

SUMMARY

ECJ 25 April 2013, case C-398/11 (Thomas Hogan and others - v - Minister for Social and Family Affairs, Ireland and Attorney General), Insolvency

Facts

The ten plaintiffs in this case were formerly employed by Waterford Crystal. They were enrolled in the company's pension scheme. It entitled them to an old-age pension equal to two thirds of the balance of a sum based on their last-earned salary and the State pension. The pension scheme's assets were administered by a trustee and separated from the company in a trust. The scheme was funded by contributions from the employees and the employer. The employees paid a percentage of their salary. The employer made annual contributions to the pension fund calculated to ensure that in the long term the pension scheme had sufficient assets to meet its liabilities. In 2009, Waterford Crystal became insolvent, as a result of which the pension scheme was wound up and each employee became entitled to a share of the fund's assets. Given that the pension fund's liabilities exceeded its assets, the employees were informed that they would receive no more than a percentage (somewhere between 16 and 41%) of the amounts to which they would have been entitled if they had received the present value of their accrued old-age pension rights.

National proceedings

The plaintiffs brought an action, claiming that Ireland had failed to properly transpose Article 8 of Directive 2008/94 ("Article 8"). Article 8 enjoins Member States to ensure that the necessary measures are taken to protect the interests of employees and former employees in respect of rights conferring on them entitlement to old-age benefits under supplementary

occupational pension schemes outside the national statutory social security schemes.

The plaintiffs based their claim on the ECJ's 2007 ruling in *Robins* (C- 278/05). In that judgment, which was based on Directive 80/987 (that was replaced in 2008 by Directive 2008/94), the ECJ ruled that:

- accrued pension rights need not necessarily be funded by the Member States themselves or be funded in full;
- a system of protection such as that at issue in *Robins* (under which entitlement to pension benefits could be reduced by as much as 80% in the event of insolvency) is incompatible with Directive 80/987;
- if that directive has not been properly transposed into domestic law, the liability of the Member State concerned is contingent on a finding of manifest and grave disregard by that State for the limits set at its discretion.

More in particular, the ECJ in *Robins* ruled that “neither Article 8 of the Directive nor any other provision therein contains elements which make it possible to establish with any precision the minimum level required in order to protect entitlement to benefits under supplementary pension schemes. Nevertheless, having regard to the express wish of the Community legislature, it must be held that provisions of domestic law that may, in certain cases, lead to a guarantee of benefits limited to 20 or 49% of the benefits to which an employee was entitled, that is to say, of less than half of that entitlement, cannot be considered to fall within the definition of the word ‘protect’ used in Article 8 of the Directive.

The Irish High Court referred to the ECJ seven questions on the interpretation of Directive 2008/94.

ECJ's findings

- The first question related to the fact that the plaintiff's claim for loss of pension benefits was not a claim against their former employer. The ECJ pointed out that the plaintiffs' entitlement to old-age benefits arose from their contract of employment. Member States may fulfil their obligation under Article 8 by ensuring, either that the employer is able to meet its pension obligations, or, that an institution separate from the employer is able to do so. The plaintiffs' interests in respect of old-age pension were not protected by Ireland in the event of their employer's insolvency. Consequently, Directive 2008/94 must be interpreted as

meaning that it applies to the entitlement of former employees to old-age benefits under a supplementary pension scheme set up by their employer (§ 22-27).

- The taking in account of State pension benefits, for the purposes of applying Article 8, would be contrary to the practical effect of the protection required by that article (§ 28-32).
- Article 8 does not distinguish between the possible causes for the underfunding of a supplementary occupational pension scheme, but lays down a general obligation to protect the interests of employees and leaves it to Member States to define the methods by which they fulfil that obligation. Therefore, in order for Article 8 to apply, it is not necessary to identify the causes of the underfunding (§ 35-40).
- In *Robins* the ECJ acknowledged that the Member States have considerable latitude in determining the means and the level of protection of rights to old-age benefits under supplementary occupational pension schemes in the event of insolvency of the employer. However, the ECJ held that domestic law that may lead to a guarantee of benefits limited to less than half of the benefits to which an employee was entitled does not fall within the definition of the word “protect”. That assessment takes account of the need for balanced economic and social development, by taking into consideration, on the one hand, divergent and rather unpredictable developments in the economic situations of the Member States and, on the other, the necessity of ensuring that employees have a minimum guarantee of protection. Against that background, it is not the specific nature of the measures adopted by a Member State that determines whether that Member State has correctly fulfilled the obligations laid down in Article 8, but rather the outcome of those national measures. The Irish legislation at issue (that allows an outcome under which the plaintiffs will be receiving no more than 16-41% of their pension rights’ value) does not seem to be capable of guaranteeing the minimum level of protection required by *Robins* (§ 41-47).
- The measures taken by Ireland subsequent to *Robins* have not brought about the result that the plaintiffs would receive in excess of 49% of the value of their accrued old-age benefits. Is this fact in itself a serious breach of Ireland’s obligations? Individuals harmed have a right to reparation against a Member State where three conditions are met: (1) the rule of EU law infringed must be intended to confer rights on them; (2) the breach of that law must be sufficiently serious; and (3) there must be a direct causal link between the breach and the loss. The referring court’s 7th question relates to Condition 2.

As soon as the judgment in *Robins* was delivered, the Member States were informed that

correct transposition of Article 8 requires an employee to receive, in the event of the insolvency of his employer, at least half of the old-age benefits arising out of the accrued pension rights for which he has paid contributions under a supplementary occupational pension scheme (§ 48-52).

Ruling

- Directive 2008/94 applies to the entitlement of former employees to old-age benefits under a supplementary pension scheme set up by their employer.
- Article 8 of Directive 2008/94 prohibits State pension benefits from being taken into account in assessing whether a Member State has complied with the obligation laid down in that article.
- “Article 8 [...] must be interpreted as meaning that, in order for that article to apply, it is sufficient that the pension scheme is underfunded as of the date of the employer’s insolvency and that, on account of his insolvency, the employer does not have the resources to contribute sufficient money to the pension scheme to enable the pension benefits owed to the beneficiaries of that scheme to be satisfied in full. It is not necessary for those beneficiaries to prove that there are other factors giving rise to the loss of their entitlement to old-age benefits.
- Directive 2008/94 must be interpreted as meaning that the measures adopted by Ireland following the judgment [...] of 25 January 2007 in [...] *Robins* [...] do not fulfil the obligations imposed by that directive and that the economic situation of the Member State concerned does not constitute an exceptional situation capable of justifying a lower level of protection of the interests of employees as regards their entitlement to old-age benefits under a supplementary occupational pension scheme.
- Directive 2008/94 must be interpreted as meaning that the fact that the measures taken by Ireland subsequent to *Robins* [...] have not brought about the result that the plaintiffs would receive in excess of 49% of the value of their accrued old-age pension benefits under their occupational pension scheme is in itself a serious breach of that Member State’s obligations.

Creator: European Court of Justice (ECJ)

Verdict at: 2013-04-25

Case number: C-398/11