

LEGAL REGULATION OF COLLECTIVE REDUNDANCIES

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Abstract in original language:

Hromadné propouštění neznamená jenom významný zásah do sociální sféry většího počtu zaměstnanců, ale představuje rovněž neopomenutelný dopad na trh práce zejména v regionech s vyšší nezaměstnaností. Příspěvek se zabývá právní úpravou hromadného propouštění jak v právu ES včetně interpretace některých ustanovení příslušné směrnice v judikatuře Evropského soudního dvora, tak implementací této úpravy do právního řádu České republiky.

Key words in original language:

Propouštění, výpověď z pracovního poměru, výpovědní doba, dohoda o rozvázání pracovního poměru, hromadné propouštění, informace, projednání, zástupci zaměstnanců, odbory, rada zaměstnanců, úřad práce.

Abstract:

Collective redundancies bring serious social consequences for large number of employees. This situation represents also significant impact on the labour market, especially in regions with high unemployment rate. This contribution deals with legal regulation of collective redundancies in the European Community law including the interpretation of certain provisions of relevant directive in the case-law of the European Court of Justice and its implementation into the legal order of the Czech Republic.

Key words:

Dismissal, notice of termination of an employment relationship, notice period, agreement on termination of an employment relationship, collective redundancies, information, consultation, workers' representatives, works council, trade union, labour office.

The loss of employment may cause, and in fact causes, serious social consequences not only for an employee concerned but also for his or her family. Due to the present economic crisis many enterprises in Europe reduce their production, or even close down which, in many cases, leads to collective redundancies. The aim of this article is to analyse the European Community (hereinafter EC) legislation, including its interpretation in the case-law of the European Court of Justice (hereinafter ECJ), and its implementation into the legal order of the Czech Republic.

1. REGULATION OF COLLECTIVE REDUNDANCIES IN EUROPEAN COMMUNITY LAW

The article 137 of the Treaty Establishing the European Community in its consolidated version states that the Council may adopt measures designed to encourage cooperation between Member States inter alia in the area of protection of workers where their employment contract is terminated. The EC law does not regulate the termination of an employment relationship or an employment contract, it only harmonises the laws of the Member States concerning the collective dismissals. This issue has been regulated since 1975. The original Council Directive 75/129/EEC of 17 February 1975 on the approximation of the laws of the

Member States relating to collective redundancies was consolidated by the Council Directive 98/59/EC of 20 July 1998 on the approximation of the laws of the Member States relating to collective redundancies. By harmonising the rules applicable to collective redundancies, the Community legislature intended both, 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.¹

The later directive is based, inter alia, on point 7 of the Community Charter of Fundamental Social Rights of Workers adopted on 9 December 1989 in Strasbourg (hereinafter Community Charter). This provision provides for that the improvement in living and working conditions must cover, where necessary, the development of certain aspects of employment regulations such as procedures for collective redundancies and those regarding bankruptcies. Collective redundancies shall be also the subject of information, consultation and participation for workers stated in point 17 of the Community Charter.

The preamble to the Council Directive 98/59/EC highlights the importance of greater protection afforded to workers in the event of collective redundancies while taking into account the need for balanced economic and social development within the Community. It also underlines remaining differences between the provisions in force in the Member States concerning the practical arrangements and procedures for such redundancies and the measures designed to alleviate the consequences of redundancy for workers. These differences can have a direct effect on the functioning of the internal market.

1.1 DEFINITION OF COLLECTIVE REDUNDANCIES

The collective redundancies are defined in the Article 1 of the Council Directive 98/59/EC as dismissals effected by an employer for one or more reasons not related to the individual workers concerned. The Member States may choose one of two possibilities how to lay down the number of redundancies:

I. 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 and more.

For the purpose of calculating the number of redundancies, terminations of an employment contract which occur on an employer's initiative for one or more reasons not related to individual workers concerned shall be assimilated to redundancies, provided that there are at least five redundancies. According to this definition, the collective redundancies may not occur in establishments employing less than 21 workers.

¹ Judgment of the European Court of Justice of 8 June 1994 in Case C-383/92 Commission of the European Community v. United Kingdom of Great Britain and Northern Ireland, par.16.

II. Over a period of 90 days, at least 20, whatever the number of workers normally employed in the establishments in question.

The Council directive 98/59/EC defines only collective redundancies it contains no definition of redundancy. The notion of redundancy is interpreted in the case-law of the European Court of Justice. This concept must, however, be given a uniform interpretation for the purposes of the Directive.² The concept of redundancy as mentioned in Article 1(1)(a) of the Directive may not be defined by any reference to the laws of the Member States, but has instead meaning in Community law.³ For example in the case *Junk* (C-188/03) the ECJ dealt with the question whether the event constituting redundancy consists of the expression by the employer of his intention to put an end to the contract of employment or of the actual cessation of the employment relationship on the expiry of the period in the notice of redundancy. In the opinion of the ECJ, event constituting redundancy consists in the declaration by an employer of his intention to terminate the contract of employment.⁴

In the above mentioned case *Commission v. Portugal* (C- 188/03) the ECJ solved the question whether the national law restricting the concept of collective redundancies for structural, technological or cyclical reasons and by failing to extend that concept to dismissals for any reasons not related to the individual workers concerned is failure to fulfil the obligations under the EC law. The ECJ interpreted the concept of redundancy with respect to the objective of the Directive which is to strengthen the protection of workers in the case of collective redundancies. The objectives referred to in the Directive would be attained only in part if the termination of a contract of employment that was not contingent on the will of the employer were to be excluded from the body of rules laid down by the Directive.⁵ In the opinion of the ECJ the concept of redundancy has to be interpreted as including any termination of contract of employment not sought by the worker, and without his consent. It is not necessary that the underlying reasons should reflect the will of the employer.⁶

1.2 SCOPE OF APPLICATION OF THE COUNCIL DIRECTIVE 98/59/EC

Article 2 (a) of the Council Directive 98/59/EC expressly excludes from its scope of application collective redundancies effected under contracts of employment concluded for limited periods of time or for specific tasks that means employment contracts or employment relationships for a fixed-term. However, the provisions of this Directive shall apply where such redundancies take place prior to the date of expiry or the completion of such contracts.

The personal scope of application of the Council Directive 98/59/EC does not include:

² Judgment of the European Court of Justice of 12 October 2004 in Case C-55/02 *Commission of the European Communities v. Portuguese Republic*, par. 44.

³ *Op.Cit.* par. 49.

⁴ Judgment of the European Court of Justice of 27 January 2005 in Case C-188/03 *Irmtraud Junk v. Wolfgang Kühnel*, par. 39.

⁵ Judgment of the European Court of Justice of 12 October 2004 in Case C-55/02 *Commission of the European Communities v. Portuguese Republic*, par. 52.

⁶ *Op.Cit.*, par. 50.

- a) Workers employed by public administrative bodies or by establishments governed by public law (or, in Member States where this concept is unknown, by equivalent bodies),
- b) The crews of seagoing vessels

1.3 OBLIGATIONS OF EMPLOYERS

Section II of the Council Directive 98/59/EC provides for obligations of employers who are contemplating collective redundancies. This obligations include information and consultation fulfilled vis-à-vis the workers' representatives who are provided for by laws or practices of the Member States. The employer has also obligation to notify the competent public authority. It is irrespective whether the decision regarding the collective redundancies is being taken by the employer or by an undertaking controlling the employer.

1.3.1 EMPLOYEES' RIGHT TO CONSULTATIONS

An employer who is contemplating collective redundancies shall begin consultations with the workers' representatives in good time. The aim of consultations is to reach an agreement between the employer and the worker's representatives. Article 2 (2) of the Council Directive 98/59/EC provides for the minimum issues subjected to consultations. They include:

- The ways and means of avoiding collective redundancies or reducing of number of workers affected,
- Ways and means of mitigating the consequences by recourse of accompanying social measures aimed, inter alia, at aid for redeploying or retraining workers made redundant.

The Member States may provide that the workers' representatives may call on the services of experts in accordance with national legislation and/or practice.

1.3.2 EMPLOYEES' RIGHT TO INFORMATION

The purpose of the employer's obligation to inform the workers' representatives is to enable them to make constructive proposals. The employer shall in good time during the course of the consultations supply them with all relevant information. He shall in any event notify them in writing of:

- the reasons for the projected redundancies,
- the number of categories of workers to be made redundant,
- the number of categories of workers normally employed
- the period over which the collective redundancies are to be effected,
- the criteria proposed for the selection of the workers to be made redundant in so far as national legislation and/or practice confers the power thereof upon the employer,

- the method for calculating any redundancy payments other than those arising out of national legislation and/or practice.

The employer shall forward to the competent public authority the copy of at least elements of this communication with exception of method for calculating any redundancy payments other than those arising out of national legislation and/or practice.

1.4 PROCEDURE FOR COLLECTIVE REDUNDANCIES

Procedural rules regarding collective redundancies are provided for in Section III of Council Directive 98/59/EC. According to Article 3 (1) employers shall notify the competent public authority in writing of any projected collective redundancies. This provision enables to the Member States to provide that in the case of planned collective redundancies arising from termination of the establishment's activities as a result of a judicial decision, the employer shall be obliged to notify the competent public authority in writing only if the competent authority requests. The content of this notification corresponds to content of information and consultations with the worker's representatives. Employers shall forward to the worker's representatives a copy of this notification. The worker's representatives may send any comments they may have to the competent public authority.

Article 4 of the Council Directive 98/59/EC states that projected collective redundancies notified to the competent public authority shall take effect not earlier than 30 days after the notification referred to the competent public authority without prejudice to any provisions governing individual rights with regard to notice of dismissal. Member States may grant the competent public authority the power to reduce the above mentioned period. This period shall be used by the competent public authority to seek solution to the problems raised by the projected collective redundancies.

2. REGULATION OF COLLECTIVE REDUNDANCIES IN THE CZECH REPUBLIC

In the Czech Republic the collective redundancies are governed by the act no 262/2006 Coll. Labour Code, as amended.⁷ The legislature chose the first way how to define the collective redundancies stated in the Council Directive 98/59/EC. However, it defines the number of employees made redundant in a different way. According to section 62 subsection 1 collective dismissals mean the termination of employment relationships by one employer within the period of 30 calendar days on the basis of notice given for one or more reasons laid down in section 52 (a) to (c) to:

- ten employees in the case of an employer employing from 20 to 100 employees,
- 10 % of employees in the case of an employer employing from 101 to 300 employees,
- 30 employees in the case of an employer employing more than 300 employees.

⁷ The English translation of the Czech Labour Code uses the term collective dismissals (see http://www.mpsv.cz/files/clanky/3221/labour_code.pdf).

The acts-in-law causing the termination of an employment relationship are the notice of termination or in cases laid down agreement. Where an employment relationship is terminated by the notice, it is terminated after the expiry of notice period. Notice period is at least two months. However, it may be stated longer for example in relevant collective agreement, employer's internal regulation, employment contract or other contract between an employer and an employee. Notice period starts to run on the first day of the calendar day of the calendar month following delivery of the notice and ends at the expiry of the last day of the relevant calendar month. Where employment relationships of at least five employees are terminated by one employer within the period of 30 calendar days on the basis of notice given for one or more reasons laid down in section 52 (a) to (c) of the Labour Code a total number of employees shall also include those employees with whom the employer terminated their employment relationship by agreement. Where an employment relationship is terminated by agreement it terminates on the agreed day. In this case, there is no notice period. The Czech legislature thus implemented last sentence of Article 1 (1) of the Council Directive 98/59/EC.

The reasons for termination of an employment relationship are so called organisational reasons. They consist of following situation:

- a) The employer's undertaking or its part is closed down,
- b) The employer's undertaking or its part relocates,
- c) The employee becomes redundant owing to the decision of the employer, or the employer's competent body to change the activities, plants and equipment to reduce the number of employees for the purpose of increasing labour efficiency or to introduce other organisational changes.

An employee whose employment relationship is terminated by notice given by his or her employer for one of these reasons, or by agreement for the same reasons is entitled to receive severance pay in the amount of at least three times his or her average monthly earnings. The employer shall pay severance pay to the employee after termination of the employment relationship, namely on the next pay day fixed for the wage or salary payment at his undertaking, unless the employer agrees with the employee on payment of such severance pay on the day when the employee's relationship comes to an end or on a later pay day.

The workers' representatives entitled to be informed and consulted under the Czech Labour Code are trade union or works council. Where neither trade union organisation nor works council has been formed at the employer's undertaking or where, it has been formed, it does not operate there, the employer shall fulfil the stated duties vis-à-vis every employees affected by collective redundancies.

Section 62 sub 2 of the Labour Code provides for the employer's duty to report in writing to the trade union or the works council or individual employees before giving notice to individual employees, at least 30 days in advance. Content of this information corresponds to Article 2 (3) of the Council Directive 98/59/EC. The employer's duty to consult the trade union or the works council or individual employees does not differ from the Council Directive 98/59/EC.

The competent public authority to be reported is the labour office. The employer is obliged to provide two reports in writing. The first one is served at the moment of information and

consultation with the trade union organisation or the work council and includes: reasons for collective redundancies, a total number of employees, and a number of those employees to be affected and their job titles, the period within which collective dismissals will take place, the criteria proposed for the selection of employees to be made redundant, and further of the start of consultation with the trade union organisation or the works council. One copy of this written report shall be served by the employer on the trade union organisation or the works council.

The second report is more important because it may have an effect on the moment of termination of employment relationships of individual employees. This report on employer's decision concerning collective dismissals and on the results of consultation the trade union organisation or the works council must be provingly delivered by an employer to the competent labour office. It must contain a total number of employees a number of those employees to be affected by collective dismissals and their job titles. One copy of this written report shall be delivered to the trade union organisation or the works council. The trade union organisation or the works council have the right to give its independent opinion on the employer's written report and serve it to the competent labour office. However, there is an exception in the cases where an insolvency order has been declared on the employer's property. In this case an employer shall deliver the written report to the competent labour office only at its request. The Czech legislature made use of the possibility provided for in Article 3 (1) of the Council Directive 98/59/EC.

Nor the Labour Code neither the Employment Act (act no. 435/2004 Coll. as amended) states which labour office is competent to be served on this written report. The local competence may be determined by the place where the work is performed, or by the employer's registered seat. In the opinion of the Czech Supreme Court the competent labour office is every labour office.⁸

Section 62 subsection 7 of the Labour Code imposes on the employer the duty to inform his employee of the day when his written report was delivered to the labour office. This day is very important because according section 63 of the Labour Code the employment relationship of an employee who is affected by collective dismissals shall terminate by notice earliest on expiry of 30 consecutive days of the day when the employer's report was delivered to the competent labour office, except when the employee states that he does not insist on observance of this time-limit. This rule shall not apply if an insolvency order has been declared against the employer.

Conclusion:

Collective redundancies have been regulated in the EC law for more than 30 years. The EC law harmonises the laws of the Member States concerning this issue because differences between the provisions in force in the Member States can have a direct effect on the functioning of the internal market. The original Directive 129/75 was consolidated by the later Directive 98/59. In the Czech Republic the EC regulation relating to collective redundancies is implemented in section 62, 63 and 64 of the Labour Code (act no. 262/2006 Coll. as amended). The conditions for collective redundancies are fulfilled when an employer

⁸ Judgment of the Supreme Court of the Czech Republic Sp. Zn. 2985/2005.

terminates employment relationships by notice of termination with certain number of employees for so called organisational reasons. On the conditions laid down employment relationships terminated by agreement are included in total number of employees made redundant.

Literature:

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- Community Charter of Fundamental Social Rights of Workers;
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