JUDGMENT OF THE COURT (Fourth Chamber)

21 February 2008 *

In Case C-498/06,

REFERENCE for a preliminary ruling under Article 234 EC from the Juzgado de lo Social Único de Algeciras (Spain), made by decision of 18 September 2006, received at the Court on 7 December 2006, in the proceedings

Maira María Robledillo Núñez

v

Fondo de Garantía Salarial (Fogasa),

THE COURT (Fourth Chamber),

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

* Language of the case: Spanish.

Advocate General: M. Poiares Maduro,
Registrar: M. Ferreira, Principal Administrator,

having regard to the written procedure and further to the hearing on 22 November 2007,

after considering the observations submitted on behalf of:

— the Spanish Government, by J. Rodríguez Cárcamo and B. Plaza Cruz, acting as Agents,

— 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 was made in the context of proceedings between Ms Robledillo Núñez and Fondo de Garantía Salarial (Wages Guarantee Fund, 'Fogasa') concerning its refusal to pay her, by virtue of its secondary liability, compensation for unfair dismissal, that payment having been agreed under an extra-judicial conciliation settlement between Ms Robledillo Núñez and her 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 The first paragraph of Article 3 of Directive 80/987 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.'

6 Article 10(a) and (b) of Directive 80/987 provides:

'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 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.'

7 According to Article 3, Directive 2002/74 came into force on 8 October 2002.

Spanish legislation

The claims for which Fogasa is responsible

8 Article 33(1) of Legislative Royal Decree 1/1995 approving the amended text of the Workers' Statute (Estatuto de los Trabajadores) of 24 March 1995 (BOE No 75 of 29 March 1995, p. 9654), in the version in force from 14 December 2002 ('the Workers' Statute'), provides:

'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 a conciliation settlement or a judicial decision recognises as such on the basis of the definition laid down in Article 26(1), as well as "salarios de tramitación" [wages for the period between the dismissal and disposal of proceedings] in the cases laid down by the Law …'

9 Article 33(2) of the Workers' Statute, in the version resulting from Law 60/1997 of 19 December 1997 (BOE No 304 of 20 December 1997, p. 37453), provided:

'The Wages Guarantee Fund, in the cases referred to in the previous paragraph, shall pay the compensation fixed by a judgment or administrative decision in favour of workers on account of their dismissal or of the termination 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 inter-professional wage.

…'

10 Article 33(2) of the Workers' Statute, in the version resulting from Law 43/2006 of 29 December 2006 for improving growth and employment (BOE No 312 of 30 December 2006, p. 46586), resulting from Legislative Royal Decree No 5/2006 (Real Decreto Ley 5/2006) of 9 June 2006 (BOE No 141 of 14 June 2006, p. 22670), which came into force on 15 June 2006, states:

'In the cases referred to in the previous paragraph, the Wages Guarantee Fund shall pay the compensation fixed by a judgment, an order, a judicial conciliation settlement or an administrative decision in favour of workers because of dismissal or termination of contracts in accordance with Articles 50, 51 and 52 of this Law, and in accordance with Article 64 of Law 22/2003 of 9 July 2003 on insolvency …'

11 Under Article 56 of the Workers' Statute, an unfair dismissal, recognised as such by the employer in a judicial or extra-judicial conciliation settlement or laid down in a judicial decision, gives rise for the employer to the obligation to pay the employee concerned, first, the 'salarios de tramitación', namely the salaries which fell due during the proceedings challenging the dismissal, and, second, compensation for termination of the contract of employment.

The extra-judicial conciliation

12 Legislative Royal Decree 2/1995 approving the amended text of the Law on Employment Procedure (Ley de Procedimiento laboral) of 7 April 1995 (BOE No 86 of 11 April 1995, p. 10695, the 'LPL') lays down the rules for extra-judicial and pre-litigation conciliation.

13 Article 67 of the LPL, which lays down rules for challenging a conciliation agreement, provides:

'1. Conciliation agreements may be challenged, by the parties and by those to whom they may cause a detriment, before the court with jurisdiction to hear the case which is the subject of the conciliation by bringing an action for nullity based on grounds capable of vitiating contracts.

2. The action shall become time-barred 30 days after the adoption of the agreement. For any parties adversely affected, the time-limit shall run from the day that they became aware of the agreement.'

14 The operation of the conciliation services is governed by the Royal Decree 2756/1979 of 23 November 1979 (BOE No 291 of 5 December 1979, p. 28015), which governs the role of the Instituto de Mediación, Arbitraje y Conciliación (Centre for Mediation, Arbitration and Conciliation). Articles 5, 8, 10 and 11 of the Royal Decree provide:

'*Article 5*

1. Conciliation settlements shall be concluded before the Centre for Mediation, Arbitration and Conciliation of the place of performance of the services or the place of residence of the interested parties, at the applicant's choice.

2. Conciliation settlements shall take place before the Director, the President of the Arbitration Tribunal, the Secretary or any other official of the Centre, on condition that they hold a degree ('Licenciatura') in law.

The parties to the conciliation procedure must have the same legal capacity as that required for parties to court proceedings in employment law matters.

…

Article 8

1. Once the application is received and registered, it shall be examined to determine whether it complies with the requirements. Details shall, if necessary, be requested to ensure that the summonses of the interested parties are correct. A copy, duly dated and stamped, shall be delivered by personal service with signed confirmation of receipt to the person who is to appear, who shall be informed of the place, day and time of the conciliation, which must take place within the legally prescribed time-limits. Where the person being summoned is not the applicant and refuses to accept the summons, he shall be notified in the same way as the other interested parties.

…

Article 10

Once the hearing is open, after calling the parties, who may appear accompanied by an intermediary, the conciliator shall verify their identity, capacity and authority to represent their principals and, after the applicant has given his agreement, he shall

allow them to speak in order for them to set out their claims and their pleas in law. The production of documents and other evidence is optional.

Next, he shall invite the interested parties to reach an agreement, assisted, where appropriate, by the intermediaries, permitting them to speak as often as is necessary and suggesting equitable solutions to them. He shall keep order during the discussion which he shall be empowered to suspend in the case of disruption or if it proves impossible to reach an agreement: in both cases the procedure shall then be treated as concluded without agreement.

The conciliator shall keep a minute of the hearing and record as clearly as possible the content of the agreements concluded by the interested parties. If no agreement is concluded, he shall expressly state this.

The official record shall be signed by the interested parties and by the conciliator and if one of them does not know how to sign or is unable to sign, this shall be noted and the intermediary shall be able to sign in his stead. Similarly, the refusal to sign shall be expressly noted along with the grounds for the refusal, if known, and the procedure shall then be treated as concluded without an agreement.

Immediately after the conciliation settlement, the conciliator shall deliver a certified copy of the minute to the interested parties.

Article 11

What has been decided upon at the conciliation before the Centre for Mediation, Arbitration and Conciliation constitutes final judgment, and may be enforced in courts with employment law jurisdiction.

…'

Judicial conciliation

15 Judicial conciliation is governed by Article 84 of the LPL, which reads as follows:

'1. The judicial body, adjudicating at a public hearing, shall attempt conciliation by indicating to the parties their rights and obligations without prejudice to the content of any possible judgment. If the judicial body considers that the content of the conciliation agreement constitutes a serious detriment to one of the parties, evasion of the law or a misuse of rights, it shall not approve it.

2. It may approve the agreement at any moment before giving judgment.

…'

16 Regarding Fogasa's participation in the judicial employment Law proceedings, Article 23 of the LPL provides:

'1. The Wages Guarantee Fund may appear as a party at any stage in proceedings which may lead to payment by the Wages Guarantee Fund of salaries or compensation to workers, without such intervention causing the delay or suspension of the proceedings.

…'

Fogasa's rights and obligations

17 Under Articles 274 and 275 of the LPL, which govern Fogasa's participation in the procedure for declaring undertakings insolvent:

'*Article 274*

1. Prior to the declaration of insolvency, if the Wages Guarantee Fund has not already been called, it shall be heard within a maximum period of fifteen days, so that it may seek adoption of appropriate measures and designate the assets of the principal person liable which are known to it.

2. In the thirty days following the adoption of the measures sought by the Wages Guarantee Fund, the court to which the matter has been referred shall deliver an order which declares, where necessary, the total or partial insolvency of the employer and fixes, in that case, the value at which the goods seized are assessed. The insolvency shall be considered for all purposes to be provisional until the assets of the employer are known or until the assets which have been seized are sold.

…

Article 275

1. Where the goods liable to be seized are deployed in the production process of the debtor undertaking and the activity of that undertaking is continuing, the Wages Guarantee Fund may request a suspension of execution for a period of thirty days …

2. Once the Wages Guarantee Fund has found that it is impossible to pay the salaries owed, … it shall make this known, stating the grounds in support, by requesting a declaration of insolvency for the sole purpose of affording the benefit of the wages guarantee.'

18 Article 28(3) of Royal Decree 505/1985, of 6 March 1985, governing the organisation and operation of the Wages Guarantee Fund (BOE No 92, of 17 April 1985, p. 10203), lays down the rules concerning the treatment of requests for benefits from Fogasa in the following terms:

'At the end of any period of investigation referred to at subparagraph 2 above, the General Secretariat shall, within five days, deliver a decision in which it upholds totally or partially or rejects the claims. Abusive and fraudulent claims, along with those in respect of which payment is unjustified because of the existence of a common interest of the employees and employers in creating the appearance of legal insolvency with the purpose of obtaining provision from the Wages Guarantee Fund, must be rejected.'

The main proceedings and the question referred for a preliminary ruling

19 The applicant in the main proceedings, Maria Robledillo Núñez, was on the staff of Linya Fish S.L. ('Linya Fish') from 4 October 2001 to 28 January 2003, when she was dismissed by that undertaking.

20 Following the application for conciliation made by Ms Robledillo Núñez to the Algeciras Centre for Mediation, Arbitration and Conciliation, the parties concluded a conciliation agreement on 2 April 2003 on account of the unfairness of her dismissal whereby Linya Fish recognised that it owed Ms Robledillo Núñez the sum of EUR 1 237 ('the compensation for dismissal'), although, according to the national court, that compensation could not in any event exceed EUR 1 186.

21 On 5 May 2004, as part of the enforcement proceedings brought by Ms Robledillo Núñez against Linya Fish in that court, a provisional insolvency order was made. On 26 November 2004, on the basis of that decision Ms Robledillo Núñez requested that Fogasa pay her the benefit corresponding to the compensation for dismissal which Linya Fish had not yet paid her.

22 By a decision of 21 January 2005, Fogasa dismissed that application in its entirety on the basis that the compensation for dismissal had not been awarded by a judgment or administrative decision.

23 On 5 May 2006, the petitioner brought an action before the Juzgado de lo Social Único de Algeciras, against Fogasa's decision to dismiss her application. She challenged the latter's refusal to pay her the compensation for dismissal provided for in that conciliation agreement.

24 In the grounds of its order for reference, the national court states that, at Article 33(2) of the Workers' Statute in the versions in force before 15 June 2006, Spanish law provides for payment of compensation due by reason of the termination of an employment relationship, but only where that compensation is recognised by a judgment or administrative decision in favour of employees by reason of dismissal or termination of contract. As they are not mentioned in that provision of the Workers' Statute, compensation recognised in an extra-judicial conciliation procedure is not therefore, according to the national court, among those for which Fogasa is responsible.

25 Referring to the order in C-177/05 *Guerrero Pecino* [2005] ECR I-10887, concerning compensation fixed in a judicial conciliation procedure, the national court notes the difference between extra-judicial conciliation and judicial conciliation, in that judicial conciliation takes place before a court which can refuse to approve it, in application of Article 84(1) of the LPL, whilst extra-judicial conciliation takes place before a body specifically entrusted with that task, which is not invested with any power to review the content of the agreement nor any jurisdiction to approve or disapprove that agreement. That legal distinction between those two methods of conciliation seeks to operate as a break on possible fraudulent behaviour. However, according to the same court, Fogasa was entitled to refuse completely to pay the compensation for dismissal fixed according to the extra-judicial conciliation procedure, by basing itself on the fraud found in the procedure to be followed in order to obtain benefits from that body where the employer is insolvent.

26 Against that background, the Juzgado de lo Social Único de Algeciras decided to stay the proceedings and to refer the following question to the Court of Justice for a preliminary ruling:

'Having regard to the general principle of equality and non-discrimination, is there no objective justification for the difference in treatment created by Article 33(2) of the … Workers' Statute (in its current version and in the previous one which remained in force until 14 June 2004) and, consequently, must compensation for dismissal payable to an employee pursuant to extra-judicial conciliation be included

in the ambit of Council Directive 80/987 … 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, in the version amended by Directive 2002/74 …, given that Article 33(1) of the Workers' Statute recognises this type of conciliation in relation to the payment by the guarantee institution of the 'salarios de tramitación' which also arise from the dismissal?'

The question referred for a preliminary ruling

27 By its question, the national court, relying on the order in *Guerrero Pecino*, asks whether excluding compensation for unfair dismissal from the payment guarantee of the guarantee institutions provided for in the first paragraph of Article 3 of Directive 80/987 is objectively justified as a measure necessary to avoid abuses adopted under Article 10(a) of that directive where the compensation is recognised by an extra-judicial conciliation settlement.

28 At the outset, it should be stated that, according to the first paragraph of Article 3 of Directive 80/987, Member States are to take the measures necessary to ensure that the guarantee institutions guarantee, subject to Article 4 of that directive, 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.

29 It follows that the national legislation at issue in the main proceedings falls within the scope of Directive 80/987, since it brings the payment of severance pay on termination of the employment relationship within the protection granted by the competent guarantee institution, despite the fact that that institution is in no way required

to make the payment pursuant to the first paragraph of Article 3 of that directive (see Case C-81/05 *Cordero Alonso* [2006] ECR I-7569, paragraph 31, and Case C-246/06 *Velasco Navarro* [2008] ECR I-105, paragraph 32).

30 Therefore, the power of national law, recognised by that directive, to specify the benefits payable by the guarantee institution is conditional upon the requirements flowing from the general principle of equality and non-discrimination (Case C-442/00 *Rodríguez Caballero* [2002] ECR I-11915, paragraphs 29 to 33, and Case C-520/03 *Olaso Valero* [2004] ECR I-12065, paragraphs 34 and 35).

31 As workers who have been unfairly dismissed are in a comparable situation in so far as they are entitled to compensation when they are not reinstated (see *Rodríguez Caballero*, paragraph 33, and *Olaso Valero*, paragraph 35), it follows that the compensation for dismissal recognised in the extra-judicial conciliation procedure cannot be treated differently from other compensation due by denying them the compensation falling under Article 33(2) of the Workers' Statute, unless that difference in treatment can be objectively justified (see, to that effect, the order in *Guerrero Pecino*, paragraphs 26 and 28, and *Olaso Valero*, paragraphs 34 and 36).

32 With regard to such a justification, it should be noted that Article 10(a) of Directive 80/987 confers on Member States the right to adopt necessary measures to avoid abuses (see *Rodríguez Caballero*, paragraph 36). Accordingly, Spanish law provides that compensation for dismissal granted following an extra-judicial conciliation procedure is excluded from benefiting from Fogasa's assumption of responsibility.

33 Such exclusion cannot be considered necessary in order to attain the objective pursued by Article 10(a) where the guarantee institution has sufficient means to enable it to avoid abuse. According to the case-law of the Court, such is particularly the case where the conciliation is supervised by a judicial body (see, to that effect, *Rodríguez Caballero*, paragraphs 36 and 37, and *Olaso Valero*, paragraph 37).

34 In that regard, the Spanish Government is of the view that extra-judicial conciliation is not comparable to judicial conciliation because it does not include sufficient guarantees for the avoidance of abuse. Conversely, the Commission of the European Communities considers that the difference in treatment described in the order for reference lacks any objective justification. Fogasa is invested with appropriate and sufficient means to detect and prevent fraud in specific cases.

35 First, it should be noted that, according to the order for reference, an agreement on compensation for dismissal concluded during extra-judicial conciliation proceedings occurs without the involvement of any judicial body. In particular, the drawing up of such an agreement is not supervised by a judge. As is clear, in particular, from Article 10 of Royal Decree 2756/1979, the conciliator is not invested with powers which allow him to influence the conciliation procedure.

36 In that respect, it must be pointed out that Article 23 of the LPL makes no provision for intervention by Fogasa during the extra-judicial conciliation procedure. Unlike the judicial conciliation procedure, the guarantee institution is not authorised to participate in an extra-judicial conciliation procedure. Consequently, Fogasa is not, in practice, in a position to become aware of circumstances constituting abuse or fraud.

37 Likewise, Fogasa's participation in the procedure for declaring the employer concerned insolvent does not permit it to challenge a claim relating to compensation for dismissal which it suspects was established abusively. It is clear from Articles 274 and 275 of the LPL that that procedure only concerns the employer's insolvency and the declaration to that effect. Conversely, once the insolvency is declared, the procedure does not have the objective of reviewing the legality of the claims for which Fogasa is responsible.

38 Second, according to Royal Decree 2756/1979, extra-judicial conciliation settlement leading to an agreement on compensation for dismissal takes place before the Centre for Mediation, Arbitration and Conciliation. The agreement so concluded is not subject to the approval of a judicial body since the conciliator, unlike a judicial body pursuant to Article 84 of the LPL in a judicial conciliation, is not empowered to review the content of the agreement.

39 With regard, third, to the possibility of the guarantee institution refusing, by reasoned decision, to pay the compensation for dismissal for which it is responsible (see, to that effect, *Rodríguez Caballero*, paragraph 36), it is clear from Article 28.3 of Royal Decree 505/1985 that such an institution is only empowered actually to reject the request for payment if it is able, for example in any subsequent judicial procedure, to adduce evidence of circumstances supporting a finding of abuse within the meaning of that provision. However, in practice, it is hard to imagine how the guarantee institution concerned could, where appropriate, establish and prove such circumstances, since it is not permitted to take part in the extra-judicial conciliation procedure. That is equally true with regard to the power of the guarantee institution to bring an action under Article 67(1) of the LPL.

40 It must therefore be held that compensation for dismissal recognised by an extra-judicial conciliation settlement does not offer sufficient guarantees of the avoidance of abuse, unlike compensation in a conciliation procedure carried out in the presence of a judicial body, in which the guarantee institution has the right to intervene.

41 That conclusion is not called into question by legislation on 'salarios de tramitación' appearing in Article 33(1) of the Workers' Statute which does not provide protection equivalent to that relating to the compensation awarded pursuant to Article 33(2) of the Workers' Statute in order to avoid abuses. In that regard, it is clear from the order for reference that, by its question, the national court also wishes to know whether, for the compensation provided for in Article 33(2), the protection measure at issue is actually 'necessary' within the meaning of Article 10(a) of Directive 80/987.

42 In that regard, it should be noted that, when they are recognised in an extra-judicial conciliation settlement, claims such as 'salarios de tramitación', by their very nature, are not generally liable to be fixed in circumstances where there is abuse. As such claims are calculated and established according to objective criteria, they do not leave the parties a sufficiently wide discretion to encourage abuses when they are determined, unlike compensation calculated in accordance with Article 33(2) of the Workers' Statute.

43 The need to exclude compensation recognised in an extra-judicial conciliation settlement from the guarantee by the guarantee institution of payment of outstanding claims cannot therefore be called into question in the light of the treatment from which claims such as 'salarios de tramitación' benefit.

44 In the light of all the foregoing considerations, the answer to the question referred by the national court must be that the first paragraph of Article 3 of Directive 80/987 is to be interpreted as meaning that a Member State has the power to exclude compensation granted for unfair dismissal from the payment guarantee of the guarantee institutions pursuant to that provision where they have been recognised by an extra-judicial conciliation settlement and such exclusion, objectively justified, constitutes a measure necessary to avoid abuses within the meaning of Article 10(a) of that directive.

Costs

45 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:

The first paragraph of Article 3 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, as amended by Directive 2002/74/EC of the European Parliament and of the Council of 23 September 2002, is to be interpreted as meaning that a Member State has the power to exclude compensation granted for unfair dismissal from the payment guarantee of the guarantee institutions pursuant to that provision where they have been recognised by an extra-judicial conciliation settlement and such exclusion, objectively justified, constitutes a measure necessary to avoid abuses within the meaning of Article 10(a) of that directive.

[Signatures]