

SUMMARY

ECJ 10 July 2014, case C-198/13 (Víctor Hernandez and others - v - Reino de España and others), Insolvency

Facts

Mr Hernandez and the other plaintiffs in this case were employed by, inter alia, Obras Alteamar SL. They were dismissed. On 2 October 2009 a Spanish court declared the dismissals to be invalid and ordered the defendant employers to pay them (i) severance compensation and (ii) their remuneration owed since the date of their dismissal. The plaintiffs attempted to enforce the judgment, but were unsuccessful because the companies in question were unable to pay, and on 11 June 2010 they were declared to be in a state of provisional insolvency. The plaintiffs applied to the Wage Guarantee Fund, known as “Fogasa”. Fogasa paid part of what the defendants owed, thereby discharging its obligations under the Spanish law transposing Directive 2008/94 on the protection of employees in the event of insolvency of their employer. They then brought an action against the Spanish State for additional payments. Their claim was based on the following legislation.

Depending on the reason for, and the facts underlying, a dismissal, a court can declare a dismissal to be either unfair or invalid. In the event a dismissal has been declared to be unfair, the employer is ordered (i) to either reinstate the employee or to pay him compensation and (ii) to pay the employee his salary and other benefits for the period between the dismissal and the judgment. However, in order to protect employers against long delays in delivering judgment, Spanish law provides that if unfair dismissal proceedings last longer than 60 days, the State shall referred to the employer the salary he had to pay beyond 60 days (the “60 days rule”). The 60 days rule is there to protect the employer, not the employee. However, in the event an employer is insolvent, the employee may - by way of subrogation in the employer’s

right - claim such a refund from the State. In the event a dismissal is declared to be invalid, the employer must reinstate the employee and pay him his salary for the period between the dismissal and the judgment, except where the employer has ceased trading, in which case the employer may pay compensation rather than reinstating the employee. The difference with the situation where an insolvent employer dismissed an employee unfairly is that the 60 days rule does not apply. The issue in this case was essentially whether this difference complies with EU law.

National proceedings

The court before which the plaintiffs brought their claim against the State referred four questions to the ECJ.

ECJ's findings

1. The provisions of Spanish law in question must be assessed in the light of Article 20 of the Charter of Fundamental Rights and Freedoms of the EU (the "Charter"), which provides: "Everyone is equal before the law", on condition that they come within the scope of Directive 2008/94. According to Article 51(1) of the Charter, its provisions are addressed to the Member States only when they are implementing EU law. The concept of "implementing EU law" presupposes a degree of connection between the measure of EU law and the national measure at issue which goes beyond the matters concerned being closely related or one of those matters having an indirect impact on the other. In particular, fundamental EU rights cannot be applied in relation to national legislation if the relevant provisions of EU law do not impose any specific obligation on Member States with regard to the situation at issue in the main proceedings. The mere fact that a national measure comes within an area in which the EU has powers cannot bring it within the scope of EU law, and, therefore, cannot render the Charter applicable (§ 32-36).

2. In order to determine whether a national measure involves the implementation of EU law for the purposes of Article 51(1) of the Charter, it is necessary to determine, inter alia, (i) whether that national legislation is intended to implement a provision of EU law; (ii) the nature of the legislation at issue and whether it pursues objectives other than those covered by EU law, even if it is capable of indirectly affecting EU law; and also (iii) whether there are specific rules of EU law on the matter or rules which are capable of affecting it (§ 37).

3. As regards, first, the objectives pursued by the legislation at issue in the main proceedings, it appears that that legislation sets in place a regime under which the Spanish State is liable in respect of 'irregularities' in the administration of justice. To that end, the law grants the employer, in cases in which the duration of unfair dismissal proceedings exceeds 60 days, the

right to request from the Spanish State the payment of remuneration paid after the 60th working day following the date on which those proceedings were commenced. Even though the employee may directly request from the Spanish State payment of that remuneration if the employer is in a state of provisional insolvency and has not yet paid that remuneration, this is by operation of a legal subrogation to the right granted in favour of the employer against the Spanish State, not by operation of the employee's own right. It follows that the purpose of the law is not to recognise an employee's claim against his employer resulting from his employment relationship, to which Directive 2008/94 is capable of applying, but to recognise a right of a separate nature (§ 38-39).

4. In addition, it should be pointed out that the right resulting from the 60 days rule does not cover remuneration which has become due during the first 60 working days of unfair dismissal proceedings. Thus, in so far as those provisions do not confer entitlement to any payment where the duration of the proceedings challenging a dismissal does not exceed 60 working days, those provisions do not guarantee the payment of remuneration, as required by Directive 2008/94 (§ 40).

5. It follows from the characteristics of the legislation at issue that that legislation pursues an objective which differs from that of guaranteeing a minimum protection for employees in the event of the employer's insolvency, as referred to in Directive 2008/94, namely, that of providing for compensation by the Spanish State for the adverse consequences resulting from the fact that judicial proceedings last for more than 60 working days (§ 41).

6. The mere fact that the legislation at issue in the main proceedings come within an area in which the European Union has powers under Article 152(2) TFEU cannot render the Charter applicable (§ 46).

7. It follows from the foregoing that the 60 days rule cannot be regarded as implementing EU law within the meaning of Article 51(1) of the Charter and, therefore, cannot be examined in the light of the guarantees of the Charter and, in particular, of Article 20 thereof (§ 48).

Ruling

National legislation, such as that at issue in the main proceedings, according to which an employer can request from the Member State concerned payment of remuneration which has become due during proceedings challenging a dismissal after the 60th working day following the date on which the action was brought and according to which, where the employer has not paid that remuneration and finds itself in a state of provisional insolvency, the employee concerned may, by operation of legal subrogation, claim directly from that State the payment of that remuneration, does not come within the scope of Directive 2008/94 [...] on the

protection of employees in the event of the insolvency of their employer and cannot, therefore, be examined in the light of the fundamental rights guaranteed by the Charter of Fundamental Rights of the European Union and, in particular, of Article 20 thereof.

Creator: European Court of Justice (ECJ)

Verdict at: 2014-07-10

Case number: C-198/13