EELA EUROPEAN EMPLOYMENT LAWYERS ASSOCIATION

SUMMARY

2021/10 Employee's right to a guaranteed payment arises after a court decision for opening of bankruptcy proceedings is published (BG)

The Bulgarian Supreme Administrative Court has ruled that an employee's right to a guaranteed payment from the Guaranteed Receivables Fund arises only after a court decision for opening of bankruptcy proceedings has been issued and the decision has been published in the Commercial Register with the Registry Agency of the Republic of Bulgaria. Therefore, if this condition is not met, the employee is not entitled to such payment even if the employer is de facto insolvent.

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Legal background

The Law on the Guaranteed Payment of Employees in Case of Employer Bankruptcy (Guaranteed Payment Law) provides a guarantee that employees will receive their compensation in the event that bankruptcy proceedings are initiated against their employer. For the purposes of the Guaranteed Payment Law, a Guaranteed Receivables Fund (GRF) was

established within the structure of the National Social Security Institute (NSSI).

Contributions are made entirely by the employer. In return, the employee is entitled to a guaranteed payment.

Pursuant to Article 6 of the Guaranteed Payment Law, the right of the employee to receive such guaranteed payment arises as of the date on which the court decision for opening of bankruptcy proceedings is registered in the Commercial Register.

In order to receive payment from the GRF, the employee must file a written application with the local division of the NSSI within three months of the date that the court publishes its decision to open bankruptcy proceedings against the employer or the date on which employees are informed by their Bulgarian employer that a bankruptcy proceeding has been opened pursuant to another country's laws.

Facts

The applicant initiated a successful lawsuit against their former employer for payment of compensation for the period during which the employee was unemployed under the Bulgarian Labour Code. Subsequently, since his former employer did not pay the compensation, he filed applications with the NSSI requesting a compensatory payment from the GRF for the above-mentioned compensation due from the employer pursuant to the respective court decision, as well as for the court fees he had incurred during the lawsuit.

The director of the GRF rejected payment of the compensatory amounts to the applicant. He indicated that the reason for the rejection was that upon filing of the respective applications to the NSSI, no court decision for opening of bankruptcy proceedings had been registered in the Commercial Register. Therefore, the requirements under the Guaranteed Payment Law were not met, so that the employee was not entitled to receive a compensatory payment.

The applicant appealed against this rejection before the Varna Administrative Court, which dismissed the appeal (20 November 2019, Decision No. 2234). The decision was appealed against to the Supreme Administrative Court.

The applicant argued that the Varna Administrative Court had not applied Directive 2008/94 to the case, which deprived him of the guarantees provided by EU legislation. He claimed that the rejection by the director of the GRF was unlawful and had led to a material damage. He also claimed that he had been treated discriminatorily on social and financial grounds, since

his employer was de facto in a state of bankruptcy even though the company had not been officially declared bankrupt. The applicant argued that the Court should have given precedence to the respective provisions of EU law, in particular Article 41 of the Charter of Fundamental Rights of the European Union (Right to good administration), since it did not assess all facts related to the case, including the fact that in 2015 bankruptcy proceedings against his employer had been initiated but then terminated due to withdrawal of the claim.

Judgment

On 29 July 2020, the Supreme Administrative Court (Decision No. 10386) ruled that the objections raised by the appellant for the existence of discriminatory treatment and contradiction of the appealed decision with the Charter of Fundamental Rights of the European Union, as well as the cited isolated passages from judicial acts of the European Court of Human Rights, the Court of Justice of the European Union, the Constitutional Court of the Republic of Bulgaria and the Supreme Administrative Court relate to general principles in relation to citizens' rights, but did not concern the specifics of the legal dispute.

The Court cited Article 2(1) of Directive 2008/94/EC on the protection of employees in the event of the insolvency of their employer which states that:

For the purposes of this Directive, an employer shall be deemed to be in a state of insolvency where a request has been made for the opening of collective proceedings based on insolvency of the employer, as provided for under the laws, regulations and administrative provisions of a Member State, and involving the partial or total divestment of the employer's assets and the appointment of a liquidator or a person performing a similar task, and the authority which is competent pursuant to the said 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.

The Court also referred to case C-247/12 (*Mustafa*) in which it had been established that Bulgarian law is in compliance with the provisions of Directive 2008/94. Accordingly, the Court pointed out that in order for the guarantee provided by Directive 2008/94 to apply, two conditions must be satisfied. First, there must have been a request for the opening of proceedings based on the insolvency of the employer and, second, there must have been a decision either to open those proceedings or, where the available assets are insufficient to warrant the opening of such proceedings, it must have been established that the undertaking

has been definitively closed down.

As a result, since these conditions were not satisfied in the present case, the Supreme Administrative Court dismissed the appeal.

Commentary

The decision of the Supreme Administrative Court is in line with EU law as well as with previous national case law. The Court clarified that the *de facto* status of bankruptcy of the employer is irrelevant. The provisions of the Guaranteed Payment Law which set down the prerequisites for payment of compensation are imperative. The bankruptcy status of the employer becomes relevant only after registration of the court decision for opening of bankruptcy proceedings in the Commercial Register. Pursuant to the Bulgarian law this is the specific moment when the employee's right to a guaranteed payment from the GRF arises.

Comment from other jurisdiction

Ireland (Anthony Kerr, UCD Sutherland School of Law): A similar issue arose in Ireland where an applicant had been awarded €16,818.75 in respect of her employer's breaches of employment protection legislation which remained unpaid because the employer had ceased trading and had been struck off the Register of Companies. The applicant had not petitioned the High Court to wind up the employer but had obtained a Declaration that it was unable to pay its debts and the reason for it not being wound up was due to the insufficiency of its assets. The applicant contended that this satisfied the requirements of Article 2(1)(b) of Directive 2008/94 and, accordingly, the Minister was obliged to make the payment out of the Social Insurance Fund.

Although the Supreme Court confirmed that the requirements of the Directive were not satisfied by such a declaratory order, the Court decided that Ireland had not fully or properly transposed Article 2. Because there was not in place a procedure where, as part of the statutory scheme applicable to a petition to wind up a company, an application could be made, in the alternative, for an order of a type envisaged by Article 2(1)(b), the Court awarded the sum claimed as *Francovich* damages. The Court was satisfied that the Directive required a procedure to cover 'informal insolvencies' and that Irish law did not contain any provision for such a procedure: see *Glegola – v – Minister for Social Protection* [2018] IESC 65.

Subject: Insolvency

Parties: N. K. – v – A. W. B. AD

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Court: |||||||| |||||||||||||| ||| (Supreme Administrative Court)

Date: 29 July 2020

Case number: 1685/2020

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Creator: Bulgaria
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Case number: 1685/2020