

SUMMARY

ECJ 5 November 2014, case C-311/13 (O. Tümer & Raad van bestuur van het Uitvoeringsinstituut werknemersverzekeringen), Insolvency

Facts

Mr Tümer is a Turkish national. He lived in The Netherlands without a residence permit. On 22 January 2008, the company where he worked was declared insolvent and he was dismissed. Because that company had failed to pay all of his wages, he applied to the relevant authority (the UWV) for insolvency benefits as provided in Article 61 of the Dutch Unemployment Act. This provision transposes Directive 80/987 (later codified by Directive 2008/94) on the protection of employees in the event of the insolvency of their employer. The UWV refused Mr Tümer's application on the grounds that he did not qualify as an "employee" within the meaning of the Unemployment Act. Article 3(3) of that Act provides that a third country national who does not reside legally in The Netherlands is not to be regarded as an employee.

National proceedings

Mr Tümer appealed the UWV's refusal. When this appeal was unsuccessful, he lodged an appeal with the Appellate Court. One of his arguments related to Directive 2003/109 concerning the status of third-country nationals who are long-term residents, under which such long-term residents are to enjoy equal treatment in relation to social security. The UWV argued that Directive 2003/109 concerns only third-country nationals who reside legally in the EU. The Appellate Court referred a question to the ECJ.

ECJ's findings

1. Although Directive 80/987 does not itself define the term ‘employee’ and although it states that the directive is without prejudice to national law as regards the definition of that term, it is clear that the discretion enjoyed by Member States for the purposes of defining the term ‘employee’ is nevertheless not wholly unfettered, for two reasons. First, neither Article 1(1) nor the other provisions of Directive 80/987 exclude third-country nationals from the scope of the directive; nor do they expressly permit Member States to do so. Secondly, the possibility under Article 1(2) and (3) of Directive 80/987 for Member States to exclude certain categories of employee from the scope of that directive concerns only specific cases and is subject to conditions. Moreover, Article 1(2), which makes it possible, by way of exception, to exclude certain categories of employee, does not release Member States from every obligation to provide those employees with protection in the event of their employer’s insolvency; rather, it requires that the employees concerned be offered protection equivalent to that arising from the directive (§ 35-38).

2. In view of the fact that Article 3(3) of the Unemployment Act does not grant ‘illegally staying third-country nationals’ protection equivalent to the insolvency benefit, it does not satisfy the conditions that must be met in order to exclude certain categories of ‘employee’ under Article 1(2) of Directive 80/987. Moreover, it is common ground that Article 3(3) of the Unemployment Act is unrelated to Article 1(3). Furthermore, according to the case law of the Court, the first subparagraph of Article 2(2) of Directive 80/987 must be interpreted in the light of the social objective of that directive, which is to guarantee employees a minimum of protection at EU level in the event of the employer’s insolvency through payment of outstanding claims resulting from contracts of employment and relating to pay for a specific period. Member States therefore cannot define at will the term ‘employee’ in such a way as to undermine the social objective of that directive (§ 41-42).

3. The term “employee” in Directive 80/987 necessarily refers to an employment relationship that gives rise to a right, held vis-à-vis the employer, to receive payment for work done. Those elements are present in the definition of the term ‘employee’ under the civil law of the Netherlands. It is thus contrary to the social objective of Directive 80/987 to deny the protection provided for under that directive in the event of the employer’s insolvency to individuals to whom national legislation generally attributes the status of employees and who, by virtue of that legislation, have wage claims vis-à-vis their employer arising from contracts of employment. It follows that Directive 80/987 precludes national legislation on the protection of employees in the event of the insolvency of their employer, such as that at issue in the main proceedings, under which a third-country national has no right to an insolvency benefit because he is not lawfully resident, even though that third-country national is recognised under the civil law of that Member State as having the status of an ‘employee’ with

an entitlement to pay (§ 44-46).

4. The fact that ‘illegally staying third-country nationals’ do not have the right to work in the Netherlands does not invalidate that conclusion, given that such persons are, under national civil law, ‘employees’ with an entitlement to payment for work done, that is to say, with a claim of the kind that Directive 80/987 intends to make secure. It is true that Article 10(a) of Directive 80/987 permits Member States to take the measures necessary to prevent abuse. However, the circumstances of this case do not reflect the constituent elements of an abuse for the purposes of that provision. Furthermore, Mr Tümer’s employer fulfilled its obligation to pay contributions in accordance with national legislation on the protection of employees in the event of the employer’s insolvency.

Ruling

Council Directive 80/987 [...] must be interpreted as precluding national legislation on the protection of employees in the event of the insolvency of their employer, such as that at issue in the main proceedings, under which a third-country national who is not legally resident in the Member State concerned is not to be regarded as an employee with the right to an insolvency benefit – on the basis, in particular, of claims relating to unpaid wages – in the event of his employer’s insolvency, even though that third-country national is recognised under the civil law of the Member State as having the status of an ‘employee’ with an entitlement to pay which could be the subject of an action against his employer before the national courts.

Creator: European Court of Justice (ECJ)

Verdict at: 2014-11-05

Case number: C-311/13