

JUDGMENT OF THE COURT (Fifth Chamber)
14 July 1998 *

In Case C-125/97,

REFERENCE to the Court under Article 177 of the EC Treaty by the Arrondissementsrechtbank te Alkmaar (Netherlands) for a preliminary ruling in the proceedings pending before that court between

A. G. R. Regeling

and

Bestuur van de Bedrijfsvereniging voor de Metaalnijverheid,

on the interpretation of Article 4 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),

THE COURT (Fifth Chamber),

composed of: C. Gulmann, President of the Chamber, M. Wathelet (Rapporteur), D. A. O. Edward, J.-P. Puissochet and P. Jann, Judges,

* Language of the case: Dutch.

Advocate General: G. Cosmas,
Registrar: L. Hewlett, Administrator,

after considering the written observations submitted on behalf of:

- Mr Regeling, by R. Polderman, of the Alkmaar Bar,
- the Bestuur van de Bedrijfsvereniging voor de Metaalnijverheid, by Bestuur van het Landelijk Instituut Sociale Verzekeringen, itself represented by C. R. J. A. M. Brent, Director of the Legal Affairs Section of the enforcement agency Gak Nederland BV, and by A. I. van der Kris, Legal Assistant in the same agency, acting as Agents,
- the United Kingdom Government, by John E. Collins, of the Treasury Solicitor's Department, acting as Agent, and C. Lewis, Barrister,
- the Commission of the European Communities, by P. J. Kuijper, Legal Adviser, and M. Patakia, of its Legal Service, acting as Agents,

having regard to the Report for the Hearing,

after hearing the oral observations of the Bestuur van de Bedrijfsvereniging voor de Metaalnijverheid and of the Commission at the hearing on 5 March 1998,

after hearing the Opinion of the Advocate General at the sitting on 14 May 1998,

gives the following

Judgment

- 1 By order of 18 March 1997, received at the Court on 26 March 1997, the Arrondissementsrechtbank te Alkmaar (Alkmaar District Court) referred to the Court for a preliminary ruling under Article 177 of the EC Treaty a question on the interpretation of Article 4 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, 'the Directive').
- 2 That question was raised in proceedings between Mr Regeling and the Bestuur van de Bedrijfsvereniging voor de Metaalnijverheid (Metal Industry Professional and Trade Association, 'the guarantee institution') concerning the calculation of the guarantee provided for by the Directive.
- 3 The Directive is intended to guarantee employees a minimum level of protection under Community law in the event of their employer's insolvency, without prejudice to more favourable provisions existing in the Member States.
- 4 For that purpose, Article 3(1) of the Directive requires the Member States to take the measures necessary to ensure that guarantee institutions guarantee payment of employees' outstanding claims resulting from contracts of employment or employment relationships and relating to pay for the period prior to a given date; in accordance with Article 3(2), the date is, at the choice of the Member States, that of the onset of the employer's insolvency (first indent), or that of the notice of dismissal issued on account of insolvency (second indent) or that of the onset of the

employer's insolvency or that on which the contract of employment or the employment relationship was discontinued on account of the employer's insolvency (third indent).

5 However, under Article 4(1) and (2) of the Directive, payment may be limited to outstanding claims relating to pay for certain periods, depending on the choice made by the Member States pursuant to Article 3(2), namely:

- in the case referred to in Article 3(2), first indent, the last three months of the contract of employment or employment relationship occurring within a period of six months preceding the date of the onset of the employer's insolvency (first indent);
- in the case referred to in Article 3(2), second indent, the last three months of the contract of employment or employment relationship preceding the date of the notice of dismissal issued to the employee on account of the employer's insolvency (second indent);
- in the case referred to in Article 3(2), third indent, the last 18 months of the contract of employment or employment relationship preceding the date of the onset of the employer's insolvency or the date on which the contract of employment or the employment relationship with the employee was discontinued on account of the employer's insolvency, in which case the Member States may limit the liability to make payment to pay corresponding to a period of eight weeks or to several shorter periods totalling eight weeks (third indent).

- 6 The Member States may still set a ceiling to the guaranteed payment of employees' outstanding claims, in accordance with Article 4(3), 'in order to avoid the payment of sums going beyond the social objective' of the Directive.
- 7 It is stated in Article 2(2) that the 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".'
- 8 Finally, Article 9 of the Directive gives Member States the option to apply or introduce provisions which are more favourable to employees.
- 9 Under Netherlands law, the Directive was implemented by the *Werkloosheidswet* (Law on Unemployment, 'the WW'). Under Chapter IV of that Law, concerning the assumption of liabilities arising from employment relationships where the employer is unable to pay wages, a worker whose employer is declared insolvent and who has a claim relating to pay or holiday pay is entitled to payment covering:
 - a maximum of 13 weeks' pay in respect of the period immediately preceding the date of termination of the employment relationship, which corresponds to the reference period of three months preceding the date of the notice of dismissal referred to in the second indent of Article 4(2) of the Directive;
 - pay owed for the appropriate notice period (the maximum being the period laid down in Article 40 of the *Faillissementswet* (Law on Insolvency));

- a maximum of one year's holiday pay, holiday allowances and sums owed by the employer to third parties on account of his employment relationship with the employee (Articles 61(1) and 64 of the WW).

- 10 On 29 October 1990 Mr Regeling was engaged as a welder by Mr Moojen. The contract of employment was terminated on 14 June 1991 with effect from 1 August 1991. The employer was declared insolvent on 21 April 1992; the insolvency procedure was closed several months late on the ground of lack of assets.
- 11 Up to and including December 1990 Mr Regeling received his pay on the due date. Between 1 January and 1 August 1991, however, the employer paid him a fraction of his wages at irregular intervals. Whereas Mr Regeling was entitled, according to his calculations, to net pay of HFL 21 892 for the period in question, consisting of basic pay, overtime and holiday pay, his employer made sporadic payments in that period totalling HFL 18 136. Therefore, according to Mr Regeling, his employer still owes him HFL 3 756 by way of arrears of wages and other amounts.
- 12 On 1 July 1992 Mr Regeling claimed those arrears from the guarantee institution pursuant to Chapter IV of the WW.
- 13 By decision of 11 November 1993 the defendant rejected the application on the ground that Mr Regeling had no claim for wages in respect of the reference period, that is to say, 15 March to 25 July 1991, since the total amount of payments made by the employer during that period was greater than the applicant's entitlement to pay for the same period.

- 14 It is clear from the documents before the Court that, as provided in Article 43 of Book 6 of the Burgerlijk Wetboek (Civil Code, 'the BW'), which entered into force on 1 January 1992 but whose wording corresponds to that of Articles 1432 and 1435 of the old BW, where a debtor makes a payment which can be attributed to two or more obligations, it is to be applied, first, to the obligation indicated by the debtor; second, where there is no such indication, to obligations due for performance; third, to the most onerous of those obligations and, last, if all the obligations are due for performance and all equally onerous, to the oldest of them. Pursuant to those provisions, the payments made by Mr Moojen during the reference period should first have been set against the oldest debts, with the result that Mr Regeling would be the holder of outstanding claims in respect of which he would be entitled to the guarantee provided for by the Directive.
- 15 However, in accordance with the case-law of the Netherlands administrative courts and, in particular, the Centrale Raad van Beroep, any payment of wages during the reference period must be set against the wages due for that period, since the provisions of the Civil Code do not apply to claims based on the legislation relating to the protection of employees in the event of their employer's insolvency. According to those decisions, Mr Regeling has no outstanding claims within the meaning of Article 4(2) of the Directive, because of the payments made during the reference period, and is not therefore entitled to the guarantee.
- 16 In the light of the foregoing, the national court has decided to refer the following question to the Court for a preliminary ruling:

'Are the requirements of Directive 80/987 fully satisfied by rules of national law which may result in a claim relating to pay being met, as required by that directive, only if and in so far as that claim amounts, over the period referred to in the directive, to a sum greater than the amount of pay which the employee received during that period but which is attributed, under national civil law, to a claim relating to pay which arose prior to that period?'

- 17 By its question the national court is in substance asking whether, on a proper construction of Article 4(2) of the Directive, where an employee has, simultaneously, claims against his employer in respect of periods of employment before the reference period laid down in that provision and claims relating to the reference period itself, payments of wages made by the employer during the latter period must be regarded as covering solely the employee's claims arising during the reference period or whether they must be set in priority against earlier claims.
- 18 According to the guarantee institution and the United Kingdom Government, since the Directive is intended to achieve partial approximation of national laws and since Article 2(2) expressly leaves it to the Member States *inter alia* to define 'pay', they are free to determine the method for attributing payments in the case of successive claims and, accordingly, to decide whether payments made by the employer during the reference period are to cover the worker's claims arising during that period or earlier claims.
- 19 That argument must be rejected. Although the aim of the Directive is only partial harmonisation of the laws of the Member States relating to the protection of employees affected by their employer's insolvency, the question referred by the national court none the less concerns the interpretation of the words 'outstanding claims relating to pay for the last three months' of the contract of employment or employment relationship preceding the date of the notice mentioned in the second indent of Article 4(2) of the Directive. Since those words apply to the actual determination of the minimum guarantee under Community law, they must be given a uniform interpretation if the harmonisation sought, even in part, at Community level is not to be rendered ineffective.
- 20 The guarantee institutions are required, in principle, in accordance with Article 3(1) of the Directive, to guarantee payment of employees' outstanding claims relating to pay for the period prior to a given date. It is purely by way of derogation that Member States have the option, under Article 4(1), to limit that liability to pay

to a given period fixed in accordance with the detailed rules laid down in Article 4(2). As the Advocate General observes at point 45 of his Opinion, that provision must be construed narrowly and in conformity with the social purpose of the Directive, which is to ensure a minimum level of protection for all workers.

- 21 Where, as in the circumstances of the main action, a worker has outstanding claims relating to periods of employment before the reference period, the direct consequence of setting payments made by the employer during the reference period against claims arising during that period, notwithstanding the existence of earlier claims, would be to undermine the minimum protection guaranteed by the Directive, the provision of which would in such cases depend on the employer's fortuitous or deliberate decision to make or not to make certain payments during the reference period.
- 22 It would be contrary to the purpose of the Directive to interpret Article 4(2) in such a way that a worker in that situation is not entitled to the guarantee in respect of wages which he has in fact lost during the reference period.
- 23 Consequently, the answer to be given to the question referred must be that, on a proper construction of Article 4(2) of the Directive, where a worker has, simultaneously, claims against his employer in respect of periods of employment before the reference period laid down in that provision and claims relating to the reference period itself, payments of wages made by the employer during the latter period must be set in priority against earlier claims.

Costs

- 24 The costs incurred by the United Kingdom Government and by the Commission, which have submitted observations to the Court, are not recoverable. 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.

On those grounds,

THE COURT (Fifth Chamber),

in answer to the question referred to it by the Arrondissementsrechtbank te Alkmaar by order of 18 March 1997, hereby rules:

On a proper construction of Article 4(2) 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, where a worker has, simultaneously, claims against his employer in respect of periods of employment before the reference period laid down in that provision and claims relating to the reference period itself, payments of wages made by the employer during the latter period must be set in priority against earlier claims.

Gulmann

Wathelet

Edward

Puissochet

Jann

Delivered in open court in Luxembourg on 14 July 1998.

R. Grass

C. Gulmann

Registrar

President of the Fifth Chamber