RULING n°342 of 17 March 2021 (19-12.025, 19-12.026, 19-12.027) – Cour de cassation (*Court of Cassation*) - Social chamber - ECLI:FR:CCASS:2021:SO00342

Only the French version is authentic

Dismissal

Appellant: Keyria, a single-member simplified joint stock company
Respondents: Mr H.. Q... & Ors

Consolidation

1. Given that they are related, appeals Nos. P 19-12.025 to R 19-12.027 have been consolidated.

Partial withdrawal

2. Kerya is hereby acknowledge as having withdrawn its appeals insofar as they are directed against Messrs A... and K... in their capacity as administrators to implement Keyria's plan, the company MJA, represented by Mrs F... in her capacity as creditor's representative of Keyria, Frégate, Legris Industries Partners 1 (LIP1) and the AGS CGEA IDF Ouest.

Facts and procedure

3. According to the rulings under appeal (Paris, 11 December 2018), on 1 January 2009 the Legris group was organised in three industrial divisions, including the Keyria division comprised of 31 companies whose activity was the design and installation of factories and equipment for the production of building materials. Keyria, itself owned by Legris Industrie via Legris Industries Partner 1 and Legris industrie FE, was the holding company of the Keyria division and was engaged in providing services to all the companies in the division in various fields (accounting, tax, communication, etc.).

4. By judgment of 28 October 2009, the Tribunal de commerce *(Commercial Court*) of Paris started safeguard proceedings against Keyria and subsequently, by judgment of 9 June 2010, approved the company's safeguard plan. At the same time, most of the French subsidiaries of the Keyria division were would up by the court.

5. MESSRS Q... S... and Mrs V... who were employees of the Keyria, were dismissed between February and May 2010, as part of a collective redundancy scheme involving 30 employees. They referred the matter to the conseil des prud'hommes (*Labour Tribunal*) in order to have it ascertained that the economic reason given was the result of a fault and amounted at the least to a culpable carelessness on the part of their employer, requesting that Keyria be ordered to pay damages for unfair dismissal.

Request for a preliminary ruling from the Court of Justice of the European Union

6. Keyria requests that the following questions be referred to the Court of Justice of the European Union for a preliminary ruling:

"Since the redundancy carried out in this case was, as stated, collective, the question arises as to whether Directive 98/59/EC of 20 July 1998, together with the principle of freedom of establishment and freedom to conduct a business, should not be interpreted as meaning that where an employer is in real economic difficulties, he should be free to carry out collective redundancies, the only exception to this principle being the case of fraud?

Shouldn't this directive and these principles be interpreted as prohibiting the disqualification of a collective redundancy on grounds of unfair dismissal in so far as the economic difficulties together with the absence of fraud are proven and given that the disqualification retained ("culpable carelessness") not only impinges upon the sovereign appreciation of the employer with regard to management decisions but is also neither sufficiently precise nor known in advance? "

Court's response

7. It follows from the third paragraph of Article 267 of the Treaty on the Functioning of the European Union that where a question is raised in a case pending before a national court against whose decisions there is no judicial remedy under national law, that court shall bring the matter before the Court to request a preliminary ruling thereon. There is no such obligation on that court where it finds that the question raised is inconsequential or where the provision of Union law at issue has already been interpreted by the Court or that the correct application of Union law is so obvious that it leaves no room for reasonable doubt.

8. The main purpose of Council Directive 98/59/EC of 20 July 1998 on the approximation of the laws of the Member States relating to collective redundancies is to ensure that collective redundancies are preceded by consultation of the workers' representatives and information of the competent public authority.

9. It does not appear from the ruling that Keyria falls within the scope of the freedom of establishment as a company established in another Member State which has set up subsidiaries in France.

10. The Court of Justice of the European Union, in a judgment of 21 December 2016 (CJEU, judgment of 21 December 2016, AGET Iraklis, C-201/15), having noted that Article 2 of Council Directive 98/59 of 20 July 1998 "imposes an obligation to negotiate", that the consultation of workers' representatives must be carried out "with a view to reaching an agreement" in order to avoid or limit the number of redundancies as well as to mitigate the consequences, also specified the substantive conditions to which the ability of the employer to effect or refrain from effecting collective redundancies might be subject are not covered, in principle, by the provisions of Directive 98/59 and consequently remain a matter for the Member States (point 33). Accordingly, the Directive cannot, in principle, be interpreted as precluding a national regime which confers upon a public authority the power to prevent collective redundancies by a reasoned decision, unless such national regime were to result in Articles 2 to 4 of Directive 98/59 being deprived of their effect (paragraphs 34 and 35), that is to say, by ruling out any effective possibility for the employer to carry out collective redundancies (paragraph 38).

11. However, it should be noted that the case law of the Cour de cassation (*Court of Cassation*) that is criticised does not, contrary to the AGET Iraklis case, involve a prior control permitting a national authority to oppose a proposed collective redundancy on grounds relating to the protection of workers and of employment. It is, on the contrary, based on an "a posteriori" control of the cause of the dismissal so as not affect in any way the employer's freedom of judgement as to if and when a plan for collective redundancy

should be implemented and, as such, does not result in Council Directive 98/59 of 20 July 1998 being deprived of its effect.

12. It also follows from the case law of the Cour de cassation (*Court of Cassation*) that while the trial court must verify the true and serious nature of the economic reason for redundancy in the light of the criteria laid down in Article L. 1233-3 of the Labour Code, they cannot substitute themselves for the employer in terms of the choices it makes in order to deal with the economic situation of the company. The Cour de cassation (*Court of Cassation*) therefore ensures that in the context of this control of the truth and seriousness of the economic reason, the trial court does not carry out an assessment of the employer's management choices (Ass. plen. 8 December 2000, pourvoi n° 97-44.219, Bull civ Ass plen n° 11 ; Soc., 8 July 2009, pourvoi n° 08-40.046, Bull V, n° 173).

13. This case law shows that if the employer can justify real and serious economic difficulties, technological changes, a reorganisation necessary to safeguard the competitiveness of the company or a total and definitive cessation of activity, it cannot be sanctioned for its management choices, even when they result from an error of appreciation (Soc., 14 December 2005, appeal no. 03-44.380, Bull. V, no. 365). Only certain misconduct on the part of the employer, which does not constitute a simple error in the appreciation of the risk inherent in any management choice, can deprive a dismissal of an economic nature of real and serious cause (Soc., 16 January 2001, Appeal No. 98-44.647, Bull. V, No. 10; Soc., 4 November 2020, Appeal No. 18-23.029, publication in progress).

14. Economic difficulties cannot therefore result from a voluntary situation in which the employer "*allowed itself to be stripped of a significant part of its assets by pure complacency and thereby knowingly contributed to the generation of the poor financial situation that had arisen at the time of dismissal*" (Soc, 9 October 1991, Appeal No. 89-41.705, Bull. V, No. 402), or fraud when the difficulties were "*intentionally and artificially brought about*" (Soc., 12 January 1994, Appeal No. 92-43.191).

15. In its ruling of 10 September 2019 (Soc., 10 September 2019, Appeal Nos 19-12.025, 19-12.026, 19-12.027) in which it refused to refer the Priority Constitutional Question raised by Keyria, the Cour de cassation (*Court of Cassation*) also recalled that there was no settled case law according to which a dismissal for economic reasons could be deprived of real and serious cause in the presence of any management fault, even if this had no direct and certain causal link with the economic difficulties.

16. It follows that the case law of the Court of cassation that is criticised and that allows, in the context of an "a posteriori" review, that an economic dismissal may be devoid of real and serious cause when the employer has committed a fault at the origin of the economic reason cited, is based on sufficiently precise criteria. It does not constitute an impediment to the employer's right to dismiss nor deprive Directive 98/59 of its effect.

17. In the absence of reasonable doubt as to the interpretation of Council Directive 98/59 of 20 July 1998, there is therefore no need to refer the question to the Court of Justice of the European Union for a preliminary ruling.

Reviewing pleas

On the first and second pleas, annexed hereto

18. Pursuant to the paragraph 2 of Article 1014 of the Code of Civil Procedure, there is no need to rule by a specially reasoned decision on these pleas, which are clearly not of a nature to the quashing.

ON THESE GROUNDS, the Court:

DECLARES that there is no need to refer the question for a preliminary ruling;

DISMISSES the appeals;

Orders the Keyria to pay the costs.

President: Mr Cathala
Reporting Judge: Ms Mariette, Counsellor
Advocate General: Ms Laulom
Lawyers: SCP Nicolaÿ, de Lanouvelle et Hannotin - Me Haas