

Nikola L. Filipović, LL.M.¹

FOREIGN CASE LAW

**JUDGMENT OF THE EUROPEAN COURT OF JUSTICE
IN THE CASE
JOHANNES EVERT ANTONIUS MASSAR
v.
DAS NEDERLANDSE RECHTSBIJSTAND
VERZEKERINGSMAATSCHAPPIJ NV**

1. Introduction

The legal issue dealt with by the European Court of Justice in the case no. C-460/14 *Johannes Evert Antonius Massar v. DAS Nederlandse Rechtsbijstand Verzekeringsmaatschappij NV* (judgement made on 7 April 2016) was placed in the context of the right to choose freely a lawyer concerning the refusal of the defendant, the insurance company (*DAS Nederlandse Rechtsbijstand Verzekeringsmaatschappij NV*), to bear the costs of legal assistance provided by the lawyer chosen by the insured person during a procedure that led to termination of his employment contract.

2. EU Regulatory Framework

At the time of conclusion of the contract, the provisions of the Directive 87/344/EEC of 22 July 1987 on coordination of laws and other regulations relating to legal expenses insurance were relevant.

The 11th recital of the Directive 87/344 states that the interest of persons having legal expenses insurance means that the insured person must be able to choose a lawyer or other person appropriately qualified according to national law in any inquiry or proceedings.

Article 2(1) of the Directive 87/344 is worded as follows: 'This Directive shall apply to legal expenses insurance. Such consists in undertaking, against the payment of a premium, to bear the costs of legal proceedings and to provide other services directly linked to insurance cover, in particular with a view to: [...] defending or

¹ Compliance advisor

representing the insured person in civil, criminal, administrative or other proceedings or in respect of any claim made against the insured person.’

Article 4(1) of the Directive provides: ‘Any contract of legal expenses insurance shall expressly recognise that the insured person shall be free to choose a lawyer or, if he so prefers and to the extent that national law so permits, any other appropriately qualified person according to national law in any inquiry or proceedings.’

2.1. The Netherlands Law

Article 4:67, paragraph 1, of the Law on Financial Supervision in the Netherlands is worded as follows: ‘A legal expenses insurer shall ensure that, in the contract for legal assistance cover, it is expressly provided that the insured person is free to choose a lawyer or other practitioner authorised by law [...] in order to defend, represent or serve the interests of the insured person in any inquiry or proceedings.’

3. Subject Matter of the Proceedings and Legal Issues

Johannes Evert Antonius Massar had taken out legal expenses insurance, the management of which was entrusted to *DAS Nederlandse Rechtsbijstand Verzekeringsmaatschappij NV*.

On 14 January 2014, Mr Massar’s employer requested, pursuant to Article 6 of the Extraordinary Decree on Labour Relations, authorisation from the Employee Insurance Agency, a public body independent of the central administration, to terminate the employment contract with Mr Massar on grounds of redundancy.

On 17 January 2014, Mr Massar requested DAS to cover the costs of legal assistance relating to his representation by an external lawyer in that procedure. DAS informed him that the procedure before the Employee Insurance Agency was not an inquiry or proceedings within the meaning of the Law on Financial Supervision (and the Directive), that the insured person accordingly had no right to choose a lawyer and that the insurer would not bear the costs associated with representation by a lawyer.

Mr Massar applied to the judge of the District Court dealing with applications for interim measures for an order that DAS should transfer the case on the procedure concerning him before the Employee Insurance Agency to an external lawyer appointed by him, and pay the lawyer’s fees and the costs associated with that procedure. The District Court referred to the Supreme Court of the Netherlands the question whether the proceedings before the Employee Insurance Agency fell within the definition of inquiry, within the meaning of Directive 87/344 and the Law on Financial Supervision on the basis of which the insured person would have the right to freely choose a lawyer, and at the same time on the basis of which the

insurance company would be obliged to bear the legal expenses. The Supreme Court of the Netherlands considers that, *prima facie*, the proceedings before the Employee Insurance Agency can be categorised as an inquiry. However, the arguments against that meaning include, inter alia, the legislative history of that directive and the consequences that such a wide interpretation of inquiry could have for legal expenses insurance schemes. The Supreme Court of the Netherlands decided to stay proceedings and refer the following questions to the Court of Justice for a preliminary ruling.

3.1. Opinion of the European Court of Justice

The question essentially concerned the interpretation of the term inquiry from Article 4 paragraph 1 of Directive 87/344, i.e. whether the proceedings before the Employee Insurance Agency, which should approve qualification of a worker as redundant, and thus allow termination of the employment contract, can be considered an inquiry that activates the rights from the legal expenses insurance. In a broader sense, based on which facts and circumstances the national court determines whether the proceedings should be considered an inquiry in terms of Article 4 of the Directive.

At the beginning of the consideration, the Court notes that it is clear from the wording of the Article of the Directive that inquiry and proceedings are different terms that the legislator intended to cover different legal procedures in which the insured may have a need for legal protection, and therefore freedom of choice of a lawyer. Therefore, the position of the defendant insurance company, which considers that the inquiry refers only to proceedings, presents an unjustified narrow interpretation of this term that is contrary to the wording of the Directive (which differentiates these two terms).

Furthermore, the court emphasizes that when interpreting provisions of the EU law, it is necessary to take into account not only the wording of the article, but also its objectives and the function that the provision has in the context of this objective. In that regard, it is to be noted that the objective pursued by Directive 87/344, in particular Article 4 thereof, concerning the free choice of a lawyer, is to protect the interests of insured persons. Having in mind the general character of this right, the court considers that it cannot be interpreted narrowly.

It is apparent from the documents in the case file submitted to the Court that there was no action available to the dismissed worker against the decision of the Employee Insurance Agency granting the employer authorisation to dismiss on grounds of redundancy. The employee can bring an action for damages for manifestly unjustified dismissal before the civil courts, the decision in such a case cannot, however, call into question the decision taken by the Agency. In those circumstances,

it is indisputable that the rights of the employee are affected by the decision of the Employee Insurance Agency and that his interests as an insured person require protection in the context of the procedure before that body.

Therefore, the Court recognises the right of an employee who holds legal expenses insurance to choose freely his lawyer that a public body authorises the employer to dismiss him. Furthermore, as regards the financial consequences for legal expenses insurance schemes, the Court noted that member states and insurance companies can in certain cases set limits on the costs to be borne by the insurer, but they cannot deny the insured the right to freely choose a lawyer.

4. Brief Overview of Judgement

As is often the case in the European law, in this case it was necessary to check whether specific national legal concepts are included in the general formulations used by the European legislator to cover various legal institutes that exist under different national laws. Specifically, regarding legal expenses insurance, there may be a difference of opinion between the insured and the insurance company. While the insured has the need to entrust the case to a lawyer whom he trusts and whom he believes will adequately protect his interests, the insurance company has an interest in doing business with lawyers from a pre-established group, with whom it has pre-defined conditions of cooperation. At the same time, disagreements can occur in understanding specific procedure as a procedure that falls under the concept of an insured case, that is, activation of insurance rights. In this sense, the European Court took the position that the wording from Article 4 of the Directive specified two types of legal procedures that are covered by the Directive, on one hand proceedings and on the other hand inquiries, or other types of procedures that strictly speaking are not proceedings, but affect the insured person's rights or obligations, and therefore the insured has an interest in being represented by a lawyer of his choice in such proceedings. In this case, the procedure before the Employee Insurance Agency, which should approve qualification of a worker as redundant, falls under this type of inquiry, that is, the procedure in a broader sense. While on one hand, national laws and insurance companies must not deny general right to freely choose a lawyer, the Court pointed out that free choice of a lawyer does not exclude the possibility of setting limits on expenses that an insurance company could bear in relation to a freely chosen lawyer in certain cases.

Translated by: Jelena Rajković