

JUDGMENT OF THE COURT (First Chamber)
16 December 2004^{*}

In Case C-520/03,

REFERENCE for a preliminary ruling under Article 234 EC, from the Tribunal Superior de Justicia de la Comunidad Valenciana (Spain), by decision of 27 November 2003, received at the Court on 15 December 2003, in the proceedings

José Vicente Olaso Valero

v

Fondo de Garantía Salarial (Fogasa),

THE COURT (First Chamber),

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

Advocate General: A. Tizzano,
Registrar: R. Grass,

^{*} Language of the case: Spanish.

having regard to the written procedure,

after considering the observations submitted on behalf of:

- José Olaso Valero, by T. Alcalá Mellado, abogada,
- the Spanish Government, by L. Fraguas Gadea, acting as Agent,
- the Commission of the European Communities, by G. Rozet and L. Lozano Palacios, acting as Agents,

and having regard to the decision taken, after hearing the Advocate General, to determine the case 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 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).

- 2 The reference has been made in proceedings between Mr Olaso Valero and the Fondo de Garantía Salarial (Wages Guarantee Fund, 'Fogasa') concerning Fogasa's refusal to pay him, by virtue of its secondary liability, compensation for his unfair dismissal, the payment of that compensation having been agreed between the worker and his employer in a conciliation settlement.

Legal background

The relevant provisions of Community law

- 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) thereof states that that 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 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 and relating to pay for the period prior to a given date.’

- 6 According to Article 4 of Directive 80/987, Member States are to 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 thereof provides that the directive is ‘not [to] 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 Directive 2002/74/EC of the European Parliament and the Council of 23 September 2002 amending Directive 80/987/EEC (OJ 2002 L 270, p. 10), which entered into force after the material time, replaced Article 3 of Directive 80/987 with the following text:

‘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.'

The relevant provisions of national law

Legislative Royal Decree 1/1995

- 10 Article 26(1) and (2) of Legislative Royal Decree 1/1995 of 24 March 1995 approving the amended text of the Estatuto de los Trabajadores (Workers' Statute) (BOE No 75 of 29 March 1995, p. 9654; 'the Workers' Statute'), provides:

'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.'

- 11 Article 28 of the Workers' Statute, as amended by Law 33/2002 of 5 July 2002 (BOE No 161 of 6 July 2002, p. 24683), under the heading 'Equal pay for men and women', states:

'Employers shall be required to pay equal remuneration for work of equal value, directly or indirectly, whatever the nature of the work, whether as wages or as other benefits, without any discrimination as regards any of the elements or conditions thereof on grounds of sex.'

- 12 Article 33(1) and (2) of the Workers' Statute, in the version under Law 60/1997 of 19 December 1997 (BOE No 304 of 20 December 1997, p. 37453), 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 judicial settlement on the part 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.'

13 According to Article 33(4) of the Workers' Statute, the Fund is to perform the obligations mentioned in the preceding paragraphs, after having examined the case to check that it is well founded.

14 Article 50 of the Workers' Statute, which refers to the grounds for termination of the contract at the worker's request, provides:

'1. The following shall be valid grounds on which the worker may request the termination of the contract:

...

(c) Any other serious breach by the employer of his obligations, save in case of *force majeure* ...

2. In those cases, the worker shall be entitled to the allowances provided for in the case of unfair dismissal.'

15 Article 56(1) of the Workers' Statute is worded as follows:

'1. Where the dismissal is held to be unfair, the employer, within five days of notice of the judgment being served, may choose between reinstatement of the worker together with payment of the "salarios de tramitación", as prescribed in (b) below, and 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 on which is served notice 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 judgment is delivered and if the employer provides evidence of the sums paid in order for them to 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 (b) above.'

Royal Decree 505/1985 concerning Fogasa

- ¹⁶ Article 14 of Royal Decree 505/1985 of 6 March 1985 on the organisation and operation of the Wages Guarantee Fund (BOE No 92 of 17 April 1985, 'Royal Decree 505/85'), provides:

'For the purposes of this Royal Decree, all economic benefits to which workers are entitled shall be considered to be protected claims for wages provided that they remunerate:

- (a) work actually performed;

- (b) rest periods treated as work;

- (c) economic benefits paid under Article 56(1)(b) of the Workers' Statute and the last paragraph of Article 211 of the law on employment procedure.

...

2. The sum awarded to workers in the judgment, the employment authority's decision or the judicial decision supplementing those shall be deemed to be a claim for compensation, on account of the dismissal or cancellation of the employment contract, in accordance with Articles 50 and 51 of the Workers' Statute.'

- 17 In accordance with Article 28(3) of that royal decree, 'the finding of an abuse of process or a contravention of the law and where payment is not warranted because it has been established that the workers and employers have a common interest in creating the appearance of a legal state of insolvency for the purpose of obtaining payments from the Wages Guarantee Fund' constitutes grounds for refusing claims for wage guarantee payments.

The law on employment procedure

- 18 Article 63 of Legislative Royal Decree 2/1995 of 7 April 1995 approving the amended text of the Ley de Procedimiento laboral (Law on Employment Procedure) (BOE No 86 of 11 April 1995, p. 10695, 'the LPL') requires a conciliation procedure conducted by an administrative service before any judicial proceedings take place.
- 19 Article 84 of the LPL provides that, if the conciliation before that service should fail, it is mandatory for new conciliation proceedings to take place before the competent court.

The dispute in the main proceedings

- 20 In a conciliation agreement drawn up on 15 December 1999 before the Juzgado de lo Social (Labour Court) No 16 of Valencia (Spain), in proceedings challenging his dismissal brought before that court by Mr Olaso Valero, it was recognised that his dismissal by the firm Valls y Lorente SL ('Valls') was unfair. In the circumstances, Valls undertook to pay Mr Olaso Valero the 'salarios de tramitación' and compensation for unfair dismissal. That undertaking was accepted by the employee.
- 21 Valls having failed to pay the sums due pursuant to that undertaking on the day agreed, the Juzgado de lo Social No 3 of Valencia made an order on 10 February 2000 for enforcement of that undertaking. By order of the same court of 21 September 2001 Valls was declared insolvent. That order was served on the parties and on Fogasa.
- 22 Mr Olaso Valero then applied to Fogasa for payment of the guarantee benefits, which was refused by that body's decision of 30 October 2001. With regard to the compensation for unfair dismissal, Fogasa stated that the sums claimed in that respect had been agreed in a conciliation settlement and were not, therefore, recognised by a judgment, a decision of the employment authority or a judicial decision supplementing such, in accordance with Article 14(2) of Royal Decree No 505/85.
- 23 Mr Olaso Valero brought proceedings challenging Fogasa's decision before the Juzgado de lo Social No 16 of Valencia, which dismissed the action by judgment of 20 March 2003.

The questions referred for a preliminary ruling

- 24 In its order for reference the Tribunal Superior de Justicia de la Comunidad Valenciana (High Court of Justice of the Community of Valencia), before which Mr Olaso Valero has brought an appeal against the order dismissing his action, finds that the issue of 'salarios de tramitación' has already been disposed of by the Court of Justice in Case C-442/00 *Rodríguez Caballero* [2002] ECR I-11915).
- 25 With regard to compensation for unfair dismissal, the Tribunal observes that, in the light of Article 28 of the Workers' Statute, it would seem that the concept of 'pay' in Spanish law is not necessarily confined to wages alone, inasmuch as it may mean 'wages' or 'other benefits'.
- 26 The national court is conscious of some initial doubt as to the general application of Directive 80/987 to the compensation paid to a worker who has been unfairly dismissed, having particular regard to paragraphs 26 and 27 of *Rodríguez Caballero*. It points out, inter alia, that it was Directive 2002/74 that introduced into Article 3 of Directive 80/987 the reference to 'severance pay on termination of employment relationships' 'where provided for by national law'. Furthermore, Article 4(2) of Directive 80/987 links the payment of remuneration to periods that do not accord well with the notion of compensation. Unless a quite unprecedented interpretation of the legal concept of pay is to be given, under Article 28 of the Workers' Statute, to the effect that it covers compensation for unfair dismissal, it is apparent from Spanish law that Directive 80/987 is not applicable to that compensation, the national provisions in that respect being more favourable to workers than the Community rules.
- 27 The court making the reference also harbours doubts as to observance of the general principles of equality and non-discrimination referred to in paragraphs 30, 31, 32 and 33 of *Rodríguez Caballero*. In its view, if the provisions of Article 33 of the

Workers' Statute and of Royal Decree 505/85 are to be regarded as falling within the ambit of Community law, it may be concluded, as in the case of 'salarios de tramitación', that if all unfairly dismissed workers — both those the unfair nature of whose dismissal has been recognised by a judgment and those who have entered into a conciliation agreement based on previous recognition of the unfairness of the dismissal — are entitled to compensation if they are not reinstated, the restriction imposed by Article 33(2) of the Workers' Statute in respect of the compensation awarded by a judicial or administrative decision cannot be justified objectively.

28 The Tribunal Superior de Justicia de la Comunidad Valenciana maintains that, in accordance with Article 28(3) of Royal Decree 505/85, Fogasa had available to it enough guarantees to avoid any kind of fraud. Conciliation under Article 84 of the LPL is strictly supervised by the judicial authority which has to approve it. That is all the more true in circumstances such as those of this dispute, in which the guarantee institution itself has admitted, at the hearing before the court, that the sum claimed is correct and in accordance with the ceilings and limits fixed by Spanish law.

29 It is on the basis of those decisions that the Tribunal Superior de Justicia de la Comunidad Valenciana has decided to stay proceedings and refer to the Court of Justice the two following questions for a preliminary ruling:

'(1) Does the compensation claimed for unfair dismissal fall within the ambit of Directive 80/987 ... in its version prior to that as amended by Directive 2002/74?

- (2) From the point of view of observance of the principles of equality and non-discrimination, can the rules set out in Article 33(2) [of the Workers' Statute], in so far as they require a judgment or an administrative decision in order for Fogasa to pay the corresponding compensation, be regarded as objectively unreasonable and, therefore, inapplicable?

On the questions referred

On the first question

- 30 The ambit of Directive 80/987 is defined in Article 1 thereof. A reading of Article 1(1) in conjunction with Article 3(1) of that directive makes it clear that the directive covers only those claims made by workers that arise from contracts of employment or employment relationships where those claims relate to pay within the meaning of Article 3(1) (see *Rodríguez Caballero*, paragraph 26).
- 31 According to Article 2(2) of Directive 80/987, it is for national law to specify the term 'pay' and to define it (*Rodríguez Caballero*, paragraph 27). In the circumstances, that directive therefore refers back to Spanish law.
- 32 The fact that Directive 80/987 links the payment of remuneration to reference periods does not exclude its application to compensation for unfair dismissal. This finding is borne out by Article 3 of that directive, in the version amended by

Directive 2002/74, which, while preserving the link to such periods, makes express reference to compensation for termination of the employment relationship.

- 33 The answer to be given to the first question must therefore be that it falls to the national court to determine whether the word 'pay', as defined by national law, includes compensation for unfair dismissal. If it does, such compensation falls within the ambit of Directive 80/987 as it stood before it was amended by Directive 2002/74.

On the second question

- 34 The right reserved to national law to specify the benefits payable by the guarantee institution is conditional upon observance of fundamental rights, which include inter alia the general principle of equality and non-discrimination. That principle requires that comparable situations should not be treated differently unless such difference in treatment is objectively justified (*Rodríguez Caballero*, paragraphs 29 to 32).

- 35 Workers who have been unfairly dismissed are in a comparable situation in so far as they are entitled to compensation where they are not reinstated.

- 36 The different treatment afforded to those workers under the Spanish legislation, in so far as claims relating to compensation for unfair dismissal are payable by Fogasa only if they have been determined by a judgment or administrative decision, can

thus be accepted only if it is objectively justified (see, to that effect, *Rodríguez Caballero*, paragraph 34).

37 In this connection it has to be observed that the documents before the Court do not supply any information additional to that which the Court has already had an opportunity of examining in *Rodríguez Caballero*, paragraphs 36 to 38. It follows that no persuasive argument has been made to justify the difference in treatment between claims corresponding to compensation for unfair dismissal awarded by a judgment or administrative decision and claims for compensation for unfair dismissal established in conciliation proceedings.

38 In light of the foregoing considerations the answer to be given to the second question must be that, where, according to the national legislation in question, claims corresponding to compensation for unfair dismissal, awarded by judgment or administrative decision, fall within the definition of 'pay', identical claims, established in a conciliation procedure such as that in question in the circumstances of this case, must be regarded as employees' claims arising from contracts of employment or employment relationships and as relating to pay for the purposes of Directive 80/987. The national court must set aside domestic legislation which, in breach of the principle of equality, excludes the latter claims from the definition of 'pay' under that legislation.

Costs

39 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) rules as follows:

1. **It falls to the national court to determine whether the word ‘pay’, as defined by national law, includes compensation for unfair dismissal. If it does, such compensation falls within the ambit 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, as it stood before it was amended by Directive 2002/74/EC of the European Parliament and the Council of 23 September 2002 amending Directive 80/987.**

2. **Where, according to the national legislation in question, claims corresponding to compensation for unfair dismissal, awarded by judgment or administrative decision, fall within the definition of ‘pay’, identical claims, established in a conciliation procedure such as that in question in the circumstances of this case, must be regarded as employees’ claims arising from contracts of employment or employment relationships and as relating to pay for the purposes of Directive 80/987. The national court must set aside domestic legislation which, in breach of the principle of equality, excludes the latter claims from the definition of ‘pay’ under that legislation.**

Signatures.