Reports of Cases

JUDGMENT OF THE COURT (Fifth Chamber)

28 November 2013*

(Request for a preliminary ruling — Directive 80/987/EEC — Directive 2002/74/EC — Protection of employees in the event of employer's insolvency — Guarantee institutions — Limitation on the payment obligation of the guarantee institution — Wage claims falling due more than six months before the commencement of legal proceedings seeking a declaration of the employer's insolvency)

In Case C-309/12,

REQUEST for a preliminary ruling under Article 267 TFEU from the Tribunal Central Administrativo Norte (Portugal), made by decision of 30 March 2012, received at the Court on 27 June 2012, in the proceedings

Maria Albertina Gomes Viana Novo,

Ezequiel Martins Dias,

Gabriel Inácio da Silva Fontes,

Marcelino Jorge dos Santos Simões,

Manuel Dourado Eusébio,

Alberto Martins Mineiro,

Armindo Gomes de Faria,

José Fontes Cambas,

Alberto Martins do Alto,

José Manuel Silva Correia,

Marilde Marisa Moreira Marques Moita,

José Rodrigues Salgado Almeida,

Carlos Manuel Sousa Oliveira,

Manuel da Costa Moreira,

Paulo da Costa Moreira,

* Language of the case: Portuguese.

José Manuel Serra da Fonseca,

Ademar Daniel Lourenço Dias,

Ana Mafalda Azevedo Martins Ferreira

v

Fundo de Garantia Salarial IP,

THE COURT (Fifth Chamber),

composed of T. von Danwitz, President of the Chamber, E. Juhász (Rapporteur), A. Rosas, D. Šváby and C. Vajda, Judges,

Advocate General: Y. Bot,

Registrar: M. Ferreira, Principal Administrator,

having regard to the written procedure and further to the hearing on 15 May 2013,

after considering the observations submitted on behalf of:

— Maria Albertina Gomes Viana Novo and Others, by J. Trocado da Costa, advogado,

— the Fundo de Garantia Salarial, IP, by J. Pereira, advogada,

— the Portuguese Government, by L. Inez Fernandes and J. Quintela Coelho, acting as Agents,

— the German Government, by T. Henze and J. Möller, acting as Agents,

— the European Commission, by M. Afonso and J. Enegren, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 20 June 2013,

gives the following

Judgment

1 This request for a preliminary ruling concerns the interpretation of Articles 4 and 10 of Council Directive 80/987/EEC of 20 October 1980 on the approximation of the laws of the Member States relating to the protection of employees in the event of the insolvency of their employer (OJ 1980 L 283, p. 23) ('Directive 80/987, in its original version'), and as amended by Directive 2002/74/EC of the European Parliament and of the Council of 23 September 2002 (OJ 2002 L 270, p. 10) ('Directive 80/987, as amended').

2 The request has been made in proceedings between Ms Gomes Viana Novo and 17 other persons ('Ms Gomes Viana Novo and Others') and the Fundo de Garantia Salarial IP (the 'Wage Guarantee Fund', 'the FGS') concerning cover by the latter of wage claims put forward by the applicants in the main proceedings against their former employer which is in a state of insolvency.

Legal context

European Union law

3 Article 3 of Directive 80/987, in its original version states as follows:

‘1. Member States shall take the measures necessary to ensure that guarantee institutions guarantee, subject to Article 4, payment of employees’ outstanding claims resulting from contracts of employment or employment relationships and relating to pay for the period prior to a given date.

2. At the choice of the Member States, the date referred to in paragraph 1 shall be:

— either that of the onset of the employer’s insolvency;

— or that of the notice of dismissal issued to the employee concerned on account of the employer’s insolvency;

— or that of the onset of the employer’s insolvency or that on which the contract of employment or the employment relationship with the employee concerned was discontinued on account of the employer’s insolvency.’

4 Article 4 of Directive 80/987, in its original version read as follows:

‘1. Member States shall have the option to limit the liability of guarantee institutions, referred to in Article 3.

2 When Member States exercise the option referred to in paragraph 1, they shall:

— in the case referred to in Article 3(2), first indent, ensure the payment of outstanding claims relating to pay for the last three months of the contract of employment or employment relationship occurring within a period of six months preceding the date of the onset of the employer’s insolvency;

— in the case referred to in Article 3(2), second indent, ensure the payment of outstanding claims relating to pay for the last three months of the contract of employment or employment relationship preceding the date of the notice of dismissal issued to the employee on account of the employer’s insolvency;

— in the case referred to in Article 3(2), third indent, ensure the payment of outstanding claims relating to pay for the last 18 months of the contract of employment or employment relationship preceding the date of the onset of the employer’s insolvency or the date on which the contract of employment or the employment relationship with the employee was discontinued on account of the employer’s insolvency. In this case, Member States may limit the liability to make payment to pay corresponding to a period of eight weeks or to several shorter periods totalling eight weeks.’

5 Articles 3 and 4 of Directive 80/987, in its original version, were amended by Directive 2002/74. Article 2(1) of Directive 2002/74 provides that Member States are to bring into force the laws, regulations and administrative provisions necessary to comply with it before 8 October 2005, and that they are to apply those provisions to any state of insolvency of an employer occurring after the date of entry into force of those provisions.

6 Directive 2008/94/EC of the European Parliament and of the Council of 22 October 2008 on the protection of employees in the event of the insolvency of their employer (OJ 2008 L 283, p. 36) codified and repealed Directive 80/987, as amended. However, taking account of the date of the onset of the insolvency of the employer of Ms Gomes Viana Novo and Others, it is Directive 80/987 which must be applied.

7 Article 3 of Directive 80/987, as amended, provides:

'Member States shall take the measures necessary to ensure that guarantee institutions guarantee, subject to Article 4, payment of employees' outstanding claims resulting from contracts of employment or employment relationships, including, where provided for by national law, severance pay on termination of employment relationships.

The claims taken over by the guarantee institution shall be the outstanding pay claims relating to a period prior to and/or, as applicable, after a given date determined by the Member States.'

8 Article 4 of that directive provides:

'1. Member States shall have the option to limit the liability of the guarantee institutions referred to in Article 3.

2. When Member States exercise the option referred to in paragraph 1, they shall specify the length of the period for which outstanding claims are to be met by the guarantee institution. However, this may not be shorter than a period covering pay for the last three months of the employment relationship prior to and/or after the date referred to in Article 3. Member States may include this minimum period of three months in a reference period with a duration of not less than six months.

Member States having a reference period of not less than 18 months may limit the period for which outstanding claims are met by the guarantee institution to eight weeks. In this case, those periods which are most favourable to the employee are used for the calculation of the minimum period.

3. Furthermore, Member States may set ceilings on the payments made by the guarantee institution. These ceilings must not fall below a level which is socially compatible with the social objective of this Directive.

When Member States exercise this option, they shall inform the Commission of the methods used to set the ceiling.'

Portuguese law

9 Article 380 of Law No 99/2003 of 27 August 2003 adopting the Labour Code, in the version applicable to the case in the main proceedings, states, under the heading 'Payment guarantee':

'The guarantee to pay employees' claims arising from a contract of employment and from breach or termination of that contract, which cannot be paid by the employer as a result of insolvency or economic difficulties, shall be assumed and borne by the [FGS], on terms laid down in special legislation.'

10 Law No 35/2004 laid down the framework for the FGS. Under Article 317 thereof, those funds must 'in the event of the employer's failure to do so, guarantee payment of employees' claims arising from a contract of employment and from breach or termination of that contract on the following terms.'

11 Article 318 of that Law, which determines the situations covered by the guarantee, provides:

'1 The [FGS] shall guarantee payment of the claims referred to in the preceding article in cases where the employer is declared insolvent by a decision of a court.

2 The [FGS] shall also guarantee payment of the claims referred to in the preceding paragraph, where the conciliation procedure provided for in Decree Law No 316/98 of 20 October 1998 has been initiated.

3 Without prejudice to the provisions of the preceding paragraph, if the conciliation procedure is not followed, as a result of rejection or termination pursuant to Articles 4 and 9 of Decree-Law No 316/98 of 20 October 1998 respectively, and the undertaking's employees have applied for payment of claims guaranteed by the [FGS], [the FGS] must seek a judicial declaration that the undertaking is insolvent.

4 To ensure compliance with the provisions of the preceding paragraphs, the [FGS] must be informed, where the undertakings in question have employees working for them:

(a) by the courts, with respect to applications for special insolvency proceedings and the relevant declaration;

(b) by the Instituto de Apoio às Pequenas e Médias Empresas e ao Investimento (Institute for the Support of Small and Medium-sized Enterprises and Investment, IAPMEI), with respect to applications for the conciliation procedure, rejection of the applications or termination of the procedure.'

12 Article 319 of that law identifies the claims covered as follows:

'1 The [FGS] shall guarantee payment of claims under Article 317 falling due in the six months preceding the initiation of the proceedings or the submission of the applications referred to in the preceding article.

2 If there are no claims falling due in the reference period mentioned in the preceding paragraph, or if the amount claimed is below the ceiling defined in paragraph 1 of the following article, the [FGS] shall make payment up to that ceiling of claims falling due after the specified reference period.

3 The [FGS] shall guarantee payment only of claims that are submitted to it no later than three months before expiry of the relevant limitation period.'

The dispute in the main proceedings and the question referred for a preliminary ruling

13 Since the employer of Ms Gomes Viana Novo and Others stopped paying their salaries from April 2003, the applicants terminated their contracts of employment on 15 September 2003 as they were entitled to do under the relevant applicable national law. On 10 February 2004 Ms Gomes Viana Novo and Others brought an action before the Tribunal de Trabalho de Barcelos (Labour Court, Barcelos), seeking a judicial determination of the amount of their wage claims and an enforcement order to recover those sums. Their action was upheld.

14 As the goods comprising the employer's assets were insufficient to cover the claims, on 28 November 2005 Ms Gomes Viana Novo and Others brought an action before the Tribunal de Comércio de Vila Nova de Gaia (Commercial Court, Vila Nova de Gaia) seeking a declaration that the employer was insolvent. After that declaration had been made, the wage claims were registered.

15 On 26 July 2006, Ms Gomes Viana Novo and Others applied to the FGS for payment of their claims. By orders of 21 and 26 December 2006, the President of the FGS dismissed those claims on the ground that the claims at issue had fallen due more than six months before the action seeking a declaration that the employer was insolvent had been brought, that is a date preceding the reference period laid down in Article 319(1) of Law No 35/2004 of 29 July 2004.

16 By decision of 18 March 2010, the Tribunal Administrativo e Fiscal do Porto (Administrative and Tax Court, Oporto) dismissed the application for annulment of those orders brought by Ms Gomes Viana Novo and Others. The latter appealed against that decision before the referring court.

17 In those circumstances, the Tribunal Central Administrativo Norte decided to stay proceedings and refer the following question to the Court of Justice for a preliminary ruling:

'Is European Union law in the specific context of guarantees covering wage claims in the event of the employer's insolvency, in particular Articles 4 and 10 of Directive [80/987 as amended], to be interpreted as precluding provisions of national law which guarantee only claims falling due in the six months preceding the initiation of insolvency proceedings against the employer, even where the employees have brought an action against their employer before the Tribunal do Trabalho (Labour Court) with a view to obtaining a judicial determination of the amount outstanding and an enforcement order to recover those sums?'

Consideration of the question referred for a preliminary ruling

18 By its question, the referring court asks essentially whether Directive 80/987, as amended, must be interpreted as meaning that it precludes national legislation which does not guarantee wage claims falling due more than six months prior to the commencement of the action seeking a declaration that the employer is insolvent even though the workers brought legal proceedings before the commencement of the six-month period against their employer with a view to obtaining a determination of the amount of those claims and an enforcement order to recover those sums.

19 It is clear from the file submitted to the Court that Ms Gomes Viana Novo and Others were refused payment of their wage claims by the FGS on account of the fact that those claims fell due more than six months before the date on which the action seeking a declaration that the employer was insolvent was commenced, that the national legislation transposing Directive 80/987, as amended, adopted as the date from which the reference period referred to in Article 3, second indent, and Article 4(2) must be calculated.

20 Directive 80/987, in its original version and as amended, aims to guarantee employees a minimum level of European Union protection in the event of the employer's insolvency through payment of outstanding claims resulting from contracts of employment or employment relationships and relating to pay for a specific period (see, Joined Cases C-19/01, C-50/01 and C-84/01 *Barsotti and Others* [2004] ECR I-2005; paragraph 35; Case C-69/08 *Visciano* [2009] ECR I-6741, paragraph 27; and Case C-435/10 *van Ardennen* [2011] ECR I-11705, paragraph 27).

21 It is for those reasons that Article 3 of Directive 80/987, as amended, requires Member States to take the measures necessary to ensure that guarantee institutions guarantee payment of workers' outstanding claims.

22 However, both Directive 80/987, in its original version, and Directive 80/987, as amended, confer on the Member States the power to limit the payment obligation by fixing a reference period or a guarantee period and/or setting ceilings on payments.

23 In that respect, it is clear from point 3 in the Report from the Commission to the European Parliament and the Council on the implementation and application of certain provisions of Directive 2008/94 (COM(2011) 84 final), of which Articles 3 and 4 correspond essentially to those in Directive 80/987, as amended, a large number of Member States have used that option to set temporal limits on their payment obligations and/or ceilings on payments.

24 Directive 80/987, in its original version in Article 3, offered Member States the option to choose from among several possibilities the date prior to which unpaid remuneration would be guaranteed. It is by taking account of the choice thus made by Member States that Article 4(2) of the directive determines the outstanding claims which in any event will have to be covered by the guarantee obligation if, as in this case, a Member State has decided, pursuant to Article 4(1), to limit that guarantee obligation (Case C-373/95 *Maso and Others* [1997] ECR I-4051, paragraph 47).

25 The amendments made by Directive 2002/74 to Article 3 of Directive 80/987, in its original version, removed the reference to the three dates which were originally mentioned therein so that under the second paragraph of that provision, Member States are free to determine the date prior to which and/or, as applicable, after which the period during which the outstanding pay claims are to be taken over by the guarantee institution is to fall (see, to that effect, Case C-247/12 *Mustafa* [2013] ECR, paragraphs 39 to 41).

26 Under Article 4(1) and (2) of Directive 80/987, in its original version, when Member States intended to exercise the option to limit the guarantee provided by the institution, they could provide for the minimum guarantee of three months to be within a period of six months preceding the reference date. After the entry into force of the amendments to Directive 80/987, in its original version, by Directive 2002/74, it is even possible for that period to be after the reference date. The Member States also have the option to provide for a minimum guarantee limited to eight weeks, provided that that eight-week period is within a longer reference period or at least 18 months.

27 In those circumstances, it must be held that Directive 80/987, as amended, does not preclude a Member State from fixing the date from which the reference period must be calculated as the date on which the action for a declaration of an employer's insolvency is commenced. Likewise, where a Member State decides to exercise the option to limit the guarantee by setting a reference period, it may choose to limit that reference period to six months provided that it guarantees pay for the last three months of the employment relationship.

28 Given that, in the dispute in the main proceedings, the national legislation guarantees pay for the last three months of the employment relationship, it must be held that it is open to the national legislature, when adopting provisions providing that the FGS is to ensure the payment of wages claims falling due within the six months which preceded the commencement of the action seeking a declaration that the employer is insolvent and, under certain conditions, even after that date, to exercise the option that Articles 3 and 4 of Directive 80/987, as amended, confers on it to limit the obligation imposed on the guarantee institutions.

29 As is clear from the case-law of the Court set out in paragraph 20 of the present judgment, Directive 80/987, as amended, seeks only minimum protection for workers in the event of their employer's insolvency. The provisions concerning the option offered to the Member States to limit their guarantee show that the system established by Directive 80/987, as amended, takes account of the financial capacity of those States and seeks to preserve the financial stability of their guarantee institutions.

30 That consideration is apparent, in particular, in the option granted to Member States to reduce the guarantee period if the minimum reference period is extended as provided for in Article 4(2), second indent, of Directive 80/987, as amended, and the option to set ceilings on payments under Article 4(3) thereof.

31 It must be held that the cases in which it is permitted to limit the payment obligation of the guarantee institutions, as laid down in Article 4 of Directive 80/987, as amended, must be interpreted strictly (see, to that effect, *van Ardennen*, paragraph 34).

32 However, a restrictive interpretation in those cases cannot deprive of its effectiveness the option expressly conferred on Member States to limit that payment obligation.

33 It must be held that that would be the case if it were necessary to interpret Directive 80/987, as amended, as meaning that it precludes national legislation which does not guarantee wage claims falling due more than six months prior to the commencement of an action for a declaration that the employer is insolvent.

34 Furthermore, it must be stated, as is clear from the case-law of the Court set out in paragraph 20 of the present judgment, Directive 80/987 aims to guarantee workers protection in the event of their employer's insolvency. It follows that the system established by that directive requires a link between the insolvency and the outstanding wage claims.

35 However, it appears, on the basis of the elements in the file submitted to the Court, that there is no such link in the dispute in the main proceedings.

36 Therefore, while the wages claims which are the subject-matter of the dispute in the main proceedings result from the fact that the employer of Ms Gomes Viana Novo and Others stopped paying their wages from April 2003 and while they terminated their employment contracts in September 2003 on account of that cessation of payment, other workers employed by the same employer continued to receive their wages during 2004 and 2006 and it was only in May 2006 that the contracts of employment of the latter workers were terminated on account of their employer's insolvency. Thus, despite the delays in the payment of wages, the employer retained and paid a substantial part of its workforce for several years after the termination of the employment contracts of Ms Gomes Viana Novo and Others.

37 Therefore, the answer to the question referred is that Directive 80/987, as amended, must be interpreted as meaning that it does not preclude national legislation which does not guarantee wage claims falling due more than six months before the commencement of an action seeking a declaration that the employer is insolvent, even where the workers initiated, prior to the start of that period, legal proceedings against their employer with a view to obtaining a determination of the amount of those claims and an enforcement order to recover those sums.

Costs

38 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Fifth Chamber) hereby rules:

Council Directive 80/987/EEC of 20 October 1980 relating to the protection of employees in the event of the insolvency of their employer, in its original version, as amended by Directive 2002/74/EC of the European Parliament and of the Council of 23 September 2002, must be interpreted as meaning that it does not preclude national legislation which does not guarantee wage claims falling due more than six months before the commencement of an action seeking a declaration that the employer is insolvent, even where the workers initiated, prior to the start of that period, legal proceedings against their employer with a view to obtaining a determination of the amount of those claims and an enforcement order to recover those sums.

[Signatures]