JUDGMENT OF THE COURT (Eighth Chamber)

10 February 2011 *

In Case C-30/10,

REFERENCE for a preliminary ruling under Article 267 TFEU from the Linköpings tingsrätt (Sweden), made by decision of 28 October 2009, received at the Court on 19 January 2010, in the proceedings

Lotta Andersson

v

Staten genom Kronofogdemyndigheten i Jönköping, Tillsynsmyndigheten,

THE COURT (Eighth Chamber),

composed of K. Schiemann (Rapporteur), President of the Chamber, A. Prechal and E. Jarašiūnas, Judges,

* Language of the case: Swedish.

Advocate General: Y. Bot,
Registrar: A. Calot Escobar,

having regard to the written procedure,

after considering the observations submitted on behalf of:

— the Staten genom Kronofogdemyndigheten i Jönköping, Tillsynsmyndigheten, by S. Granath, advokat,

— the Swedish Government, by A. Falk and A. Engman, acting as Agents,

— the Spanish Government, by M. Muñoz Pérez, acting as Agent,

— the European Commission, by J. Enegren, acting as Agent,

having decided, after hearing the Advocate General, to proceed to judgment without an Opinion,

gives the following

Judgment

1 This reference for a preliminary ruling concerns the interpretation of Article 10(c) of Council Directive 80/987/EEC of 20 October 1980 on the protection of employees in the event of the insolvency of their employer (OJ 1980 L 283, p. 23), 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').

2 The reference has been made in proceedings between Mrs Andersson and the Staten genom Kronofogdemyndigheten i Jönköping, Tillsynsmyndigheten (Supervisory Authority for Judicial Liquidations), concerning Mrs Andersson's right to payment of an outstanding claim arising from her employment relationship in an undertaking which was declared insolvent and in which Mrs Andersson was one of the two shareholders.

Legal context

European Union legislation

Directive 80/987

3 Under its Article 1(1), Directive 80/987 applied to employees' claims arising from contracts of employment or employment relationships and existing against employers who were in a state of insolvency within the meaning of Article 2(1) thereof.

4 Article 10(c) of Directive 80/987 provided that the directive was not to affect the option of Member States to refuse or reduce the liability referred to in its Article 3 or the guarantee obligation referred to in its Article 7 in cases where the employee, on his or her own or together with his or her close relatives, was the owner of an essential part of the employer's undertaking or business and had a considerable influence on its activities.

Directive 2008/94/EC

5 Directive 80/987 having been substantially amended several times, was, in the interests of clarity and rationality, codified by 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 (Codified version) (OJ 2008 L 283, p. 36).

6 In accordance with recital 7 in the preamble to Directive 2008/94:

'Member States may set limitations on the responsibility of the guarantee institutions. Those limitations must be compatible with the social objective of the Directive and may take into account the different levels of claims.'

7 Article 3 of that directive 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 The terms of Article 7 of that directive are as follows:

'Member States shall take the measures necessary to ensure that non-payment of compulsory contributions due from the employer, before the onset of his insolvency, to their insurance institutions under national statutory social security schemes does not adversely affect employees' benefit entitlement in respect of these insurance institutions in so far as the employees' contributions have been deducted at source from the remuneration paid.'

9 Article 12 of Directive 2008/94 states:

'This Directive shall not affect the option of Member States:

(a) to take the measures necessary to avoid abuses;

(b) to refuse or reduce the liability referred to in the first paragraph of Article 3 or the guarantee obligation referred to in Article 7 if it appears that fulfilment of the obligation is unjustifiable because of the existence of special links between the employee and the employer and of common interests resulting in collusion between them;

(c) to refuse or reduce the liability referred to in the first paragraph of Article 3 or the guarantee obligation referred to in Article 7 in cases where the employee, on his or her own or together with his or her close relatives, was the owner of an essential part of the employer's undertaking or business and had a considerable influence on its activities.'

National legislation

10 Paragraph 1(1) of the Wage Guarantee Law (lönegarantilagen 1992:497, SFS 1992, No 497) provides that the State is to be liable for payment of employees' claims for remuneration against their employers who have been declared insolvent in Sweden or in another Scandinavian country.

11 Under Paragraph 7(1) of that law, in cases of insolvency payment under the State's guarantee is to apply to claims for wages or other remuneration and pensions which have a preferential right under Paragraph 12 or 13 of the Law on preferential rights (förmånsrättslagen 1970:979; SFS 1970, No 979).

12 Under Paragraph 7a of the Wage Guarantee law, payment under the guarantee is, however, not to be made to employees to whom the sixth subparagraph of Paragraph 12 of the Law on preferential rights applies.

13 According to the first subparagraph of Paragraph 12 of that law, a general preferential right is to attach to the employee's claim for wages or other remuneration in respect of his or her employment.

14 The sixth subparagraph of Paragraph 12 of that law provides that, if the insolvent debtor is a trader, an employee who, on his own or together with his close relatives, more recently than six months before the application for a declaration of insolvency, was the owner of an essential part of the employer's undertaking or business and had a considerable influence on its activities is not to have a preferential right under that paragraph in respect of his remuneration or pension rights.

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

15 Linköpings Ridskola AB ('Linköpings Ridskola') was declared insolvent on 23 December 2008. Mrs Andersson, the applicant in the main proceedings, who lived with Mr Andersson from 1996 to 2008 owned, like him, 50 % of the shares in that company.

16 Mrs Andersson received her shares in 2006 as a gift and was employed by Linköpings Ridskola since the mid-1990s. She was a deputy member of its board of directors and was authorised to be a sole signatory on behalf of the company until Mr Andersson, its sole director, decided on 20 November 2008 to withdraw from her the right to sign.

17 On 12 January 2009, Mrs Andersson's right to the guarantee of her outstanding claims under the Wage Guarantee Law was refused by the insolvency administrator, on the ground that she had owned an essential part of the company in question and had had a considerable influence on its activities during the six months preceding the application for the company to be put into liquidation and, accordingly, by virtue of the sixth subparagraph of Paragraph 12 of the Law on preferential rights, she was not entitled to the preferential right under that paragraph.

18 In her action before the Linköpings tingsrätt, Mrs Andersson claimed payment of her remuneration for December 2008 and part of January 2009 and for pay during the dismissal notice period and holiday pay in the total sum of SEK 138 240 and interest. She claimed that she had a preferential right under Paragraph 12 of the Law on preferential rights and that the sixth subparagraph thereof did not apply to her because, although she owned an essential part of Linköpings Ridskala, she did not, at the time

of the application for its liquidation, have any considerable influence on that company and could not control it.

19 In those circumstances, the Linköpings tingsrätt decided to stay the proceedings and to refer the following question to the Court of Justice for a preliminary ruling:

'Is a national provision which excludes an employee from a preferential right on the basis that he, on his own or together with his close relatives, *more recently than six months before the application for a declaration of insolvency*, was the owner of an essential part of the employer's undertaking or business and had a considerable influence on its activities compatible with Article 10(c) of … Directive 80/987 …?'

The question referred for a preliminary ruling

20 It is appropriate, at the outset, to observe that the question referred seeks the interpretation of Article 10(c) of Directive 80/987 whereas, as was correctly pointed out in their written observations by the defendant in the main proceedings, the Spanish Government and the European Commission, the European Union legislation relevant to the analysis of the main proceedings, having regard to the fact that the company in question was declared insolvent on 23 December 2008, is Directive 2008/94, which entered into force on 17 November 2008. That directive codified Directive 80/987 and contains, in essence, the same provisions. Thus, Article 12(c) of Directive 2008/94 reproduces the content, in identical terms, of Article 10(c) of Directive 80/987.

21 It is appropriate, therefore, to reformulate the question referred by the national court to the effect that it is intended to determine whether Article 12(c) of Directive 2008/94 must be interpreted as precluding a provision of national law which excludes an employee from entitlement under the guarantee of payment of employees' outstanding claims on the ground that the employee, alone or together with close relatives, within the six months preceding the application for a declaration of insolvency, was the owner of an essential part of the undertaking or business concerned and had a considerable influence on its activities.

22 It is appropriate to note, in that regard, that Article 3 of Directive 2008/94 imposes a liability to pay employees' outstanding claims whereas Article 12(c) of that directive permits Member States to refuse or reduce that liability in cases where the employee, on his or her own or together with his or her close relatives, was the owner of an essential part of the employer's undertaking or business and had a considerable influence on its activities.

23 Article 12(c) of Directive 2008/94 makes no mention of any period during which ownership of an essential part of the undertaking concerned and considerable influence on its activities must have been exercised for the liability to be refused or reduced. In order to determine whether that provision precludes the fixing of a period of six months, as laid down by the national legislation at issue in the man proceedings, the Court must examine the scheme of that provision and the objectives which it pursues.

24 In that regard, it follows from recital 7 in the preamble to, and Article 12(a) to (c) of, Directive 2008/94 that the legislature did not intend to affect the Member States' option to set limitations on the responsibility of the guarantee institutions in certain cases, including those set out in Article 12(c). The latter provision is based, among other things, on an implicit assumption that an employee who, simultaneously,

owned an essential shareholding in the undertaking concerned and had a considerable influence on its activities could, thereby, be partly responsible for its insolvency.

25 However, that option must be assessed in the light of the social objective of Directive 2008/94 which is to guarantee all employees a minimum level of protection in the European Union 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, to that effect, Case C-201/01 *Walcher* [2003] ECR I-8827, paragraph 38 and the case-law cited).

26 The Court has already held that the application of a national rule intended to prevent abuse must not prejudice the full effect and uniform application of European Union law in the Member States (*Walcher*, paragraph 37).

27 However, neither the purpose of Article 12(c) of Directive 2008/94 nor that directive's social objective is compromised by a national provision which, as is the case in the main proceedings, limits the category of employees excluded from entitlement to the guarantee of payment of outstanding claims to the category of employees who owned an essential part of the undertaking concerned and had a considerable influence on its activities during the period of six months preceding the application for that undertaking's liquidation. Indeed, in such circumstances, it is not inconceivable that an employee, who is refused entitlement to the guarantee, could be responsible for the insolvency of the undertaking in question.

28 Having regard to the foregoing, the answer to the question referred is that Article 12(c) of Directive 2008/94 must be interpreted as not precluding a provision of national law which excludes an employee from entitlement under the guarantee of payment of employees' outstanding claims on the ground that the employee, alone

or together with close relatives, within the six months preceding the application for a declaration of insolvency, was the owner of an essential part of the undertaking or business concerned and had a considerable influence on its activities.

Costs

29 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 (Eighth Chamber) hereby rules:

Article 12(c) of Directive 2008/94/EC of the European Parliament and of the Council of 22 October 2008 relating to the protection of employees in the event of the insolvency of their employer (Codified version) must be interpreted as not precluding a provision of national law which excludes an employee from entitlement under the guarantee of payment of employees' outstanding claims on the ground that the employee, alone or together with close relatives, within the six months preceding the application for a declaration of insolvency, was the owner of an essential part of the undertaking or business concerned and had a considerable influence on its activities.

[Signatures]