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JUDGMENT OF THE COURT (Second Chamber)

24 November 2016 (*)

(Reference for a preliminary ruling — Social policy — Directive 2008/94/EC — Article 8 — Protection of employees in the event of the insolvency of their employer — Provisions related to social security — Scope — Measures necessary to protect immediate or prospective entitlements of employees under supplementary pension schemes — Obligation to provide for a right to have outstanding pension contributions excluded from the scope of insolvency proceedings — Absence)

In Case C-454/15,

REQUEST for a preliminary ruling under Article 267 TFEU from the Hessisches Landesarbeitsgericht (Higher Labour Court, Hessen, Germany), made by decision of 1 April 2015, received at the Court on 24 August 2015, in the proceedings

Jürgen Webb-Sämman

v

Christopher Seagon, acting as liquidator in the insolvency of Baumarkt Praktiker DIY GmbH,

THE COURT (Second Chamber),

composed of M. Ilešič, President of the Chamber, A. Prechal (Rapporteur), A. Rosas, C. Toader and E. Jarašiūnas, Judges,

Advocate General: M. Bobek,

Registrar: V. Giacobbo-Peyronnel, Administrator,

having regard to the written procedure and further to the hearing on 4 July 2016,

after considering the observations submitted on behalf of:

- Mr Webb-Sämman, by R. Buschmann and J. Schubert,
- Mr Seagon, acting as liquidator in the insolvency of Baumarkt Praktiker DIY GmbH, by E. Hess and L. Hinkel, Rechtsanwälte,
- the German Government, by R. Kanitz and T. Henze, acting as Agents,
- the European Commission, by M. Kellerbauer and T. Maxian Rusche, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 8 September 2016,

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).

2 The request has been made in proceedings between Mr Webb-Sämman and Mr Seagon, acting as liquidator in the insolvency of Baumarkt Praktiker DIY GmbH (‘Baumarkt Praktiker’) concerning the right to have that company’s pension contributions which were outstanding prior to the onset of its insolvency excluded from the scope of insolvency proceedings.

Legal context

EU law

3 Recital 3 of Directive 2008/94 states:

‘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 [Union]. ...’

4 Article 3 of that directive is worded as follows:

‘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.’

5 Article 4 of that directive states:

‘(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.

...

(3) Member States may set ceilings on the payments made by the guarantee institution. These ceilings must not fall below a level which is socially compatible with the social objective of this Directive.

If Member States exercise this option, they shall inform the Commission of the methods used to set the ceiling.’

6 Article 6 of that directive provides:

‘Member States may stipulate that Articles 3, 4 and 5 shall not apply to contributions due under national statutory social security schemes or under supplementary occupational or inter-occupational pension schemes outside the national statutory social security schemes.’

7 Article 8 of Directive 2008/94 provides:

‘Member States shall 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.’

8 The first paragraph of Article 11 of that directive is worded as follows:

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

German law

9 Paragraph 47 of the Insolvenzordnung (German Insolvency Regulation) provides:

‘Any person who, by reason of a real or personal right, may claim that property is not part of the insolvency proceedings, shall not be a creditor in the insolvency proceedings. His right to have the property excluded from the scope of insolvency proceedings shall be governed by legislation which is applicable outside of the insolvency proceedings.’

10 Paragraph 165 of Book III of the Sozialgesetzbuch (Social Security Code) is worded as follows:

‘(1) Employees have a right to compensation if they were employed in Germany and if, when the insolvency proceedings were opened, they still had rights to remuneration during the previous three months of employment. ...

...

(2) Entitlement to pay includes any entitlement to remuneration based on the employment relationship. ... If the employee converted part of his remuneration into pension contributions, in accordance with Paragraph 1(2)(3) of the Betriebsrentengesetz (Law on occupational pensions), and if that part of his remuneration is placed in a pension fund, a retirement fund or a direct insurance product, the conversion of the remuneration shall be deemed, for the purposes of calculating the insolvency compensation, not to have been concluded to the extent that the employer has failed to pay the contributions over to the body responsible for paying the pension.’

The main proceedings

11 Mr Webb-Sämman had been employed on a part-time basis by Baumarkt Praktiker since 18 November 1996. On 1 October 2013, insolvency proceedings were initiated against that undertaking. Mr Seagon was appointed as the liquidator.

12 Mr Webb-Sämman brought proceedings before the Arbeitsgericht Darmstadt (Labour Court, Darmstadt, Germany) seeking an order that Mr Seagon, acting as liquidator in the insolvency of Baumarkt Praktiker, pay him the sum of EUR 1 017.56, plus interest. The applicant in the main proceedings explained that that sum corresponded to contributions to an occupational old-age pension scheme which Baumarkt Praktiker should have paid into the account of his occupational pension fund with the Hamburger Pensionskasse.

13 The claims, including those relating to contributions to occupational pension schemes, which cover the three months preceding the date when insolvency proceedings were opened, were honoured by the guarantee institution. Thereafter, the parties to the main proceedings are in dispute only as regards the right to have social security contributions for an occupational old-age pension scheme for the months of January to June 2013 inclusive excluded from the scope of insolvency proceedings.

14 Mr Webb-Sämman claimed in that context that he benefited from a right to have the amount claimed excluded from the scope of insolvency proceedings, in accordance with Paragraph 47 of the Insolvency Regulation. He added that that amount was withheld on trust and that, therefore, it was not part of those insolvency proceedings. Mr Webb-Sämman also invoked Article 8 of Directive 2008/94 to argue that, if he were not granted a right to have the amount payable excluded from the scope of insolvency proceedings, that provision would be infringed in the present case.

15 Mr Seagon contended that the amount claimed by Mr Webb-Sämman had always been part of the assets of Baumarkt Praktiker and that, in particular, no fiduciary agreement relating to that amount had been entered into between Mr Webb-Sämman and Baumarkt Praktiker. Therefore, according to Mr Seagon, Mr Webb Sämman could not rely on Paragraph 47 of the Insolvency Regulation to claim that he benefited from a right to exclusion.

16 The Arbeitsgericht Darmstadt (Labour Court, Darmstadt) dismissed Mr Webb-Sämman's action. That court first of all held that the latter did not have the right to have pension contributions paid into his own account and that he could claim only payment into an account of his occupational pension fund. That court next noted that Mr Webb-Sämman had failed to adduce evidence of the existence of a fiduciary agreement entered into with Baumarkt Praktiker. Finally, it noted that, even assuming that such an agreement was entered into, a right to exclusion could not be granted on the basis that the item to be excluded was not amenable to identification in relation to the other amounts in the insolvency proceedings.

17 Mr Webb-Sämman appealed against that judgment to the referring court. In the continuing dispute between the parties, as set out in paragraphs 14 and 15 of the present judgment, the referring court questions whether Article 8 of Directive 2008/94 precludes an interpretation of Paragraph 47 of the Insolvency Regulation according to which Mr Webb-Sämman would not have the right to exclude the amount of contributions which were not paid by Baumarkt Praktiker to the Hamburger Pensionskasse.

18 In those circumstances the Hessisches Landesarbeitsgericht (Higher Labour Court, Hessen, Germany) decided to stay the proceedings and to refer the following question to the Court of Justice for a preliminary ruling:

‘Is a national understanding of a rule under which outstanding salary claims which were deposited with the employer in order to be paid over to a pension fund by a particular date but which were not paid by that employer into a separate account and therefore did not come within the scope of a right to have those claims excluded from insolvency proceedings in respect of the employer's assets (Aussonderungsrecht) pursuant to Paragraph 47 of the German Insolvency Regulation contrary to Article 8 of Directive 2008/94 or to other EU law?’

The question referred for a preliminary ruling

19 By its question, the referring court asks, in essence, whether Article 8 of Directive 2008/94 must be interpreted as meaning that it requires that, in the event of employer insolvency, money withheld from a former employee's salary converted into pension contributions, which that employer should have paid into a pension fund on behalf of that employee, be excluded from the scope of insolvency proceedings.

20 First of all, it is necessary to answer the question, raised by Mr Seagon and the Commission in their written observations, whether Article 8 of Directive 2008/94 applies to the case in the main proceedings or whether it is covered exclusively by Article 3 of that directive, which involves defining the scope of application of both of those provisions.

21 Article 3 of Directive 2008/94 obliges Member States to take the measures necessary to ensure that guarantee institutions ensure, subject to Article 4, payment of employees' outstanding claims.

22 Under Article 6 of that directive, the Member States may stipulate that Articles 3, 4 and 5 of that directive shall not apply to contributions due under supplementary pension schemes. The possibility to exclude those contributions implies therefore that they fall, in principle, within the scope of Article 3 of that directive.

23 However, it cannot be inferred from the foregoing that outstanding pension contributions are excluded from the scope of Article 8 of Directive 2008/94. It follows from its wording that that article obliges Member States to take the measures necessary to protect the interests of employees in respect of rights conferring on them immediate or prospective entitlement to old-age benefits under supplementary occupational or inter-occupational pension schemes outside the national statutory social security schemes.

24 Although pension contributions are not expressly referred to in Article 8 of Directive 2008/94, they are closely connected with the rights conferring immediate or prospective entitlement to old-age benefits, which that provision seeks to protect. Those contributions are designed to finance the immediate entitlement of employees at the time of their retirement. In that regard, the Court has already held that the failure on the part of the employer to pay contributions could constitute a cause of underfunding of a supplementary occupational pension scheme, a situation which falls under Article 8 of that directive (see, to that effect, judgment of 25 April 2013, *Hogan and Others*, C-398/11, EU:C:2013:272, paragraphs 37 to 40). It follows that both Article 3 and Article 8 of that directive are relevant in the event of a failure to pay pension contributions.

25 The fact remains that Article 3 and Article 8 of Directive 2008/94 have different purposes and concern two different types of protection.

26 Article 3 of that directive requires that the payment of outstanding claims, including not only salary claims, but also, subject to Article 6 of that directive, certain contributions in the form of salary claims, be ensured by the guarantee institutions.

Moreover, Article 4(2) and (3) of Directive 2008/94 grants the Member States the power to restrict the scope of Article 3 thereof. Such a restriction may concern both the length of the period for which outstanding claims are to be met by the guarantee institution and the level at which the payments made by that institution are capped. In addition, the protection established in Article 3 of that directive concerns, in principle, short-term claims, as was noted by the Advocate General in point 46 of his Opinion.

27 Article 8 of Directive 2008/94, for its part, has a more restricted material scope in so far as it seeks to protect the interest of employees in securing payment of their pension claims. Moreover, that article, unlike Articles 3 and 4 of that directive, does not provide expressly for Member States to have the power to limit the level of protection (judgment of 25 January 2007, *Robins and Others*, C-278/05, EU:C:2007:56, paragraph 43). Finally, contrary to Article 3 of that directive, Article 8 thereof seeks to guarantee the protection of the long-term interests of employees, given that, as regards immediate or prospective entitlements, such interests extend, in principle, over the entire retirement period.

28 It follows from the above that Article 8 of Directive 2008/94 applies to outstanding pension contributions, in so far as they are not compensated under Article 3 of that directive. As the Advocate General pointed out in point 37 of his Opinion, the protection guaranteed by Article 8 is complementary to that guaranteed by Article 3 of that directive, and they can both apply together to the same situation.

29 In this case, it is apparent from the documents before the Court that Mr Webb-Sämänn received, under Paragraph 165 of Book III of the Social Security Code, compensation in respect of outstanding salary claims for the three months of employment preceding the opening of insolvency proceedings against Baumarkt Praktiker. Moreover, since the Federal Republic of Germany did not exercise the power granted to it by Article 6 of Directive 2008/94 to exclude pension contributions from the scope of Article 3 of that directive, the applicant in the main proceedings was also compensated in respect of his pension contributions for those three months. The main proceedings concern pension contributions payable in respect of the nine months before the opening of those insolvency proceedings. Since those outstanding contributions did not give rise to the payment of any compensation and the failure to pay necessarily had an impact on the amount of prospective entitlements, they fall within the scope of Article 8 of that directive.

30 Consequently, the question referred must be examined from the perspective of Article 8 of Directive 2008/94 only.

31 In accordance with recital 3 thereof, that directive seeks in particular to provide ‘protection of employees in the event of the insolvency of their employer’ and ‘to ensure a minimum degree of protection ... while taking account of the need for balanced economic and social development in the [Union]’.

32 Therefore, that directive, which is intended to reconcile the interests of employees and the need for balanced economic and social development, aims to ensure, in the

context of EU law, a minimum degree of protection for those employees in the event of the insolvency of their employer, without prejudice, in accordance with Article 11 thereof, to more favourable provisions which the Member States may apply or introduce. The level of protection required by that directive for each of the specific guarantees that it establishes must be determined having regard to the words used in the corresponding provision, interpreted, if need be, in the light of the above considerations (see, to that effect, judgment of 25 January 2007, *Robins and Others*, C-278/05, EU:C:2007:56, paragraphs 39 to 41).

33 Article 8 of Directive 2008/94 states, in general, that the Member States are to ‘ensure that the necessary measures are taken to protect the interests of employees’.

34 In that regard, the Court has already held 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 (judgments of 25 January 2007, *Robins and Others*, C-278/05, EU:C:2007:56, paragraphs 36 and 42 to 45, and of 25 April 2013, *Hogan and Others*, C-398/11, EU:C:2013:272, paragraph 42).

35 Although the Member States thus enjoy a wide margin of appreciation when implementing Article 8 of Directive 2008/94, they are nonetheless obliged, in accordance with the objective pursued by that directive, to ensure a minimum degree of protection for employees as required by that provision. In that regard, the Court has already held that a correct transposition of Article 8 of that directive 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 (see, to that effect, judgments of 25 January 2007, *Robins and Others*, C-278/05, EU:C:2007:56, paragraph 57, and of 25 April 2013, *Hogan and Others*, C-398/11, EU:C:2013:272, paragraph 51), although that does not mean that, in other circumstances, the losses suffered could also, even if their percentage differs, be regarded as manifestly disproportionate in the light of the obligation to protect the interests of employees, referred to in Article 8 of that directive.

36 In this case, it is apparent from the case documents, and in particular from the information provided by Mr Webb-Sämman, that his monthly pension rights would be reduced by an amount between EUR 5 and EUR 7 per month, as a result of the non-payment of pension contributions during the period at issue in the main proceedings. In those circumstances, the accuracy of which must be verified by the referring court, it must be held that Article 8 of Directive 2008/94 does not require a level of protection exceeding that already granted, in this case, to the applicant in the main proceedings.

37 Therefore, in so far as a Member State fulfils the obligation to ensure the minimum level of protection required by Article 8 of Directive 2008/94, its margin of appreciation as regards the mechanism for protection of entitlements to old-age benefits under a

supplementary occupational pension scheme in the event of insolvency of the employer cannot be affected.

38 In the light of all the above considerations, the answer to the question referred is that Article 8 of Directive 2008/94 must be interpreted as meaning that it does not require that, in the event of employer insolvency, money withheld from a former employee's salary converted into pension contributions, which that employer should have paid into a pension fund on behalf of that employee, be excluded from the scope of insolvency proceedings.

Costs

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

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

Article 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 must be interpreted as meaning that it does not require that, in the event of employer insolvency, money withheld from a former employee's salary converted into pension contributions, which that employer should have paid into a pension fund on behalf of that employee, be excluded from the scope of insolvency proceedings.

[Signatures]

* Language of the case: German.
