

JUDGMENT OF THE COURT (Second Chamber)

16 July 2009*

In Case C-69/08,

REFERENCE for a preliminary ruling under Article 234 EC, from the Tribunale di Napoli (Italy), made by decision of 29 January 2008, received at the Court on 20 February 2008, in the proceedings

Raffaello Visciano

v

Istituto nazionale della previdenza sociale (INPS),

THE COURT (Second Chamber),

composed of C.W.A. Timmermans, President of Chamber, K. Schiemann, J. Makarczyk, P. Küris (Rapporteur) and C. Toader, Judges,

* Language of the case: Italian.

Advocate General: V. Trstenjak,
Registrar: L. Hewlett, Principal Administrator,

having regard to the written procedure and further to the hearing on 12 February 2009,

after considering the observations submitted on behalf of:

- Raffaello Visciano, by G. Nucifero, avvocato,
- I.N.P.S., by V. Triolo, G. Fabiani and P. Tadris, avvocati,
- the Italian Government, by I. Bruni, acting as Agent, assisted by W. Ferrante, avvocato dello Stato,
- the Spanish Government, by B. Plaza Cruz, acting as Agent,
- the Netherlands Government, by C.M. Wissels and C. ten Dam, acting as Agents,

— the Commission of the European Communities, by L. Pignataro-Nolin and J. Enegren, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 2 April 2009,

gives the following

Judgment

- ¹ This reference for a preliminary ruling concerns the interpretation of Articles 3 and 4 of 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 the insolvency of their employer (OJ 1980 L 283, p. 23).

- ² The reference was made in the course of proceedings between Mr Visciano and the Istituto nazionale della previdenza sociale (National Institution for Social Welfare, 'INPS') on the subject of outstanding claims relating to pay.

Legal context

The Community legislation

3 The first recital of the preamble to Directive 80/987 reads:

‘... it is necessary to provide for the protection of employees in the event of the insolvency of their employer, in particular in order to guarantee payment of their outstanding claims ...’

4 Article 1(1) and (2) of the directive provides:

‘1. 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).

2. Member States may, by way of exception, exclude claims by certain categories of employee from the scope of this Directive, by virtue of the special nature of the employee’s contract of employment or employment relationship or of the existence of other forms of guarantee offering the employee protection equivalent to that resulting from this Directive.

The categories of employee referred to in the first subparagraph are listed in the Annex.’

5 Under Article 2(2) of the directive:

‘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”.’

6 Article 3 of Directive 80/987 provides:

‘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.

2. At the choice of the Member States, the date referred to in paragraph 1 shall be:

- either that of the onset of the employer’s insolvency;
- or that of the notice of dismissal issued to the employee concerned on account of the employer’s insolvency;

- or that of the onset of the employer's insolvency or that on which the contract of employment or the employment relationship with the employee concerned was discontinued on account of the employer's insolvency.'

7 Under Article 4(1) to (3) of the directive:

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

2. When Member States exercise the option referred to in paragraph 1, they shall:

- in the case referred to in Article 3(2), first indent, ensure the payment of outstanding claims relating to pay for the last three months of the contract of employment or employment relationship occurring within a period of six months preceding the date of the onset of the employer's insolvency;
- in the case referred to in Article 3(2), second indent, ensure the payment of outstanding claims relating to pay for the last three months of the contract of employment or employment relationship preceding the date of the notice of dismissal issued to the employee on account of the employer's insolvency;
- in the case referred to in Article 3(2), third indent, ensure the payment of outstanding claims relating to pay for the last 18 months of the contract of employment or employment relationship preceding the date of the onset of the employer's insolvency or the date on which the contract of employment or the employment relationship with the employee was discontinued on account of the

employer's insolvency. In this case, Member States may limit the liability to make payment to pay corresponding to a period of eight weeks or to several shorter periods totalling eight weeks.

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.

...'

8 Article 5 of the directive provides:

'Member States shall lay down detailed rules for the organisation, financing and operation of the guarantee institutions, complying with the following principles in particular:

- (a) the assets of the institutions shall be independent of the employers' operating capital and be inaccessible to proceedings for insolvency;
- (b) employers shall contribute to financing, unless it is fully covered by the public authorities;

(c) the institutions' liabilities shall not depend on whether or not obligations to contribute to financing have been fulfilled.'

9 Article 9 of Directive 80/987 provides:

'This Directive shall not affect the option of Member States to apply or introduce laws, regulations or administrative provisions which are more favourable to employees.'

10 Under Article 10(a) of the directive, it 'shall not affect the option of Member States ... to take the measures necessary to avoid abuses'.

National legislation

Law No 297/82

11 In implementation of Directive 80/987, Article 2 of Law No 297 of 29 May 1982 (GURI No 147 of 31 May 1982) laying down provisions on severance pay and rules on pension matters provided for the establishment within the INPS of a 'guarantee fund for severance pay' which is intended to take the place of the employer in the event of the employer's insolvency for the provision of the severance pay provided for in Article 2120 of the Codice civile (Civil Code) and due to employees or their beneficiaries ('the Fund').

12 That provision also states:

‘15 days after the lodging of the statement of liabilities, which has become enforceable under Article 97 of Royal Decree No 267 of 16 March 1942 (GURI of 6 April 1942, extraordinary supplement No 81), or after publication of the judgment referred to in Article 99 of that Decree, where objections or actions have been brought against the claim, or after publication of the judgment approving a composition with creditors, the employee and his successors in title may obtain, on application, payment by the Fund of severance pay and ancillary claims, after deduction of any sums already paid.

In the event of a late declaration of the claims relating to pay referred to in Article 101 of Royal Decree No 267 of 16 March 1942, the application provided for in the previous article may be made after the decree of admission as a creditor or after the judgment relating to any objection to the administrator in bankruptcy.

Where the undertaking is subject of involuntary liquidation, the application may be introduced 15 days after the lodging of the statement of liabilities pursuant to Article 209 of Royal Decree No 267 ..., or, where objections or actions have been brought against the claim arising from employment, after the judgment by which the court rules in that regard.

Where an employer who is not subject to the provisions of Royal Decree No 267 ... does not pay outstanding remuneration due in the event of termination of the employment relationship, or if he pays it only in part, the employee or his successors in title may ask the Fund to pay the severance pay, provided that, following the procedure for enforcing the liquidation of the claim relating to that pay, the secured assets proved insufficient to settle it in full or in part.

In the absence of any objection, the Fund shall make payment of the outstanding severance pay.

The provisions of the preceding paragraphs apply only where the termination of the employment relationship and the insolvency procedure or enforcement procedure occurred after the entry into force of this Law.

The Fund shall proceed to make the payments referred to in paragraphs 2, 3, 4 and 5 of this Article within 60 days of the application by the person concerned. The Fund shall be subrogated to the employee or the persons entitled under him as regards the preferential claims of the employee on the assets of the employers pursuant to Articles 2751-bis and 2776 of the Civil Code in respect of the sums it has paid'

- ¹³ Under Article 94 of Royal Decree No 267 of 16 March 1942, an application to be admitted as a creditor has the effect of an initiation of legal proceedings and causes limitation periods to stop running.

- ¹⁴ Under Articles 2943 and 2945 of the Civil Code, a limitation period is suspended by the service of the act initiating legal proceedings until such time as there is a final judgment in the matter.

Legislative Decree No 80/92

15 Articles 1 and 2 of Legislative Decree No 80 of 27 January 1992 transposing Directive 80/987 (GURI of 13 February 1992, general supplement No 36, p. 26, 'Legislative Decree No 80/92'), govern the guarantee of employment claims and the intervention of the Fund, which is managed by the INPS.

16 Article 1(1) of Legislative Decree No 80/92 provides, under the heading 'Guarantee of employment claims':

'Where the employer is the subject of insolvency proceedings, composition with creditors, involuntary liquidation or the extraordinary administration procedure ..., its employees or the persons entitled under them may, on application, obtain payment, chargeable to the Fund ... of their outstanding employment claims, in accordance with Article 2'.

17 Article 2(1) to (5) of Legislative Decree No 80/92 provide:

'1. Payment by the ... Fund under Article 1 of this decree covers employment claims, other than those relating to severance pay, appertaining to the last three months of the employment relationship falling within the 12 months preceding:

(a) the date of the measure deciding upon the initiation of one of the procedures mentioned in Article 1(1);

- (b) the date of the commencement of enforcement proceedings;
 - (c) the date of the decision to go into liquidation or to terminate the provisional process or the authorisation to carry on the undertaking's business, for employees who have continued to pursue their professional activity, or the date of cessation of the employment relationship if that has occurred while the undertaking was carrying on its business.
2. Payment effected by the Fund under paragraph 1 of this article may not exceed a sum equal to three times the ceiling of the special unemployment allowance net of deductions concerning social security.
3. Receipt of the sums paid by the Fund under this article is governed by the provisions of paragraphs 2, 3, 4, 5, 7, first sentence, and 10 of Article 2 of Law No 297 of 29 May 1982. The sums paid by the Fund are governed by the provisions of Article 2(7), second sentence, of the above law.
4. A payment referred to in paragraph 1 of this article may not be aggregated, up to the said amounts:
- (a) with the special allowance paid as a supplement to the salary, received during the 12 months mentioned in paragraph 1 above;
 - (b) with the remuneration paid to the employee in the course of the period of three months mentioned in paragraph 1 above;

- (c) with job-seeker's allowance granted pursuant to Law No 223 of 23 July 1991 during the three months following the termination of the employment relationship.

5. The limitation period for the right to the benefit referred to in paragraph 1 is one year. Interest and the effects of monetary devaluation are calculated from the date of the lodging of the application'.

The main proceedings and the questions referred for a preliminary ruling

¹⁸ According to the order for reference, Mr Visciano was an employee of the security company La Metropoli S.c.a.r.l. until 9 November 2000, on which date, following commencement of involuntary liquidation proceedings initiated by Ministerial Decree of 24 October 2000, he became subject to a collective dismissal measure.

¹⁹ On 8 June 2001 he submitted an application for payment by the Fund of outstanding claims in respect his last three months' employment under Articles 1 and 2 of Legislative Decree No 80/92.

²⁰ The INPS, when calculating the benefit payable by the Fund, instead of paying him in full the sums outstanding within the limit of three times the ceiling for the special unemployment allowance, had subtracted from that amount the advances received from the employer, thus paying a lesser amount than was due to Mr Visciano.

- 21 Following the judgment of the Court in Joined Cases C-19/01, C-50/01 and C-84/01 *Barsotti and Others* [2005] ECR I-2005, Mr Visciano applied to the Tribunale di Napoli to ask that the court uphold his right to receive the difference between the amount paid by the INPS and the maximum amount due, without any deduction.
- 22 The INPS objected that a one-year time limitation period applied to the claim on the ground that the claim was an independent and separate social security obligation distinct from that made against the employer, which precluded its payment under Royal Decree No 267 of 16 March 1942.
- 23 The referring court observes that the case-law of the Corte di Cassazione has been inconsistent as regards the classification of sums unpaid by employers and takes the view that the action turns on the question of limitation periods which, in turn, depends on the classification of the claim which the applicant asserts.
- 24 Accordingly, the Tribunale di Napoli decided to stay proceedings and refer the following questions to the Court for a preliminary ruling:
 - ‘1. Do Articles 3 and 4 of Directive 80/987 ... — where they provide for the payment of workers’ outstanding claims relating to pay — allow such claims, when they come to be enforced against the guarantee institution, to be deprived of their initial nature as claims relating to pay and to be reclassified as social security claims merely because the payment of them has been entrusted by the Member State to a social security institution, and therefore allow the term “pay” to be replaced in national law by the term “social security benefit”?

2. In view of the social purpose of the directive, is it sufficient for the national legislation to use the employee's initial claim relating to pay merely as a basis of comparison against which to determine *per relationem* the benefit to be guaranteed through the intervention of the guarantee institution or is it a requirement that the worker's claim relating to pay against the insolvent employer be protected, through the intervention of the guarantee institution, by ensuring that its scope, guarantees and time-limits and the procedures for its exercise are the same as those available for any other employment claim under the same legal order?

3. Do the principles inferable from Community legislation, and in particular the principles of equivalence and effectiveness, allow the application to employees' outstanding claims relating to pay, for the period determined in accordance with Article 4 of Directive 80/987, limitation rules that are less favourable than those applied to claims of a similar nature?

The questions referred for a preliminary ruling

The first question

²⁵ By its first question, the referring court essentially seeks to know whether Articles 3 and 4 of Directive 80/987 must be interpreted as precluding national legislation which allows employees' outstanding claims to be reclassified as social security benefits on the ground that they are guaranteed by the Fund.

²⁶ In that regard, it must be recalled, first, that Article 3(1) of Directive 80/987 requires Member States to take the measures necessary to ensure that guarantee institutions guarantee, subject to Article 4 of that directive, 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 (Case C-201/01 *Walcher* [2003] ECR I-8827, paragraph 31).

27 Second, the social objective of Directive 80/97 is to guarantee employees a minimum level of Community protection in the event of the employer's insolvency through payment of outstanding claims resulting from contracts of employment or employment relationships and relating to pay for a specific period (*Barsotti and Others*, paragraph 35, and case-law cited).

28 However, according to Article 2(2) of Directive 80/987, it is for national law to specify the term 'pay' and to define it (Case C-520/03 *Olaso Valero* [2004] ECR I-12065, paragraph 31 and case-law cited).

29 Consequently, it is for national law to define the legal nature of claims such as those at issue in the main proceedings.

30 In that regard, it must be observed that Directive 80/987 does not specify the judicial procedures and the limitation rules applicable to the claims of employees in the event of bankruptcy of their employer either.

31 It follows that the answer to the first question is that Articles 3 and 4 of Directive 80/987 do not preclude national legislation which allows employees' outstanding claims to be classified as 'social security benefits' where they are paid by a guarantee institution.

The second question

- 32 By its second question, the referring court essentially seeks to know whether, for the purposes of the application of Articles 4 and 5 of Directive 80/987, it is sufficient for national legislation to use the initial claim of an employee merely as a basis of comparison or whether that claim must be safeguarded by the intervention of the Fund like any other claim relating to employment.
- 33 In the light of the answer given to the first question, it must be considered that the legal regime applicable to employees' outstanding claims must also be defined by national law.
- 34 It follows that an employee's initial claim relating to pay may simply represent a basis of comparison allowing the determination of the amount of the benefit to be guaranteed by the Fund.
- 35 Consequently, the answer to the second question is that Directive 80/987 does not preclude national legislation which uses the employee's initial claim relating to pay merely as a basis of comparison for the determination of the benefit to be guaranteed by the intervention of the Fund.

The third question

- 36 By its third question the referring court essentially seeks to know whether, in the context of an application by an employee for payment by a guarantee fund of

outstanding claims relating to pay, Directive 80/987 precludes the application of rules on limitation which are less favourable than those applied to claims of a comparable nature.

³⁷ Directive 80/987 does not contain any provision which settles the question whether the Member States are entitled to set a time-limit for the lodging of an application by an employee seeking to obtain, in accordance with the detailed rules laid down in that directive, payment by the Fund of remuneration not paid by an insolvent employer.

³⁸ Articles 4, 5 and 10 of Directive 80/987, which permit the Member States not only to set the detailed rules regarding the organisation, financing and operation of the guarantee institution, but also to limit, in certain circumstances, the protection which it is designed to provide to employees, provide for neither a temporal limitation of the rights that employees derive from that directive nor a restriction on Member States' freedom to set a time-limit for lodging applications (Case C-125/01 *Pflücke* [2003] ECR I-9375, paragraph 31).

³⁹ In those circumstances, the Member States are in principle free to lay down in their national law provisions establishing a limitation period for the introduction of an application by an employee seeking the payment, under the rules laid down by Directive 80/987, of their outstanding claims relating to pay, provided, however, that those provisions are not less favourable than those governing similar domestic applications (principle of equivalence) and are not framed in such a way as to render impossible in practice or excessively difficult the exercise of rights conferred by Community law (principle of effectiveness) (see *Pflücke*, paragraph 34, and case-law cited).

⁴⁰ In that regard, the referring court considers that it must be ascertained whether the classification of an employee's claims on the Fund as social security benefits, entailing

the non-application of the rules on the suspension of the limitation period laid down for claims accepted as liabilities in a bankruptcy is contrary to the principles of equivalence and effectiveness or not.

41 As regards the principle of equivalence, it must be observed at the outset that the application for payment of an employee's outstanding remuneration from the Fund and an application by such a worker to his insolvent employer are not the same. That is apparent *inter alia* from Article 4 of Directive 80/987 which gives Member States the option of limiting the obligation to pay of guarantee institutions.

42 Consequently, the existence of different rules on limitation periods does not breach the principle of equivalence.

43 As regards the principle of effectiveness, the Court has stated that it is compatible with Community law to lay down reasonable time-limits for bringing proceedings in the interests of legal certainty which protects both the taxpayer and the authorities concerned (Case C-228/96 *Aprile* [1998] ECR I-7141, paragraph 19 and the case-law cited). Such time-limits do not make it impossible in practice or excessively difficult to exercise the rights conferred by Community law.

44 As regards payment of claims for salary which, by their very nature, are of great importance to the individual concerned, the shortness of the time-limit prescribed should not have the result that the individual concerned cannot in practice succeed in complying with that time-limit, so that he does not benefit from the protection that Directive 80/987 is specifically intended to guarantee him (see *Pflücke*, paragraph 37).

45 On that subject, the Court has held that a time-limit of one year for bringing an action seeking compensation for damage sustained as a result of the belated transposition of Directive 80/987 into national law appears reasonable (Case C-261/95 *Palmisani* [1997] ECR I-4025, paragraph 29).

46 However, it is also apparent from Case C-62/00 *Marks & Spencer* [2002] ECR I-6325, paragraph 39, that in order to serve their purpose of ensuring legal certainty, limitation periods must be fixed in advance. A situation marked by significant legal uncertainty may involve a breach of the principle of effectiveness, because reparation of the loss or damage caused to individuals by breaches of Community law for which a Member State can be held responsible could be rendered excessively difficult in practice if the individuals were unable to determine the applicable limitation period with a reasonable degree of certainty (Case C-445/06 *Danske Slagterier* [2009] ECR I-2119, paragraph 33, and the case-law cited).

47 In the main proceedings, it must be observed that, first, according to the referring court, legislative decree No 80/92 fixes a limitation period but does not determine when it starts to run.

48 Second, that court observes that the first approach of the Corte di Cassazione was to classify benefits from the Fund as being in the nature of pay, just like salaries paid by an employer, with the consequence that the limitation periods and the rules for their suspension applied in the context of an insolvency procedure were also applied to such benefits. Subsequently, the Corte di Cassazione considered that the obligation incumbent on the Fund concerned a social security benefit, independent of the employer's obligation to pay a salary, with the result *inter alia* that the rules on the suspension of those limitation periods were not applicable.

49 Those two findings are liable to give rise to legal uncertainty which might constitute a breach of the principle of effectiveness, if it is found, and it is for the national court to make any such finding, that such legal uncertainty may explain the late lodging of Mr Visciano's application before it.

50 Having regard to all the foregoing considerations, the answer to the third question is that, in the context of an application by an employee for payment by a guarantee fund of outstanding claims relating to pay, Directive 80/987 does not preclude the application of a limitation period of one year (principle of equivalence). However, it is for the national court to examine whether it is framed in such a way as to render impossible in practice or excessively difficult the exercise of the rights recognised by Community law (principle of effectiveness).

Costs

51 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Second Chamber) hereby rules:

- Articles 3 and 4 of 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 the insolvency of their employer do not preclude national legislation which allows employees' outstanding claims to be classified as 'social security benefits' where they are paid by a guarantee institution.**

2. Directive 80/987 does not preclude national legislation which uses the employee's initial claim relating to pay merely as a basis of comparison for the determination of the benefit to be guaranteed by the intervention of a guarantee fund.
3. In the context of an application by an employee for payment by a guarantee fund of outstanding claims relating to pay, Directive 80/987 does not preclude the application of a limitation period of one year (principle of equivalence). However, it is for the national court to examine whether it is framed in such a way as to render impossible in practice or excessively difficult the exercise of the rights recognised by Community law (principle of effectiveness).

[Signatures]