



Reports of Cases

JUDGMENT OF THE COURT (Fifth Chamber)

10 July 2014*

(Protection of employees in the event of the insolvency of their employer — Directive 2008/94/EC — Scope — Employer's right to compensation from a Member State in respect of the remuneration paid to an employee during proceedings challenging that employee's dismissal beyond the 60th working day after the action challenging the dismissal was brought — No right to compensation in the case of invalid dismissals — Subrogation of the employee to the right to compensation of his employer in the event of that employer's provisional insolvency — Discrimination against employees who are the subject of an invalid dismissal — Charter of Fundamental Rights of the European Union — Scope — Article 20)

In Case C-198/13,

REQUEST for a preliminary ruling under Article 267 TFEU from the Juzgado de lo Social nº1 de Benidorm (Spain), made by decision of 21 February 2013, received at the Court on 16 April 2013, in the proceedings

Víctor Manuel Julian Hernández,

Chems Eddine Adel,

Jaime Morales Ciudad,

Bartolomé Madrid Madrid,

Martín Selles Orozco,

Alberto Martí Juan,

Said Debbaj

v

Reino de España (Subdelegación del Gobierno de España en Alicante),

Puntal Arquitectura SL,

Obras Alteamar SL,

Altea Diseño y Proyectos SL,

Ángel Muñoz Sánchez,

* Language of the case: Spanish.

Vicente Orozco Miro,

THE COURT (Fifth Chamber),

composed of T. von Danwitz (Rapporteur), President of the Chamber, E. Juhász, A. Rosas, D. Šváby and C. Vajda, Judges,

Advocate General: Y. Bot,

Registrar: M. Ferreira, Principal Administrator,

having regard to the written procedure and further to the hearing on 12 March 2014,

after considering the observations submitted on behalf of:

- Mr Julian Hernández, Mr Eddine Adel, Mr Morales Ciudad, Mr Madrid Madrid, Mr Selles Orozco, Mr Martí Juan and Mr Debbaj, by F. Van de Velde Moors, abogado,
- the Spanish Government, by M. García-Valdecasas Dorrego, acting as Agent,
- the European Commission, by R. Vidal Puig, acting as Agent,

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 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) and Article 20 the Charter of Fundamental Rights of the European Union ('the Charter').
- 2 The request has been made in proceedings between Mr Julian Hernández, Mr Eddine Adel, Mr Morales Ciudad, Mr Madrid Madrid, Mr Selles Orozco, Mr Martí Juan and Mr Debbaj, on the one hand, and the Reino de España (Subdelegación del Gobierno de España en Alicante) (Kingdom of Spain (Provincial Office of the Spanish Government in Alicante)), ('the Subdelegación'), Puntal Arquitectura SL, Obras Alteamar SL, Altea Diseño y Proyectos SL, Mr Muñoz Sánchez and Mr Orozco Miro, on the other hand, concerning the payment of an amount corresponding to that of the outstanding remuneration owed to the applicants in the main proceedings during proceedings challenging those employees' dismissals after the 60th working day following the date on which their actions challenging their dismissals were brought and until the date of service of the judgment declaring those dismissals to be invalid.

Legal context

EU law

3 Recitals 3 and 7 in the preamble to Directive 2008/94 state:

‘(3) It is necessary to provide for the protection of employees in the event of the insolvency of their employer and to ensure a minimum degree of protection, in particular in order to guarantee payment of their outstanding claims, while taking account of the need for balanced economic and social development in the Community. To this end, the Member States should establish a body which guarantees payment of the outstanding claims of the employees concerned.

...

(7) Member States may set limitations on the responsibility of the guarantee institutions. Those limitations must be compatible with the social objective of the Directive and may take into account the different levels of claims.’

4 Article 1(1) of Directive 2008/94 provides that ‘[t]his 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)’.

5 Article 2 of Directive 2008/94 is worded as follows:

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

- (a) either decided to open the proceedings; or
- (b) established that the employer’s undertaking or business has been definitively closed down and that the available assets are insufficient to warrant the opening of the proceedings.

2. 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. This Directive does not prevent Member States from extending employee protection to other situations of insolvency, for example where payments have been de facto stopped on a permanent basis, established by proceedings different from those mentioned in paragraph 1 as provided for under national law.

...’

6 Article 3 of Directive 2008/94 provides:

‘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, including, where provided for by national law, severance pay on termination of employment relationships.

The claims taken over by the guarantee institution shall be the outstanding pay claims relating to a period prior to and/or, as applicable, after a given date determined by the Member States.’

7 According to Article 4(1) and (2) of Directive 2008/94:

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

2. If Member States exercise the option referred to in paragraph 1, they shall specify the length of the period for which outstanding claims are to be met by the guarantee institution. However, this may not be shorter than a period covering the remuneration of the last three months of the employment relationship prior to and/or after the date referred to in the second paragraph of Article 3.

Member States may include this minimum period of three months in a reference period with a duration of not less than six months.

Member States having a reference period of not less than 18 months may limit the period for which outstanding claims are met by the guarantee institution to eight weeks. In this case, those periods which are most favourable to the employee shall be used for the calculation of the minimum period.’

8 Article 5 of Directive 2008/94 provides:

‘Member States shall lay down detailed rules for the organisation, financing and operation of the guarantee institutions ...

...’

9 According to the first paragraph of Article 11 of Directive 2008/94, that directive ‘shall not affect the option of Member States to apply or introduce laws, regulations or administrative provisions which are more favourable to employees’.

Spanish law

The Constitution

10 According to Article 121 of the Constitution ‘[H]arm caused by judicial error, as well as that arising from irregularities in the administration of justice, shall give rise to a right to compensation by the State, in accordance with the law’.

The Workers' Statute

- 11 Article 33 of the consolidated text of the Law on the Workers' Statute (texto refundido de la Ley del Estatuto de los Trabajadores), adopted by Royal Legislative Decree 1/1995 (Real Decreto Legislativo 1/1995) of 24 March 1995 (BOE No 75 of 29 March 1995, p. 9654), in the version in force at the time of the facts at issue in the main proceedings ('the Workers' Statute'), is worded as follows:

'1. The Wages Guarantee Fund, an autonomous body accountable to the Ministry of Employment and Social Security, which has legal personality and the capacity to act in order to achieve its objectives, shall pay to workers any remuneration which is unpaid on account of the insolvency or administration of the employer.

For the purposes of the preceding paragraph, remuneration shall include the amount which the conciliation agreement or the judicial decision recognises as such by virtue of the definition in Article 26(1), as well as outstanding remuneration falling due during proceedings challenging a dismissal in cases where this is payable in accordance with the law, although the Wages Guarantee Fund shall not pay, in one capacity or another, jointly or separately, an amount greater than the product of three times the minimum daily interprofessional wage, including the proportional share of any bonus, and the number of days of unpaid remuneration, up to a maximum of 150 days.

2. In the cases referred to in the previous paragraph, the Wages Guarantee Fund shall pay the compensation fixed by a judgment, an order, a judicial conciliation settlement or an administrative decision in favour of workers by reason of the dismissal or the termination of contracts in accordance with Articles 50, 51 and 52 of the present Law or by reason of the termination of contracts in accordance with Article 64 of Law 22/2003 of 9 July 2003 on insolvency, and also the compensation for the termination of temporary or fixed-term contracts in cases provided by the law. In all cases, a maximum of one year's remuneration shall be paid, taking into account that the daily wage, taken as the basis for that computation, may not exceed three times the minimum interprofessional wage, including the proportional share of any bonus.

...

6. For the purposes of this article, the employer shall be deemed to be insolvent where an action for recovery initiated in the form laid down by the Law on Employment Procedure does not secure the satisfaction of claims made against that employer. ...'

- 12 Article 53 of the Workers' Statute, entitled 'Form and effects of termination on objective grounds', provides:

'1. The adoption of a decision terminating the employment contract under the provisions of the preceding article must meet the following requirements:

- (a) written notification to the worker giving the reason for termination.
- (b) the employer must make available to the worker, at the same time as it gives written notification of termination, compensation equivalent to twenty days per year of service, periods of less than one year being calculated pro rata on a monthly basis, up to a maximum of twelve monthly payments.

...

4. If the employer does not satisfy the requirements laid down in paragraph 1 hereof or the employer's decision terminating the employment contract is motivated by any of the grounds of discrimination prohibited by the Constitution or by law, or was adopted in breach of the worker's fundamental rights and public freedoms, the decision terminating the employment contract shall be invalid, in which event it shall be for the judicial authority to make a declaration to that effect *ex officio*. ...

...'

13 Article 55(6)(c) of the Workers' Statute provides:

'Any dismissal which is invalid shall entail the immediate reinstatement of the worker, with payment of any unpaid remuneration.'

14 Article 56(1) of the Workers' Statute provides:

'Where the dismissal is declared to be unfair, the employer, within five days of the judgment being served, may choose either to reinstate the worker and pay the outstanding remuneration referred to in point (b) of the present paragraph, or to pay the following sums, which must be determined by the judgment:

- (a) compensation equivalent to 45 days' remuneration for each year of service, periods of less than one year being calculated pro rata on a monthly basis up to a maximum of 42 monthly payments;
- (b) an amount equal to the sum of the remuneration unpaid between the date of dismissal and the date on which notice of the judgment declaring the dismissal to be unfair is served or the date on which the worker takes up other employment, if he is recruited before judgment is delivered and if the employer is able to furnish evidence of the sums paid so that these may be deducted from the outstanding remuneration.'

15 Article 57(1) of the Workers' Statute provides:

'Where the judgment declaring the dismissal to be unfair is delivered more than 60 working days after the date on which the action for unfair dismissal was brought, the employer may claim from the State payment of the economic benefit which the worker receives in accordance with Article 56(1)(b) for the period beyond those 60 days.'

The LPL

16 Article 116 of the consolidated text of the Law on Employment Procedure (texto refundido de la Ley de Procedimiento Laboral), adopted by Royal Legislative Decree 2/1995 (Real Decreto Legislativo 2/1995) of 7 April 1995 (BOE No 86 of 11 April 1995, p. 10695), in the version in force at the time of the facts in the main proceedings ('the LPL'), provides:

'1. If more than 60 working days elapse between the date on which the action for unfair dismissal was brought and the date of the judgment of the court or tribunal that first declares that dismissal to be unfair, the employer may, once the judgment has become final, claim from the State the remuneration paid to the worker beyond that period.

2. In the event of the employer's provisional insolvency, the worker may claim directly from the State any remuneration as referred to in the preceding paragraph which has not been paid by the employer.'

17 Article 279(2) of the LPL provides:

‘Within the following three days, the court shall, unless neither of the two circumstances alleged by the party seeking recovery is established, make an order:

- a. declaring the employment relationship terminated on the date of that order;
- b. directing that the worker be paid the compensation referred to in Article 110(1) of the present Law...;
- c. requiring the employer to pay any remuneration unpaid between the date of service of the judgment which first declared the dismissal to be unfair and the date of the aforementioned order.’

18 According to Article 284 of the LPL:

‘Without prejudice to the provisions of the preceding articles, where it is shown to be impossible to reinstate the worker because of the cessation of activities or closure of the undertaking liable, the court shall make an order declaring the employment relationship to be terminated on the date of that order and shall direct that the worker be paid the compensation and unpaid remuneration referred to in Article 279(2).’

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

19 On 16 December 2008, the applicants in the main proceedings brought an action contesting their dismissals before the Juzgado de lo Social nº1 de Benidorm (Social Court No 1, Benidorm) against their employers, namely, Puntal Arquitectura SL, Obras Alteamar SL, Altea Diseño y Proyectos SL, together with Mr Muñoz Sánchez and Mr Orozco Miro.

20 By its judgment of 2 October 2009, that court declared, first, that those dismissals were invalid, and, second, that the employment relationship between the applicants in the main proceedings, on the one hand, and Obras Alteamar SL and Altea Diseño y Proyectos SL, on the other hand, had been terminated as a result of the fact that those companies had ceased their activities. By that judgment, those two companies were directed to pay to the applicants in the main proceedings compensation for dismissal and the outstanding remuneration owed since their dismissals, including remuneration corresponding to the duration of the proceedings challenging those dismissals. By that judgment, that court also ordered the Fondo de Garantía Salarial (Wages Guarantee Fund, ‘Fogasa’) to guarantee, in the alternative, payment of those sums within the statutory limits.

21 On 11 June 2010, those companies were declared to be in a state of provisional insolvency.

22 After having unsuccessfully sought to enforce the judgment of the Juzgado de lo Social nº1 de Benidorm of 2 October 2009 against those companies, the applicants in the main proceedings requested Fogasa to pay, within the statutory limits, the sums decreed by that judgment.

23 Subsequently, they sought from the Subdelegación the payment of a sum corresponding to that of the outstanding remuneration which had become due during the proceedings challenging their dismissals, after the 60th working day following the date on which their actions challenging the dismissals had been brought and until the date of the service of the judgment declaring those dismissals to be invalid. That request was rejected by decision of the Subdelegación of 9 November 2010 on the ground that, according to that judgment, those dismissals were not unfair, but invalid.

- 24 On 25 November 2010, the applicants in the main proceedings brought an action before the Juzgado de lo Social nº1 de Benidorm against that decision, seeking an order directing the Subdelegación to pay that sum.
- 25 Since the national legislation provides for payment by the Spanish State of outstanding remuneration after the 60th working day following the date on which actions challenging dismissals were brought solely in cases where the dismissal is declared to be unfair, and not in cases where the dismissal is declared to be invalid, the referring court expresses uncertainty as to whether that difference in treatment as between employees who are the subject of an unfair dismissal and employees who are the subject of an invalid dismissal must be considered contrary to Article 20 of the Charter.
- 26 In this regard, the referring court points out that, according to the national legislation, the essential difference between a dismissal which is unfair and one which is invalid is that, in the first case, the employer is allowed, instead of reinstating the employee, to terminate that employee's employment contract and to pay him compensation, while, in the second case, the employer has an obligation to reinstate the employee. That said, in the event that the employer ceases activities, the national court may replace the obligation to reinstate the employee whose dismissal has been declared invalid with the obligation to pay compensation after having declared the employment contract to be terminated. In all those cases, the employer is under an obligation to pay to the employee the remuneration which has become due during the proceedings challenging the dismissal.
- 27 So far as concerns the obligation on the Spanish State to pay the remuneration which becomes due during proceedings challenging the dismissals after the 60th working day following the date on which the action challenging a dismissal was brought, the referring court points out that, according to the case-law of the Tribunal Supremo (Spanish Supreme Court), the principal beneficiary of that obligation is the employer, who must not have to bear the consequences of certain delays in judicial proceedings. It would only be by subrogation to that right of the employer that, in the event of that employer's insolvency, where that remuneration has not been paid, the employees may directly seek from the Spanish State payment under Article 116(2) of the LPL. Since the employer cannot seek from the Spanish State payment of the remuneration paid in the case of invalid dismissal, the employees concerned by such a dismissal cannot, by way of subrogation to the rights of their insolvent employer, make a claim against the State in respect of remuneration which has not been paid to them.
- 28 In those circumstances, the Juzgado de lo Social nº1 de Benidorm decided to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:
1. Do the rules contained in Article 57 of [the Workers' Statute] in conjunction with Article 116(2) of [the LPL], which provide for the practice operated by the [Spanish State] of paying directly to workers, in the event of the insolvency of their employer, remuneration which has become due during proceedings challenging their dismissal beyond the 60th ... working day after the date on which the action for unfair dismissal was brought before the competent court, come within the scope of [Directive 2008/94], in particular Articles 1(1), 2(3) and (4), 3, 5 and 11 thereof?
 2. If the answer to the first question is in the affirmative, must the practice operated by the [Spanish State] of paying directly to workers, in the event of the insolvency of their employer, remuneration which has become due during proceedings challenging their dismissal beyond the 60th ... working day after the date on which the action for unfair dismissal was brought, but of doing so only in the case of dismissals which have been declared by a court to be unfair and not in the case of dismissals which have been declared by a court to be invalid, be regarded as being contrary to Article 20 of the [Charter] and, in any event, to the general principle of equality and non-discrimination under EU law?

3. In connection with the foregoing question, may a court such as the referring court refrain from applying a provision which permits the [Spanish State] to pay directly to workers, in the event of the insolvency of their employer, remuneration which has become due during proceedings challenging their dismissal beyond the 60th ... working day after the date on which the action for unfair dismissal was brought, but only in the case of dismissals which have been declared by a court to be unfair and not in the case of dismissals which have been declared by a court to be invalid, in circumstances where there do not appear to be any objective differences between the two types of dismissal [with regard to] the remuneration which has become due during proceedings challenging the dismissals?’

Consideration of the questions referred

- ²⁹ By its questions, which it is appropriate to examine together, the referring court asks, in essence, whether national legislation such as that at issue in the main proceedings, under which the employer can request from the Member State concerned payment of the remuneration which has become due during proceedings challenging a dismissal after the 60th working day following the date on which the action challenging the dismissal was brought and according to which, where the employer has not paid that remuneration and finds itself in a state of provisional insolvency, the employee concerned may, by operation of legal subrogation, claim directly from that State the payment of that remuneration, comes within the scope of Directive 2008/94, whether Article 20 of the Charter precludes that legislation in so far as that legislation applies only to cases of unfair dismissal and not to cases of invalid dismissal, and whether that legislation may be disapplied by a national court before which an action challenging an invalid dismissal has been brought.
- ³⁰ It must be noted at the outset that, although a Member State may designate itself as the entity liable to meet claims for remuneration guaranteed under Directive 2008/94 (see, to that effect, Case C-441/99 *Gharehveran* EU:C:2001:551, paragraph 39), the Kingdom of Spain established Fogasa as the guarantee institution in accordance with that directive. It is clear from the case-file before the Court that, in accordance with Article 33 of the Workers’ Statute, Fogasa paid to the applicants in the main proceedings, within the statutory limits, inter alia, the remuneration which had become due during proceedings challenging their dismissals and the compensation for dismissal which had not been paid by their insolvent employers. It is also apparent from that case-file that those payments made by Fogasa discharged the obligation, imposed by Directive 2008/94, to provide minimum protection for employees in the event of the employer’s insolvency; this, however, is a matter which the referring court must verify.
- ³¹ The questions concern solely the right, resulting from Article 57 of the Workers’ Statute and Article 116 of the LPL, to seek from the Spanish State payment of outstanding remuneration after the 60th working day following the date on which proceedings challenging the dismissals were commenced and the fact that that right is provided for only in cases of unfair dismissals and not in cases of invalid dismissals.
- ³² It should be noted that those provisions of Spanish law must be assessed in the light of Article 20 of the Charter, on condition that they come within the scope of Directive 2008/94. According to Article 51(1) of the Charter, its provisions are addressed to the Member States only when they are implementing EU law. Under Article 51(2), the Charter does not extend the field of application of EU law beyond the powers of the European Union and does not ‘establish any new power or task for the Union, or modify powers and tasks as defined in the Treaties’. Accordingly, the Court is called upon to interpret, in the light of the Charter, the law of the European Union within the limits of the powers which are conferred on it (Case C-400/10 PPU *McB.* EU:C:2010:582, paragraph 51; Case C-256/11 *Dereci and Others* EU:C:2011:734, paragraph 71; and Case C-206/13 *Siragusa* EU:C:2014:126, paragraph 20).

- 33 As is apparent from the explanations relating to Article 51 of the Charter, which must be given due regard pursuant to Article 52(7) thereof, the concept of implementation provided for in Article 51 thereof confirms the case-law of the Court as to the applicability of the fundamental rights of the European Union as general principles of the EU law developed before the Charter entered into force (Case 5/88 *Wachauf* EU:C:1989:321; Case C-260/89 *ERT* EU:C:1991:254; and Case C-309/96 *Annibaldi* EU:C:1997:631), according to which the requirement to respect fundamental rights guaranteed in the legal order of the European Union is binding on the Member States only when they are acting within the scope of EU law (see, to that effect, Case C-617/10 *Åkerberg Fransson* EU:C:2013:105, paragraph 18).
- 34 In this regard, it should be borne in mind that the concept of ‘implementing Union law’, as referred to in Article 51 of the Charter, presupposes a degree of connection between the measure of EU law and the national measure at issue which goes beyond the matters covered being closely related or one of those matters having an indirect impact on the other (see, to that effect, the judgments delivered prior to the entry into force of the Charter in Case 149/77 *Defrenne* EU:C:1978:130, paragraphs 29 to 32; Case C-299/95 *Kremzow* EU:C:1997:254, paragraphs 16 and 17; Case C-144/04 *Mangold* EU:C:2005:709, paragraph 75; and *Siragusa* EU:C:2014:126, paragraph 24).
- 35 In particular, the Court has found that fundamental European-Union rights could not be applied in relation to national legislation because the provisions of EU law in the area concerned did not impose any specific obligation on Member States with regard to the situation at issue in the main proceedings (see Case C-144/95 *Maurin* EU:C:1996:235, paragraphs 11 and 12, and *Siragusa* EU:C:2014:126, paragraphs 26 and 27).
- 36 In the same vein, the Court has already held that Article 13 EC (now Article 19 TFEU) could not, as such, bring within the scope of EU law, for the purposes of the application of fundamental rights as general principles of EU law, a national measure which does not come within the framework of the measures adopted on the basis of that article (see, to that effect, Case C-427/06 *Bartsch* EU:C:2008:517, paragraph 18; Case C-555/07 *Küçükdeveci* EU:C:2010:21, paragraph 25; and Case C-147/08 *Römer* EU:C:2011:286, paragraph 61). Consequently, the mere fact that a national measure comes within an area in which the European Union has powers cannot bring it within the scope of EU law, and, therefore, cannot render the Charter applicable (see, to that effect, Joined Cases C-483/09 and C-1/10 *Gueye and Salmerón Sánchez* EU:C:2011:583, paragraphs 55, 69 and 70, and Case C-370/12 *Pringle* EU:C:2012:756, paragraphs 104, 105, 180 and 181).
- 37 In accordance with the Court’s settled case-law, in order to determine whether a national measure involves the implementation of EU law for the purposes of Article 51(1) of the Charter, it is necessary to determine, inter alia, whether that national legislation is intended to implement a provision of EU law; the nature of the legislation at issue and whether it pursues objectives other than those covered by EU law, even if it is capable of indirectly affecting EU law; and also whether there are specific rules of EU law on the matter or rules which are capable of affecting it (see *Annibaldi* EU:C:1997:631, paragraphs 21 to 23; Case C-40/11 *Iida* EU:C:2012:691, paragraph 79; Case C-87/12 *Ymeraga and Others* EU:C:2013:291, paragraph 41; and *Siragusa* EU:C:2014:126, paragraph 25).
- 38 As regards, first, the objectives pursued by the legislation at issue in the main proceedings, it appears, according to the information contained in the case-file sent to the Court and the explanations provided by the Spanish Government at the hearing, that that legislation sets in place a regime under which the Spanish State is liable in respect of ‘irregularities’ in the administration of justice. To that end, Article 57 of the Workers’ Statute and Article 116(1) of the LPL grant the employer, in cases in which the duration of proceedings challenging a dismissal exceeds 60 days, the right to request from the Spanish State the payment of remuneration paid after the 60th working day following the date on which those proceedings were commenced. Even though, under Article 116(2) of the LPL, the

employee may directly request from the Spanish State payment of that remuneration if the employer is in a state of provisional insolvency and has not yet paid that remuneration, this is by operation of a legal subrogation to the right granted in favour of the employer against the Spanish State.

- 39 It follows that the purpose of Article 116(2) of the LPL is not to recognise an employee's claim against his employer resulting from his employment relationship, to which Directive 2008/94 is capable of applying by virtue of Article 1(1) thereof, but to recognise a right of a separate nature, namely, the right of the employer to request from the Spanish State compensation for the loss suffered as a result of 'irregularities' in the administration of justice, resulting from the fact that the national legislation requires the employer to pay remuneration during proceedings challenging a dismissal. It thus appears that, although Article 116(2) of the LPL confers entitlement to payment of a sum equal to the outstanding remuneration after the 60th working day of those proceedings, that sum constitutes compensation granted to the employer by the Spanish legislature, which the employee can claim only by operation of legal subrogation.
- 40 In addition, it should be pointed out that the right resulting from Article 57 of the Workers' Statute and Article 116 of the LPL does not cover remuneration which has become due during the first 60 working days of the proceedings challenging a dismissal. Thus, in so far as those provisions do not confer entitlement to any payment where the duration of the proceedings challenging a dismissal does not exceed 60 working days, those provisions do not guarantee the payment of remuneration during the minimum period of the last three months of the employment relationship, as required by Articles 3 and 4(2) of Directive 2008/94. By contrast, in the period after the 60th working day and until service of the judgment establishing that dismissal to be unfair, that right covers all remuneration without any limitation.
- 41 It follows from those characteristics of the legislation at issue in the main proceedings that that legislation pursues an objective which differs from that of guaranteeing a minimum protection for employees in the event of the employer's insolvency, as referred to in Directive 2008/94, namely, that of providing for compensation by the Spanish State for the adverse consequences resulting from the fact that judicial proceedings last for more than 60 working days.
- 42 Although the amount of the sums paid pursuant to Article 116(2) of the LPL may exceed that of the pay claims guaranteed by Fogasa, it is apparent from the observations of the Spanish Government, first, that that situation results from the fact that that provision confers entitlement to compensation, the amount of which is not limited, with the aim of making the Spanish State liable for any excessive duration of judicial proceedings and, second, that it is not reflective of a decision on the part of the Spanish legislature to provide employees with a supplementary protection in addition to the guarantee provided by Fogasa.
- 43 Second, it should be pointed out that the claims for payment made by the applicants in the main proceedings on the basis of Article 116(2) of the LPL, which are before the referring court, do not relate to a period covered by the guarantee of Fogasa, but go beyond that guarantee. As is apparent from paragraph 30 of the present judgment, those employees obtained from Fogasa payments of pay claims up to the statutory limits which satisfied the obligation of minimum protection for employees in the event of the employer's insolvency imposed by Directive 2008/94. In those circumstances, the fact of granting, or not granting, to the applicants in the main proceedings the right resulting from Article 116(2) of the LPL is not capable of affecting or limiting the minimum protection that the Spanish State has guaranteed to them via Fogasa, in accordance with Articles 3 and 4 of that directive.
- 44 Third, as regards the first paragraph of Article 11 of Directive 2008/94, to which the referring court alludes in its order for reference, that provision merely states that Directive 2008/94 'shall not affect the option of Member States to apply or introduce laws, regulations or administrative provisions which are more favourable to employees'. In the light of its wording, that provision, which features in Chapter V, entitled 'General and Final Provisions', does not grant the Member States an option of

legislating by virtue of EU law, but merely, unlike the options provided for in Chapters I and II of that directive, recognises the power which the Member States enjoy under national law to provide for such more favourable provisions outside the framework of the regime established by that directive.

- 45 It follows that a provision of national law, such as that at issue in the main proceedings, which merely grants employees more favourable protection resulting from the exercise of the exclusive competence of the Member States, confirmed by the first paragraph of Article 11 of Directive 2008/94, cannot be regarded as coming within the scope of that directive.
- 46 Moreover, in accordance with the Court's case-law cited at paragraph 36 of the present judgment, the mere fact that the legislation at issue in the main proceedings comes within an area in which the European Union has powers under Article 153(2) TFEU cannot render the Charter applicable.
- 47 Finally, it should be borne in mind that the reason for pursuing the objective of protecting fundamental rights in EU law, as regards both action at EU level and the implementation of EU law by the Member States, is the need to avoid a situation in which the level of protection of fundamental rights varies according to the national law involved in such a way as to undermine the unity, primacy and effectiveness of EU law (see, to that effect, Case 11/70 *Internationale Handelsgesellschaft* EU:C:1970:114, paragraph 3; Case C-399/11 *Melloni* EU:C:2013:107, paragraph 60; and *Siragusa* EU:C:2014:126, paragraphs 31 and 32). In the light of what has been discussed in paragraphs 40, 41 and 43 of the present judgment, the legislation at issue in the main proceedings does not present such a risk.
- 48 It follows from all of the foregoing that Article 116(2) of the LPL cannot be regarded as implementing EU law within the meaning of Article 51(1) of the Charter and, therefore, cannot be examined in the light of the guarantees of the Charter and, in particular, of Article 20 thereof.
- 49 Having regard to all of the foregoing, the answer to the questions referred is that national legislation, such as that at issue in the main proceedings, according to which an employer can request from the Member State concerned payment of remuneration which has become due during proceedings challenging a dismissal after the 60th working day following the date on which the action was brought and according to which, where the employer has not paid that remuneration and finds itself in a state of provisional insolvency, the employee concerned may, by operation of legal subrogation, claim directly from that State the payment of that remuneration, does not come within the scope of Directive 2008/94 and cannot, therefore, be examined in the light of the fundamental rights guaranteed by the Charter and, in particular, of Article 20 thereof.

Costs

- 50 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 (Fifth Chamber) hereby rules:

National legislation, such as that at issue in the main proceedings, according to which an employer can request from the Member State concerned payment of remuneration which has become due during proceedings challenging a dismissal after the 60th working day following the date on which the action was brought and according to which, where the employer has not paid that remuneration and finds itself in a state of provisional insolvency, the employee concerned may, by operation of legal subrogation, claim directly from that State the payment of that remuneration, does not come within the scope 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 and cannot, therefore, be examined in the light of the fundamental rights guaranteed by the Charter of Fundamental Rights of the European Union and, in particular, of Article 20 thereof.

[Signatures]