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The obligation of information and consultation in the event of projected collective dismissals with no representatives appointed (RO)

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Summary

The Bucharest Court of Appeal has overturned a dismissal decision related to a collective dismissal, drawing upon the reasoning given by the European Court of Justice in Case C-496/22 (*Brink's Cash Solutions*). This ruling followed a request for a preliminary ruling made by the same Court during the proceedings.
Following the ECJ's interpretation, the Appeal Court found that the employer violated national laws transposing Directive 98/59/EC by proceeding with collective dismissals without waiting for the employee representative election results.

Legal background

Directive 98/59/EC on the approximation of the laws of the Member States relating to collective redundancies has been transposed into the Romanian Labour Code. Article 69 of the Labour Code states:

> (1) Where the employer is contemplating collective redundancies, that employer shall begin consultations, in good time and with a view to reaching an agreement, under the conditions laid down by law, with the trade union or, as the case may be, the employees' representatives, on at least the following matters:
> (a) the methods and means of avoiding collective redundancies or reducing the number of employees to be made redundant;
> (b) mitigation of the consequences of dismissal by recourse to social measures aimed, in particular, at aid for the vocational retraining of dismissed employees.
> (2) In the course of the consultations referred to in paragraph 1, in order to enable the trade union or employees' representatives to make proposals in good time, the employer shall provide them with all relevant information and notify them in writing of the following: […]

Article 70 of the Labour Code further states that:

> The employer shall forward a copy of the notification referred to in Article 69(2) to the regional labour inspectorate and to the regional employment agency on the same date as that on which that employer communicated it to the trade union or, as the case may be, to the employees' representatives. […]
> The trade union or, where appropriate, the employees' representatives may propose to the employer measures to avoid redundancies or to reduce the number of employees made redundant within 10 calendar days of the date of receipt of the notification.

Facts

Mr. A was employed by Company X, a firm specialising in ATM cash management operations. He served as a driver stationed at a processing centre.
Due to the impact of the COVID-19 pandemic in 2020, the company saw a major drop in activity. This led them to restructure and start a collective redundancy process, affecting Mr. A and 127 other employees.
Subsequently, Mr. A contested the dismissal decision in the Bucharest County Court, aiming to have it annulled and to be reinstated in his previous role. He claimed that the employer had not adhered to the collective consultation procedure. Given the absence of elected representatives at the time of the collective dismissal, Mr. A argued that the employer should have directly informed and consulted each employee. Furthermore, he maintained that it was the company's duty to inform the

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affected employees about the need to elect new representatives for the redundancy process.

Judgment

The Bucharest Tribunal dismissed the claim, stating that no trade union existed when the restructuring began and the employees' representatives mandate had expired.
Since the employees neither appointed new representatives nor extended existing mandates, the employer was found not to be at fault for missing the information and consultation procedures required by the Labour Code.
The decision was appealed. The former employee argued that the employer had a duty to communicate the need for appointing representatives (similar to what is performed in the context of the obligation to initiate collective negotiations) and that by neglecting to do so it violated the European Social Charter and Directive 98/59/EC.
Given the specific circumstances of the case, the Bucharest Appeal Court requested a preliminary ruling from the European Court of Justice ('ECJ') regarding the compatibility of national provisions with the scope and provisions of Directive 98/59/EC.
The inquiry aimed to determine whether an employer can refrain from consulting the affected workers in a collective dismissal procedure when neither representatives have been appointed nor where there is a legal obligation to appoint them.
The ECJ delivered its judgment in October 2023 (Case C-496/22), affirming that the right to information and consultation applies to worker representatives rather than individual workers, since the protection afforded by the Directive is collective, not individual.
It further stated that the Directive does not prohibit national legislation from exempting employers from individually informing and consulting the employees affected by projected collective dismissals, nor to require those employees to appoint such representatives. However, the national legislation must still ensure that the full effect of the relevant provisions of Directive 98/59 (concerning collective dismissals) is maintained and that this guarantee should be maintained even in situations where circumstances beyond the control of the affected workers arise.

The Appeal Court applied the conclusions of the ECJ and ascertained that the national legislation provides the means to facilitate the appointment of employee representatives. In relation to the circumstances of the case, the Court determined that:

(i) the mandate of the employees' representatives had expired on 23 April 2020;
(ii) in the first notification issued on 12 May 2020 addressed to the regional employment agency, the employer stated that it was aware that the employees were conducting an election procedure with a view to appointing new representatives; further
(iii) in the second notification issued on 15 May 2020 addressed to the regional labour inspectorate, the employer stated that the employees' representatives mandate had expired on 24 April 2020 and that no proof of appointment was communicated.

Thus, it was considered that the employer was aware of the ongoing election process and knowingly continued with the collective dismissal procedure without waiting for the election results. Hence, the information and consultation process was not executed due to the deliberate actions of the employer, beyond the control of the affected workers.
Consequently, the decision of the Tribunal was overturned and the dismissal procedure deemed null and void leading to the reinstatement of the employee.

Commentary

Ultimately, can workers validly forfeit the mechanisms provided by Directive 98/59/EC and proceed without representation during a collective dismissal? The Court diplomatically abstained from delivering a clear verdict on this matter, yet it presents an intriguing perspective: the Directive is designed to uphold its scope and guarantees, even in circumstances deemed 'beyond the control of those workers'.
How this control will be assessed is still unclear. The Court examined whether employees could exercise their rights and if there was any fault when they didn't. But it raises another question: without representatives, what evidence must employers provide to show workers exercised this control? As usual, in the absence of explicit norms, future case law will clarify the issue.

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