal is in the foreground and perhaps more pronounced than in the last decade. More precisely, the courts are called on to apply the manner in which the thresholds for a collective dismissal are calculated from a national, as well as from a European, labour law perspective.

p style="margin-right:-30px">Although from our point of view the Directive is one of the European normative acts that has been successfully transposed into our domestic legislation, some national courts are still reluctant to analyse and enforce these provisions more thoroughly.

p style="margin-right:-30px">Consequently, it remains unanswered why the judge did not properly analyse the merits of the case and did not even raise the question regarding the

possible qualification of such restructuring process as a collective dismissal.

Comments from other jurisdictions

p style="margin-right:-30px">*Bulgaria (Rusalena Angelova, Djingov, Gouginski, Kyutchukov and Velichkov)*: Similar to Romanian legislation, the collective dismissal rules of the Bulgarian Labour Code largely coincide with the requirements of Directive 98/59/EC which is transposed into Bulgarian law.

p style="margin-right:-30px">However, Bulgarian courts take a different approach with respect to mutual consent terminations counting for the purposes of meeting the threshold for collective dismissals. The Bulgarian Labour Code recognises two types of mutual consent termination:

Mutual consent termination upon the employer's initiative against payment of compensation – such cases are always taken into consideration on an assessment of the collective dismissal thresholds.
Mutual consent termination upon either party's initiative – provided that the mutual consent is initiated by the employer, the termination would influence the assessment whether collective dismissal requirements shall apply; provided that the mutual consent termination is suggested by the employee, the case shall not be taken into consideration for the purposes of the applicability of the collective dismissal rules.

p style="margin-right:-30px">*Germany (Pia Schweers, Luther Rechtsanwaltsgesellschaft mbH)*: In Germany, Directive 98/59/EC was, as in Romania, transposed into national law, although the relevant thresholds differ from the Romanian law. The relevant stipulation, Section 17 paragraph 1 sentence 1 of the Dismissal Protection Act (*Kündigungsschutzgesetz*), states the following:

p style="margin-left:47px; margin-right:-30px">The employer is obliged to report to the Employment Agency (*Arbeitsagentur*) within 30 calendar days before it dismisses:

p style="margin-left:47px; margin-right:-30px">1. in businesses with, as a rule, more than 20 and less than 60 employees, more than five employees;

p style="margin-left:47px; margin-right:-30px">2. in businesses with usually at least 60 and less than 500 employees, 10% of the employees regularly employed in the business or more than 25 employees; and

p style="margin-left:47px; margin-right:-30px">3. in businesses with, as a rule, at least 500

employees, at least 30 employees.

p style="margin-right:-30px">Sentence 2 of this stipulation specifies that ‘dismissal’ shall mean all terminations of employment initiated by the employer. Accordingly, a collective dismissal also arises if the employee themselves resign or conclude a termination agreement with the employer, insofar as this is done in relation to an intended termination by the employer. In this respect, the German legal position is consistent with the remarks of the judicial assistant and the Romanian Labour Code. In the specific case, German courts would therefore presumably have found non-compliance with the collective dismissal regulations. For this reason, the termination would have been ineffective under German law as well.

p style="margin-right:-30px">Compliance with collective dismissal regulations were brought into focus in Germany last year. The reason for this were judgments by the Federal Labour Court (*Bundesarbeitsgericht*) dealing with collective dismissals following the insolvency of the airline Air Berlin. Numerous terminations were declared ineffective due to mistakes made in connection with the collective dismissal. Since then, increased attention has been paid to compliance with the regulations on collective dismissals.

p style="margin-right:-30px">*Portugal (Dora Joana, SRS Advogados)*: A very similar situation occurred a few years ago in Portugal, leading to a legal discussion on how to determine the number of terminations that would oblige the employer to follow a collective dismissal procedure as opposed to an individual redundancy.

p style="margin-right:-30px">In fact Portuguese law, as with Romanian law, qualifies as a wrongful dismissal the termination of an employment agreement by means of an individual redundancy when the collective dismissal procedure should have been followed, it being important to state that the choice of the procedure to follow is made according to the number of employees affected.

p style="margin-right:-30px">In the legal proceedings that this case report reminded me of, the employer had executed several termination agreements prior to initiating the dismissal procedure and chose to follow the individual redundancy procedure considering that only one employment contract was to be terminated by means of a unilateral decision. The employee contested the dismissal arguing, among other things, that the termination agreements were, in reality, a form of unilateral termination, as they were based on economic reasons related to the employer (similar to the ones that formed the basis of the individual redundancy that was being contested) and the agreements were executed as an alternative to a formal termination procedure.

p style="margin-right:-30px">The court ruled in the employee’s favour, essentially because it

understood that Directive 98/59 should not only be considered while interpreting internal provisions but it should supress such provisions, if necessary. In this sense, considering that the Directive refers to terminations based on the employers' initiative, the fact that the other terminations were made through the execution of termination agreements was considered irrelevant, given the reasons that grounded and led to the execution of such agreements.

p style="margin-right:-30px">This was a unique decision in the Portuguese jurisdiction and, as far as I am able to determine, the question has not been put before a court again. However, even if unique, the decision initiated an intense debate on the issue and led to a very high degree of uncertainty for employers, considering that, until such moment, the issue had never been raised.

p style="margin-right:-30px">Even today, the question continues to be raised when initiating a termination procedure for objective reasons, and it is my understanding that it has not led to other judicial decisions because, due to the rules governing unemployment benefit, the possibility of executing termination agreements is very restricted and, in most cases, employers end up choosing to promote a collective dismissal instead of trying to terminate employment contracts by agreement.

p style="margin-right:-30px">It is my view, however, that the pandemic situation and the inherent economic crisis will reignite the debate, and it is the reason why it was very interesting to read this case report as it shows that the question is being discussed at a European level.

p style="margin-right:-30px">*United Kingdom (Richard Lister, Lewis Silkin LLP)*: The competing opinion of the judicial assistant in this case raises interesting issues concerning EU law on collective redundancy consultation, especially in relation to the question of the circumstances in which an employee's resignation or a termination by mutual agreement might nonetheless be 'at the initiative of the employer' under the Romanian Labour Code.

p style="margin-right:-30px">In this context, the judicial assistant no doubt took into account the ECJ's important ruling in *Pujante Rivera – v – Gestora Clubs Dir SL* (C-422/14) that the definition of 'redundancy' in the EU Collective Redundancies Directive is sufficiently broad to cover an employee's resignation, where the employer has unilaterally made a significant change to essential elements of their employment contract for reasons not related to the individual and which cause them substantial detriment. The Advocate General's opinion in that case referred to resignation in these circumstances as 'indirect redundancy', concluding that employees faced with substantial and detrimental changes to their terms of employment should have the same protection as employees who are actually made redundant.

p style="margin-right:-30px">Issues of this type arise quite often in the UK in determining whether the threshold number of proposed dismissals has been reached to trigger collective redundancy consultation. For example, it has been established that voluntary redundancies are likely to count towards the total of 'dismissals', depending on the circumstances (*Optare Group Ltd – v – Transport and General Workers Union* [2007] UKEAT/0143/07). Employees are also dismissed for these purposes where the employer brings their current contract to an end, even though they continue to be employed by the same employer under a new contract (*Hardy – v – Tourism South East* [2005] IRLR 242).

p style="margin-right:-30px">**Subject:** Collective Redundancies

p style="margin-right:-30px">**Parties**: G. C vs. Mopan S.A.

p style="margin-right:-30px">**Court:** *Tribunalul Vaslui* (Vaslui Tribunal)

p style="margin-right:-30px">**Date**: 23 October 2020

p style="margin-right:-30px">**Case number**: 1030/2020

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