Judgment of the court (Fifth Chamber) 15 May 2003

Reference for a preliminary ruling: Sozialgericht Leipzig - Germany

Karin Mau v Bundesanstalt für Arbeit

Council Directive 80/987/EEC - National legislation fixing the final date for the guarantee period as that of the decision to open the procedure for the collective settlement of claims where the employment relationship still exists at that date - Article 141 EC - Indirect discrimination against female employees on child raising leave - Liability of a Member State in the event of infringement of Community law

Case C-160/01

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In Case C-160/01,

REFERENCE to the Court under Article 234 EC by the Sozialgericht Leipzig (Germany) for a preliminary ruling in the proceedings pending before that court between
Karin Mau
and
Bundesanstalt für Arbeit,
on the interpretation of Articles 3 and 4 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) and of Article 141 EC,
THE COURT (Fifth Chamber),
composed of: M. Wathelet, President of the Chamber, C.W.A. Timmermans, D.A.O. Edward (Rapporteur), P. Jann and S. von Bahr, Judges,
Advocate General: J. Mischo,
Registrar: H.A. Rühl, Principal Administrator,
after considering the written observations submitted on behalf of:

- the German Government, by W.-D. Plessing and B. Muttelsee-Schön, acting as Agents,

- the Commission of the European Communities, by J. Sack and H. Kreppel, acting as Agents,

having regard to the Report for the Hearing,

after hearing the oral observations of Mrs Mau, represented by K. Schurig, Rechtsanwalt, of the German Government, represented by W.-D. Plessing, and the Commission, represented by J. Sack, at the hearing on 2 May 2002,

after hearing the Opinion of the Advocate General at the sitting on 2 July 2002,
gives the following

Judgment

1. By order of 30 March 2001, received at the Court on 12 April 2001, the Sozialgericht (Social Court) Leipzig referred to the Court for a preliminary ruling under Article 234 EC six questions on the interpretation of Articles 3 and 4 of Council Directive 80/987/EEC of 20 October 1980 on the approximation of the laws of the MemberStates relating to the protection of employees in the event of the insolvency of their employer (OJ 1980 L 283, p. 23) and of Article 141 EC.
2. Those questions were raised in a dispute between Mrs Mau and the Bundesanstalt für Arbeit (Federal Labour Office) concerning the payment of an insolvency benefit ('Insolvenzgeld').

Legal background

Community legislation

3. Directive 80/987 is designed to give employees a Community minimum of protection in the event of their employer's insolvency, without prejudice to more favourable provisions existing in the legislation of Member States. To that end, it provides, inter alia, for specific guarantees for the payment of remuneration not received by those employees.

4. Article 2 of Directive 80/987 provides:
'1. For the purposes of this Directive, an employer shall be deemed to be in a state of insolvency:
(a) where a request has been made for the opening of proceedings involving the employer's assets, as provided for under the laws, regulations and administrative provisions of the Member State concerned, to satisfy collectively the claims of creditors and which make it possible to take into consideration the claims referred to in Article 1(1), and
(b) where the authority which is competent pursuant to the said laws, regulations and administrative provisions has:
- either decided to open the proceedings,
- or established that the employer's undertaking or business has been definitively closed down and that the available assets are insufficient to warrant the opening of the proceedings.
2. This 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 of Directive 80/987 provides:
'1. 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.
2. At the choice of the Member States, the date referred to in paragraph 1 shall be:
- either that of the onset of the employer's insolvency;
- or that of the notice of dismissal issued to the employee concerned on account of the employer's insolvency;
- or that of the onset of the employer's insolvency or that on which the contract of employment or the employment relationship with the employee concerned was discontinued on account of the employer's insolvency.'

6. Article 4 of Directive 80/987 provides:
'1. Member States shall have the option to limit the liability of guarantee institutions, referred to in Article 3.
2. When Member States exercise the option referred to in paragraph 1, they shall:
- in the case referred to in Article 3(2), first indent, ensure the payment of outstanding claims relating to pay for the last three months of the contract of employment or employment relationship occurring within a period of six months preceding the date of the onset of the employer's insolvency;
- in the case referred to in Article 3(2), second indent, ensure the payment of outstanding claims relating to pay for the last three months of the contract of employment or employment relationship preceding the date of the notice of dismissal issued to the employee on account of the employer's insolvency;
- in the case referred to in Article 3(2), third indent, ensure the payment of outstanding claims relating to pay for the last 18 months of the contract of employment or employment relationship preceding the date of the onset of the employer's insolvency or the date on which the contract of employment or the employment relationship with the employee was discontinued on account of the employer's insolvency. In this case, Member States may limit the liability to make payment to pay corresponding to a period of eight weeks or to several shorter periods totalling eight weeks.
3. However, in order to avoid the payment of sums going beyond the social objective of this Directive, Member States may set a ceiling to the liability for employees' outstanding claims.
When Member States exercise this option, they shall inform the Commission of the methods used to set the ceiling.'

National legislation

7. In Germany, the provisions of Paragraph 183 of Sozialgesetzbuch III (German Social Code, Part III) of 24 March 1997 (BGBl. 1997 I, p. 594; 'SGB III') are designed to implement Directive 80/987. That Paragraph, in the version resulting from the First Law Amending SGB III of 16 December 1997 (BGBl. 1997 I, p. 2970), headed 'Rights of Employees', provides in subparagraphs 1 and 2:
'1. Employees are entitled to insolvency benefit if
(1) at the time of the opening of insolvency proceedings in respect of their employer's assets,
(2) at the time of the rejection of the request for the opening of insolvency proceedings due to insufficiency of assets, or
(3) at the time of the complete cessation of business within the country if no request for the opening of insolvency proceedings has been lodged and there is clearly no possibility of insolvency proceedings taking place due to lack of assets,
(the insolvency event) they are still entitled to pay for the preceding three months of the employment relationship. Entitlement to pay includes any right to remuneration based on the employment relationship.
2. If an employee, who is not aware of the insolvency event, continues or begins to work, his or her entitlement is to pay on the strength of the employment relationship for the three months preceding the day on which he or she became aware of the insolvency.'

The dispute in the main proceedings and the questions referred

8. The dispute in the main proceedings concerns the payment of an insolvency benefit ('Insolvenzgeld').

9. On 1 November 1997, Mrs Mau began to work for Planungsbüro Franz-Josef Holschbach GmbH, established in

Böhlitz-Ehrenberg (Germany) as a graduate landscape architect at a gross monthly salary of DEM 3 200. As from 1 January 1999, Mrs Mau received no further pay from her employer.

10. From 16 September to 29 December 1999, Mrs Mau was subject to the employment prohibitions under Paragraphs 3(2) and 6(1)(1) of the Mutterschutzgesetz (Law on Maternity Protection). During that period she received from her Sickness Fund maternity benefit of DEM 25 per calendar day, totalling DEM 1 575. She gave birth on 3 November 1999.

11. The order for reference shows that, during that period, Mrs Mau continued to be entitled under German law to receive payment of her salary from her employer, the amount of that salary being reduced, however, by the amount of the maternity benefits referred to above.

12. From 30 December 1999, Mrs Mau was on child raising leave, and received benefit in that respect pursuant to the Bundeserziehungsgeldgesetz (Federal Law on Child Raising Benefit). She intended to take a total of three years' child raising leave. Under German law, her employment was maintained during that period, even though the main obligations flowing from that employment (obligation to work and to pay remuneration) were suspended.

13. On 14 December 1999, Mrs Mau brought an action before the Arbeitsgericht Leipzig (Germany) for payment of arrears of salary in respect of the period from 1 January to 29 December 1999, totalling DEM 22 669.73 gross. By a judgment given by default on 7 January 2000 and rectified on 24 February 2000, the Arbeitsgericht Leipzig upheld her claim.

14. By letter of 16 December 1999, received by the Amtsgericht Leipzig (Germany) on 27 December 1999, the Deutsche Angestelltenkrankenkasse (Sickness Insurance Fund for Employees), in its capacity as the body levying all social contributions, applied for insolvency proceedings to be opened against the assets of Mrs Mau's employer, by reason of arrears of social contributions. By order of 23 June 2000, that court dismissed the application for lack of assets.

15. The documents before the Court show that, as an initial precaution, Mrs Mau applied to the Bundesanstalt für Arbeit, and more specifically to the Arbeitsamt Leipzig (Leipzig Labour Office), for payment of an insolvency benefit without knowing whether or not insolvency proceedings had been commenced. It was only after several requests for information that the Amtsgericht Leipzig informed Mrs Mau of its order of 23 June 2000. Questioned by the defendant, Mrs Mau stated on 21 August 2000 that she was claiming insolvency benefit for the period from 1 October to 31 December 1999.

16. That claim having been rejected by decision of 28 August 2000, Mrs Mau lodged a complaint against that decision, which was subsequently also rejected. Mrs Mau then brought the matter before the Sozialgericht Leipzig.

17. Having doubts as to the conformity of national law with the Community law applicable to the case, and in particular with Directive 80/987, the Sozialgericht Leipzig decidedto stay proceedings and refer the following questions to the Court for a preliminary ruling:
'1. Does Paragraph 183(1) of Sozialgesetzbuch III provide for a date within the meaning of Article 3(2) 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?
2. Has the Federal Republic of Germany effectively limited the liability of the Bundesanstalt für Arbeit in accordance with Article 4 of Directive 80/987/EEC?
3. Is the Federal Republic of Germany liable to pay damages to the plaintiff on account of defective implementation of Directive 80/987/EEC?
4. Does the Court hold to its view that the date to be taken as the basis for determining the reference period is that of the request for the opening of proceedings?
5. Is the calculation of the insolvency benefit period provided for in Paragraph 183(1) of Sozialgesetzbuch III compatible with Article 141 EC?
6. In the case of claimants who are on child raising leave, is the day before that leave was taken the relevant date for the purposes of Article 3(2) of Directive 80/987/EEC?'

The questions referred

18. The questions referred to the Court partly concern the interpretation of national law and the assessment of its conformity with Community law. According to settled case-law (see, in particular, Case C-134/95 USSL No 47 di Biella [1997] ECR I-195, paragraph 17, and Case C-228/98 Dounias [2000] ECR I-577, paragraph 36) the Court does not have jurisdiction to reply to such questions, and it is therefore necessary, as a preliminary step, to define the subject-matter of this reference for a preliminary ruling.

19. The documents before the Court show that the national court is faced with essentially two problems. The first concerns the rules for calculating the period during which Member States must ensure the payment of employees' outstanding salary claims ('the guarantee period'). The second concerns the legal consequences which follow when the rules for calculating that period laid down by national law do not correspond to those required by Community law.

20. It is necessary to examine those two problems before replying specifically to the questions referred.

The rules for calculating the guarantee period

21. Under Article 3(1) of Directive 80/987, the guarantee period precedes a termination date which Member States may select from among three dates listed in Article 3(2). It is apparent from German legislation, as the German Government confirmed in its written observations, that the Federal Republic of Germany decided when transposing Directive 80/987 into national law to opt for the first suggested termination date, namely that of the onset of the employer's insolvency.

22. As for the date of such onset, the Court's case-law shows that it is the date on which the request is lodged for the opening of the procedure collectively to satisfy creditors' claims (Joined Cases C-94/95 and C-95/95 Bonifaci and Others and Berto and Others [1997] ECR I-3969, paragraphs 42 and 44; Case C-373/95 Maso [1997] ECR I-4051, paragraphs 52 and 54).

23. Article 4 of Directive 80/987 allows Member States to limit the guarantee period, and thus the resulting payment obligation of the guarantee institutions, provided, however, that a minimum guarantee is ensured, the rules governing which depend upon the date chosen under Article 3(2).

24. Thus, Article 4(2), first indent, of Directive 80/987 requires Member States which have selected the date of the onset of the employer's insolvency as the termination date preceded by the guarantee period to ensure the payment of outstanding claims relating to pay for the last three months of the contract of employment or employment relationship occurring within a period of six months preceding that date.

25. In a situation such as Mrs Mau's, therefore, Directive 80/987 requires the Federal Republic of Germany to ensure, even if the guarantee period has been validly limited in German law pursuant to Article 4 of Directive 80/987, at least the payment of the claimant's outstanding claims in respect of the last three months of the six months of her employment relationship preceding 27 December 1999, that being the date on which the request was lodged for the opening of the procedure collectively to satisfy creditors' claims, and therefore the date of the onset of Mrs Mau's employer's insolvency within the meaning of Article 3(2) of Directive 80/987.

26. The German Government nevertheless argues that the date of the onset of the employer's insolvency within the meaning of Article 3(2) of Directive 80/987 should be determined in accordance with the definition of that concept which appears in Article 2(1) of Directive 80/987. Thus, the employer's insolvency arose not on the date of the request for the opening of the procedure for the collective satisfaction of creditors' claims, but on the date of the decision ruling on that request.

27. In the submission of the German Government, Directive 80/987 sets out from the principle that there is a single concept of 'onset of insolvency', which is defined in Article 2 of that directive and is thus equally applicable in the context of Article 3.

28. In that respect, it should be noted that the Court has set out, in paragraph 42 of Bonifaci and Berto and in paragraph 52 of Maso, the reasons why the term 'onset of the employer's insolvency', used in Articles 3(2) and 4(2) of Directive 80/987, cannot be interpreted by reference to the concept of insolvency as it appears in Article 2 of that directive.

29. The German Government argues, however, that those judgments were given in the context of collective procedures under Italian law. Since that law requires the guarantee period to be within a limit of 12 months before the reference date, whereas German legislation has not imposed such a limit, the German Government concludes that one is dealing with different contexts and legal systems which cannot be subject to the same interpretation of Directive 80/987.

30. On that point, there is nothing in Directive 80/987 to suggest that the date of the onset of the employer's insolvency depends on a particular national context. On the contrary, it is a concept of Community law which calls for a uniform interpretation in all Member States. The fact that the Court referred to the circumstances of the case in its judgments in Bonifaci and Berto and in Maso does not imply that the interpretation of Community law which the Court reached in those judgments cannot be transposed to similar situations in other Member States.

31. Finally, the German Government argues that to interpret the date of the 'onset of the employer's insolvency' as being the date on which opening of the procedure was requested would have negative consequences in Germany for both sides of industry and, more generally, for the overall economic situation. Since their rights were guaranteed only until the date of the lodging of the request for opening of the insolvency procedure, workers would no longer be inclined to work after the lodging of such a request. Moreover, legal administrators would find their room for manoeuvre severely reduced, and recovery of the undertaking in difficulty would become almost impossible, even though that constitutes one of the objectives of German insolvency legislation.

32. In that regard, it is sufficient to note that Directive 80/987, as is pointed out in Article 9, does not affect the option of Member States to apply or introduce laws, regulations or administrative provisions which are more favourable to employees. It is for the Federal Republic of Germany to increase the guarantee period

appropriately, if it sees fit.

Legal consequences of the fact that the rules for calculating the guarantee period laid down by national law do not correspond to those required by Community law

33. According to the order for reference, the national court considers that the rules for calculating the guarantee period laid down by German law are different from those required by Community law, and therefore incompatible with it, the date of the onset of the employer's insolvency having been determined in a manner incompatible with Directive 80/987. Under Paragraph 183 of SGB III, according to which the date of the onset of the employer's insolvency was the date of the decision ruling on the request for the opening of the procedure for the collective satisfaction of creditors' claims, the guarantee period in the case at issue in the main proceedings is from 23 March to 22 June 2000, whereas, under Directive 80/987, which takes the lodging of that request as the starting-point for that period, the period ran from 27 September to 26 December 1999.

34. In such a situation, it is for the national court to ensure, for matters within its jurisdiction, the full effectiveness of Community law when it determines the dispute before it.

35. It is settled case-law that the Member States' obligation arising from a directive to achieve the result envisaged by the directive and their duty under Article 10 EC to take all appropriate measures, whether general or particular, to ensure the fulfilment of that obligation, is binding on all the authorities of Member States including, for matters within their jurisdiction, the courts (Case 14/83 Von Colson and Kamann [1984] ECR 1891, paragraph 26; Case C-131/97 Carbonari and Others [1999] ECR I-1103, paragraph 48).

36. Where a national court is called upon to interpret national law, whether the provisions in question were adopted before or after the directive concerned, it is required to do so, so far as possible, in the light of the wording and the purpose of the directive in order to achieve the result pursued by the latter and thereby comply with the third paragraph of Article 249 EC (Case C-106/89 Marleasing [1990] ECR I-4135, paragraph 8; Case C-334/92 Wagner Miret [1993] ECR I-6911, paragraph 20; Joined Cases C-270/97 and C-271/97 Deutsche Post [2000] ECR I-929, paragraph 62).

37. In this case, the order for reference shows that the national court considers it impossible to give an interpretation of Paragraph 183 of SGB III, concerning the date of the onset of the employer's insolvency, which conforms to Directive 80/987. It considers, however, that, if the expression 'employment relationship' within the meaning of Directive 80/987 were to be interpreted as excluding periods in which that relationship was suspended by reason of child raising leave, the guarantee period would cover the three months before 30 December 1999, the date as from which Mrs Mau benefited from such leave. In that way, it could allow Mrs Mau's application without it being necessary to examine either the question of possible direct applicability of Directive 80/987 or the question of State liability.

38. In those circumstances, it is necessary to proceed to an interpretation of the expression 'employment relationship' within the meaning of Articles 3 and 4 of Directive 80/987.

The expression 'employment relationship' within the meaning of Articles 3 and 4 of Directive 80/987

39. It should be noted that one is dealing here with a Community law expression that calls for a uniform interpretation in all Member States.

40. That expression does not appear in Article 2(2) of Directive 80/987, which lists certain expressions whose definition in national law is not affected by the directive.

41. Moreover, the case-law of the Court shows that words which apply to the actual determination of the minimum guarantee under Community law must be given a uniform interpretation if the harmonisation sought, even in part, at Community level is not to be rendered ineffective (Case C-125/97 Regeling [1998] ECR I-4493, paragraph 19). Since the concept of an employment relationship is a necessary factor in determining the guarantee period, it requires a uniform interpretation in Community law.

42. Interpretation of the concept of an employment relationship must in particular take account of the social purpose of Directive 80/987, which is to ensure a minimum level of protection for all workers (Regeling, paragraph 20). The concept cannot therefore be interpreted in such a way as to allow the minimum guarantees laid down in Article 4(2) of that directive to be reduced to nothing.

43. As the Advocate General has pointed out in paragraph 76 of his Opinion, that would be precisely the case with a national legislative provision allowing 'the last three months of the contract of employment or employment relationship' within the meaning of the first indent of Article 4(2) of Directive 80/987 to coincide with a period during which the employment relationship is suspended and no salary is due.

44. The expression 'employment relationship' within the meaning of Articles 3 and 4 of Directive 80/987 must therefore be interpreted as excluding periods which, by their nature, cannot give rise to outstanding claims for salary. Periods during which the employment relationship is suspended on account of child raising are therefore excluded by reason of the fact that no remuneration is due during those periods.

45. It is on the basis of the above considerations that the questions referred must be answered.

The first and fourth questions

46. In these questions, which it will be convenient to examine together, the referring court essentially asks whether Articles 3(2) and 4(2) of Directive 80/987 must be interpreted as precluding a provision of national law, such as Paragraph 183(1) of SGB III, which defines the date of the onset of the employer's insolvency as the date of the decisionruling on the request for opening of the insolvency procedure and not the date on which that request was lodged.

47. It is clear from paragraph 22 of this judgment that the date of the 'onset of the employer's insolvency', referred to in Articles 3(2) and 4(2) of Directive 80/987, must be interpreted as designating the date on which the request is lodged for the opening of the procedure collectively to satisfy creditors' claims.

48. Therefore, Articles 3(2) and 4(2) of Directive 80/987 must be interpreted as precluding a provision of national law, such as Paragraph 183(1) of SGB III, which defines the date of the onset of the employer's insolvency as the date of the decision ruling on the request for opening of the insolvency procedure and not the date on which that request was lodged.

The second question

49. In its second question, the referring court asks whether the Federal Republic of Germany effectively limited the payment obligation of the Bundesanstalt für Arbeit in accordance with Article 4 of Directive 80/987.

50. In that respect, it should be noted that, even if a Member State has effectively limited that payment obligation, the fact remains that it must provide the guarantee of payment of outstanding salary claims in relation to a minimum guarantee period. Under the option provided for in the first indent of Article 4(2) of Directive 80/987, which is the option chosen by the Federal Republic of Germany, that period is the last three months of the contract of employment or employment relationship occurring within a period of six months preceding the date on which the request is lodged for the opening of the procedure collectively to satisfy creditors' claims.

51. Since Mrs Mau is seeking an insolvency benefit only in respect of the period from 1 October to 31 December 1999, namely a period which does not begin before the commencement of the minimum guarantee period required by Directive 80/987, the question whether the Federal Republic of Germany has effectively limited the payment obligation does not arise in this case, and there is therefore no need to reply to the second question.

The sixth question

52. In its sixth question, the referring court essentially asks whether the expression 'employment relationship' within the meaning of Articles 3 and 4 of Directive 80/987 must be interpreted as excluding periods which, by their very nature, cannot give rise to outstanding salary claims, such as a period during which the employment relationship is suspended on account of child raising leave and, for that reason, confers no right to remuneration.

53. It is clear from paragraphs 39 to 44 of this judgment that that question is to be answered in the affirmative.

The third and fifth questions

54. Having regard to the answers given to the first, fourth and sixth questions, there is no need to reply to the third and fifth questions. In particular, as has been adumbrated in paragraph 37 of this judgment, the order for reference shows that the interpretation of the expression 'employment relationship' as given in paragraph 53 of this judgment allows the referring court to resolve the dispute before it.

Costs

55. The costs incurred by the German Government and the Commission, which have submitted observations to the Court, are not recoverable. 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.

On those grounds,
THE COURT (Fifth Chamber),
in answer to the questions referred to it by the Sozialgericht Leipzig by order of 30 March 2001, hereby rules:

1. Articles 3(2) and 4(2) 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 must be interpreted as precluding a provision of national law, such as Paragraph 183(1) of Sozialgesetzbuch III (German Social Code, Part III), which defines the date of the onset of the employer's insolvency as the date of the decision ruling on the request for opening of the insolvency procedure and not the date on which that request was lodged.
2. The expression 'employment relationship' within the meaning of Articles 3 and 4 of Directive 80/987, must be interpreted as excluding periods which, by their very nature, cannot give rise to outstanding salary claims. A

period during which the employment relationship is suspended on account of child raising leave and, for that reason, confers no right to remuneration, is therefore excluded.
Wathelet
Timmermans
Edward
Jann von Bahr
Delivered in open court in Luxembourg on 15 May 2003

Registrar	President of the Fifth Chamber
R. Grass	M. Wathelet

1: Language of the case: German.