OPINION OF ADVOCATE GENERAL GEELHOED

delivered on 27 June 2002 [1]

I — Introduction

1. In this case the Spanish court seeks a ruling on a number of questions concerning the interpretation 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 insolvency of their employer [2] (hereinafter: 'the Directive'). These questions essentially ask whether payments to be made by the employer to the employee as a result of unfair dismissal are claims for the purposes of the Directive, whether these claims should be determined by way of a judicial or administrative decision and whether the Directive is directly applicable in the event that national legislation has precluded a specific situation.

1 — Original language: Dutch.
2 — OJ 1980 L 283, p. 23.

II — Legal framework

A — *Community law*

2. Article 1(1) of the Directive provides that:

'This 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).'

3. Article 2(2) reads:

'This 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".'

4. Articles 3(1) and 4(1) and (3) provide:

'*Article 3*

1. 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.

Article 4

1. Member States shall have the option to limit the liability of guarantee institutions, referred to in Article 3.

3. However, in order to avoid the payment of sums going beyond the social objective of this Directive, Member States may set a ceiling to the liability for employees' outstanding claims.

When Member States exercise this option, they shall inform the Commission of the methods used to set the ceiling.'

5. Article 10 of the Directive provides that:

'This Directive shall not affect the option of Member States:

(a) to take the measures necessary to avoid abuses;

(b) ...'.

B — *National legislation*

6. The Fondo de Garantía Salarial (Fogasa) is an autonomous body accountable to the Ministerio de Trabajo y Seguridad Social (Ministry of Employment and Social Security) to which, upon the transposition of the Directive, the function of guarantee institution as referred to in Article 3 of the Directive has been assigned.

7. This guarantee institution guarantees employees' claims in the event of the employer's insolvency. Pursuant to Article 33 of the Estatuto de los Trabajadores (Workers' Statute) remuneration includes the amount recognised in a conciliation agreement or in a judicial decision concerning all claims referred to in Article 26 of the Workers' Statute and 'supplementary compensation in respect of post-dismissal remuneration awarded where appropriate by the competent court'.

8. Article 26 of the Workers' Statute indicates what the term 'remuneration' should be understood to mean. Essentially, remuneration involves any economic benefit, either in cash or in kind, that workers receive in consideration of the services they provide under the terms of their employment.

9. Under Article 56(1)(b) of the Workers' Statute, post-dismissal remuneration is the remuneration which the undertaking has to pay in any event for the period starting with the effective date of dismissal and ending with the date on which the decision is made public, the dismissal is declared unfair, or the employer acknowledges in the pre-litigation administrative conciliation proceedings, which are compulsory under Article 63 of the Ley Procesal Laboral (Law on employment procedure), that the dismissal was unfair and offers to pay the relevant statutory compensation and the outstanding remuneration from the date of dismissal. The same applies to remuneration which has been agreed upon in a conciliation procedure which is also compulsory and takes place before the court prior to the commencement of legal proceedings and which must be promoted by the court itself, as provided by Article 84(1) of the Law on employment procedure.

III — Facts and procedure

10. On 30 March 1997, Ángel Rodríguez Caballero, the applicant in the main proceedings, was dismissed by his employer, the undertaking AB Diario de Bolsillo SL. The dismissal was recognised as unfair. The employer acknowledged this in the settlement following the pre-litigation administrative procedure which is compulsory under Spanish law.[3] In this settlement between the parties it was also agreed that the employer would pay a sum of ESP 136 896 in 'salarios de tramitación' (remuneration which has to be paid in the event of unfair dismissal; hereinafter: 'post-dismissal remuneration').[4]

11. This sum, however, was not paid by the undertaking in question, which led to the instigation of enforcement proceedings. By

3 — In the present case this involved a compulsory conciliation procedure pursuant to Article 84 of the Law on employment procedure.

4 — It emerges from the file that according to the settlement that was reached the employer would 're-employ' Mr Caballero. The sum mentioned covers the period starting with the dismissal and ending with the settlement which resulted from the conciliation procedure.

a decision of 7 June 1997 the undertaking was declared insolvent. Caballero subsequently applied to Fogasa and requested that the sum mentioned be paid to him as remuneration. This institution, however, rejected his application by a decision of 30 April 1998.

12. On 21 January 1999, Caballero applied to the Juzgado de lo Social (Social Court) No 2, Albacete, for an order against FOGASA. By a decision of 16 April 1999, this court dismissed the application on the ground that, pursuant to Article 33 of the Workers' Statute, when an employer has previously been declared insolvent Fogasa incurs secondary liability for post-dismissal remuneration only where this has been awarded by the competent court and not where it has resulted from conciliation between the parties.

13. Caballero appealed from this decision to the Sala de lo Social (Chamber for Labour Matters) of the Tribunal Superior de Justicia (High Court of Justice) of Castilla La-Mancha.

14. This court was not certain whether the claim arising from remuneration, which had been recognised in a procedure prescribed by statute, such as a conciliation agreement reached before and approved by the court, and supervised and promoted by it, should also be regarded as falling within the scope of the term 'employees' claims' as referred to in Article 1(1) of the Directive and whether Fogasa should not be ordered to accept this claim.

15. Further, the court also pointed out the following aspects:

(a) Under Spanish law, in case of the employer's insolvency, it is sufficient for the statutory liability of Fogasa (in place of the employer) to arise for ordinary claims concerning remuneration due in respect of services performed but not paid for by the employer, or in respect of bonuses or holiday allowances not paid by the employer, that this claim has been recognised in any type of conciliation, whether in a court-supervised or an administrative-law procedure, or by a decision of the court.

(b) The agreement reached in the compulsory, court-supervised conciliation must also be approved by the court. The court is furthermore obliged to encourage agreement between the parties and the agreement may in any event be challenged by, *inter alia*, Fogasa.

(c) In order for Fogasa to be liable in place of the employer, the employer must be declared insolvent in legal proceedings commenced after an attempt has been made to enforce the terms of the conciliation agreement and specific provision is made enabling Fogasa to intervene in these proceedings and make any relevant submissions.

(d) Fogasa is able, by a reasoned decision given in the file which is to be compiled at the request of the employee, to refuse to make the requested payment in place of the employer if it considers that the conciliation agreement was reached as a result of circumvention of the law; it may also do this when the employee's claim has been recognised in a judgment.

(e) In both cases (ordinary and post-dismissal claims concerning remuneration) the claim arises from a contract of employment and judicial review is assured.

IV — Questions referred for a preliminary ruling

16. The above has induced the court in the main proceedings to seek a preliminary ruling by an Order of 27 October 2000, received at the Court Registry on 30 November 2000, on the following questions:

'(a) 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 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?

(b) 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 the 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?

(c) 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 Directive 80/987 directly on the ground that it considers the provision to be clear, precise and unconditional?'

V — Assessment

A — *Observations of the parties*

17. The Spanish Government, the United Kingdom Government and the Commission and the EFTA Surveillance Authority have intervened in the proceedings.

18. According to the Spanish Government, 'salarios de tramitación' or 'post-dismissal remuneration' does not fall within the 'employees' claims arising from contracts of employment or employment relationships' referred to in Article 1(1) of Directive 80/987/EEC. It argues that 'post-dismissal remuneration' is not in the nature of pay, but rather compensation, as it does not correspond to a period of employment but to a period which runs from the dismissal to the conciliation.

19. The United Kingdom Government also regards post-dismissal remuneration as being more in the nature of compensation. It thereto observes that in order to determine whether post-dismissal remuneration falls within 'employees' claims' it should in fact be examined whether the Directive obliges the Member States to also guarantee post-dismissal remuneration in the event of the employer's insolvency. As appears from Article 3 in conjunction with Article 1 of the Directive, what must be at issue are employees' claims to pay and these claims, as defined by national law, must be guaranteed. It points out that this is a matter of minimum harmonisation and that the meaning of the term 'pay' depends on the national definition. Whether post-dismissal remuneration may be considered pay is therefore a matter for the national court, applying its national law, to decide. As the Spanish legislator, given the wording of Article 33(2) of the Workers' Statute, has chosen to distinguish between remuneration and compensation as a result of unfair dismissal, which, according to the United Kingdom Government, it is competent to do (as, according to that Government, it is up to the Member States whether they wish to guarantee such compensation in the case of the insolvency of the employer), the first question should be answered in the negative.

20. The Commission is of the opinion that, for the determination of the actual scope of the guarantee obligation, Articles 3 and 4 of the Directive have to be examined. In this the term 'pay', which is determined by national law, is of essential importance. The Commission emphasises that pursuant

to the Spanish implementing legislation pay is also understood to include supplementary compensation on account of 'post-dismissal remuneration'. From this it deduces that the latter remuneration falls as much within the scope of 'employees' outstanding claims' as referred to in Article 3(1) of the Directive, as within that of 'employees' claims arising from contracts of employment or employment relationships' as referred to in Article 1(1) of the Directive.

21. The EFTA Surveillance Authority also believes that 'employees' claims' are at issue here, given that 'post-dismissal remuneration' falls within the Spanish definition of pay and therefore presupposes an employment relationship.

22. As regards the second question, both the Commission and the EFTA Surveillance Authority are of the opinion that the Member States are free to impose rules and conditions which have to be complied with before a claim can be accepted. The Surveillance Authority of EFTA, however, points out that these rules should not have the result of rendering the exercise of Community-law given rights practically impossible or extremely difficult. According to this institution, the Spanish rule amounts to a de facto restriction of the guarantee institution's liability. The Commission stresses that it must be examined whether objective criteria underlie the distinction made by the Spanish legislation in the treatment of post-dismissal remuneration which has been recognised by a judicial decision and post-dismissal remuneration which has been acknowledged in a court-supervised conciliation agreement. Relevant to this question are the legal consequences of each of these documents, the rights of defence belonging to Fogasa in either case and the need to prevent abuse.

B — *Assessment*

1. The first question

23. The referring court asks whether Mr Caballero's claim (post-dismissal remuneration) falls within the employees' claims arising from contracts of employment or employment relationships referred to in Article 1 of the Directive.

24. Article 1 of the Directive, together with Article 2 of the Directive, concerns the Directive's personal scope. It includes the elements 'claims arising from contracts of employment or employment relationships', 'employees' claims' and 'claims existing against employers who are in a state of insolvency'. The referring court has indicated that the present case indeed involves a claim arising from an employment contract or employment relationship, that it involves a claim of an employee and that it involves an employer who is in a state of insolvency.

25. As far as I am concerned, the fact that Mr Caballero falls within the personal scope of the Directive is hereby established.

26. It is, however, not sufficient to answer the question solely in accordance with Article 1 of the Directive, as the Commission and the United Kingdom Government have also rightly pointed out. The analysis must also be performed in the light of the guarantee provided. In this respect, Article 3 of the Directive stipulates that employees must be offered a minimum level of protection in the event of the employer's insolvency. To this end, specific guarantees are especially provided for the payment of outstanding claims. This provision entails an obligation for the Member States.

27. Both Article 1 and Article 3 speak of claims arising from contracts of employment or employment relationships. It further appears from Article 3 that the claims in question concern pay. This means that the obligation which the Directive imposes on the Member States concerns the guarantee of outstanding claims to payment. Article 2 of the Directive provides that, for the purpose of the definition of the term pay, the national legislation must be consulted.

28. It is an established fact that Spain has implemented the Directive. It has established a guarantee institution which guarantees employees' outstanding claims relating to pay against insolvent employers.

29. The Spanish legislator has elected to guarantee not only 'strict' remuneration, but also 'post-dismissal remuneration'. This I infer from the Spanish definition of pay and the guarantee obligation of the Spanish guarantee institution.

30. The Spanish legislation provides that pay shall not only be understood to mean ordinary pay (pay in consideration for work that is performed under the terms of an employment contract), but also post-dismissal remuneration. As was already made clear in paragraph 9, the Spanish employment legislation here refers to remuneration which the employer is under an obligation to pay to the employee in the event of the latter's unfair dismissal. Therefore, given the Spanish definition of pay, the present case involves a claim within the meaning of the Directive. As an aside I will add that, even if post-dismissal remuneration could perhaps be regarded as compensation for wrongfully lost pay, this does not alter the fact that under Spanish law we are dealing with remuneration arising from an employment relationship.

31. As there is a claim arising from an employment relationship and as this claim relates to pay, it follows that Mr Caballero should also have a claim for compensation from the Spanish guarantee institution.

This after all corresponds with the obligation arising from Article 3 of the Directive, which is to guarantee outstanding claims relating to pay for a specific period of time.

2. The second question

32. It is apparent from the file, however, that Mr Caballero's claim was rejected and that FOGASA has therefore not made any payments. The reason given for this is that the claim was not recognised by a judicial decision. The referring court's second question concerns this aspect.

33. The Spanish legislator has provided that FOGASA is liable in place of the employer for ordinary claims relating to pay and for claims to post-dismissal remuneration. However, FOGASA's liability with respect to post-dismissal remuneration is conditional. It only applies in the event that it has been recognised by judicial decision.

34. For ordinary claims relating to pay it is, however, sufficient that the claim has been acknowledged in conciliation proceedings before the court or an administrative body.

35. The Directive does not include any provisions as regards the procedure that is to be followed, nor does it include the obligation to establish employees' claims by a judicial or administrative decision. The Directive thus leaves it to the Member States, within certain parameters, to establish the procedures in accordance with which the claims arising from the Directive may be enforced. These procedures as established by the Member States may not, however, prejudice the objective or the 'practical effect' of the Directive. Furthermore, the Community principle applies that similar situations should not be treated differently and that different situations should not be treated identically unless such differentiation is objectively justified. [5]

36. As appears from the above there is a difference between ordinary claims relating to pay and claims upheld by the court on account of unfair dismissal on the one hand and claims for post-dismissal remuneration which have been acknowledged in conciliation proceedings on the other. The former claims are paid by FOGASA, whereas the latter are not. It should therefore be examined whether any objective justification exists to support this difference.

37. Pursuant to Article 10 of the Directive, the Member States are authorised to take measures to prevent abuse, although the

5 — See for example Cases C-217/91 *Spain* v *Commission* [1993] ECR I-3923, paragraph 37 and C-306/93 *SMW Winzersekt* v *Land Rheinland-Pfalz* [1994] ECR I-5555, paragraph 30.

Court has imposed strict requirements on such measures in order to prevent justified claims of employees from being undermined. [6]

38. The order for reference has made clear that the procedure provided by the Spanish legislation for cases in which claims for post-dismissal remuneration are settled by means of conciliation offers sufficient guarantees to prevent abuse. In the conciliation procedure, too, there is judicial intervention. The court, before attaching its approval to the conciliation agreement, will first ascertain that no grave prejudice, evasion of the law or abuse of process has taken place. In addition, Fogasa also has means of preventing evasion of the law and protecting its interests. First of all, Fogasa can challenge the conciliation agreement reached before the court if it is of the opinion that in the conclusion of this agreement the law was evaded or its interests were not or insufficiently considered. Fogasa further has the power to directly counter any evasion of the law in the assessment of the applications it receives from employees for payment of their claims relating to pay, as the institution is able to reject such applications by a reasoned decision if it believes that the law was evaded in the conclusion of the conciliation agreement. This is even possible when the claim has been acknowledged by a judgment.

39. Against this background, I fail to detect any convincing arguments to justify the distinction between ordinary claims relating to pay and claims for post-dismissal remuneration which have been established by a judicial decision on the one hand and claims for post-dismissal remuneration which have been acknowledged in conciliation proceedings on the other.

40. Perhaps unnecessarily I will add that under Spanish employment law procedure the parties have a duty to attempt the conclusion of a conciliation agreement in order to prevent a judicial decision. The attempt must furthermore be serious. As has already appeared from the above, these matters are conducted before a court which in fact has to promote the conciliation. A record is made of the conciliation achieved, which is signed by the parties and by the judge who must also approve the agreement. Furthermore, an agreement concluded in this way is enforceable if it is not fulfilled. Under Spanish law, however, it does not constitute a judicial decision, as a judgment is not delivered in a dispute.

41. This gives rise to a situation where the conclusion of a conciliation agreement, entirely in accordance with the requirements of Spanish procedural labour law, may consequently cancel the application for payment of outstanding pay to the guarantee institution. I consider this to be a violation of the object of the Directive.

6 — There must be a real, demonstrable danger of abuse which the rule in question could forestall. See Case C-373/95 *Federica Maso and Others* v *INPS and Italian Republic* [1997] ECR I-4051.

3. The third question

42. The last question presupposes that claims relating to pay, which have been agreed upon in court-supervised conciliation proceedings and approved by the court, fall within the 'employees' claims' referred to in the Directive. The question is whether in such cases the national provision precluding the guarantee institution's liability for these claims can be disregarded and Article 1(1) of the Directive directly invoked instead.

43. The Court has already determined (see the *Francovich and Others* [7] and *Wagner Miret* [8] cases) that with regard both to its personal scope and the content of the remuneration guarantee the Directive is sufficiently precise and unconditional for application by the national courts.

44. Recently the Court has also held in the *Gharehveran* case [9] that just as a private individual must be able to rely on the right which he has under a precise and unconditional provision of a directive when the provision is separable from other provisions of the same directive that do not have the same degree of precision or unconditionality, he must also be allowed to do so once the discretion given to the Member State (with regard to these provisions) has been fully used.

45. My interpretation of the *Gharehveran* case mentioned in paragraph 44 is as follows: even when employees are unable to base their claims directly upon the provisions of the Directive itself, they are still able to do so when the national legislator has implemented the Directive. Given the fact, which I have indicated above, that the present case is governed entirely by Articles 1 and 3 of the Directive, which the Court in its earlier case-law has held to be directly applicable, it is not necessary in the present case to rely on the construction followed by the Court in *Gharehveran*.

46. As the Spanish legislator has also brought post-dismissal remuneration under the scope of the claims protected by the Directive, the obligation arises from the Directive to accept such claims. A national provision excluding the guarantee institution's liability for claims for post-dismissal remuneration established by conciliation, should therefore, when it lacks objective justification, not be applied by the national court. [10]

7 — Joined Cases C-6/90 and C-9/90 [1991] ECR I-5357.

8 — Case C-334/92 [1993] ECR I-6911.

9 — Case C-441/99 *Gharehveran* [2001] ECR I-7687.

10 — See for example Case C-258/98 *Carra and Others* [2000] ECR I-4217, paragraph 16.

Conclusion

47. In the light of the above, I propose that the Court should answer the referring court as follows:

(1) Given that Article 2(2) 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 insolvency of their employer refers to the national term 'pay' and the Spanish legislation, for the purpose of implementing the Directive, understands pay to also include supplementary compensation for lost pay on account of unfair dismissal recognised by the competent judicial authority, the remuneration included in such compensation falls within the term 'employees' claims arising from contracts of employment or employment relationships' referred to in Article 1(1) in conjunction with Article 3(1) of the Directive.

(2) Directive 80/987/EEC does not contain any rules concerning the procedures according to which the national authorities have to determine the claims arising from the Directive. It is therefore up to the Member States to determine such claims in accordance with their national law. The national regulations in question may not, however, prejudice the object and scope of the Directive and they must ensure that similar cases receive equal treatment.

(3) A national provision which excludes employees' claims arising from a contract of employment or an employment relationship from the guarantee institution's liability on the ground that the claims in question have not been recognised by a judicial decision, while identical claims, which have been recognised by a judicial decision, do fall within the scope of the guarantee institution's liability, must not be applied by the national court if there are no objective grounds to justify this difference in treatment.