

JUDGMENT OF THE COURT (Sixth Chamber)  
12 December 2002

Case C-442/00

Ángel Rodríguez Caballero / Fondo de Garantía Salarial (Fogasa)

«Social policy - Protection of employees in the event of the insolvency of their employer - Directive 80/987/EEC - Scope - 'Claims' - 'Pay' - 'Salarios de tramitación' - Payment guaranteed by the guarantee institution - Payment subject to the adoption of a judicial decision»

In Case C-442/00,

REFERENCE to the Court under Article 234 EC by the Tribunal Superior de Justicia de Castilla-La-Mancha (Spain) for a preliminary ruling in the proceedings pending before that court between

**Ángel Rodríguez Caballero**

**and**

**Fondo de Garantía Salarial (Fogasa),**

on the interpretation of Article 1 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),

THE COURT (Sixth Chamber),

composed of: J.-P. Puissochet, President of the Chamber, C. Gulmann, V. Skouris, F. Macken and N. Colneric (Rapporteur), Judges,

Advocate General: L.A. Geelhoed,

Registrar: R. Grass,

after considering the written observations submitted on behalf of:

- the Spanish Government, by M. López-Monís Gallego, acting as Agent,
- the United Kingdom Government, by J.E. Collins, acting as Agent, and K. Smith, barrister,
- the Commission of the European Communities, by I. Martínez del Peral, acting as Agent,
- the EFTA Surveillance Authority, by D. Sif Tynes, acting as Agent,

having regard to the report of the Judge-Rapporteur,  
after hearing the Opinion of the Advocate General at the sitting on 27 June 2002,  
gives the following

## **Judgment**

### **1.**

By order of 27 October 2000, received at the Court on 30 November 2000, the Tribunal Superior de Justicia (High Court of Justice) de Castilla-La-Mancha referred to the Court for a preliminary ruling pursuant to Article 234 EC three questions on the interpretation of Article 1 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; 'the Directive').

### **2.**

Those questions were raised in proceedings between Mr Rodríguez Caballero and the Fondo de Garantía Salarial (Wages Guarantee Fund, 'Fogasa') concerning Fogasa's refusal to pay him, by virtue of its secondary liability, the 'salarios de tramitación' (post-dismissal remuneration during proceedings) agreed between the employee and his employer in court-supervised conciliation on the ground of Mr Rodríguez Caballero's unfair dismissal.

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## Relevant legislation

### Community legislation

#### 3.

Article 1(1) of the Directive states 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 the Directive is without prejudice to national law as regards the definition of the terms 'employee', 'employer', 'pay', 'right conferring immediate entitlement' and 'right conferring prospective entitlement'.

#### 5.

Article 3(1) of the 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 the Directive, Member States are to have the option to restrict the liability of guarantee institutions, referred to in Article 3, by limiting it to pay corresponding to a particular period or by setting a ceiling.

#### 7.

Under Article 10(a) thereof, the Directive 'shall not affect the option of Member States: ... to take the measures necessary to avoid abuses'.

### Spanish legislation

#### 8.

Under Article 26(1) of Legislative Royal Decree No 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'), 'remuneration' includes 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, on condition that those benefits remunerate actual work, whatever form the remuneration takes, or rest periods treated as work.

#### 9.

Article 33(1) of the Workers' Statute states:

'1. The [Fogasa], an autonomous body accountable 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 owing 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) as well as supplementary compensation in respect of salarios de tramitación awarded where appropriate by the competent court, although the [Fogasa] shall not in either 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'.

#### 10.

According to Article 33(4) of the Workers' Statute, Fogasa is to fulfil the obligations referred to in the preceding paragraphs after examining the case to check that it is well founded.

#### 11.

Article 56(1) and (2) of the Workers' Statute provides:

'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.

2. Where the choice between reinstatement and compensation is to be made by the employer, the sum referred to in (1)(b) shall be limited to the remuneration payable from the date of dismissal up to the date of the prior conciliation if, in the conciliation agreement, the employer acknowledges the unfairness of the dismissal and offers to pay the compensation referred to in (1)(a), by making it available to the worker at the Juzgado de lo Social within 48 hours of

the conclusion of the conciliation agreement.'

**12.**

Article 63 of Legislative Royal Decree No 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 pre-litigation conciliation before an administrative service.

**13.**

Where conciliation before that service fails, Article 84 of the LPL makes compulsory provision for renewed conciliation before the competent court.

**The main proceedings**

**14.**

Mr Rodríguez Caballero, responsible for external relations at AB Diario de Bolsillo SL, was dismissed by his employer on 30 March 1997. The judicial procedure prescribed in Article 84 of the LPL led to an agreement under which that undertaking acknowledged that the dismissal was unfair and accepted that the 'salarios de tramitación' which it owed would be paid with effect from the date of dismissal up to the date of the conciliation agreement, that is, a sum of ESP 136 896.

**15.**

Those 'salarios de tramitación' were not paid by the undertaking. The failure to pay led to the commencement of the enforcement procedure during which AB Diario de Bolsillo SL was declared insolvent. Mr Rodríguez Caballero thus requested Fogasa to pay him the 'salarios de tramitación', which Fogasa refused by decision of 30 April 1998.

**16.**

Mr Rodríguez Caballero challenged that decision before the Juzgado de lo Social (Social Court) No 2 de Albacete (Spain). By judgment of 16 April 1999, that court dismissed the application on the ground that, under Article 33 of the Workers' Statute, Fogasa incurs secondary liability in respect of 'salarios de tramitación' only where they were awarded by the competent court and not where they result from conciliation between the parties.

**17.**

Mr Rodríguez Caballero appealed against that judgment to the Tribunal Superior de Justicia de Castilla-La-Mancha.

**The questions referred for a preliminary ruling**

**18.**

In the order for reference, the Tribunal Superior de Justicia de Castilla-La-Mancha finds that, according to Article 33 of the Workers' Statute, as interpreted in particular by the Tribunal Supremo (Supreme Court) (Spain), Fogasa is liable, where the claim was recognised during a court-supervised or administrative conciliation procedure, only for ordinary remuneration and not for 'salarios de tramitación'. If the latter are to be included in the wages guarantee, they must have been recognised by a judicial decision.

**19.**

However, as regards the secondary liability of Fogasa, the Tribunal Superior de Justicia considers that there are no reasonable arguments on which to base a distinction between employee claims for 'salarios de tramitación' and claims for other remuneration.

**20.**

Under Spanish law itself, in order for Fogasa to incur liability in respect of claims for ordinary remuneration, it is enough for those claims to have been recognised in any type of court-supervised or administrative conciliation.

**21.**

Court-supervised conciliation is compulsory and any agreement must be approved by the court which, in addition, is required to request the parties to negotiate. In all cases, the agreement may be challenged by *inter alia* Fogasa if it considers that the agreement is contrary to law or its own interests.

**22.**

In order for Fogasa to incur secondary liability, the undertaking must have been declared provisionally insolvent in legal proceedings following an attempt to enforce the terms of the conciliation agreement and specific provision is made for Fogasa to intervene in those proceedings in order to submit any observations which it considers to be relevant.

**23.**

According to the referring court, Fogasa is in all cases able, by reasoned decision given in the procedure instigated at the worker's request, to refuse to make the payment requested in place of the employer if it considers that the conciliation agreement amounted to a circumvention of the law. Fogasa may also refuse payment where the employee claim has been recognised by a judgment. In those circumstances, Fogasa thus has sufficient safeguards against any kind of fraud.

**24.**

On the basis of those considerations the Tribunal Superior de Justicia de Castilla-La-Mancha decided to stay proceedings and to refer the following three questions to the Court for a preliminary ruling:

'(1) Should a concept of the kind at issue in the present proceedings, namely the salarios de tramitación which is payable by the employer to the employee as a result of the dismissal being unfair, be regarded as falling within those employees' claims arising from contracts of employment or employment relationships referred to in Article 1(1) 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) In the affirmative, is there an obligation under Article 1(1) of Directive 80/987 to determine employees' claims by way of either a judicial decision or an administrative decision, and should such claims include all those employee claims upheld in the course of any other procedure recognised at law and judicially reviewable, such as conciliation, a compulsory procedure conducted before a court, which must encourage the parties to negotiate before commencing any legal proceedings and approve the terms of any agreement, and may prevent an agreement being concluded if it considers that the terms of the agreement would seriously prejudice one of the parties or amount to a circumvention of the law or an abuse of process?

(3) In the event that salarios de tramitación agreed upon in a court-supervised conciliation and approved by the court does fall within the scope of employees' claims, may the national court responsible for giving judgment in the proceedings refrain from applying a provision of national law which excludes the employee's claim for such remuneration from the scope of matters for which the national state guarantee institution, the Fondo de Garantía Salarial, is responsible and apply Article 1(1) of the directive directly on the ground that it considers the provision to be clear, precise and unconditional?'

**The first and second questions**

**25.**

By its first and second questions, which it is appropriate to consider together, the referring court seeks essentially to ascertain whether, and if so in what circumstances, claims in respect of 'salarios de tramitación' are covered by the concept of 'employees' claims arising from contracts of employment or employment relationships' referred to in Article 1(1) of the Directive.

**26.**

As a preliminary point, it should be pointed out that if Articles 1(1) and 3(1) of the Directive are read in conjunction, it is apparent that the Directive covers only employees' claims arising from contracts of employment or employment relationships where those claims relate to pay within the meaning of Article 3(1).

**27.**

Under Article 2(2) of the Directive, it is for national law to specify the term 'pay' and to define it. In the present case the Directive thus refers to Spanish law.

**28.**

In determining the remuneration payable by Fogasa, Article 33 of the Workers' Statute includes, according to the Tribunal Supremo's interpretation, remuneration within the meaning of Article 26(1) of that statute and 'salarios de tramitación', but only in so far as the latter are fixed by a judicial decision.

**29.**

The question none the less arises as to whether the possibility for national law to specify the payments to be made by the guarantee institution is subject to requirements of Community law and whether, in defining the term 'pay' within the meaning of Article 2(2) of the Directive, the Kingdom of Spain has complied with those requirements.

**30.**

As regards the existence of such requirements, it should be remembered, first, that according to settled case-law fundamental rights form an integral part of the general principles of law whose observance the Court ensures and, second, that the requirements flowing from the protection of fundamental rights in the Community legal order are also binding on Member States when they implement Community rules. Consequently, Member States must, as far as possible, apply those rules in accordance with those requirements (see Case C-2/92 Bostock [1994] ECR I-955, paragraph 16, and Case C-292/97 Karlsson and Others [2000] ECR I-2737, paragraph 37).

**31.**

Where national rules fall within the scope of Community law, and reference is made to the Court for a preliminary ruling, the Court must provide all the criteria of interpretation needed by the national court to determine whether those rules are compatible with the fundamental rights the observance of which the Court ensures (Case C-260/89 ERT [1991] ECR I-2925, paragraph 42, and Case C-85/97 SFI [1998] ECR I-7447, paragraph 29).

**32.**

Fundamental rights include the general principle of equality and non-discrimination. That principle precludes comparable situations from being treated in a different manner unless the difference in treatment is objectively justified (see, for example, Case C-189/01 Jippes and Others [2001] ECR I-5689, paragraph 129, and Case C-149/96 Portugal v Council [1999] ECR I-8395, paragraph 91).

**33.**

It is clear from both the grounds of the order for reference and the written observations of the Spanish Government that, under Spanish law, all workers who are unfairly dismissed are in the same situation in the sense that they are entitled to 'salarios de tramitación'. However, in the event of the employer's insolvency, Article 33(1) of the Workers' Statute treats dismissed workers differently to the extent that the right to payment by Fogasa of claims relating to 'salarios de tramitación' is acknowledged only in respect of those determined by judicial decision.

**34.**

Such a difference in treatment can be accepted only if it is objectively justified.

**35.**

In order to justify that difference in treatment, the Spanish Government relies expressly on Article 10 of the Directive and contends that the difference in treatment at issue is designed to avoid abuses.

**36.**

Article 10 of the Directive does indeed permit Member States to take the measures necessary to avoid abuses. However, the details given in the order for reference and in the observations of the Spanish Government on the role of Fogasa show that it has sufficient safeguards in order to be able to avoid any type of fraud. Fogasa is in all cases able, in particular, by reasoned decision given in the procedure instigated at the worker's request, to refuse to make the payment requested in place of the employer if it considers that the conciliation agreement amounted to a circumvention of the law.

**37.**

Moreover, the grounds of the order for reference show that conciliation, to the extent that it takes place on the basis of Article 84 of the LPL, is strictly supervised by a court required to approve it.

**38.**

Accordingly, the fact that claims relating to 'salarios de tramitación' are paid by Fogasa only if that remuneration was determined by judicial decision cannot be regarded as a measure necessary to avoid abuses for the purposes of Article 10 of the Directive.

**39.**

Since no other argument has been put forward in order to justify the difference in treatment referred to in paragraph 33 of this judgment, it must be found that no convincing arguments have been submitted such as to justify the difference in treatment between claims for ordinary remuneration and claims for 'salarios de tramitación' granted by judicial decision, on the one hand, and claims for 'salarios de tramitación' acknowledged as the result of a conciliation procedure, on the other, for the purpose of excluding the latter claims from the scope of the Directive.

**40.**

In the light of the foregoing considerations, the answer to the first and second questions must be that claims in respect of 'salarios de tramitación' must be regarded as employees' claims arising from contracts of employment or employment relationships and relating to pay, within the meaning of Articles 1(1) and 3(1) of the Directive, irrespective of the procedure under which they are determined, if, according to the national legislation concerned, such claims, when recognised by judicial decision, give rise to liability on the part of the guarantee institution and if a difference in treatment of identical claims acknowledged in a conciliation procedure is not objectively justified.

### **The third question**

**41.**

By the third question, the referring court seeks essentially to ascertain whether it is entitled to set aside national legislation such as that at issue in the main proceedings where, in a discriminatory manner, the legislation excludes from the concept of 'pay' within the meaning of Article 2(2) of the Directive claims relating to 'salarios de tramitación' other than those determined by judicial decision.

**42.**

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.

**43.**

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 to apply to members of the disadvantaged group the same arrangements as those enjoyed by other workers (see, in respect of equal pay for men and women, Case C-184/89 Nimz [1991] ECR I-297, paragraphs 18 to 20, and Case C-408/92 Avdel Systems [1994] ECR I-4435, paragraph 16).

**44.**

Consequently, the answer to the third question must be that the national court must set aside national legislation which, in breach of the principle of equality, excludes from the concept of 'pay' within the meaning of Article 2(2) of the Directive claims in respect of 'salarios de tramitación' agreed in a conciliation procedure supervised and approved by a court; it must apply to members of the group disadvantaged by that discrimination the arrangements in force in respect of employees whose claims of the same type come, according to the national definition of 'pay', within the scope of the Directive.

**Costs**

**45.**

The costs incurred by the Spanish and United Kingdom Governments, the Commission and the EFTA Surveillance Authority, 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 (Sixth Chamber),

in answer to the questions referred to it by the Tribunal Superior de Justicia de Castilla-La-Mancha by order of 27 October 2000, hereby rules:

**1. Claims in respect of 'salarios de tramitación' must be regarded as employees' claims arising from contracts of employment or employment relationships and relating to pay, within the meaning of Articles 1(1) and 3(1) 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, irrespective of the procedure under which they are determined, if, according to the national legislation concerned, such claims, when recognised by judicial decision, give rise to liability on the part of the guarantee institution and if a difference in treatment of identical claims acknowledged in a conciliation procedure is not objectively justified.**

**2. The national court must set aside national legislation which, in breach of the principle of equality, excludes from the concept of 'pay' within the meaning of Article 2(2) of Directive 80/987 claims in respect of 'salarios de tramitación' agreed in a conciliation procedure supervised and approved by a court; it must apply to members of the group disadvantaged by that discrimination the arrangements in force in respect of employees whose claims of the same type come, according to the national definition of 'pay', within the scope of that directive.**

Puissochet  
Gulmann  
Skouris  
Macken  
Colneric

Delivered in open court in Luxembourg on 12 December 2002

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Registrar R. Grass  
President of the Sixth Chamber J.-P. Puissochet