JUDGMENT OF THE COURT (Fourth Chamber)

17 January 2008 *

In Case C-246/06,

REFERENCE for a preliminary ruling under Article 234 EC from the Juzgado de lo Social Único de Algeciras (Spain), made by decision of 7 April 2006, received at the Court on 2 June 2006, in the proceedings

Josefa Velasco Navarro

v

Fondo de Garantía Salarial (Fogasa),

THE COURT (Fourth Chamber),

composed of K. Lenaerts, President of the Chamber, R. Silva de Lapuerta, E. Juhász, J. Malenovský and T. von Danwitz (Rapporteur), Judges,

* Language of the case: Spanish.

Advocate General: P. Mengozzi,
Registrar: R. Grass,

having regard to the written procedure,

after considering the observations submitted on behalf of:

— the Slovenian Government, by M. Remic, acting as Agent,

— the Commission of the European Communities, by J. Enegren and R. Vidal Puig, acting as Agents,

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 Council Directive 80/987/EEC of 20 October 1980 relating to 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 the course of proceedings brought by Ms Velasco Navarro against the Fondo de Garantía Salarial (Wages Guarantee Fund; 'Fogasa') concerning its refusal to pay her, by virtue of its secondary liability, compensation for unfair dismissal, the payment of that compensation having been agreed under a judicial conciliation settlement between Ms Velasco Navarro and her former employer.

Legislative framework

Community legislation

3 Article 1(1) of Directive 80/987 provides that '[t]his Directive shall apply to employees' claims arising from contracts of employment or employment relationships and existing against employers who are in a state of insolvency within the meaning of Article 2(1)'.

4 Article 2(2) of Directive 80/987 states that the directive is without prejudice to national law as regards the definition of the terms 'employee', 'employer', 'pay', 'right conferring immediate entitlement' and 'right conferring prospective entitlement'.

5 Article 3(1) of Directive 80/987, in its initial version, provided:

'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.'

6 Article 3(1) of Directive 80/987, in its initial version, has become the first paragraph of Article 3 in the version following the amendment by Directive 2002/74 and is now worded as follows:

'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.'

7 The first and second subparagraphs of Article 2(1) of Directive 2002/74 state:

'Member States shall bring into force the laws, regulations and administrative provisions necessary to comply with this Directive before 8 October 2005. They shall forthwith inform the Commission thereof.

They shall apply the provisions referred to in the first subparagraph to any state of insolvency of an employer occurring after the date of entry into force of those provisions.'

8 In accordance with Article 3 thereof, Directive 2002/74 entered into force on 8 October 2002.

Spanish legislation

9 Article 33(1) and (2) of Legislative Royal Decree 1/1995 of 24 March 1995 approving the amended text of the Workers' Statute (Estatuto de los Trabajadores, BOE No 75 of 29 March 1995, p. 9654), in the version following from Law 60/1997 of 19 December 1997 (BOE No 304 of 20 December 1997, p. 37453) ('the Workers' Statute') provides:

'1. The Wages Guarantee Fund … shall pay to workers the remuneration owed to them in the event of insolvency, suspension of payments, bankruptcy or judicial administration of their employers.

For the purposes of the preceding subparagraph, remuneration shall include the amount which the conciliation settlement or the judicial decision recognises as such on the basis of the definition laid down in Article 26(1), as well as supplementary compensation in respect of "salarios de tramitación" [wages for the period between the dismissal and disposal of proceedings], awarded where appropriate by the competent court …

2. The Wages Guarantee Fund, in the cases referred to in the previous paragraph, shall pay the compensation fixed by judgment or administrative decision in favour of workers on account of their dismissal or of the cancellation of their contracts in accordance with Articles 50, 51 and 52(c) of this Law, up to a maximum of one year's pay, it being understood that the daily wage taken as the basis for that computation may not exceed twice the minimum interprofessional wage.

…'

10 Compensation for unfair dismissal, as provided for in Article 56(1) of the Workers' Statute, is included in the types of compensation to be paid by Fogasa pursuant to Article 33(2) of the Workers' Statute, under the following conditions:

'1. Where the dismissal is held to be unfair, the employer, within five days of notification of the judgment, may choose between, on the one hand, reinstatement of the worker together with payment of the "salarios de tramitación", as provided for in point (b) of the present subparagraph, and, on the other hand, payment of the following sums, which must be determined by the judgment:

(a) compensation equivalent to 45 days of remuneration per year of service, periods shorter than a year being calculated pro rata on a monthly basis up to 42 monthly payments;

(b) an amount equivalent to the remuneration payable with effect from the date of dismissal up to the date of notification of the judgment holding the dismissal to be unfair or up to the date on which the worker finds another job, if he is recruited before the delivery of the judgment and if the employer provides evidence of the sums paid so that they can be deducted from the "salarios de tramitación".

The employer shall continue to register the worker with the social security authorities during the period corresponding to the remuneration referred to in point (b) of the first subparagraph.'

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

11 Ms Velasco Navarro, the claimant in the main proceedings, was a member of the staff of Camisas Leica SL ('Camisas Leica') for the period from 28 May 1998 until 27 December 2001, when she was dismissed by that company.

12 On 13 May 2002, Ms Velasco Navarro and Camisas Leica reached a judicial conciliation settlement, under which Camisas Leica acknowledged that Ms Velasco Navarro had been unfairly dismissed and agreed to pay her compensation for dismissal and the 'salarios de tramitación', as provided for in Article 56 of the Workers' Statute.

13 On the basis of a provisional insolvency order concerning Camisas Leica, made on 5 March 2003 by the same court at the company's request, Ms Velasco Navarro sought payment from Fogasa of the sum, due by way of compensation for dismissal and 'salarios de tramitación', that her former employer had not paid her.

14 Fogasa agreed to pay Ms Velasco Navarro the sum of EUR 3 338.88 by way of 'salarios de tramitación', but took the view that she was not entitled to the amount of EUR 2 696.89 that she claimed as compensation for dismissal, on the ground that that compensation had not been awarded by judgment or other judicial decision.

15 Ms Velasco Navarro challenged Fogasa's refusal to pay her compensation for dismissal before the Juzgado de lo Social Único de Algeciras (Single Social Court, Algeciras).

16 According to the explanation submitted by the national court in the grounds for the order for reference, by Article 33(2) of the Workers' Statute, Spanish law provides for the payment of severance pay, but only where entitlement to such compensation is recognised by a judgment or administrative decision in favour of the workers on account of their dismissal or the termination of the contract.

17 The referring court regards that provision of national law as contrary to the Community principle of equal treatment as enshrined in the case-law of the Court, and, in particular, in paragraph 30 of the order of 13 December 2005 in Case C-177/05 *Guerrero Pecino* [2005] ECR I-10887. According to that case-law, compensation of the same type, determined by a judicial conciliation procedure, must also be regarded as severance pay within the meaning of the first paragraph of Article 3 of Directive 80/987.

18 The referring court points out that Directive 2002/74 was already in force on 5 March 2003, the date on which it declared Camisas Leica insolvent. It considers that, even though the period allowed for transposition expired on 8 October 2005, the Spanish legislature took no steps to implement Directive 2002/74 because of its conviction that the Spanish domestic legislation, in force since 21 December 1997, fully complied with that directive.

19 The referring court concludes that it cannot therefore be maintained that the Kingdom of Spain had transposed Directive 2002/74 by 8 October 2005 because, in fact, the national legislation is not yet complete.

20 The referring court also states that, at the hearing before it, Fogasa argued that Ms Velasco Navarro could not rely upon Directive 2002/74 — or on the interpretation of that directive which results from the order in *Guerrero Pecino* — since in any event the date of the provisional insolvency order against Camisas Leica, albeit later than the date of the entry into force of Directive 2002/74 (8 October 2002), falls before the date on which the Member States were to have taken the measures to transpose that directive (8 October 2005).

21 It is in those circumstances that the Juzgado de lo Social Único de Algeciras decided to stay proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:

'(1) Where it has been found by the national court that the domestic legislation, which is incomplete, did not comply, on 8 October 2005, with Directive 2002/74 and its interpretation by the Court of Justice (with regard to the Community principle of equal treatment) in the order in [*Guerrero Pecino*], must that directive be regarded as having direct effect as regards Fogasa, the State guarantee institution, with effect from the following day (9 October 2005)?

(2) If the answer to Question 1 is in the affirmative, is the direct effect of Directive 2002/74 also to apply (because it is more beneficial to the worker and less beneficial to the State which has failed to fulfil its obligations) to a declared state of insolvency — following a court conciliation agreement not provided for in the incomplete domestic legislation — between the date of entry into force of the directive (8 October 2002) and the date by which the Spanish State was to have adopted the laws, regulations and administrative provisions necessary to comply with the provisions of the directive (8 October 2005)?'

The questions referred for a preliminary ruling

22 By its two questions, the referring court asks whether the first paragraph of Article 3 of Directive 80/987, not yet transposed into the national law of a Member State, has direct effect and, if so, from which date that provision can be relied upon directly against an institution such as Fogasa. Since both those questions turn, in essence, on whether the provision is capable of having direct effect between the date of its entry into force and the deadline for its transposition, it is appropriate to consider them together.

23 The referring court refers the two questions on the basis of the order in *Guerrero Pecino*. Although, in that order, the Court interpreted Directive 80/987 at the request of the same national court as that which has referred questions to the Court in the present proceedings and with regard to the same issue of insolvency, it did so — as it pointed out at paragraph 23 of that order — exclusively on the assumption that Directive 2002/74 had already been transposed into national law at the relevant date, a matter which it was for the national court to verify.

24 As regards the case before the referring court, the grounds of the order for reference indicate that, according to that court, Directive 2002/74 had not been transposed into national law by 8 October 2005, the deadline for its transposition (see, to that effect, Case C-6/07 *Commission* v *Spain*, not published in the ECR.

Direct effect of the first paragraph of Article 3 of Directive 80/987

25 Leaving aside the question of the conditions which must be fulfilled so that a provision of a directive, which has not yet been transposed or which has been transposed

incorrectly, may be relied upon before the national courts (Case C-62/00 *Marks & Spencer* [2002] ECR I-6325, paragraph 25, and Case C-430/04 *Feuerbestattungsverein Halle* [2006] ECR I-4999, paragraphs 28 and 29), it is settled case-law that a directive can have direct effect only after the expiry of the time-limit laid down for its transposition into national law (Case C-316/93 *Vaneetveld* [1994] ECR I-763, paragraph 16, and Case C-348/98 *Mendes Ferreira and Delgado Correia Ferreira* [2000] ECR I-6711, paragraph 33).

26 In the present case, the deadline for transposition is, pursuant to the first subparagraph of Article 2(1) of Directive 2002/74, 8 October 2005. For the purposes of the case before the referring court, it is necessary to ascertain whether the possible direct effect of that directive can be relied upon, after that date, in relation to facts which occurred before that date. On 5 March 2003, that is to say, before the deadline for transposition of Directive 2002/74, Camisas Leica was declared insolvent; after the deadline for transposition of the directive, the claimant in the main proceedings maintained, vis-à-vis Fogasa, her claim relating to the debt owing to her in the form of compensation for her dismissal as a result of that insolvency.

27 In that regard, it is possible to infer from the case-law of the Court (see, to that effect, Case C-156/91 *Hansa Fleisch Ernst Mundt* [1992] ECR I-5567, paragraph 20, and *Vaneetveld*, paragraph 18) that, where a Member State has not transposed Directive 2002/74 within the period allowed, the possible direct effect of that directive can be relied upon, from 8 October 2005, only in relation to cases of insolvency which have occurred after that date, which is not the position in the case before the referring court.

28 On that point, it should be noted that, although, clearly, the Member States were under an obligation to bring their national provisions into conformity with

Directive 2002/74 before 8 October 2005, they are obliged under the second subparagraph of Article 2(1) of that directive to apply those provisions only to cases of insolvency which have occurred after their entry into force.

29 Thus, the provision made by Directive 2002/74 can cover only insolvencies which have occurred after the transposition of the directive into national law — including those occurring before the deadline for transposition — or, in the absence of transposition, only those which have occurred after that deadline.

30 The reply to the questions referred must therefore be that, where Directive 2002/74 has not been transposed into national law by 8 October 2005, the possible direct effect of the first paragraph of Article 3 of Directive 80/987 cannot, in any event, be relied upon in relation to a state of insolvency which occurred before that date.

Breach of the principle of equal treatment

31 Although, by virtue of their wording, the two questions referred to the Court concern solely the direct effect of the first paragraph of Article 3 of Directive 80/987, it is important to recall — as regards the period falling between the date of the entry into force of Directive 2002/74 and the deadline for transposition of that directive — that, where national rules fall within the scope of Community law, and reference is made to the Court for a preliminary ruling, the Court must provide all the interpretative criteria needed by the national court for the purposes of determining whether those

rules are compatible with the fundamental rights the observance of which the Court ensures (see, to that effect, Case C-442/00 *Rodríguez Caballero* [2002] ECR I-11915, paragraph 31 and the case-law cited, and Case C-276/01 *Steffensen* [2003] ECR I-3735, paragraph 70).

32 Thus, although Member States are free, within the framework of Directive 80/987, not to provide in national law a guarantee of payment of compensation for dismissal (as the first paragraph of Article 3 of that directive contains no obligation to that effect), rules of national law which do provide for such a guarantee fall, with effect from 8 October 2002 — the date of the entry into force of Directive 2002/74 — within the scope of Community law as regards their application to events subsequent to that date (see, to that effect, Case C-81/05 *Cordero Alonso* [2006] ECR I-7569, paragraphs 31 and 32). For that reason, the lawfulness of such rules are conditional, from that date, upon their compliance with the general principles and fundamental rights whose observance the Court ensures and within which the general principle of equal treatment and non-discrimination features prominently (*Rodríguez Caballero*, paragraphs 31 and 32).

33 It should be noted that Article 33(2) of the Workers' Statute provides such a guarantee of payment, in the event of the insolvency of the employer, of certain compensation provided for under that statute for dismissal or for the termination of an employment contract.

34 In consequence, it should be held that, from the date of entry into force of Directive 2002/74, Article 33(2) of the Workers' Statute is covered by the first paragraph of Article 3 of Directive 80/987 and thus falls within the scope of Community law. With effect from that date, its lawfulness is therefore conditional upon its compliance with the general principles and fundamental rights recognised in the Community legal order (see, to that effect, Case C-81/05 *Cordero Alonso* [2006] ECR I-7569, paragraph 37).

35 It follows that it is for the referring court to interpret the national rules at issue in the main proceedings in accordance with those general principles and fundamental rights as interpreted by the Court and, in particular, the principle of equal treatment (see, to that effect, the order in *Guerrero Pecino*, paragraph 30, and *Cordero Alonso*, paragraph 38).

36 As regards the principle of equal treatment, in accordance with which comparable situations must not be treated differently unless such difference in treatment is objectively justified, the Court has held — in relation to the legislation at issue in the case before the referring court — that workers who have been unfairly dismissed are in a comparable situation in so far as they are entitled to compensation in the event that they are not reinstated (see *Rodríguez Caballero*, paragraph 33, and Case C-520/03 *Olaso Valero* [2004] ECR I-12065, paragraphs 34 and 35).

37 On establishing, in the course of its reasoning, that no persuasive argument had been made to justify the difference in treatment between claims corresponding to compensation for unfair dismissal, awarded by judgment or administrative decision, and claims for compensation for unfair dismissal, established under a conciliation procedure, the Court arrived at the conclusion that legislation such as that at issue in the main proceedings is contrary to the principle of equal treatment where it excludes the latter claims for compensation from the responsibilities of the guarantee institutions (see, to that effect, *Olaso Valero*, paragraphs 36 and 37).

38 It should be added that, in the face of such discrimination, observance of the principle of equal treatment can be ensured only by granting to persons within the disadvantaged category — for so long as the directive has not been correctly transposed into domestic law by the national legislature — the same advantages as those enjoyed by persons within the favoured category (*Rodríguez Caballero*, paragraph 42, and *Cordero Alonso*, paragraph 45).

39 It follows from the foregoing that, where rules of national law fall within the scope of Directive 80/987, the national courts are bound, as regards a state of insolvency occurring between the date of the entry into force of Directive 2002/74 and the deadline for transposition of that directive into national law, to ensure that the application of those rules of national law is consistent with the principle of non-discrimination, as recognised by the Community legal order.

Costs

40 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 (Fourth Chamber) hereby rules:

1. Where Directive 2002/74/EC of the European Parliament and of the Council of 23 September 2002 amending Council Directive 80/987/EEC on the approximation of the laws of the Member States relating to the protec-

tion of employees in the event of the insolvency of their employer has not been transposed into national law by 8 October 2005, the possible direct effect of the first paragraph of Article 3 of Council Directive 80/987/EEC of 20 October 1980 on the protection of employees in the event of the insolvency of their employer, as amended by Directive 2002/74, cannot, in any event, be relied upon in relation to a state of insolvency which occurred before that date.

2. **Where rules of national law fall within the scope of Directive 80/987, as amended by Directive 2002/74, the national courts are bound, as regards a state of insolvency occurring between the date of the entry into force of Directive 2002/74 and the deadline for transposition of that directive into national law, to ensure that the application of those rules of national law is consistent with the principle of non-discrimination, as recognised by the Community legal order.**

[Signatures]