Parent problems - the duty to consult on mass redundancies

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Christina Morton
PROFESSIONAL SUPPORT LAWYER | UK

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The European Court of Justice has given some guidance on some of the issues that arise when a company has to undertake collective redundancy consultation as a result of a strategic decision taken by its parent company.

The case of *Akavan Erityisalojen Keskusliitto AEK ry and ors v Fujitsu Siemens Computers Oy* concerned Fujitsu Siemens Computers Oy (FSC), a Finland-based subsidiary of Fujitsu Siemens Computers (Holding) BV (the parent company).

At a meeting held on 7 December 1999, the executive council of the parent company decided to make a proposal to its board of directors to close the Finnish factory. A week later the parent company board decided to support the proposal, although no specific decision was taken in relation to that factory. On the same day, FSC proposed staff consultations, which took place between 20 December 1999 and 31 January 2000. On 1 February 2000, FSC's board of directors (mainly consisting of directors of the group) decided to close most of FSC's operations in Finland. Most of the employees were dismissed on or after 8 February 2000.

The relevant unions argued that FSC had not complied with Finnish law on collective redundancy consultation, arguing that a final decision to run down the activity of the Finnish factory had in fact been taken by the parent company's board of directors by 14 December 1999, before the consultation with the workforce had taken place. FSC argued that no decision had been taken by 14 December 1999 and, moreover, that possible alternatives still existed at that date. FSC also argued that its own decision, as opposed to that of the parent company, had not been taken until 1 February 2000, after consultation had concluded.

The Finnish court of first instance and the appeal court both accepted FSC's arguments and held that there had been genuine and appropriate consultation. The employees appealed again and the matter was referred to the European Court of Justice (ECJ). In particular, the referring court wanted to know at what point the obligation to consult arises when decisions likely to give rise to collective redundancies are taken within a group of undertakings.

The ECJ gave the following guidance on the obligation to consult workers' representatives within a group of undertakings:

1. The adoption, within a group, of strategic decisions or changes in activity which compel the employing subsidiary to contemplate or plan for collective redundancies triggers the obligation to consult worker representatives. It does not matter whether the strategic decision is taken by the subsidiary employer or by the parent company, although it is always the subsidiary employer upon which the obligation to consult falls (even if it is not properly and immediately informed of the relevant decision by the parent company).
2. The obligation to hold consultations with the workers' representatives falls on the subsidiary which has the status of employer, but only once that subsidiary has been identified.
3. The obligation to start consultation does not depend on whether the employing subsidiary is able to supply the workers' representatives with all the information required by the Directive. The employer may supply information as and when it becomes available. This flexible interpretation of the obligation to inform is essential to enable the workers' representatives to be fully involved in the consultation as and when new information becomes available.
4. The employing subsidiary must complete the consultation process before it terminates the contracts of employees who are to be affected by the collective redundancies (whether such termination is on the direct instructions of its parent company or otherwise).

In the light of the ECJ's decision, the referring court will now decide whether FSC's consultation was, on its facts, compliant with the Directive.

Authors

Christina Morton

PROFESSIONAL SUPPORT LAWYER | LONDON

Employment

 +44 20 7597 6654

 christina.morton@withersworldwide.com