

Judgment of the Court (First Chamber) of 7 September 2006

Anacleto Cordero Alonso v Fondo de Garantía Salarial (Fogasa)

Reference for a preliminary ruling: Tribunal Superior de Justicia de Castilla y León - Spain

Social policy - Protection of workers in the event of the insolvency of their employer - Directive 80/987/EEC - Amending directive 2002/74/EC - Compensation for dismissal agreed during conciliation - Payment guaranteed by the guarantee institution - Payment subject to the adoption of a judicial decision

Case C-81/05

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In Case C-81/05,

REFERENCE for a preliminary ruling under Article 234 EC from the Tribunal Superior de Justicia de Castilla y León (Spain), made by decision of 28 January 2005, received at the Court on 18 February 2005, in the proceedings

Anacleto Cordero Alonso

v

Fondo de Garantía Salarial (Fogasa),

THE COURT (First Chamber),

composed of P. Jann, President of the Chamber, N. Colneric (Rapporteur), K. Lenaerts, E. Juhász and M. Ilešič, Judges,

Advocate General: A. Tizzano,

Registrar: R. Grass,

after considering the observations submitted on behalf of:

- the Fondo de Garantía Salarial (Fogasa) by A. García Trejo, acting as Agent,
 - the Spanish Government, by E. Braquehais Conesa, acting as Agent,
 - the Commission of the European Communities, by G. Rozet and R. Vidal Puig, acting as Agents,
- after hearing the Opinion of the Advocate General at the sitting on 27 April 2006, gives the following

Judgment

- 1 The reference for a preliminary ruling concerns the interpretation 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) in its original version ('Directive 80/987'), and in the version 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 That reference was submitted in the course of proceedings between Mr Cordero Alonso and the Fondo de Garantía Salarial (Wages Guarantee Fund, the 'Fogasa') concerning the latter's refusal to pay Mr Cordero Alonso, by virtue of its secondary liability, compensation in respect of the termination of a contract of employment.

Legal context

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 that directive states that it 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 the same 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 and relating to pay for the period prior to a given date.'
- 6 According to Article 4 of Directive 80/987, Member States have the option to restrict the liability of guarantee institutions referred to in Article 3 of that directive, by limiting it to pay corresponding to a particular period or by setting a ceiling.
- 7 Article 9 of the Directive provides that it 'shall not affect the option of Member States to apply or introduce laws, regulations or administrative provisions which are more favourable to employees'.

- 8 Under Article 10(a) thereof, the directive shall not affect the option of Member States 'to take the measures necessary to avoid abuses'.
- 9 Article 3 of Directive 80/987 as amended is 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.
 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.'
- 10 In accordance with Article 3 thereof, Directive 2002/74 entered into force on the day of its publication in the *Official Journal of the European Communities*, namely 8 October 2002.
- 11 Article 2 of that directive provides:
 '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.
 When Member States adopt these measures, they shall contain a reference to this Directive or be accompanied by such reference on the occasion of their official publication. The methods of making such a reference shall be laid down by the Member States.
 2. Member States shall communicate to the Commission the text of the provisions of national law which they adopt in the field covered by this Directive.'

National legislation

- 12 Article 14 of the Spanish Constitution lays down the fundamental right of equality before the law.
- 13 Article 26(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. All economic benefits which workers receive, whether in cash or in kind, in consideration of the services which they provide in their professional capacity for others shall be deemed to be remuneration, provided that those benefits remunerate actual work, whatever form the remuneration takes, or rest periods treated as work.
 ...
 2. Sums received by a worker by way of reimbursement of expenses incurred in performing his work, social security benefits and allowances and compensation for relocation, suspension or dismissal shall not be included in the definition of remuneration.'
- 14 Article 33(1), (2) and (8) of the Workers' Statute provides:
 '1. The Wages Guarantee Fund, an autonomous body answerable to the Ministry of Employment and Social Security, which has legal personality and the capacity to act in order to achieve its objectives, shall pay to workers the remuneration owed to them in the event of insolvency, suspension of payments, bankruptcy or administration of their employers.
 For the purposes of the preceding paragraph, remuneration shall include the amount which the conciliation agreement or the judicial decision recognises as such by virtue of the definition in Article 26(1), and also supplementary compensation in respect of 'salarios de tramitación', awarded where appropriate by the competent court, although the Fund shall in no case pay, jointly or separately, an amount greater than the product of twice the daily interprofessional minimum wage and the number of days of unpaid remuneration, up to a maximum of 120 days.
 2. 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 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.
 The amount of compensation, for the sole purpose of its payment by the Wages Guarantee Fund in cases of dismissal or the cancellation of a contract in accordance with Article 50 of this Law, shall be computed on the basis of 25 days per year of employment and may not exceed the ceiling fixed in the previous paragraph.
 ...
 8. In the case of undertakings with less than 25 employees, the Wages Guarantee Fund is to pay 40 % of the statutory compensation payable to workers whose employment relationships have been terminated following the procedure initiated under the provisions of Article 51 of this law or on the ground laid down in Article 52(c).
 ...'
- 15 Article 52(c) of the Workers' Statute, which lists the causes of extinction of the employment contract 'for objective reasons', provides:
 'The contract is extinguished

 c) in the event of an objectively acknowledged need to abolish employment posts for one of the causes laid down in Article 51(1) of this law and of a number less than that set in the same article.
 For that purpose, the employer is to attribute the abolition decision either to economic causes, the objective being to promote recovery from an unfavourable economic situation, or to technical, organisational or production-related causes, the objective being to overcome obstacles to the smooth functioning of the undertaking attributable either to the position of that company on the market relative to its competitors or to demand-related requirements, by means of a better organisation of resources.'

- 16 The extinction of the contract for objective reasons requires the employer to observe certain obligations defined in Article 53(1) of the Workers' Statute, which include the obligation
 '...
 b) to make available to the worker ... compensation of 20 days per year of service, compensation which will be calculated pro rata by the number of months for periods of less than one year, to a maximum of 12 months.
 ...'
- 17 Article 84 of Legislative Royal Decree 2/1995 of 7 April 1995 approving the amended text of the law on employment procedure (Ley de Procedimiento laboral, BOE No 86 of 11 April 1995, p. 10695, the 'LPL') provides that, in the event of failure of conciliation before an administrative service to which prior application must be made under Article 63 of the same decree, it is mandatory for new conciliation proceedings to take place before the competent court.
- 18 At the date of the reference for a preliminary ruling, the Kingdom of Spain had not adopted any provision which included a reference to Directive 2002/74 or notified the Commission of its transposition.

The main proceedings and the questions referred for a preliminary ruling

- 19 Mr Cordero Alonso worked in an undertaking employing less than 25 employees. He was dismissed on grounds connected with the undertaking's economic situation. The action before the courts brought by Mr Cordero Alonso against that dismissal led to a conciliation settlement concluded with the defendant in the main proceedings, supervised by and with the participation of the district judge, who subsequently approved it, which led to that settlement being accorded the same force as a judgment for the purposes of its enforcement in the event of non-compliance. Under that settlement, the parties agreed to accept the termination of the employment relationship on the grounds put forward by the employer and set, inter alia, compensation for the employee at EUR 5 540.06, which was to be paid by the employer.
- 20 Since the employer did not voluntarily discharge the amounts awarded in the conciliation settlement, Mr Cordero Alonso applied for the judicial enforcement of that settlement, following which the employer was declared insolvent on 24 April 2003 on the ground that no assets had been found which could be seized and realised to cover payment of the sums owed to the employee.
- 21 Mr Cordero Alonso then applied to the Fogasa for payment of the amounts at issue. The Fogasa awarded him 40 % of the compensation for dismissal, in accordance with Article 33(8) of the Worker's Statute, but refused to pay the remaining 60 % on the ground that the compensation had been awarded in a conciliation agreement rather than in a judgment or administrative decision.
- 22 The applicant in the main proceedings then brought a claim against the Fogasa before the Juzgado de lo Social de Palencia (Social Court of Palencia) for a sum equivalent to 60 % of the compensation agreed in the judicial conciliation agreement. That court dismissed the application on the ground that, by law, the Fogasa is obliged to pay compensation on termination of an employment contract only where that compensation has been awarded in a judgment or in an administrative decision, but not when it has been agreed between the parties in a conciliation agreement. Mr Cordero Alonso appealed to the Chamber for Social Matters of the Tribunal Superior de Justicia de Castilla y León (the High Court of Justice of Castile and Leon).
- 23 That court observes that, in its judgment No 306/1993 of 25 October 1993, the Tribunal Constitucional (Constitutional Court) considered the compatibility of Article 33(2) of the Worker's Statute with Article 14 of the Spanish Constitution. According to the Constitutional Court, the principle of equality before the law is not infringed because there is no different treatment of identical situations. In the light of Case C-442/00 *Rodríguez Caballero* [2002] ECR I-11915, the referring court raises the question of the effects of the primacy of Community law and, in particular, what authority it has to disapply a national law contrary to Community law when there is no Spanish procedural law granting it that power.
- 24 If such authority were to stem from Community law, it would be necessary to establish whether, notwithstanding the fact that Directive 80/987 does not expressly provide for compensation on termination of a contract, Community law applies in the present case. On the assumption that Community law does apply, it is questionable whether its primacy over national law extends to provisions governing fundamental rights. If this were the case, it would be necessary to ascertain whether the difference in treatment at issue in the present case is warranted. That issue is not entirely resolved by *Rodríguez Caballero*, since the case in the main proceedings concerns compensation on termination of a contract. Should it be held that such compensation does not fall within the scope of Directive 80/987, it would be necessary to consider whether the Spanish State is already applying Directive 2002/74 in so far as its content is already incorporated into Spanish law. If the answer is in the affirmative, the same questions arise concerning the fundamental right of equality before the law as where the Spanish State, by ruling on Mr Cordero Alonso's situation, is held to be applying Directive 80/987.
- 25 In those circumstances, the High Court of Justice of Castile and Leon decided to stay the proceedings and refer the following questions to the Court for a preliminary ruling:

'(1) Do the obligation imposed on the Member States to take all appropriate measures, whether general or particular, to ensure fulfilment of the obligations arising out of the Treaty establishing the European Community or resulting from action taken by the institutions of the Community (Article 10 EC), and the principle of the primacy of Community law over national law imply, of themselves and without the need for specific provisions of national law, that national courts have the power to disapply all provisions of national law which are contrary to Community law, irrespective of the status of such provisions in the hierarchy of norms (regulations, laws and even a Constitution)?

- (2) (a) Where Spanish administrative and judicial institutions are required to rule on the right of an employee whose employer has been declared insolvent to receive, from the [Fogasa], the compensation owed to him as a result of the termination of a contract of employment which, under national legislation, is guaranteed in the event of insolvency, are they applying Community law notwithstanding that Articles 1 and 3 of Directive 80/987 do not specifically provide for compensation in the event of the termination of the contract?

- (b) If so, when applying Directive 80/987 and the provisions of national law transposing the content thereof, are the Spanish administrative and judicial institutions bound by the principle of equality before the law and the prohibition of discrimination deriving from Community law, as defined by the interpretation thereof given by the Court ..., notwithstanding that that interpretation does not coincide with the interpretation in the case-law of the Spanish Constitutional Court of the equivalent fundamental right which is enshrined in the Spanish Constitution?
 - (c) If so, does the fundamental right of equality before the law deriving from Community law impose an obligation to treat equally cases where the right of an employee to be compensated for the termination of his contract has been laid down in a court judgment and cases where that right is the result of an agreement between the employee and the employer, entered into under the supervision and with the approval of a court?
- (3) (a) Where, prior to the entry into force of Directive 2002/74, a Member State had already conferred on employees a statutory entitlement to protection by a guarantee institution in the event of an employer's insolvency with regard to compensation for the termination of a contract, is it possible to conclude that the Member State has been applying Community law since the entry into force of that directive on 8 October 2002, notwithstanding that the deadline for transposing the directive has not expired, where it governs the payment by the guarantee institution of such compensation for the termination of a contract in a case where an employer was declared insolvent after 8 October 2002?
- (b) If so, when applying directive [2002/74] and the provisions of national law transposing the content thereof, are the Spanish administrative and judicial institutions bound by the principle of equality before the law and the prohibition of discrimination deriving from Community law, as defined by the interpretation thereof given by the Court ..., notwithstanding that that interpretation does not coincide with the interpretation in the case-law of the Spanish Constitutional Court of the equivalent fundamental right which is enshrined in the Spanish Constitution?
 - (c) If so, does the fundamental right of equality before the law deriving from Community law impose an obligation to treat equally cases where the right of an employee to be compensated for the termination of his contract has been laid down in a court judgment and cases where that right is the result of an agreement between the employee and the employer, entered into under the supervision and with the approval of a court?

The third question

- 26 By its third question, which should be dealt with first, the national court raises the question of the temporal application of Directive 80/987 as amended (Question 3(a)) and of the possible obligation, by reason of the Community principle of equal treatment and non-discrimination, to deal in the same way with compensation for termination of a contract awarded in a court judgment and that deriving from an agreement between the employee and the employer, entered into under the supervision and with the approval of a court (Question 3(b) and (c)).

The temporal application of Directive 80/987 as amended

- 27 Pursuant to the first subparagraph of Article 2(1) of Directive 2002/74, Member States are to bring into force the laws, regulations and administrative provisions necessary to comply with that directive before 8 October 2005.
- 28 The second subparagraph of Article 2(1) provides that they are to apply the national 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. In those circumstances, an employer's state of insolvency and its consequences thus fall within the temporal scope of Directive 80/987, as amended, from the date of the entry into force of that directive, even before the expiry of the transposition period laid down in Article 2(1) of Directive 2002/74.
- 29 Not only the national provisions specifically intended to transpose Directive 2002/74 but also, from the date of that directive's entry into force, the pre-existing national provisions capable of ensuring that the national law is consistent with it must be considered to fall within its scope.
- 30 As provided in the first subparagraph of Article 3 of Directive 80/987 as amended, Member States are to take the measures necessary to ensure that guarantee institutions guarantee, subject to Article 4 of the same 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.
- 31 Although the first subparagraph of Article 3 of Directive 80/987 as amended does not oblige a Member State to provide in its national legislation transposing Directive 2002/74 that the payment of severance pay on termination of the employment relationship is guaranteed, it must be held that, as the national legislation at issue contains a provision including such severance pay under the protection granted by the competent guarantee institution, that national provision has, since 8 October 2002 (the date when Directive 2002/74 entered into force), fallen within the scope of Directive 80/987 as amended.
- 32 It follows that a provision such as Article 33(2) of the Workers' Statute, which provides under certain circumstances for the payment of compensation to workers by the guarantee institution in the event of dismissal or termination of the employment contract, falls within the second subparagraph of Article 2(1) of Directive 2002/74 and thus within the scope of that directive as regards its application to events subsequent to the date of its entry into force.
- 33 That outcome is not precluded by the fact that, under the third subparagraph of Article 2(1) of Directive 2002/74, the national provisions adopted in order to transpose the directive must contain a reference to that directive when they are adopted or be accompanied by such reference on the occasion of their official publication. Such formal considerations cannot lead to a reduction in the protection for workers which Directive 2002/74 is intended to achieve.
- 34 The answer to Question 3(a) must therefore be that where, before the entry into force of Directive 2002/74, a Member State has already conferred on employees a statutory entitlement to protection by a guarantee institution in the event of an employer's insolvency with regard to compensation for termination of the contract

of employment, the application of that legislation to cases where the employer's insolvency occurred after the entry into force of that directive falls within the scope of Directive 80/987 as amended.

Infringement of the principle of equality

- 35 Where national rules fall within the scope of Community law, those rules must be compatible with the fundamental rights the observance of which the Court ensures (see, in this connection, *Rodríguez Caballero*, paragraph 31, and the case-law cited).
- 36 It is apparent from the decision of the referring court that, so far as compensation for termination of an employment contract is concerned, in the event of the employer's insolvency the Fogasa must pay only compensation fixed by a judgment or an administrative decision.
- 37 Although it is for the national law to specify which compensation falls within the scope of Directive 80/987 as amended, that right is conditional upon observance of fundamental rights, which include inter alia the general principle of equality and non-discrimination (see, to that effect, the order in Case C-177/05 *Guerrero Pecino* [2005] ECR I-10887, paragraphs 25 and 26, and the case-law cited). That principle precludes comparable situations from being treated in a different manner unless the difference in treatment is objectively justified (*Rodríguez Caballero*, paragraph 32, and the case-law cited).
- 38 The Court has held that where, according to the relevant national rules, compensation for unlawful dismissal granted by a judgment or an administrative decision is to be considered, as a matter of the national law, to be severance pay for termination of the employment relationship under Article 3(1) of Directive 80/987 as amended, compensation of the same nature agreed during a judicial conciliation procedure such as that provided for in Article 84 LPL must also be considered to be severance pay within the meaning of that provision (order in *Guerrero Pecino*, paragraph 30).
- 39 The same is true of statutory compensation payable on termination of an employment contract.
- 40 Firstly, all employees who have lost their post because of a termination of their employment contract are in a comparable situation when their employer is, on account of his insolvency, unable to pay them the compensation to which they have a statutory right. Secondly, as the Advocate General pointed out in point 36 of his Opinion, neither the national court nor the intervening parties have put forward any new arguments as to a possible justification for the unequal treatment that the Court has not already had the opportunity to consider in *Rodríguez Caballero*, in Case C-520/03 *Olaso Valero* [2004] ECR I-12065, and in the order in *Guerrero Pecino*.
- 41 Since the general principle of equality and non-discrimination is a principle of Community law, Member States are bound by the Court's interpretation of that principle. That applies even when the national rules at issue are, according to the constitutional case-law of the Member State concerned, consistent with an equivalent fundamental right recognised by the national legal system.
- 42 Therefore, the answer to Question 3(b) and (c) must be that, within the scope of Directive 80/987, as amended, the general principle of equality, as recognised in the Community legal order, requires that when, under national rules such as those at issue in the main proceedings, statutory compensation payable on termination of an employment contract and fixed in a judgment is payable by a guarantee institution in the event of an employer's insolvency, compensation of the same nature, fixed in an agreement between the employee and the employer which was entered into under the supervision and with the approval of a court, must be treated in the same way.

The second question

- 43 In view of the answer given to the first question, it is unnecessary to answer the second, which concerns the original version of Directive 80/987.

The first question

- 44 The first question is essentially whether the national court has any obligation to disapply, in accordance with Community law as interpreted by the Court, the national law which is not in conformity with Directive 80/987, either in its initial or in its amended version.
- 45 Once discrimination contrary to Community law has been established and for as long as measures reinstating equal treatment have not been adopted, observance of the principle of equality can be ensured only by granting to persons within the disadvantaged category the same advantages as those enjoyed by persons within the favoured category (*Rodríguez Caballero*, paragraph 42).
- 46 In such a situation, a national court must set aside any discriminatory provision of national law, without having to request or await its prior removal by the legislature, and apply to members of the disadvantaged group the same arrangements as those enjoyed by other workers (*Rodríguez Caballero*, paragraph 43, and the case-law cited). That obligation persists regardless of whether or not the national court has been granted competence under national law to do so.
- 47 Therefore, the answer to Question 1 must be that the national court must disapply a national rule which, in breach of the principle of equality as recognised in the Community legal order, precludes the payment by the competent guarantee institution of compensation on termination of a contract fixed in an agreement between the employee and the employer which was entered into under the supervision of and with the approval of a court.

Costs

- 48 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 (First Chamber) hereby rules:

1. Where, before the entry into force of Directive 2002/74/EC of the European Parliament and of the Council of 23 September 2002 amending Directive 80/987/EEC, a Member State has already conferred on employees a statutory entitlement to protection by a guarantee institution in the event of an employer's insolvency with regard to compensation for termination of the contract of employment, the application of that legislation to cases where the employer's insolvency occurred after the entry into force of that directive falls within the scope of 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, as amended by Directive 2002/74.
2. Within the scope of Directive 80/987, as amended, the general principle of equality, as recognised in the Community legal order, requires that when, under national rules such as those at issue in the main proceedings, statutory compensation payable on termination of an employment contract and fixed in a judgment is payable by a guarantee institution in the event of an employer's insolvency, compensation of the same nature, fixed in an agreement between the employee and the employer which was entered into under the supervision and with the approval of a court, must be treated in the same way.
3. The national court must disapply a national rule which, in breach of the principle of equality as recognised in the Community legal order, precludes the payment by the competent guarantee institution of compensation on termination of a contract fixed in an agreement between the employee and the employer which was entered into under the supervision of and with the approval of a court.

[Signatures]

* Language of the case: Spanish.