



Reports of Cases

JUDGMENT OF THE COURT (Third Chamber)

25 April 2013 *

(Reference for a preliminary ruling — Social policy — Approximation of laws — Protection of employees in the event of the insolvency of their employer — Directive 2008/94/EC — Scope — Supplementary occupational pension schemes — Defined benefit and balance of costs scheme — Insufficiency of resources — Minimum level of protection — Economic crisis — Balanced economic and social development — Obligations of the Member States concerned in the event of insufficiency of resources — Liability of the Member State in the event of incorrect transposition)

In Case C-398/11,

REQUEST for a preliminary ruling under Article 267 TFEU from the High Court (Ireland), made by decision of 20 July 2011, received at the Court on 27 July 2011, in the proceedings

Thomas Hogan,

John Burns,

John Dooley,

Alfred Ryan,

Michael Cunningham,

Michael Dooley,

Denis Hayes,

Marion Walsh,

Joan Power,

Walter Walsh

v

Minister for Social and Family Affairs,

Ireland,

Attorney General,

* Language of the case: English.

THE COURT (Third Chamber),

composed of R. Silva de Lapuerta, acting as President of the Third Chamber, K. Lenaerts, E. Juhász (Rapporteur), J. Malenovský and D. Šváby, Judges,

Advocate General: J. Kokott,

Registrar: L. Hewlett, Principal Administrator,

having regard to the written procedure and further to the hearing on 3 October 2012,

after considering the observations submitted on behalf of:

- Mr Hogan and Others, by G. Byrne, Solicitor, M. Collins, SC, and C. Donnelly, BL,
- the Minister for Social and Family Affairs, Ireland and the Attorney General, by D. O'Hagan, acting as Agent, assisted by B. Murray, BL, and E. Carolan, BL,
- the Netherlands Government, by J. Langer, acting as Agent,
- the European Commission, by G. Rozet and J. Enegren, acting as Agents,

having decided, after hearing the Advocate General, to proceed to judgment without an Opinion,

gives the following

Judgment

- 1 This request for a preliminary ruling concerns the interpretation of Articles 1 and 8 of Directive 2008/94/EC of the European Parliament and of the Council of 22 October 2008 on the protection of employees in the event of the insolvency of their employer (OJ 2008 L 283, p. 36).
- 2 The request has been made in proceedings between Mr Hogan and other former employees of Waterford Crystal Limited ('Waterford Crystal'), the plaintiffs in the main proceedings, and the Minister for Social and Family Affairs, Ireland and the Attorney General concerning the transposition of Directive 2008/94.

Legal context

European Union law

- 3 According to Article 1(1) of Directive 2008/94, that directive is to 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) of that directive.
- 4 Under Article 8 of that directive, Member States are to ensure that the necessary measures are taken to protect the interests of employees and of persons having already left the employer's undertaking or business at the date of the onset of the employer's insolvency in respect of rights conferring on them immediate or prospective entitlement to old-age benefits, including survivors' benefits, under supplementary occupational or inter-occupational pension schemes outside the national statutory social security schemes.

Irish law

The State pension

- 5 As regards the State pension in Ireland, it is apparent from the order for reference that the Government holds the contributions paid by employees and employers in the form of a social insurance fund. Although those contributions are known as ‘Pay Related Social Insurance contributions’, the State pension is paid without reference to the level of the employee’s earnings during his working life.
- 6 The basic pension is EUR 230.30 per week and is paid to every person who reaches retirement age and who has made a certain level of Pay Related Social Insurance contributions during his working life. The operation of the State pension scheme is independent of a person’s entitlements under an occupational pension scheme, whether a defined benefit scheme or a defined contribution scheme.

Defined-benefit supplementary occupational pension schemes in Ireland

- 7 In Ireland, in most defined-benefit supplementary occupational pension schemes, the assets of the schemes are held by trustees, fund administrators, for the exclusive benefit of the members of the scheme concerned and thus do not belong to the employer and are not available to satisfy the claims of the employer’s creditors in the event of the insolvency of the employer.
- 8 In such a scheme, the employees are entitled to a pension only on condition that their scheme has sufficient assets. Those assets are protected by the use of a trust, which segregates them from the assets of the employer.
- 9 Under the national rules, the supplementary pension schemes are funded by contributions from both employer and employees. In the case of the employees, a fixed percentage of their salary is paid to the pension fund, while the employers make an annual contribution in order to ensure that in the long term the supplementary pension scheme has sufficient assets to meet its liabilities.
- 10 In order to determine the amount of the employer’s contribution, the Pensions Act 1990, as amended, requires an actuary to calculate the employer’s contribution in accordance with a specified standard known as the ‘Minimum Funding Standard’. It follows that the supplementary pension schemes are ‘balance of cost’ schemes, where the employer contributes annually the amount needed in addition to the employees’ contributions to balance the assets and liabilities in the long term.
- 11 The rules of the pension fund allow the employer to wind up the supplementary pension schemes at any time and thus to terminate its obligation to contribute to the schemes. Those rules provide that, in the event of the fund’s being wound up, whether because of the employer’s decision to terminate its liability, because of the insolvency of the employer or for any other reason, the employees are to receive a share of the assets of the fund.
- 12 In Ireland a defined benefit supplementary scheme may take account of the State pension. Such a scheme is called an ‘integrated pension’.

The transposition of Article 8 of Directive 2008/94 into Irish law

- 13 The national court states that the only measure of national law adopted for the express purpose of transposing Article 8 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 the insolvency of their employer (OJ 1980 L 283, p. 23), now Article 8 of Directive 2008/94, is section 7 of the

Protection of Employees (Employers' Insolvency) Act 1984, which provides that any contribution deducted by an employer, or due to be paid by that employer, during the 12 months preceding insolvency is to be paid into the supplementary occupational pension scheme.

The facts in the main proceedings and the questions referred for a preliminary ruling

- 14 The plaintiffs in the main proceedings are 10 former employees of Waterford Crystal, an undertaking which since 1947 had specialised in the manufacture of very high-quality crystal products, situated in the town of Waterford, (Ireland). For eight of the plaintiffs in the main proceedings, the date of retirement was programmed between 2011 and 2013 and, for the other two, it was due to fall in 2019 and 2022.
- 15 For those plaintiffs, one of the conditions of employment was that they join one of the defined benefit supplementary pension schemes set up by their employer, the Waterford Crystal Limited Contributory Pension Scheme for Factory Employees or the Waterford Crystal Limited Contributory Pension Scheme for Staff, set up in 1975 and 1960 respectively by deed of trust.
- 16 Those schemes provided that beneficiaries taking retirement at the normal age could receive an old-age pension the basis for which is the actual final salary minus the State pension. Once that deduction has been made ('final pensionable salary'), two thirds of the amount thus obtained represents the old-age pension under the supplementary pension schemes in question.
- 17 At the beginning of 2009, a receiver was appointed for Waterford Crystal and it was found to be insolvent. The supplementary pension schemes set up by that company were wound up on 31 March 2009, when total assets came to EUR 130 million, total liabilities were EUR 240 million and the deficit was therefore around EUR 110 million.
- 18 The actuary retained by the plaintiffs in the main proceedings considered that they would receive between 18 and 28% of the amounts to which they would have been entitled if they had received the present value of their accrued old-age pension rights. The actuary retained by Ireland was critical of that calculation and considered that that percentage was between 16 and 41% and did not approach the 49% referred to by the Court in Case C-278/05 *Robins and Others* [2007] ECR I-1053.
- 19 The plaintiffs in the main proceedings therefore brought an action, claiming that Ireland had not properly transposed Article 8 of Directive 2008/94, regard being had to *Robins and Others*.
- 20 By contrast, Ireland maintains that it adopted, both before and after the judgment in *Robins and Others*, numerous important measures designed to protect the interests of beneficiaries of supplementary occupational pension schemes.
- 21 The High Court, taking the view that interpretation of the provisions of Directive 2008/94 is necessary in order for it to give its decision, decided to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:
1. Whether Directive 2008/94 ... applies to the plaintiffs' situation having regard to Article 1(1) of the Directive and to the fact that the loss of the pension benefits claimed by the plaintiffs are not, in Irish law, a debt against their employer which would be recognised in the receivership or any winding-up of the plaintiffs' employer, and which does not otherwise provide a legal basis for a claim against their employer in the circumstances of this case.
 2. Whether, in assessing whether or not the State has complied with its obligations under Article 8 [of Directive 2008/94], the national Court is entitled to take into account the State contributory pension which will be received by the plaintiffs (receipt of which is not affected by a link with the

occupational pension scheme) and to compare (a) the total of the State pension and the value of the pension the plaintiffs will or are likely to actually receive from the relevant occupational pension scheme with (b) the total of the State contributory pension and the value of the accrued pension benefits of each of the Plaintiffs at the date of winding up of the scheme where the State pension was taken into account in designing the level of pension benefit claimed by the plaintiffs?

3. If the answer to Question 2 is yes, whether any of the amounts likely to be actually received by the plaintiffs amount to compliance by the State with its obligations under Article 8?
4. Whether, in order for Article 8 of ... [D]irective [2008/94] to apply, it is necessary to establish any causal link between the plaintiffs' loss of their pension benefits and the insolvency of their employer apart from the facts that (i) the pension scheme is under-funded as of the date of the employer's insolvency and (ii) the employer's insolvency means that the employer does not have the resources to contribute sufficient money to the pension scheme to enable the members' pension benefits to be satisfied in full (the employer being under no obligation to do so once the scheme is wound up).
5. Whether the measures adopted by Ireland ... fulfil the obligations imposed by ... [D]irective [2008/94] having regard to the social, commercial and economic factors considered by Ireland in the review of pension protection following the decision in *Robins and Others* ... and, in particular, having regard to the "need for balanced economic and social development in the Community" referred to in recital 3 [in the preamble to that] directive?
6. Whether the economic situation ... constitutes a sufficiently exceptional situation to justify a lower level of protection of the plaintiffs' interests than might otherwise have been required and if so, what is that lower level of protection?
7. Assuming the answer to Question 2 is no, whether the fact that the measures taken by the State subsequent to the *Robins and Others* case have not brought about the result that the plaintiffs would receive in excess of 49% of the value of their accrued pension benefits under their occupational pension scheme is in itself a serious breach of the State's obligations such as to entitle the plaintiffs to damages ([that is to say] without separately showing that the State's actions subsequent to the *Robins and Others* judgment amounted to a grave and manifest disregard of the State's obligations under Article 8 of ... [D]irective [2008/94]).'

Consideration of the questions referred

The first question

- 22 By its first question the national court asks, in essence, whether Directive 2008/94 is to be interpreted as meaning that it applies to the entitlement of former employees to old-age benefits under a supplementary pension scheme set up by their employer.
- 23 In that question the national court refers to Article 1(1) of that directive and states that, in Irish law, in such a situation, there is no legal basis for a claim to be made by the plaintiffs in the main proceedings against their employer.
- 24 In that regard, it must be pointed out that, having regard to the fact that the plaintiffs were required, when they started work, to join the occupational pension scheme set up by their employer, their entitlement to old-age benefits under that scheme must be regarded as arising from the contracts of employment or employment relationships linking them to their employer, within the meaning of Article 1(1) of Directive 2008/94.

- 25 Article 8 of Directive 2008/94 imposes a specific obligation on the Member States in favour of employees. The Member States may fulfil that obligation by various means. That may be done by ensuring either that the employer is able to meet the obligations arising out of a supplementary occupational pension scheme or that the institution for occupational retirement provision, which is separate from the employer, is able to do so.
- 26 It is common ground that the plaintiffs in the main proceedings are former employees of a company who claim that their interests, as regards rights conferring on them immediate entitlement to old-age benefits under a supplementary occupational pension scheme, were not protected by Ireland in the event of the insolvency of their employer.
- 27 Consequently, the answer to the first question is that Directive 2008/94 must be interpreted as meaning that it applies to the entitlement of former employees to old-age benefits under a supplementary pension scheme set up by their employer.

The second question

- 28 By its second question, the national court asks, in essence, whether Article 8 of Directive 2008/94 is to be interpreted as meaning that State pension benefits may be taken into account in assessing whether a Member State has complied with the obligation laid down in that article.
- 29 It must be pointed out that the objective of Article 8 of Directive 2008/94 is to ensure, in the event of the insolvency of their employer, that the interests of employees in respect of their entitlement to old-age benefits under supplementary occupational pension schemes are protected. That provision itself states that it relates exclusively to supplementary occupational or inter-occupational pension schemes by specifying, in respect of that protection, that it concerns schemes ‘outside the national social security schemes’.
- 30 Given the clear wording of Article 8 of Directive 2008/94, State pension benefits may not be taken into account in assessing whether a Member State has fulfilled the obligation laid down in that article.
- 31 That finding cannot be invalidated by the existence of rules pertaining to a supplementary occupational pension scheme under which, when the old-age pension under that scheme is calculated, State pension benefits are deducted from the amount of the actual final salary which serves as a basis for that calculation.
- 32 The taking into account of State pension benefits, for the purposes of applying Article 8 of Directive 2008/94, would be contrary to the practical effect of the protection required by that article in respect of supplementary occupational pension schemes.
- 33 Consequently, the answer to the second question is that Article 8 of Directive 2008/94 must be interpreted as meaning that State pension benefits may not be taken into account in assessing whether a Member State has complied with the obligation laid down in that article.
- 34 Given the answer to the second question, there is no need to examine the third question.

The fourth question

- 35 By its fourth question, the national court asks, in essence, whether Article 8 of Directive 2008/94 is to be interpreted as meaning that, in order for that article to apply, it is sufficient that the pension scheme is underfunded as of the date of the employer’s insolvency and that, on account of his insolvency, the employer does not have the resources to contribute sufficient money to the pension scheme to enable

the pension benefits owned to the beneficiaries of that scheme to be satisfied in full, or whether it is necessary for those beneficiaries to prove that there are other factors giving rise to the loss of their entitlement to old-age benefits.

- 36 It must be pointed out that the purpose of Directive 2008/94 is the protection of employees in the event of the insolvency of their employer. It does not deal in any way with the causes of that insolvency.
- 37 There may be various causes for the underfunding of a supplementary occupational pension scheme, such as non-payment of contributions by employees or by the employer, unfavourable developments in the capital markets, poor management of the scheme's funds or insufficiently stringent prudential rules.
- 38 Nevertheless, Article 8 of Directive 2008/94 does not distinguish between those possible causes, but lays down a general obligation to protect the interests of employees and leaves it to Member States to define, in accordance with European Union law, in particular Directive 2003/41/EC of the European Parliament and of the Council of 3 June 2003 on the activities and supervision of institutions for occupational retirement provision (OJ 2003 L 235, p. 10), the methods by which they fulfil that obligation.
- 39 Therefore, in order for Article 8 of Directive 2008/94 to apply, it is not necessary to identify the causes of the employer's insolvency or of the underfunding of the supplementary occupational pension scheme.
- 40 Consequently, the answer to the fourth question is that Article 8 of Directive 2008/94 must be interpreted as meaning that, in order for that article to apply, it is sufficient that the pension scheme is underfunded as of the date of the employer's insolvency and that, on account of his insolvency, the employer does not have the resources to contribute sufficient money to the pension scheme to enable the pension benefits owned to the beneficiaries of that scheme to be satisfied in full. It is not necessary for those beneficiaries to prove that there are other factors giving rise to the loss of their entitlement to old-age benefits.

The fifth and sixth questions

- 41 By its fifth and sixth questions, which it is appropriate to examine together, the national court asks, in essence, whether Directive 2008/94 is to be interpreted as meaning that the measures adopted by Ireland following the judgment in *Robins and Others* fulfil the obligations imposed by that directive, having regard to the need for balanced economic and social development, and whether the economic situation constitutes an exceptional situation capable of justifying a lower level of protection of the interests of employees as regards their entitlement to old-age benefits under a supplementary occupational pension scheme.
- 42 In *Robins and Others*, the Court, in interpreting Article 8 of Council Directive 80/987, now Article 8 of Directive 2008/94, acknowledged that the Member States have considerable latitude in determining both the means and the level of protection of rights to old-age benefits under supplementary occupational pension schemes in the event of the insolvency of the employer, which precludes an obligation to guarantee in full (*Robins and Others*, paragraphs 36 and 42 to 45).
- 43 The Court held however that provisions of domestic law that may lead to a guarantee of benefits under a supplementary occupational pension scheme limited to less than half of the benefits to which an employee was entitled does not fall within the definition of the word 'protect' used in Article 8 of Directive 80/987 (*Robins and Others*, paragraph 57).

- 44 That assessment takes account of the need for balanced economic and social development, by taking into consideration, on the one hand, divergent and rather unpredictable developments in the economic situations of the Member States and, on the other, the necessity of ensuring that employees have a minimum guarantee of protection if their employer becomes insolvent owing, for example, to unfavourable developments in economic conditions.
- 45 Against that background, it is not the specific nature of the measures adopted by a Member State that determines whether that Member State has correctly fulfilled the obligations laid down in Article 8 of Directive 2008/94, but rather the outcome of those national measures.
- 46 Furthermore, the measure mentioned by the national court, which is referred to in paragraph 13 of the present judgment, does not seem, having regard to the information referred to in paragraph 18 of the present judgment, to be capable of guaranteeing the minimum level of protection required by *Robins and Others*.
- 47 Consequently, the answer to the fifth and sixth questions is that Directive 2008/94 must be interpreted as meaning that the measures adopted by Ireland following the judgment in *Robins and Others* do not fulfil the obligations imposed by that directive and that the economic situation of the Member State concerned does not constitute an exceptional situation capable of justifying a lower level of protection of the interests of employees as regards their entitlement to old-age benefits under a supplementary occupational pension scheme.

The seventh question

- 48 By its seventh question, the national court asks, in essence, whether Directive 2008/94 is to be interpreted as meaning that the fact that the measures taken by Ireland subsequent to *Robins and Others* have not brought about the result that the plaintiffs would receive in excess of 49% of the value of their accrued old-age pension benefits under their occupational pension scheme is in itself a serious breach of that Member State's obligations.
- 49 Individuals harmed have a right to reparation against a Member State where three conditions are met: the rule of European Union law infringed must be intended to confer rights on them; the breach of that rule must be sufficiently serious; and there must be a direct causal link between the breach and the loss or damage sustained by the individuals (Case C-445/06 *Danske Slagterier* [2009] ECR I-2119, paragraph 20, and Case C-568/08 *Combinatie Spijker Infrabouw-De Jonge Konstruktie and Others* [2010] ECR I-12655, paragraph 87 and the case-law cited).
- 50 The seventh question relates to the second of those conditions.
- 51 As soon as the judgment in *Robins and Others* was delivered, namely on 25 January 2007, the Member States were informed that correct transposition of Article 8 of Directive 2008/94 requires an employee to receive, in the event of the insolvency of his employer, at least half of the old-age benefits arising out of the accrued pension rights for which he has paid contributions under a supplementary occupational pension scheme.
- 52 In those circumstances, it must be held that, although the nature and extent of the obligation incumbent on the Member States under Article 8 of Directive 2008/94, which is intended to confer rights on individuals, were clear and specific, at the latest as of 25 January 2007, Ireland had not correctly fulfilled that obligation, which constitutes a sufficiently serious breach of that rule of law in the context of any examination which might be carried out in respect of that Member State's liability for damage caused to individuals.

53 Consequently, the answer to the seventh question is that Directive 2008/94 must be interpreted as meaning that the fact that the measures taken by Ireland subsequent to *Robins and Others* have not brought about the result that the plaintiffs would receive in excess of 49% of the value of their accrued old-age pension benefits under their occupational pension scheme is in itself a serious breach of that Member State's obligations.

Costs

54 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 (Third Chamber) hereby rules:

1. **Directive 2008/94/EC of the European Parliament and of the Council of 22 October 2008 on the protection of employees in the event of the insolvency of their employer must be interpreted as meaning that it applies to the entitlement of former employees to old-age benefits under a supplementary pension scheme set up by their employer.**
2. **Article 8 of Directive 2008/94 must be interpreted as meaning that State pension benefits may not be taken into account in assessing whether a Member State has complied with the obligation laid down in that article.**
3. **Article 8 of Directive 2008/94 must be interpreted as meaning that, in order for that article to apply, it is sufficient that the pension scheme is underfunded as of the date of the employer's insolvency and that, on account of his insolvency, the employer does not have the resources to contribute sufficient money to the pension scheme to enable the pension benefits owned to the beneficiaries of that scheme to be satisfied in full. It is not necessary for those beneficiaries to prove that there are other factors giving rise to the loss of their entitlement to old-age benefits.**
4. **Directive 2008/94 must be interpreted as meaning that the measures adopted by Ireland following the judgment of the Court of Justice of the European Union of 25 January 2007 in Case C-278/05 *Robins and Others* do not fulfil the obligations imposed by that directive and that the economic situation of the Member State concerned does not constitute an exceptional situation capable of justifying a lower level of protection of the interests of employees as regards their entitlement to old-age benefits under a supplementary occupational pension scheme.**
5. **Directive 2008/94 must be interpreted as meaning that the fact that the measures taken by Ireland subsequent to *Robins and Others* have not brought about the result that the plaintiffs would receive in excess of 49% of the value of their accrued old-age pension benefits under their occupational pension scheme is in itself a serious breach of that Member State's obligations.**

[Signatures]