JUDGMENT OF THE COURT (Second Chamber)

18 January 2007 *

In Case C-385/05,

REFERENCE for a preliminary ruling under Article 234 EC by the Conseil d'État (France), made by decision of 19 October 2005, received at the Court on 24 October 2005, in the proceedings

Confédération générale du travail (CGT),

Confédération française démocratique du travail (CFDT),

Confédération française de l'encadrement (CFE-CGC),

Confédération française des travailleurs chrétiens (CFTC),

Confédération générale du travail-Force ouvrière (CGT-FO)

v

Premier ministre,

Ministre de l'Emploi, de la Cohésion sociale et du Logement,

* Language of the case: French.

THE COURT (Second Chamber),

composed of C.W.A. Timmermans, President of the Chamber, R. Schintgen (Rapporteur), R. Silva de Lapuerta, J. Makarczyk and L. Bay Larsen, Judges,

Advocate General: P. Mengozzi,
Registrar: L. Hewlett, Principal Administrator,

having regard to the written procedure and further to the hearing on 7 June 2006,

after considering the observations submitted on behalf of:

— the Confédération générale du travail (CGT), by A. Lyon-Caen, avocat,

— the Confédération française démocratique du travail (CFDT), by H. Masse-Dessen, avocat,

— the Confédération française de l'encadrement (CFE-CGC), by H. Masse-Dessen, avocat,

— the Confédération française des travailleurs chrétiens (CFTC), by H. Masse-Dessen, avocat,

— the Confédération générale du travail-Force ouvrière (CGT-FO), by T. Haas, avocat,

— the French Government, by G. de Bergues and C. Bergeot-Nunes, acting as Agents,

— the Commission of the European Communities, by J. Enegren and G. Rozet, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 12 September 2006,

gives the following

Judgment

1 The reference for a preliminary 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 (OJ L 225, p. 16) and Directive 2002/14/EC of the European Parliament and of the Council of 11 March 2002 establishing a general framework for informing and consulting employees in the European Community (OJ 2002 L 80, p. 29).

2 This reference has been made in the context of a number of actions brought before the Conseil d'État (Council of State) by the Confédération générale du travail (CGT), the Confédération française démocratique du travail (CFDT), the Confédération française de l'encadrement (CFE-CGC), the Confédération française des travailleurs chrétiens (CFTC) and the Confédération générale du travail-Force ouvrière (CGT-FO) and seeking the annulment of Order No 2005-892 of 2 August 2005 on the Adaptation of the Rules for the Calculation of Staff Numbers in Undertakings (JORF of 3 August 2005, p. 12687; 'Order No 2005-892').

Legal context

Community legislation

3 Article 1(1) of Directive 98/59 provides:

'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,

— 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;

(b) "workers' representatives" means the workers' representatives provided for by the laws or practices of the Member States.

For the purpose of calculating the number of redundancies provided for in the first subparagraph of point (a), terminations of an employment contract which occur on the employer's initiative for one or more reasons not related to the individual workers concerned shall be assimilated to redundancies, provided that there are at least five redundancies.'

4 Pursuant to Article 2(1) of Directive 98/59:

'Where an employer is contemplating collective redundancies, he shall begin consultations with the workers' representatives in good time with a view to reaching an agreement.'

5 Article 3 of Directive 98/59 provides:

'1. Employers shall notify the competent public authority in writing of any projected collective redundancies.

...

2. Employers shall forward to the workers' representatives a copy of the notification provided for in paragraph 1.

The workers' representatives may send any comments they may have to the competent public authority.'

6 Pursuant to Article 5 of Directive 98/59:

'This Directive shall not affect the right of Member States to apply or to introduce laws, regulations or administrative provisions which are more favourable to workers or to promote or to allow the application of collective agreements more favourable to workers.'

7 The seventh and eighth recitals in the preamble to Directive 2002/14 state as follows:

'7. There is a need to strengthen dialogue and promote mutual trust within undertakings in order to improve risk anticipation, make work organisation more flexible and facilitate employee access to training within the undertaking while maintaining security, make employees aware of adaptation needs, increase employees' availability to undertake measures and activities to increase their employability, promote employee involvement in the operation and future of the undertaking and increase its competitiveness.

8. There is a need, in particular, to promote and enhance information and consultation on the situation and likely development of employment within the undertaking and, where the employer's evaluation suggests that employment within the undertaking may be under threat, the possible anticipatory measures envisaged, in particular in terms of employee training and skill development, with a view to offsetting the negative developments or their consequences and increasing the employability and adaptability of the employees likely to be affected.'

8 Furthermore, it is evident from the 18th recital in the preamble to Directive 2000/14 that it is intended to put in place a general framework designed to establish minimum requirements applicable throughout the Community while not preventing Member States from laying down provisions that are more favourable to employees.

9 The purpose of this general framework, as indicated by the 19th recital in the preamble to that directive, is also to avoid any administrative, financial or legal constraints which would hinder the creation and development of small and

medium-sized undertakings. To that end, it appeared appropriate, in the terms of that recital, to restrict the scope of that directive, according to the choice made by Member States, to undertakings with at least 50 employees or establishments employing at least 20 employees.

10 Article 1(1) of Directive 2002/14 provides:

'The purpose of this Directive is to establish a general framework setting out minimum requirements for the right to information and consultation of employees in undertakings or establishments within the Community.'

11 Article 2 of that directive states as follows:

'For the purposes of this Directive:

...

(d) "employee" means any person who, in the Member State concerned, is protected as an employee under national employment law and in accordance with national practice;

...'

12 Article 3(1) of Directive 2002/14 provides:

'This Directive shall apply, according to the choice made by Member States, to:

(a) undertakings employing at least 50 employees in any one Member State, or

(b) establishments employing at least 20 employees in any one Member State.

Member States shall determine the method for calculating the thresholds of employees employed.'

13 Pursuant to Article 4(1) of Directive 2002/14:

'In accordance with the principles set out in Article 1 and without prejudice to any provisions and/or practices in force more favourable to employees, the Member States shall determine the practical arrangements for exercising the right to information and consultation at the appropriate level in accordance with this Article.'

14 Article 11 of Directive 2002/14 provides that the Member States are to be obliged to take all necessary steps enabling them to guarantee the results imposed by that directive at all times.

National legislation

15 Under Article L. 421-1 of the French Labour Code (Code du travail), staff delegates must be provided in all establishments where there are at least 11 employees.

16 Articles L. 321-2 and L. 321-3 of that Code provide that employers contemplating redundancies for economic reasons must call a meeting of and consult the works council or the staff delegates where the number of planned redundancies amounts to at least 10 within the same 30-day period.

17 Prior to the adoption of Order No 2005-892, Article L. 620-10 of the French Labour Code read as follows:

'For the purpose of implementing the provisions of this Code, the size of an undertaking's workforce shall be calculated in accordance with the following provisions:

Employees with a full-time contract of indefinite duration and homeworkers shall be taken fully into account in calculating the size of an undertaking's workforce.

Employees with a fixed-term contract, employees with an intermittent employment contract, employees provided to the undertaking by an outside undertaking, including temporary employees, shall be taken into account in calculating the size of an undertaking's workforce pro-rata to the amount of time they have spent at the

undertaking during the preceding 12 months. However, employees with a fixed-term contract, a temporary contract or those provided by an outside undertaking shall be excluded from the calculation of the size of the workforce where they replace an employee who is absent or whose employment contract has been suspended.

Part-time employees, whatever the nature of their employment contract, shall be taken into account by dividing the total number of working hours laid down in their employment contracts by the statutory or standard working hours.'

18 Article 1 of Order No 2005-892 added the following paragraph to Article L. 620-10 of the French Labour Code:

'An employee engaged after 22 June 2005 who is under 26 years of age shall not be taken into account in calculating the size of the workforce of the undertaking by which he is employed until he reaches the age of 26, whatever the nature of his contract with the undertaking. This provision cannot have the effect of abolishing a staff representation body or an authority to represent staff. The provisions of this subparagraph shall be applicable until 31 December 2007.'

The dispute in the main proceedings and the questions referred for a preliminary ruling

19 It is apparent from the file lodged with the Court that, with a view to remedying the worrying employment situation in France, the Prime Minister presented an emergency employment plan to Parliament in his General Policy Statement of 8 June 2005. In order to enable those measures to enter into force on 1 September 2005, the Government sought authorisation to legislate by way of order.

20 Thus, Article 1 of Law No 2005-846 of 26 July 2005 (JORF of 27 July 2005, p. 12223) authorised the Government to adopt, by order, any measure intended, inter alia, to adapt the rules on the calculation of workforce numbers used to implement employment law provisions or financial obligations imposed by other laws in order to encourage undertakings, as from 22 June 2005, to take on employees aged under 26.

21 On 2 August 2005, the Government adopted Order No 2005-892 laying down measures concerning the adaptation of the rules on the calculation of workforce numbers, whilst providing that the provisions of that order were to expire on 31 December 2007.

22 Proceedings challenging Order No 2005-892 were lodged before the Conseil d'État by the CGT, the CFDT, the CFE-CGC, the CFTC and the CGT-FO.

23 In support of their actions, the applicants in the main proceedings submitted, in particular, that the amendments to the rules on the calculation of workforce numbers, as laid down in Order No 2005-892, were contrary to the objectives of Directives 98/59 and 2002/14.

24 The national court points out that, although the disputed provision of Order No 2005-892 does not directly have the effect of excluding the application of the national provisions transposing Directives 98/59 and 2002/14, it is nevertheless the case that, in respect of establishments with more than 20 employees, but fewer than 11 of whom are aged 26 or over, application of the contested provision may have the consequence of relieving the employer of certain obligations under those two directives.

25 In those circumstances, the Conseil d'État decided to stay the proceedings and to refer to the Court for a preliminary ruling the following questions:

'(1) In view of the purpose of Directive [2002/14], which, as set out in Article 1(1) thereof, is to establish a general framework setting out minimum requirements for the right to information and consultation of employees in undertakings or establishments within the Community, must the transfer to the Member States of responsibility for determining the method for calculating the thresholds of employees employed, which is set out in that directive, be regarded as allowing those States to defer taking account of certain categories of employees for the application of those thresholds?

(2) To what extent may Directive [98/59] be interpreted as authorising an arrangement with the effect that some establishments normally employing more than 20 employees will be relieved, albeit temporarily, of the obligation to create a structure for the representation of employees because of rules for the calculation of staff numbers that exclude taking account of some categories of employees for the application of the provisions organising that representation?'

26 In its decision for reference, the Conseil d'État asked the Court to apply an accelerated procedure to the reference for a preliminary ruling in accordance with the first paragraph of Article 104a of the Rules of Procedure.

27 That application was dismissed by order of the President of the Court of 21 November 2005.

The questions referred

28 As a preliminary point, it is clear from the Court's case-law that the encouragement of recruitment constitutes a legitimate aim of social policy and that, in choosing the measures capable of achieving the aims of their social and employment policy, the Member States have a broad margin of discretion (see, inter alia, Case C-167/97 *Seymour-Smith and Perez* [1999] ECR I-623, paragraphs 71 and 74, and Case C-187/00 *Kutz-Bauer* [2003] ECR I-2741, paragraphs 55 and 56).

29 However, the margin of discretion which the Member States enjoy in matters of social policy cannot have the effect of frustrating the implementation of a fundamental principle of Community law or of a provision of that law (see, to that effect, *Seymour-Smith and Perez*, paragraph 75, and *Kutz-Bauer*, paragraph 57).

The first question

30 By its first question, the national court asks, in substance, whether Article 3(1) of Directive 2002/14 is to be interpreted as precluding national legislation which excludes, even temporarily, a specific category of workers from the calculation of staff numbers within the meaning of that provision.

31 In that regard, it should be noted that, pursuant to Article 2(d) of Directive 2002/14, 'employee' means any person who, in the Member State concerned, is protected as an employee under national employment law and in accordance with national practice.

32 It follows that, since it is not disputed that the workers aged less than 26 referred to in the national provision at issue in the main proceedings are protected by national employment legislation, they are employees within the meaning of Directive 2002/14.

33 It is true that the second subparagraph of Article 3(1) of the Directive provides that Member States are to determine the method for calculating the thresholds of employees employed. However, that provision concerns determination of the method of calculation of the thresholds of employees employed and not the actual definition of the concept of an employee.

34 Since Directive 2002/14 defined the group of persons to be taken into account at the time of that calculation, Member States cannot exclude from that calculation a specific category of persons initially included in that group. Thus, although that directive does not prescribe the manner in which the Member States are to take account of employees falling within its scope when calculating the thresholds of workers employed, it does nevertheless require that they be taken into account.

35 As is apparent from the Court's case-law, where a Community provision refers to national legislation and practice, Member States cannot adopt measures likely to frustrate the objective of the Community legislation of which that provision forms part (see, to that effect, Case C-151/02 *Jaeger* [2003] ECR I-8389, paragraph 59).

36 With regard more particularly to Directive 2002/14, firstly, it is clear from both Article 137 EC, which constitutes its legal basis, and the 18th recital in the preamble to the Directive and Article 1(1) thereof that its objective is to lay down minimum requirements for the right to information and consultation of employees in undertakings or establishments within the Community.

37 Secondly, the fact remains that the system put into place by Directive 2002/14 is intended to apply to all employees referred to in Article 2(d) of that directive, apart from certain exceptions laid down in Article 3(2) and (3) thereof.

38 Legislation such as that at issue in the main proceedings which, as the Advocate General observed in point 28 of his Opinion, has the consequence of exempting certain employers from the obligations laid down in Directive 2002/14 and of depriving their employees of the rights granted under that directive, is liable to render those rights meaningless and thus make the Directive ineffective.

39 Furthermore, it follows from the observations submitted by the French Government that the national provision at issue in the main proceedings is intended to relax the constraints created, for employers, by the fact that the recruitment of additional employees may cause them to cross the thresholds laid down, inter alia, for application of the obligations under Directive 2002/14.

40 With regard to the interpretation of Directive 2002/14 proposed by the French Government, to the effect that Article 3(1) of the Directive does not prohibit Member States from instituting, as is the case of the provision at issue in the main proceedings, methods for the calculation of thresholds of employees which may go as far as temporarily excluding certain categories of employee, inasmuch as that exclusion is justified on the basis of an objective of general interest constituted by the promotion of employment of young people and complies with the principle of proportionality, it is sufficient to note that such an interpretation is incompatible with Article 11(1) of Directive 2002/14, which requires Member States to take all necessary steps enabling them to guarantee the results imposed by Directive 2002/14 at all times, in that it implies that those States would be allowed to evade, even temporarily, that obligation to reach a clear and precise result imposed by Community law (see, by analogy, Case C-212/04 *Adeneler and Others* [2006] ECR I-6057, paragraph 68).

41 In the light of the foregoing, the answer to the first question referred must be that Article 3(1) of Directive 2002/14 is to be interpreted as precluding national legislation which excludes, even temporarily, a specific category of workers from the calculation of staff numbers within the meaning of that provision.

The second question

42 By its second question, the national court asks, in substance, whether Article 1(1)(a) of Directive 98/59 is to be interpreted as precluding national legislation which excludes, even temporarily, a specific category of workers from the calculation of staff numbers set out in that provision.

43 In order to answer the question reformulated in that way, it should first be observed that Directive 98/59 is designed to ensure comparable protection for workers' rights in the different Member States and to harmonise the costs which such protective rules entail for Community undertakings (see, by analogy, Case C-383/92 *Commission* v *United Kingdom* [1994] ECR I-2479, paragraph 16).

44 Secondly, it is clear from Articles 1(1) and 5 of Directive 98/59 that it is intended to provide minimum protection with regard to the information and consultation of employees in the event of collective redundancies, Member States remaining free to adopt national measures more favourable to such employees.

45 The fact remains that the thresholds laid down in Article 1(1) of Directive 98/59 constitute precisely such minimum provisions from which Member States may derogate only by provisions more favourable to employees.

46 Firstly, it follows from the Court's case-law that national legislation which makes it possible to impede protection unconditionally guaranteed to workers by a directive is contrary to Community law (*Commission* v *United Kingdom*, paragraph 21).

47 Secondly, and contrary to the submissions of the French Government, Directive 98/59 cannot be interpreted as meaning that the methods for calculation of those thresholds, and therefore the thresholds themselves, are within the discretion of the Member States, since such an interpretation would allow the latter to alter the scope of that directive and thus to deprive it of its full effect.

48 As is clear from the decision for reference and from points 73 and 74 of the Advocate General's Opinion, a national provision such as that at issue in the main proceedings is liable to deprive, even temporarily, all workers employed by establishments normally employing more than 20 workers of the rights which they derive from Directive 98/59 and thus undermines its effectiveness.

49 In the light of the foregoing, the answer to the second question referred must be that Article 1(1)(a) of Directive 98/59 is to be interpreted as precluding national legislation which excludes, even temporarily, a specific category of workers from the calculation of staff numbers set out in that provision.

Costs

50 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Second Chamber) hereby rules:

1. **Article 3(1) of Directive 2002/14/EC of the European Parliament and of the Council of 11 March 2002 establishing a general framework for informing and consulting employees in the European Community must be interpreted as precluding national legislation which excludes, even temporarily, a specific category of workers from the calculation of staff numbers within the meaning of that provision.**

2. **Article 1(1)(a) of Council Directive 98/59/EC of 20 July 1998 on the approximation of the laws of the Member States relating to collective redundancies must be interpreted as precluding national legislation which excludes, even temporarily, a specific category of workers from the calculation of staff numbers set out in that provision.**

[Signatures]