JUDGMENT OF THE COURT (Third Chamber)

14 June 2007 *

In Case C-127/05,

ACTION under Article 226 EC for failure to fulfil obligations, brought on 21 March 2005,

Commission of the European Communities, represented by M.-J. Jonczy and N. Yerrell, acting as Agents, with an address for service in Luxembourg,

applicant,

v

United Kingdom of Great Britain and Northern Ireland, represented by C. Gibbs, acting as Agent, and by D. Anderson, QC, and D. Barr, Barrister,

defendant,

* Language of the case: English.

THE COURT (Third Chamber),

composed of A. Rosas, President of the Chamber, A. Tizzano, A. Borg Barthet (Rapporteur), U. Lõhmus and A. Ó Caoimh, Judges,

Advocate General: P. Mengozzi,
Registrar: B. Fülöp, Administrator,

having regard to the written procedure and further to the hearing on 13 September 2006,

after hearing the Opinion of the Advocate General at the sitting on 18 January 2007,

gives the following

Judgment

1 By its application, the Commission of the European Communities seeks a declaration from the Court that, by restricting the duty upon employers to ensure the safety and health of workers in all aspects related to work to a duty to do this only 'so far as is reasonably practicable', the United Kingdom of Great Britain and Northern Ireland has failed to fulfil its obligations under Article 5(1) and (4) of Council Directive 89/391/EEC of 12 June 1989 on the introduction of measures to encourage improvements in the safety and health of workers at work (OJ 1989 L 183, p. 1).

Legal context

Community legislation

2 The 10th recital in the preamble to Directive 89/391 provides:

'... preventive measures must be introduced or improved without delay in order to safeguard the safety and health of workers and ensure a higher degree of protection'.

3 According to the 13th recital in the preamble to Directive 89/391:

'... the improvement of workers' safety, hygiene and health at work is an objective which should not be subordinated to purely economic considerations'.

4 Article 1, in Section I, 'General Provisions', of Directive 89/391 provides:

'1. The object of this Directive is to introduce measures to encourage improvements in the safety and health of workers at work.

2. To that end it contains general principles concerning the prevention of occupational risks, the protection of safety and health, the elimination of risk and accident factors, the informing, consultation, balanced participation in accordance with national laws and/or practices and training of workers and their representatives, as well as general guidelines for the implementation of the said principles.

3. This Directive shall be without prejudice to existing or future national and Community provisions which are more favourable to protection of the safety and health of workers at work.'

5 Article 4 of Directive 89/391 provides:

'1. Member States shall take the necessary steps to ensure that employers, workers and workers' representatives are subject to the legal provisions necessary for the implementation of this Directive.

2. In particular, Member States shall ensure adequate controls and supervision.'

6 Article 5, in Section II, 'Employers' obligations', of Directive 89/391 provides:

'General provision

1. The employer shall have a duty to ensure the safety and health of workers in every aspect related to the work.

2. Where, pursuant to Article 7(3), an employer enlists competent external services or persons, this shall not discharge him from his responsibilities in this area.

3. The workers' obligations in the field of safety and health at work shall not affect the principle of the responsibility of the employer.

4. This Directive shall not restrict the option of Member States to provide for the exclusion or the limitation of employers' responsibility where occurrences are due to unusual and unforeseeable circumstances, beyond the employers' control, or to exceptional events, the consequences of which could not have been avoided despite the exercise of all due care.

Member States need not exercise the option referred to in the first subparagraph.'

7 Article 6 of Directive 89/391, which sets out the general obligations on employers, is worded as follows:

'1. Within the context of his responsibilities, the employer shall take the measures necessary for the safety and health protection of workers, including prevention of occupational risks and provision of information and training, as well as provision of the necessary organisation and means.

The employer shall be alert to the need to adjust these measures to take account of changing circumstances and aim to improve existing situations.

2. The employer shall implement the measures referred to in the first subparagraph of paragraph 1 on the basis of the following general principles of prevention:

(a) avoiding risks;

(b) evaluating the risks which cannot be avoided;

(c) combating the risks at source;

(d) adapting the work to the individual, especially as regards the design of work places, the choice of work equipment and the choice of working and production methods, with a view, in particular, to alleviating monotonous work and work at a predetermined work-rate and to reducing their effect on health;

(e) adapting to technical progress;

(f) replacing the dangerous by the non-dangerous or the less dangerous;

(g) developing a coherent overall prevention policy which covers technology, organisation of work, working conditions, social relationships and the influence of factors related to the working environment;

(h) giving collective protective measures priority over individual protective measures;

(i) giving appropriate instructions to the workers.

3. Without prejudice to the other provisions of this Directive, the employer shall, taking into account the nature of the activities of the enterprise and/or establishment:

(a) evaluate the risks to the safety and health of workers, inter alia in the choice of work equipment, the chemical substances or preparations used, and the fitting-out of work places.

Subsequent to this evaluation and as necessary, the preventive measures and the working and production methods implemented by the employer must:

— assure an improvement in the level of protection afforded to workers with regard to safety and health,

— be integrated into all the activities of the undertaking and/or establishment and at all hierarchical levels;

...'

8 Article 16(1) and (3) of Directive 89/391 provides for the adoption of individual directives in certain areas while stating that '[t]he provisions of this Directive shall apply in full to all the areas covered by the individual Directives, without prejudice to more stringent and/or specific provisions contained in these individual Directives'.

9 Article 18(1) of Directive 89/391 requires Member States to bring into force the provisions necessary to comply with the directive by 31 December 1992.

National legislation

10 Section 2(1) of the Health and Safety at Work etc. Act 1974 ('the HSW Act') provides:

'It shall be the duty of every employer to ensure, so far as is reasonably practicable, the health, safety and welfare at work of all his employees.'

11 Failure to discharge a duty imposed on the employer under section 2 of the HSW Act gives rise to criminal sanctions pursuant to section 33(1)(a) of that Act.

Pre-litigation procedure

12 In a letter of formal notice of 29 September 1997, the Commission set out a number of complaints against the United Kingdom concerning the transposition of Directive 89/391 into national law. One of those complaints alleged that Article 5 of the directive had been incorrectly transposed as regards, among other things, the insertion in the national legislation of the clause 'so far as is reasonably practicable' ('the disputed clause'), which, in the Commission's view, restricts, in disregard of Article 5(1) of the directive, the scope of the duty imposed on employers.

13 In its response to the Commission by letters of 30 December 1997 and 23 October 2001, the United Kingdom maintained that the disputed clause reflected the provisions of Article 5 of Directive 89/391 and was fully in compliance with Community law. In support of its arguments, it sent to the Commission a number of decisions of national courts which had applied that clause.

14 As it was not persuaded by the arguments submitted by the United Kingdom on 23 July 2003, the Commission issued a reasoned opinion in which, firstly, it reiterated its complaint of infringement of Article 5 of Directive 89/391 and, secondly, it asked that Member State to take the measures necessary to comply with the opinion within two months of its notification. At the request of the United Kingdom, an additional period of two months was granted.

15 Since the United Kingdom, in its response to that reasoned opinion, maintained its position that, in essence, the Commission's criticisms of the disputed clause were not valid, the Commission decided to bring this action.

The action

Arguments of the parties

16 The Commission takes the view that the transposition of Directive 89/391, as effected by the United Kingdom, does not lead to the result intended by Article 5(1) of that directive, even if that provision is read in conjunction with the exception provided for in Article 5(4) thereof.

17 According to the Commission, although Article 5(1) of Directive 89/391 does not impose a duty upon employers to ensure an absolutely safe working environment, it implies that the employer remains responsible for the consequences of any event detrimental to the health and safety of workers occurring in his undertaking.

18 The only derogation possible from such a responsibility is in the circumstances expressly laid down in Article 5(4) of Directive 89/391. That provision, which is an exception to the general principle that the employer is responsible, must be interpreted strictly.

19 The Commission maintains that an interpretation of Article 5 to that effect is confirmed by the legislative history of Directive 89/391 and by the fact that, while certain early directives on the safety and health of workers, which preceded the insertion into the EC Treaty of Article 118a, now Article 138 EC (Articles 117 to 120 of the EC Treaty have been replaced by Articles 136 EC to 143 EC), did incorporate a 'reasonably practicable' qualification in defining the obligations imposed on the employer, subsequent directives, including Directive 89/391, adopted on the basis of Article 118a, have permanently abandoned it.

20 The Commission submits that it is apparent from the provisions of the HSW Act and, more particularly, from section 2(1), read in conjunction with sections 33 and 47 of that Act, that an employer is not liable for the risks which arise or the consequences of events which occur in his undertaking if he is able to demonstrate that he took all reasonably practicable measures to ensure the safety and health of the workers.

21 The Commission submits that, by thus limiting the employer's duty, the United Kingdom allows him to escape his responsibility if he can prove that the adoption of measures which make it possible to ensure the safety and health of workers would have been grossly disproportionate in terms of money, time or trouble when balanced against the relevant risk.

22 The Commission concludes that the United Kingdom's legislation is not in compliance with Article 5(1) and (4) of Directive 89/391.

23 The Commission points to the fact that the assessment which must be made on the basis of the disputed clause involves account being taken of the cost of preventive measures, which clearly conflicts with the wording of the 13th recital in the preamble to Directive 89/391.

24 In reply to the arguments submitted in the alternative by the United Kingdom to the effect that the disputed clause is in any event compatible with the combined provisions of Article 5(1) and (4) of Directive 89/391, the Commission points out that Article 5(4) does not introduce a derogation based on 'a reasonableness test' from the principle of the employer's responsibility, but merely prescribes situations in which the employer may, exceptionally, be released from responsibility, such circumstances equating to *force majeure*.

25 The United Kingdom does not admit to a failure to fulfil its obligations, as alleged, and submits that Article 5(1) of Directive 89/391 has been sufficiently implemented under national law.

26 That Member State submits that Article 5(1) of Directive 89/391 identifies the employer as the person subject to the primary duty to protect the safety and health of workers at work. On the other hand, the question of the employer's liability is left to the Member States in accordance with their duty to take all measures necessary to guarantee the application and effectiveness of Community law, to which Article 4 of the directive gives specific expression.

27 As regards the scope of the duty imposed on the employer by Article 5(1) of Directive 89/391, the United Kingdom considers that, although expressed in absolute terms, that duty does not impose upon the employer a duty of result, consisting in guaranteeing a risk-free working environment, but a general duty to provide a safe workplace, the precise content of which may be discerned from Articles 6 to 12 of that directive and from the principle of proportionality.

28 That interpretation is consistent both with those provisions of Directive 89/391 which are designed to give substance to the duty set out in Article 5(1), in particular Article 6(2) thereof, and with various requirements of individual directives which, in specifying the preventive measures to be adopted in certain specific industrial sectors, refer to considerations related to the practicability or appropriateness of such measures. Such an interpretation is also consistent with the general principle of proportionality and with Article 118a of the Treaty, pursuant to which the directives adopted on the basis of that article are designed to introduce 'minimum requirements for gradual implementation' only.

29 As regards the employer's liability, the United Kingdom points out that nothing in Directive 89/391, in particular in Article 5(1) thereof, requires employers to be subject to no-fault liability. First of all, that provision simply provides that the employer has a duty to ensure the safety and health of workers, but does not also lay down an obligation to provide compensation for damage suffered as a result of workplace accidents. Secondly, Directive 89/391 leaves the Member States free to decide on the form of liability, civil or criminal, which should be imposed on employers. Thirdly, the question whether it should be the individual employers, the general category of employers or society as a whole who meets the costs of workplace accidents, is also left to the Member States.

30 The United Kingdom takes the view that its system of 'automatic' criminal liability on all employers, subject to the 'reasonably practicable' defence, which is narrowly defined, serves to give effect to Article 5(1) of Directive 89/391.

31 According to that Member State, an employer may escape that form of liability only by showing that he has done everything reasonably practicable to avoid risks to the safety and health of workers. Accordingly, he is required to show that there was a gross disproportion between, on the one hand, the risk to the safety and health of workers and, on the other hand, the sacrifice, whether in money, time or trouble that the adoption of the measures required to prevent that risk from arising would have involved and that the risk itself was insignificant in relation to that sacrifice.

32 The United Kingdom adds that the application of the disputed clause by the national courts involves a purely objective assessment of the circumstances, which excludes any consideration of the employer's financial position.

33 The United Kingdom also submits that the HSW Act serves to guarantee an effective system of prevention, as a criminal sanction has a greater deterrent effect than civil liability resulting in the payment of damages, against which employers are able to take out insurance cover. That effectiveness is also shown by the statistics, which reveal that the United Kingdom has long been one of the Member States recording the lowest number of workplace accidents.

34 Furthermore, the United Kingdom states that it has established compensation for victims of workplace accidents on the basis of the social security system. The employer is also liable for damage resulting from a failure on his part to discharge the duty of care in relation to workers provided for under the common law.

35 In the alternative, the United Kingdom contends that the scope of the disputed clause, as applied by the United Kingdom courts, exactly mirrors that of Article 5(4) of Directive 89/391.

Findings of the Court

The subject-matter of the action

36 The Court notes, as a preliminary point, that it is apparent from both the written and oral procedure that, although the Commission criticises the disputed clause above all on account of its capacity to introduce a limit on the employer's liability in the event of accident, it also seems to base its complaint on the clause's capacity to affect the scope of the general duty of safety incumbent on the employer.

The scope of the employer's liability for the consequences of any event detrimental to workers' health and safety

37 The Commission bases its argument on a reading of Article 5(1) of Directive 89/391 primarily from the point of view of the employer's responsibility for damage to the health and safety of workers. His liability extends to the consequences of any event detrimental to workers' health and safety, regardless of whether that event or those consequences can be attributed to any form of negligence on the part of the employer in adopting preventive measures.

38 It follows that the Commission adopts an interpretation of the provisions of Directive 89/391, and in particular of Article 5(1) thereof, whereby the employer is subject to no-fault liability, whether civil or criminal.

39 The Court must therefore first examine whether Article 5(1) of Directive 89/391 requires Member States, as the Commission submits, to impose no-fault liability on employers for all accidents which occur in the workplace.

40 In that regard, it should be noted that, under Article 5(1) of Directive 89/391, '[t]he employer shall have a duty to ensure the safety and health of workers in every aspect related to the work'.

41 That provision makes the employer subject to the duty to ensure that workers have a safe working environment, the meaning of which is specified in Articles 6 to 12 of Directive 89/391 and by various individual directives which lay down the preventive measures to be adopted in certain specific industrial sectors.

42 On the other hand, it cannot be asserted that the employer should be subject to no-fault liability by reason merely of Article 5(1) of Directive 89/391. That provision simply embodies the general duty of safety to which the employer is subject, without specifying any form of liability.

43 The Commission submits that its suggested interpretation of Article 5 is borne out by the legislative history of Directive 89/391. It maintains that since the request of the United Kingdom and Irish delegations for the disputed clause to be incorporated in the definition of the employer's responsibilities was expressly rejected in the course of the discussions of the working party set up by the Council of the European Union, it can accordingly be accepted that there is no-fault liability on the part of the employer.

44 That argument cannot, however, be upheld. It is apparent from the legislative history of Directive 89/391, and in particular from the joint statement by the Council and the Commission recorded in the minutes of the Council meeting of 12 June 1989, that the insertion of such a clause was suggested in order to resolve the problems that formulating the employer's duty to ensure safety in absolute terms would have raised in the common-law systems, bearing in mind the obligation on the courts concerned to interpret written law literally.

45 Against that background, the refusal to insert a clause comparable to the disputed clause in Article 5(1) of Directive 89/391 cannot suffice to justify an interpretation of that provision to the effect that the employer is subject to a form of no-fault liability in the event of accident.

46 Such an interpretation cannot be based on the scheme of Article 5 of Directive 89/391 either.

47 Article 5(2) and (3) of Directive 89/391 provides that the employer is not discharged from his responsibilities in the area of health and safety at work where he enlists external experts and that he is not discharged from those responsibilities on account of the workers' obligations in that field either. In that sense, those provisions serve to explain the nature and scope of the duty laid down in Article 5(1) and it cannot be inferred from them that there is any form of liability under Article 5(1) in the event of accident.

48 The first subparagraph of Article 5(4) of Directive 89/391 allows Member States the option of limiting employers' responsibility 'where occurrences are due to unusual and unforeseeable circumstances, beyond the employers' control, or to exceptional events, the consequences of which could not have been avoided despite the exercise of all due care'.

49 As Advocate General Mengozzi observed at point 82 of his Opinion, it is apparent from the wording of that subparagraph that it is intended to clarify the scope of certain provisions of Directive 89/391 by explaining the margin of manoeuvre available to the Member States in transposing those provisions into national law. On the other hand, it cannot be inferred from that provision, on the basis of an interpretation *a contrario*, that the Community legislature intended to impose upon Member States a duty to prescribe a no-fault liability regime for employers.

50 Lastly, it must be held that the Commission has not shown in what respect the objective of Directive 89/391, consisting in 'the introduction of measures to encourage improvements in the safety and health of workers at work', cannot be attained by means other than the setting up of a no-fault liability regime for employers.

51 It follows from the above that the Commission has not established, to the requisite legal standard, that, in excluding a form of no-fault liability, the disputed clause limits, in disregard of Article 5(1) and (4) of Directive 89/391, employers' responsibility.

The extent of the duty on employers to ensure the safety and health of workers

52 Secondly, it is necessary to analyse the Commission's complaint inasmuch as it alleges that the United Kingdom did not correctly transpose Article 5(1) of Directive 89/391 as regards the extent of the general duty on employers to ensure the safety and health of workers.

53 In that regard, although the Commission submits that the duty on the employer is absolute, it expressly acknowledges that that duty does not imply that the employer is required to ensure a zero-risk working environment. In its reply, the Commission also acknowledges that, as a result of carrying out a risk assessment, the employer may conclude that the risks are so small that no preventive measures are necessary. In those circumstances, the key point, according to the Commission, is that the employer would remain responsible if an accident were to occur.

54 As is apparent from paragraph 51 of this judgment, the Commission has not established that, in excluding a form of no-fault liability, the disputed clause limits, in disregard of Article 5(1) and (4) of Directive 89/391, employers' responsibility. Nor has it succeeded in establishing in what respect the disputed clause, which concerns employers' criminal liability, can affect the extent of the employer's general duty to ensure safety resulting from those provisions.

55 Although the disputed clause lays down a proviso to the employer's duty to ensure the safety and health of workers in every aspect related to the work as regards what is 'reasonably practicable', the significance of the proviso depends on the precise content of that duty. With regard to the arguments put forward by the Commission set out in paragraph 53 of this judgment, the Commission has not sufficiently clarified its interpretation of the content of that duty, apart from civil or criminal liability in the event of accident, and irrespective of the obligations stemming from Article 5(2) and (3) and Articles 6 to 12 of Directive 89/391. Consequently, the

Commission has not established in what way the disputed clause, considered in the light of the national case-law cited by both parties, infringes Article 5(1) and (4) of Directive 89/391.

56 Against that background, it must be pointed out that, in an action brought on the basis of Article 226 EC, it is for the Commission to prove the existence of the alleged infringement and to provide the Court with the information necessary for it to determine whether the infringement is made out, and the Commission may not rely on any presumption for that purpose (see Case C-287/03 *Commission* v *Belgium* [2005] ECR I-3761, paragraph 27, and the case-law cited, and Case C-428/04 *Commission* v *Austria* [2006] ECR I-3325, paragraph 98).

57 Consequently, it must be held that the Commission has not established that the disputed clause limits, in disregard of Article 5(1) of Directive 89/391, the duty of employers to ensure the safety and health of workers. It follows that the failure to fulfil obligations has not been made out as regards that second part of the complaint either.

58 Having regard to all the foregoing considerations, it must be concluded that the Commission has not established to the requisite legal standard that, in qualifying the duty on employers to ensure the safety and health of workers in every aspect related to the work by limiting that duty to what is reasonably practicable, the United Kingdom has failed to fulfil its obligations under Article 5(1) and (4) of Directive 89/391.

59 The action brought by the Commission must therefore be dismissed.

Costs

60 Under Article 69(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. Since the United Kingdom has applied for costs to be awarded against the Commission and the latter has been unsuccessful, the Commission must be ordered to pay the costs.

On those grounds, the Court (Third Chamber) hereby:

1. Dismisses the action;

2. Orders the Commission of the European Communities to pay the costs.

[Signatures]