Anonymised version

Case C-799/19

Request for a preliminary ruling

Date lodged:

30 October 2019

Referring court:

Okresný súd Košice I (Košice I District Court, Slovakia)

Date of issue of the decision to refer:

5 August 2019

Applicants:

NI

OJ

PK

Defendant:

Sociálna poisťovňa (Social Insurance Agency)

DECISION

Okresný súd Košice I (Košice I District Court, Slovakia) […] [name of the judge] in the case of applicants: 1/**NI**, […] [date of birth and address] Hniezdne, 2/**OJ**, […] [date of birth and address] Hniezdne, and 3/minor **PK**, […] [date of birth and address] Hniezdne, […]against the **defendant: Sociálna poisťovňa** (Social Insurance Agency) with its registered office in Bratislava, […] Košice branch, […] [branch address] **for payment of EUR 49 790.85 with interest**

decides:

I. to stay the proceedings pursuant to paragraph 162(1)(c) of the Civilný sporový poriadok (Code of Civil Procedure).

II. to refer the following questions to the Court of Justice of the European Union for a preliminary ruling:

1. Must Article 3 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 be interpreted as meaning that the concept of "employees' outstanding claims resulting from contracts of employment" also covers non-material damage suffered as a result of the death of an employee caused by an accident at work?

2. Must Article 2 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 be interpreted as meaning that where an action for enforcement has been brought against an employer in connection with a judicially recognised claim for compensation for non-material damage suffered as a result of the death of an employee caused by an accident at work, but the claim is deemed irrecoverable in the enforcement proceedings on the ground that the employer has no funds at its disposal, the employer in question is also deemed insolvent?

Grounds

1 On 16 October 2003, RL […] [date of birth], who was **[Or. 2]** employed by the employer KF, […] [date of birth] residing at [address], Košice ('the employer'), died as a result of an accident at work for which the employer was responsible.

2 NI ('applicant 1') was married to the deceased RL at the time of his death, and OJ ('applicant 2') and minor PK ('applicant 3') are the daughters of the deceased RL.

3 In the action brought before the Okresný súd Košice II (Košice II District Court, Slovakia) on 21 April 2004, the applicants submitted a claim for compensation for the fatal accident at work of the deceased RL. This claim included one-off compensation for material damage of EUR 16 596.95 for each applicant and compensation for non-material damage of EUR 16 596.95 for each applicant.

4 As a result of the action taken by the court (dividing the case into separate proceedings), the claim for compensation for material damage and the claim for compensation for non-material damage were adjudicated in separate proceedings.

5 In its judgment of 14 June 2016, the Košice II District Court […] [case file reference] awarded compensation for material damage to the applicants from the defendant employer in the total amount of EUR 49 790.85 (3 x EUR 16 596.95). On 16 September 2016, this compensation was voluntarily paid in full on behalf of the defendant employer by the Social Insurance Agency acting as a guarantee

institution under the employer's statutory liability insurance against damage caused by accidents at work.

6 In its judgment of 29 May 2012 […] [case file reference], delivered in connection with the judgment of the Krajský súd v Košiciach (Regional Court in Košice, Slovakia) […] [case file reference] of 15 August 2013, the Košice II District Court awarded compensation for non-material damage to the applicants from the defendant employer in the total amount of EUR 49 790.85 (3 x EUR 16 596.95). The Social Insurance Agency refused to pay on behalf of the insured employer the compensation for non-material damage awarded by that final judgment on the ground that, in its view, compensation for accidents at work did not include compensation for non-material damage.

7 The enforcement proceedings conducted by the bailiff […] [name of bailiff and case file reference] against the employer in order to obtain compensation for non-material damage proved ineffective and did not even result in partial payment of the claim as it was irrecoverable due to the employer's insolvency.

8 Due to the Social Insurance Agency's refusal to pay compensation for non-material damage and the irrecoverability of the claims against the employer, the applicants brought an action against the Social Insurance Agency ('the defendant') before the Košice II District Court in which they sought payment on behalf of the insured employer of the compensation for non-material damage awarded by the final judgment, amounting to a total of EUR 49 790.85, under the employer's statutory liability insurance against damage suffered as a result of accidents at work.

9 At the same time, the applicants moved for the proceedings to be stayed under paragraph 162(1)(c) of the Civilný sporový poriadok (Code of Civil Procedure) in order to refer to the Court of Justice of the European Union for a preliminary ruling questions concerning the interpretation of the provisions 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, which are relevant to adjudicating **[Or. 3]** the applicants' claims.

II

EU law and national law

10 When formulating the questions referred for a preliminary ruling, the court relied in particular on the provisions of recital 4 and Articles 1(1), 2(1), 3, 8 and 16 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 ('Directive 2008/94/EC') and Article 20 of the Charter of Fundamental Rights of the European Union.

11 In accordance with recital 4 of Directive 2008/94/EC, in order to ensure equitable protection for the employees concerned, the state of insolvency should be defined

in the light of the legislative trends in the Member States and that concept should also include insolvency proceedings other than liquidation. In this context, Member States should, in order to determine the liability of the guarantee institution, be able to lay down that where an insolvency situation results in several insolvency proceedings, the situation is to be treated as a single insolvency procedure.

12 Article 1(1) of Directive 2008/94/EC provides that the directive applies 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).

13 Pursuant to Article 2(1) of Directive 2008/94/EC, for the purposes of the directive, an employer is to 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.

14 Pursuant to the first sentence of Article 3 of Directive 2008/94/EC, Member States are to 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.

15 Pursuant to the second sentence of Article 3 of Directive 2008/94/EC, the claims taken over by the guarantee institution are to be the outstanding pay claims relating to a period prior to and/or, as applicable, after a given date determined by the Member States.

16 Pursuant to Article 8 of Directive 2008/94/EC, 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 **[Or. 4]** 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.

17 Pursuant to Article 11 of Directive 2008/94/EC, the directive is not to affect the option of Member States to apply or introduce laws, regulations or administrative

provisions which are more favourable to employees. Implementation of the directive is not under any circumstances to be sufficient grounds for a regression in relation to the current situation in the Member States and in relation to the general level of protection of employees in the area covered by it.

18 Pursuant to the first sentence of Article 16 of Directive 2008/94/EC, Directive 80/987/EEC, as amended by the acts listed in Annex I, is repealed, without prejudice to the obligations of the Member States relating to the time limits for transposition into national law and application of the Directives set out in Annex I, Part C.

19 In accordance with the second sentence of Article 16 of Directive 2008/94/EC, references to the repealed Directive are to be construed as references to Directive 2008/94/EC and are to be read in accordance with the correlation table in Annex II.

20 Pursuant to Article 20 of the Charter of Fundamental Rights of the European Union, everyone is equal before the law.

21 The following national laws apply to the applicants' claims for compensation for non-material damage under the employer's statutory liability insurance against damage.

22 Pursuant to paragraph 195(1) of Law No 311/2001 Z.z., Zákonník práce (Labour Code) in the version in force until 31 December 2003, if an employee has suffered damage to his health in the course of, or in direct connection with, the performance of his duties, or if he or she died as a result of an accident (accident at work), the employer with whom the employee was employed under an employment relationship at the time of the accident at work is liable for the damage caused.

23 Pursuant to paragraph 204(1) of the Labour Code in the version in force until 31 December 2003, if an accident at work or occupational disease results in the employee's death, the employer's liability includes:

a) reimbursement of reasonable expenses incurred in connection with his treatment;

b) reimbursement of reasonable funeral expenses;

c) reimbursement of the cost of living for survivors;

d) one-off compensation for survivors;

e) compensation for material damage; paragraph 192(3) is to apply in the same manner.

24 Pursuant to paragraph 44a(2) of Law No 274/1994 Z.z., o Sociálnej poisťovni (Law on the Social Insurance Agency) in the version in force until 31 December 2003 ('Law No 274/1994'), where an insurance event occurs, the Social Insurance Agency is to pay on behalf of the employer the claims determined with respect to compensation for damage to health caused by an accident at work occurring during the term of the employer's liability insurance for damage **[Or. 5]** or caused by an occupational disease which was first determined during the term of the employer's liability insurance for damage.

25 Pursuant to paragraph 44a(3) of Law No 274/1994, an insurance event consists in damage to health or death caused by an accident at work or occupational disease.

26 Pursuant to paragraph 44a(4) of Law No 274/1994, if compensation is awarded by a court of competent jurisdiction, the insurance event is to be deemed to have occurred only on the date on which the judgment on the Social Insurance Agency's obligation to pay becomes final.

27 Pursuant to the third and fourth sentences of paragraph 3(2) of Law No 7/2005 Z.z. o konkurze a reštrukturalizácii a o zmene a doplnení niektorých zákonov (Law on Bankruptcy and Restructuring and on Amendments to Certain Laws), a natural person becomes insolvent if he is unable to meet at least one monetary obligation within 180 days after its due date. If a monetary claim cannot be enforced against the debtor by way of enforcement proceedings or if the debtor has failed to fulfil the obligation imposed on him or her by a request for payment in accordance with paragraph 19(1)(a), he or she is deemed to be insolvent.

III.

Grounds for the reference

28 EU law covers the protection of employees in the event of the insolvency of their employer; this is regulated in 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.

29 As regards the legal nature and effects of the directive, it has left some discretion to the Member States concerning the mechanism and choice of measures to ensure the protection of claims arising from contracts of employment or employment relationships against the employer in the event of its insolvency, this discretion being limited by the Member State's obligation to meet the goal of the directive, which is to ensure equitable protection of all claims arising from employment relationships against insolvent employers at least to the extent laid down in the directive, with the proviso that a Member State may adopt laws or administrative provisions more favourable to employees in this respect (Article 11).

30 Under national law, one of the measures whose purpose is to protect employees in the event of the insolvency of their employer is also the institution of the statutory insurance scheme covering the employer's liability for damage caused by

accidents at work, which guarantees the payment of compensation for accidents at work on behalf of the insured employer by a guarantee institution (the Social Insurance Agency) directly to the beneficiaries.

31 As regards the voluntary payment of the compensation claim directly to applicants by the Social Insurance Agency, it is indisputable that, in the event of the employer's insolvency, the national law, in paragraph 204(1) of the Labour Code in conjunction with paragraph 44a(2) of Law No 274/1994, not only guarantees that claims for compensation for 'damage to health' will be paid directly to the employee by the Social Insurance Agency on behalf of the employer, but also that, in the event of the employee's death, claims for compensation resulting from an accident at work will be paid to his survivors **[Or. 6]**.

32 With respect to this voluntary payment of compensation to applicants by the guarantee institution, and with respect to the scope of claims for which the employer is liable in the event of the employee's death pursuant to paragraph 204(1) of the Labour Code, it is indisputable that although paragraph 44a(2) only expressly lists [a claim for compensation for] 'damage to the employee's health' as a claim guaranteed under the statutory insurance scheme, the Social Insurance Agency's guarantee obligation also covers the survivors' claim for compensation.

33 Therefore, it remains to be determined whether the guarantee institution's obligation to compensate for the damage caused by an accident at work also includes compensation for non-material damage within the framework of the concept of damage laid down in paragraph 44a(2) of Law No 274/1994.

34 As the referring court has reasonable doubts as to whether, in the context of the protection of claims in the event of the employer's insolvency and the existing case-law of the Court of Justice of the European Union, the restrictive interpretation of the concept of damage put forward by the guarantee institution is compatible with the provisions of Directive 2008/94/EC and with the obligation to interpret national law in accordance with EU law, the court considers that an answer to the first question referred for a preliminary ruling is required in the light of the following circumstances.

35 Even if in Article 3 the directive does not further define the concept of "employees' outstanding claims resulting from contracts of employment" by providing a positive exhaustive list [of relevant cases], given that it contains a precise definition of the limits relating to guaranteed claims with respect to which a Member State may exclude or limit payments, it must be presumed that the directive, in relation to its goals and subject matter, does not allow for the arbitrary exclusion or limitation of the payment of claims arising from contracts of employment.

36 Directive 2008/94/EC specifically provides for a Member State's ability to limit the guarantee with respect to claims arising from contracts of employment or

employment relationships as regards the possibility to exclude certain categories of employees (Article 1(1)), the possibility to limit the length of the period during which outstanding claims are to be met by the guarantee institution (Article 4) and measures to avoid abuses (Article 12), but a claim for compensation following an accident at work is not among those which the Member States may exclude.

37 Moreover, since it is clear that the claims paid by a guarantee institution in the event of the employer's insolvency include compensation paid to survivors in connection with accidents at work, the key question is whether the concept of damage suffered in connection with an accident at work also covers non-material damage.

38 In this respect, account should also be taken of the existing case-law of the Court of Justice of the European Union. The Court, in its judgment in *Katarína Haasová v Rastislav Petrík and Blanka Holingová* (C-22/12), indicated in relation to claims covered by compulsory contractual insurance against civil liability in respect of the use of a motor vehicle that 'the notion of personal injuries covers any type of damage, in so far as compensation for such damage is provided for, as part of the civil liability of the insured, under the national law applicable in the dispute, resulting from an injury to physical integrity, which includes both physical and psychological suffering'. **[Or. 7]**

39 Although the above judgment concerned compulsory insurance against civil liability in respect of the use of a motor vehicle, there is no reason, in the light of the purpose of statutory liability insurance against damage caused by accidents at work, to depart from that interpretation even in the case of claims covered by statutory liability insurance against damage caused by accidents at work.

40 The purpose of the employer's statutory liability insurance against damage caused by accidents at work is to provide compensation to victims of accidents at work, and this purpose can only be achieved by obliging the insurer to meet, on behalf of the insured, all the victims' claims for which the person responsible for the damage is liable under national law. It is clear that the death of an employee is the most serious possible consequence of an accident at work.

41 Consequently, where under national law death as a result of an accident at work entails civil liability for damage as well as civil liability for unlawful interference with personal rights, which liability results in providing compensation for non-material damage, the claim for compensation for non-material damage suffered as a result of an accident at work must also be covered by insurance.

42 A different interpretation would lead to an absurd situation in which, if an employee had an accident at work as a result of a road traffic accident, the injured parties would receive compensation under compulsory contractual insurance against civil liability in respect of the use of a motor vehicle, whereas in other cases of accidents at work resulting from other causes, the injured parties would not be compensated for non-material damage without any reasonable cause and,

moreover, this compensation would be denied to them by a guarantee institution established by the State.

43 Should the employer become insolvent, this would remove any protection of claims arising from the employment relationship in the event of the employer's insolvency and thus the claim would become unenforceable.

44 At the same time, this would infringe the principle of equality of parties in civil law relations and would give the public guarantee institution an unjustified advantage over private insurers, which would result in an infringement of Article 20 of the Charter of Fundamental Rights of the European Union.

45 In this respect, it should also be borne in mind that, even in other cases where the Court of Justice was asked to interpret analogous concepts of material or non-material damage contained in other EU legislation or in international agreements to which the European Union is a party, the Court of Justice always adopted an interpretation of those concepts which also covered non-material damage.

46 In the *Leitner* judgment (of 12 March 2002, C-168/00), the Court of Justice of the European Union interpreted the concept of 'damage' referred to in Article 5 of the Council Directive of 13 June 1990 on package travel, package holidays and package tours as including non-material damage.

47 In the *Walz* judgment (judgment of 6 May 2010, C-63/09), the referring court requested **[Or. 8]** clarification as to whether the concept of 'damage' underlying Article 22(2) of the Convention for the Unification of Certain Rules for International Carriage by Air ('Montreal Convention'), which provides for limitations on the air carrier's liability for damage caused, without limitation, in the case of the loss of baggage, must be interpreted as covering both material and non-material damage. The Court of Justice of the European Union examined the concept of damage in the light of general principles of international law and replied in the affirmative. Similarly, in the judgment in *Sousa Rodríguez and Others* (of 13 October 2011, C-83/10), the Court of Justice reached the same conclusion when interpreting the concept of 'further compensation' referred to in Article 12 of Regulation (EC) No 261/2004 on the rights of air passengers [.]The Court of Justice of the European Union ruled that the concept of 'further compensation' should be interpreted in such a manner as to allow national courts to award compensation for non-material damage.

48 Even if the abovementioned rulings concern the interpretation of other directives, it is clear from the conclusions of the Court of Justice of the European Union that there is a need for a uniform interpretation of the concept of damage, which is based on the principle of full redress of both material and non-material damage.

49 In the light of these circumstances, if the Court of Justice of the European Union, in answering the first question referred for a preliminary ruling, concludes that the concept of "employees' outstanding claims resulting from contracts of employment" should be interpreted as meaning that those claims also cover non-

material damage resulting from the death of an employee caused by an accident at work, as a result of applying an interpretation which is compatible with EU law, this will allow the court to broadly interpret the concept of 'damage to health' in connection with an accident at work, according to which interpretation that damage also includes non-material damage.

50 Given that a precondition for the protection of outstanding claims resulting from contracts of employment under the directive is the employer's insolvency, the second question referred for a preliminary ruling is a request for interpretation of the concept of insolvency in the light of the following circumstances.

51 In the present case, there is no doubt that the claim for compensation against the former employer KF is irrecoverable. The employer is a natural person who is not an entrepreneur and has no assets which could be sold; his only income is a disability pension and he has several other unpaid debts. The insured employer's insolvency vis-à-vis the applicants was confirmed by the bailiff's report of 15 December 2014 on the state of enforcement proceedings.

52 As regards the employer's insolvency, with respect to the applicants' case it should be noted that since the court judgment which obliged the employer to pay compensation to the applicants (judgment of the Košice II District Court […] [case file reference] of 29 May 2012 in conjunction with the judgment of the Regional Court in Košice […] (case file reference) of 15 August 2013) was passed more than 10 years after the date of the deceased RL's accident, it was not possible to open bankruptcy proceedings against the employer in the case at issue. Moreover, due to the fact that the employer had no funds, such proceedings would merely be a formal measure involving a considerable financial and administrative burden.

53 Although no formal bankruptcy proceedings were opened with respect to the employer under **[Or. 9]** Law No 7/2005 on Bankruptcy and Restructuring and on Amendments to Certain Laws, pursuant to paragraph 3(2) of Law No 7/2005 a natural person is to be considered insolvent where claims against him are irrecoverable in enforcement proceedings.

54 Although Article 2(1) of Directive 2008/94/EC links insolvency primarily to formal collective or liquidation proceedings, recital 4 nevertheless implies the need for a broad understanding of the concept of insolvency in the interest of equitable protection of the relevant claims, which paves the way for a broad interpretation of the 'insolvent' concept; moreover, national law itself (paragraph 3(2) of Law No 7/2005) is based on a statutory presumption of a natural person's insolvency where claims are irrecoverable in enforcement proceedings.

55 This conclusion is also confirmed by the judgment of the Court of Justice of 19 November 1991 in *Francovich and Bonifaci v Italian Republic*, Joined Cases C-6/90 and C-9/90, since in that case (Francovich) the employer's insolvency was

established only after enforcement proceedings (a bailiff's report on the ineffective enforcement of a decision), which the Court of Justice clearly considered sufficient to establish the employer's insolvency, since it went on to examine the merits of the case.

56 In the light of these circumstances, it is possible to interpret Directive 2008/94/EC in such a manner that an employer who is found to be insolvent during enforcement proceedings owing to the irrecoverability of claims against him may also be considered insolvent thereunder.

57 Since the accident at work in question occurred on 16 October 2003, that is, before the accession of the Slovak Republic to the European Union, the court also considered it necessary to examine the jurisdiction of the Court of Justice of the European Union to reply to the questions referred for a preliminary ruling from the temporal point of view (*ratione temporis*).

58 From the case-law of the Court of Justice of the European Union it follows that, from the point of view of temporal jurisdiction (*ratione temporis*), the Court of Justice in principle has jurisdiction to answer questions referred for a preliminary ruling where the relevant facts arose after the accession of the Member State in question to the European Union, but exceptions may be made to this rule.

59 In accordance with the decision-making practice of the Court of Justice, the Court is also competent to answer a question referred for a preliminary ruling in cases where the facts of the case arose before the accession of the Member State concerned to the European Union but continued to develop even after accession, and also in cases where the competent authority in the Member State has already decided on the case after accession with constitutive effect (see, for instance, the judgment of the Court of Justice in Case C-64/06 of 14 June 2007).

60 The case in question also concerns the applicants, since the facts of the case (the fatal accident of the deceased RL as an insurance event) arose in 2003, but it was not until long after the Slovak Republic's accession to the European Union **[Or. 10]** that judgments were delivered on the applicants' claims against the insured employer which gave rise to the applicants' claim for payment of compensation against the defendant, namely, the judgment of the Košice II District Court […] of 29 May 2012 in conjunction with the judgment of the Regional Court in Košice […] of 15 August 2013.

61 Moreover, in this connection, account must also be taken of the time at which the claim against the guarantee institution arose, as determined by national law, which provides in paragraph 44a(4) of Law No 274/1994 that where compensation for damage caused by an accident at work is awarded by a court, the insurance event is deemed to have occurred only on the date on which the judgment on the Social Insurance Agency's obligation to pay becomes final, which is applicable to the present case.

62 In the light of the foregoing, it must be concluded that the Court of Justice of the European Union has jurisdiction to answer the questions referred for a preliminary ruling in this case.

IV. Summary

63 In the light of the above considerations and in the light of the general interest in the uniform application of EU law and also the fact that existing case-law does not provide the necessary clarifications in the context of an entirely new legal and factual situation, the court has concluded that it is necessary to refer the questions for a preliminary ruling to the Court of Justice of the European Union. Consequently, pursuant to paragraph 162(1)(c) of the Code of Civil Procedure and Article 267 of the Treaty on the Functioning of the European Union, the court stayed the proceedings and decided as indicated in Section II of the operative part.

[…] [information that the decision cannot be appealed]

Košice, 5 August 2019