Dalila Ghailani

Social policy case law of the Court of Justice in 2002

Introduction

The Court of Justice of the European Communities (CJEC) occupies a pre-eminent position in the European institutional system, which cannot remotely be compared with that of similar international courts enjoying a usually marginal role. Its importance is a corollary of the role of law in European integration. Within a system in which integration is dependent on the decisions of the European institutions, it was not possible to award these bodies fully sovereign powers. Guarantees had to be incorporated into the treaties to protect the interests of States and individuals affected by these decisions. An appeals process had to be provided for. The existence of the notion of the rule of law within European legal culture was reflected in the establishment of legal control mechanisms.

The extraordinary development of the Court's role is largely linked to a particular provision, Article 177 of the Treaty of Rome, the new Article 234 EC. When cases involving problems of Community law are referred to national courts, this provision allows them to put questions to the Court as to the interpretation which should be given to Community provisions or as the validity of enactments of the institutions. This preliminary ruling mechanism sets up a genuine dialogue between the national court and the European Court. It is for the national court and not the parties to the case to determine whether a matter should be referred to the European Court. It is also for the

national court to apply the Court's conclusions regarding the case referred to it (Dehousse, 1997).

Dozens of referrals for preliminary rulings are made to the CJEC each year. A sizeable proportion of them relate to the social sphere: equal treatment for men and women, social security of migrant workers, cross-border health care, the insolvency of employers, and the transfer of undertakings are all areas where clarification has been required from the Community's highest instance. Such clarifications play a fundamental role in the development and content of Community law. Thus, two new directives were adopted during the course of 2002. The first covers the insolvency of employers, and the second the implementation of the principle of equal treatment for men and women in employment and vocational training. These two new directives incorporated the Court's case law on these issues and will be referred to later.

The year 2002 witnessed the fiftieth anniversary of the Court of Justice and proved no exception to the rule. The Court's deliberations have been highly instructive. Since it would be impossible to cover every case relating to social policy, we have selected a number which were particularly noteworthy. They have been divided into three sections: social security of migrant workers, equal treatment for men and women, and the rights and obligations of employees and employers.

1. Social security of migrant workers: Regulation 1408/71 and its implementation

Since its creation in 1957, the promotion of free movement for workers has been one of the pillars of the European Economic Community. This freedom encouraged the economic development of the Member States. Active measures were needed to guarantee the free movement of workers beyond national borders. A significant portion of these measures had to be taken in the realm of social security. Workers would not have availed themselves of this right to free movement if, in doing so, they had lost their social security entitlements. As most national legislation in this area is based on nationality or residence, it could not be applied to migrants unless social security schemes were co-ordinated

(Pennings, 2001). Regulation 1408/71 on the co-ordination of social security schemes (Council of the European Communities, 1971) was adopted to avoid these undesirable effects. This Regulation, now undergoing amendment, is without any doubt the most obscure and difficult to understand of all Community texts. Questions as to its scope are regularly referred for preliminary rulings.

Advances on maintenance payments for the benefit of the children of divorced parents: Anna Humer, 5 February 2002 ([1])

In the *Offermanns* case ([2]), which we referred to in the previous edition of Social Developments in the European Union, the Court of Justice made it clear that advances on maintenance payments were indeed family benefits within the meaning of Regulation 1408/71, and should thus be granted irrespective of nationality. In the *Humer* ruling, the Court continued along the same lines, stipulating that residence cannot be a factor in determining whether or not such advances should be granted.

Anna Humer, born on the 10 September 1987, is the child of a marriage of Austrian nationals. The couple divorced on 9 March 1989, and, since then, the mother has had custody of her daughter. In 1992, the mother moved to France with her daughter, where they have been ordinarily resident ever since and where she is a salaried worker. The father continues to reside in Austria.

On 2 November 1993, the father assumed an obligation under a court settlement to pay monthly maintenance payments for his daughter. He was at that time employed in a commercial capacity and continued in that occupation until at least 31 January 1998, after which date he was unemployed.

On 24 July 1998, Anna Humer applied to the Austrian State for advances on maintenance payments for a period of three years. She

1 CJEC, 5 February 2002, *Humer*, C-255/99, Rec.2002 I-1205.

2 CJEC, 15 March 2001, *Offermanns*, C-85/99, Rec.2001 I-2261.

claimed that, despite "repeated enforcement measures", her father's maintenance payments were several months in arrears.

The court of first instance dismissed that application for an advance on the ground that the child and her mother, who had custody of her, were not ordinarily resident in Austria, as required by Austrian legislation. Anna Humer's case was successful on appeal. An appeal was brought by the Austrian State before the *Oberster Gerichtshof*, the court of final instance, which referred the question to the Court of Justice of the EC to determine whether the Austrian rule is compatible with European Law. The Court considered whether the advance on maintenance payments provided for under Austrian legislation constitutes family benefits for the purposes of the Community Regulation on the social security of migrant workers and members of their families.

The Court reiterated that the expression in the Regulation "to meet family expenses" is to be interpreted as referring, in particular, to a public contribution to a family's budget to alleviate the financial burdens involved in the maintenance of children. The Court noted in addition that the reasons given by the Austrian legislature were to ensure the maintenance of minor children in cases where their mothers are left to cope alone with their children, and, in addition to the heavy burden of raising their children, find themselves faced with the additional difficulty of obtaining maintenance for them from the father. Previously, the Court had also emphasised that it is to resolve such difficult situations that the State has to take the place of the person in default of payment of maintenance and pay advances on maintenance. The Court, therefore, maintained that advances on maintenance payments constitute family benefits. Moreover, where either of a child's parents is employed or self-employed, that child, as a member of the worker's family, falls within the scope ratione personae of the Community Regulation even where, as a result of divorce, he does not live with the latter.

In joint cases *Hoever and Zachow* ([3]), the Court ruled that the spouse of a worker may benefit from advances on maintenance payments in particular in order to compensate for the default of a parent from whom maintenance is due. This argument applies to all members of the family, including minor children, who enjoy the same direct right. Moreover, the right to free movement, which permits residence in another Member State, would be hampered if the granting of family benefit payments were contingent on the place of residence. It follows that residence in another Member State should not hinder the granting of family benefits where the requisite conditions are fulfilled.

Application of a bilateral convention which is more favourable than Regulation 1408/71: Kaske v. Landesgeschäftsstelle des Arbeitsmarktservice Wien, 5 February 2002 ([4])

In the *Rönfeldt* ([5]) ruling, the Court decided that a bilateral or multilateral convention could not give rise to the loss of social security advantages for workers who had exercised their right to freedom of movement. In that ruling, it was pension rights which were at issue. The Court applied the same case law in the *Kaske* case, but with respect to unemployment benefit.

Ms. Kaske, a German national by birth, has also been an Austrian national since 1968. She was for ten years an employee in Austria and made contributions to unemployment insurance. In 1983, she moved to Germany, where she worked and contributed to an identical insurance scheme for 12 years. After a period of unemployment, she was once more employed in a new post subject to compulsory unemployment insurance. She then returned to Austria and on 12 June 1996 applied to the regional bureau of the *Arbeitsmarktservice* for unemployment benefit. The latter rejected her application on the ground that Ms. Kaske did not

---

3 CJEC, 10 October 1996, *Hoever and Zachow*, C-245/94 and C-312/94, Rec.1996 I-4895.

4 CJEC, 5 February 2002, *Kaske*, C-277/99, Rec. 2002 I-1261.

5 CJEC, 7 February 1991, *Rönfeldt*, C-227/89, Rec. 1991 I-323.

fulfil the conditions for the granting of this benefit provided for under the Austrian law transposing the Community Regulation on social security of migrant workers, which entered into force in Austria on 1 January 1994. On the one hand, Ms. Kaske had not completed a period of insurance or employment in Austria immediately before making her application for unemployment benefit, and, on the other, the special provisions provided for by Austrian legislation for the benefit of residents completing a stay of at least fifteen years in Austria before the acquisition of periods of insurance abroad did not apply to her. This derogation makes it possible for the application for unemployment benefit to be favourably met in Austria without there being any need for the interested party to complete a new period of employment before applying for unemployment benefit.

However, Ms. Kaske submitted that an Austro-German Convention, which entered into force in 1979, might permit the periods of insurance she had completed in Germany to be credited to her. Under these circumstances, Ms. Kaske entered an appeal against the Office's decision, which was rejected. She challenged this decision before the *Verwaltungsgerichtshof*. This court referred the matter to the Court of Justice of the European Communities and asked whether the provisions of the Austro-German Convention, which were more favourable than national law, could apply despite the subsequent entry into force of the Community legislation. The question at issue was whether the CJEC's *Rönfeldt* case law could apply with respect to unemployment benefit.

The Court noted that, contrary to what the Austrian government submitted, there was no reason why the arguments in the *Rönfeldt* ruling, concerning pension rights, should not equally apply to unemployment benefit, which can be categorised as a social security advantage; the case law refers to these kinds of advantages as an overall group.

This implies that a national of a Member State which is a party to a bilateral convention, who has exercised his right as a worker to free movement, enjoys a right to unemployment benefit prior to the entry into force of the Community Regulation on social security of migrant workers. Such a person has an established right to the continued application of the said Convention which continues once the Regulation

enters into force. The interested party rightly entertained a legitimate expectation that he would benefit from the provisions of the bilateral convention.

Accordingly, the Court considered that there is no reason to differentiate between the periods of insurance or employment according to whether these periods fell before or after the entry into force of the Treaty and Regulation. Entitlement to the application of the Convention could be acquired prior to the intervention of the Community text. It is only if the worker has exhausted all the rights accrued on the basis of a period of insurance or employment after the entry into force of the Community rule that his situation must be assessed in the light of the provisions of that regulation.

Moreover, the Court stipulated that national rules which impose restrictive residence conditions for the granting of unemployment benefit (fifteen years prior to the last employment abroad), first discriminate on the grounds of nationality, since they confer privileges on "settled" Austrians, and, second, constitute an obstacle to free movement, as they disadvantage nationals of other Member States. In any event, such conditions are incompatible with the Community law principle of the free movement of workers.

The reader is also invited to consider the *INSS and TGSS* cases relating to the award of pension rights, *Martinez Dominguez* on pensions under a social security convention between Member States concluded prior to accession to the European Communities, and *Rydegard* on the retention of entitlement to benefits for an unemployed person travelling to another Member State to seek work (6).

6 CJEC, 3 October 2002, *INSS and TGSS*, C-347/00, unpublished; CJEC, 24 September 2002, *Alfredo Martinez Dominguez*, C-471/99, unpublished; CJEC, 21 February 2002, *Rydegard*, C-215/00, Rec.2002 I-1817.

2. Equal treatment for men and women

The starting point in the European Union with regard to equal treatment was the principle of equal pay for work of equal value, set out in former Article 119 (now Article 141) of the EC Treaty. From these modest beginnings, the Court of Justice has developed an extensive body of case law which, in many Member States, has brought about substantial changes to women's employment rights, and even, in certain cases, to men's. Beyond the issue of equal pay, a general principle of equal treatment for men and women has been developed, which is now increasingly recognised in Community legislation and the Court's case law. Moreover, the Treaty of Amsterdam provides a new legal basis (Article 13) for legislation on discrimination and recognises the legitimacy of positive action. This makes it possible to grant the under-represented sex certain advantages with a view to permitting the exercise of a profession, and avoiding or compensating for any disadvantages encountered during the course of a career (Vonfelt, 2000). We have selected two rulings from this sphere in 2002.

Differentiated access to nursery places: Lommers v. Minister van Landbouw, Natuurbeheer en Visserij, ruling dated 19 March 2002 (7)

Mr. Lommers was an official at the Netherlands Ministry of Agriculture. His wife was gainfully employed elsewhere. In December 1995, Mr. Lommers asked the Minister to reserve a nursery place for his child yet unborn. This request was rejected on the ground that, in conformity with Circular No. P 93-7841, which was applicable within the Ministry and attempts to tackle the under-representation of women therein, children of male officials could be given places in the nursery facilities in question only in cases of emergency. At Mr. Lommers' request, the Commission for Equal Treatment considered whether this circular was compatible with the *Wet Gelijke Behandeling van mannen en vrouwen* (Law on Equal Treatment of Men and Women) and concluded that it was. The Ministry therefore rejected the applicant's complaint. Mr.

7 CJEC, 19 March 2002, *Lommers*, Rec.2002, p.I-2891.

Lommers' appeal against that decision was declared unfounded by the *Arrondissementsrechtbank te's-Gravenhage*.

Mr. Lommers appealed against that judgment to the *Centrale Raad van Beroep*. He claimed that the Minister for Agriculture had not demonstrated that the number of women staying in their jobs after taking maternity leave had increased as a result of the subsidised nursery places scheme. He also maintained that, in most Netherlands Government Ministries, no distinction is made between men and women as regards access to subsidised nursery schemes arranged within them. Insufficiency of resources cannot be invoked as a ground for excluding male officials of the said Ministry from the nursery scheme in question. What is more, such an exclusion would be contrary to Article 2(1) of Directive 76/207/EEC (Council of the European Communities, 1976) ([8]). The Minister for Agriculture maintained on the contrary that the scheme in question is justifiable under Article 2(4) ([9]) of the Directive. The priority given to women was the result of a determination to tackle inequalities existing between male and female officials. The creation of nursery places is the kind of measure needed to help eliminate this *de facto* inequality.

The *Centrale Raad van Beroep* decided to stay proceedings and refer the following question to the Court of Justice for a preliminary ruling: does Article 2(1) and (4) preclude rules of an employer under which subsidised nursery places are made available only to female employees save where, in the case of a male employee, an emergency situation, to be determined by the employer, arises?

The Court pointed out, first, that the making available to employees, by their employer, of nursery places at their place of work, or outside it, was indeed to be regarded as a 'working condition' within the meaning

---

8 The article states: "*For the purposes of the following provisions, the principle of equal treatment shall mean that there shall be no discrimination whatsoever on grounds of sex either directly or indirectly by reference in particular to marital or family status*".

9 "*This Directive shall be without prejudice to measures to promote equal opportunity for men and women, in particular by removing existing inequalities which affect women's opportunities […]*".

of the Directive. It emphasised, second, that a scheme under which nursery places made available by an employer to his staff are reserved only for female employees does in fact create a difference of treatment on grounds of sex, within the meaning of Articles 2 and 5 of the Directive. The situations of a male employee and a female employee, respectively father and mother of young children, are comparable as regards the possible need for them to use nursery facilities because they are in employment.

The question to be examined was whether a measure such as that at issue is permissible under Article 2(4), and, if so, whether it adheres to the principle of proportionality. The Court emphasised that the case papers reveal that when the Circular was adopted, the employment situation within the Ministry of Agriculture was characterised by an extensive under-representation of women and that a proven insufficiency of proper, affordable care facilities for children was such as to encourage female officials in particular to quit their jobs. The Court therefore held that such a measure belongs to that group of measures that are designed to eliminate the causes of women's reduced opportunities of access to employment and careers and intended to improve the ability of women to compete on the labour market and pursue a career on an equal footing with men.

Such a derogation from equal treatment of men and women must remain within the limits of what is appropriate and necessary in order to achieve the aim in view. Next, the measure at issue does not totally exclude male officials from its scope but allows the employer to grant requests from the latter in cases of emergency. Nevertheless, a measure which would exclude male officials who take care of their children by themselves from access to a nursery scheme subsidised by their employer would go beyond the permissible derogation provided for in Article 2(4) of the Directive, by interfering excessively with the individual right to equal treatment which that provision guarantees.

Determination of a different age condition based on gender with regard to access to occupational pensions: Pirkko Niemi v. Valtiokonttori (management body for the State pensions scheme), ruling dated 12 September 2002 ([10])

An enlisted public servant who served in the defence forces from 1 April 1969, Mrs. Niemi reached the age of 55 in 1993 and 60 in 1998. On 31 March 1999, she had completed 30 years of service in the defence forces. As an enlisted member of the defence forces, Mrs. Niemi is covered by the pension scheme laid down in Law 280/1966 on pensions for State officials, for which the age-limit is set by Decree 667/1992. That scheme is administered by the *Valtiokonttori*, which decides pension applications at first instance. In order to determine her pensionable age based on years of service, Mrs. Niemi sought a binding advance ruling from the *Valtiokonttori*. By decision of 26 April 1995, Mrs. Niemi was informed that she would not be entitled to an old-age pension until she reached the age of 60 years.

Mrs. Niemi appealed against that decision to the *Valtion eläkelautakunta*, claiming entitlement to a pension from the age of 55. Her appeal was dismissed. Appealing before the *Vakuutusoikeus* (social security tribunal), she stated that a man who had exactly the same employment record as hers and exactly the same duties would have been entitled to a pension from the age of 50 or 55, whereas the age for women enlisted in the defence forces was 60, without exception. The pension scheme applicable was therefore discriminatory on grounds of sex, contrary to the Finnish law on the equal treatment of men and women and to Community law.

The appeal court was uncertain as to whether a pension payable under Law 280/1966 falls within the scope of Article 119 ([11]) of the Treaty, and

---

10 CJEC, 12 September 2002, *Pierkko*, C-351/00, unpublished.

11 Article 119, now Article 141, states "*Each Member State shall ensure that the principle of equal pay for male and female workers for equal work or work of equal value is applied. […] 'pay' means the ordinary basic or minimum wage or salary and any other consideration, whether in cash or in kind, which the worker receives directly or indirectly, in respect of his employment, from his employer*".

whether that pension scheme is contrary to the prohibition of discrimination laid down in that article. It therefore decided to stay proceedings and to refer the following question to the Court for a preliminary ruling: "Does the pension scheme under the *Valtion eläkelaki* fall within the scope of Article 119 of the Treaty or of Council Directive 79/7/EEC (Council of the European Communities, 1979) (12)?"

Mrs. Niemi submitted that persons reaching retirement age must retire from the service and are then entitled to receive a retirement pension based on their years of service up to that age limit. Such a pension constitutes a benefit comparable to pay and falls within the scope of Article 119 of the Treaty. In addition, the existence of different age-limits for women and men carrying out the same work is contrary to Council Directive 76/207/EEC on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions.

The Court recalled that benefits granted under a pension scheme which essentially relates to the employment of the person concerned form part of the pay received by that person and come within the scope of Article 119 of the Treaty. Even if the scheme at issue is determined directly by statute, that is not in itself sufficient to exclude such a scheme from the scope of Article 119 of the Treaty. In addition, the applicability of that provision to pension benefits is not conditional, as the Finnish government submitted, upon a pension being supplementary to a benefit provided by a statutory security scheme. The existence of a link between the employment relationship and the retirement benefit is the only decisive criterion for determining whether a retirement pension falls within the scope of Article 119. If the pension concerns only a particular category of workers, if it is directly related to the period of service completed and if its amount is calculated by reference to the public servant's last salary, the pension paid by the public employer is in that

12 In the words of Article 7 (1) a) "*This Directive shall be without prejudice to the right of Member States to exclude from its scope: (a) the determination of pensionable age for the purposes of granting old-age and retirement pensions and the possible consequences thereof for other benefits*".

case comparable to that paid by a private employer to his former employees. In this case, public servants who benefit under the pension scheme constitute a particular category, that of persons enlisted in the defence forces. A person is entitled to this pension only if he is in a relationship with the State as a public servant or ordinary employee. The age-limit which gives rise to compulsory retirement, which in turn gives entitlement to pension benefits, is directly related to the period of service completed. Finally, the level of the pension paid under Law 280/1966 is determined by the person's length of service. Moreover, pension benefits paid under Law 280/1966 are calculated on the basis of the average pay received over a period limited to a few years directly preceding retirement.

A pension such as that granted under the *valtion eläkelaki* 280/1966 satisfies these criteria and therefore fall within the scope of Article 119 of the Treaty, which prohibits any discrimination with regard to pay as between men and women, whatever system may give rise to such inequality. Accordingly, it is contrary to that article of the Treaty to determine an age condition, differing according to sex, for eligibility for employment-related pensions for workers who are in identical or similar situations.

To conclude on equal treatment, Directive 2002/73/EC of 23 September 2002 (European Parliament and Council of the European Union, 2002a) amended Directive 76/207/EEC on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions. The main aim of these changes is to incorporate the Court's case law into the Directive. Thus the new Directive introduces and defines the notions of "direct discrimination, indirect discrimination and sexual harassment". Moreover, "this Directive shall be without prejudice to provisions concerning the protection of women, particularly as regards pregnancy and maternity". The provisions relating to appeals and the protection of employees have also been revised. Finally, the Directive contains a new section on the creation by Member States of a body or bodies for the promotion, analysis, monitoring and support of equal treatment. Member States must come into conformity with this new Directive by 5 October 2005 at the latest.

3. Rights and obligations of workers and employers within the Community legal system

The three decisions we have selected concern the difficulties linked to the transfer of undertakings, insolvency of employers and the posting of workers.

Safeguarding of employees' rights in the event of the transfer of undertakings: Beckman v. Dynamco WhicheloeMacfarlane Ltd [13] and Temco Service Industries [14]

Economic development has led on both a national and a Community level to changes in the structure of undertakings, *inter alia* through the transfer of undertakings, businesses or parts of businesses to other employers as a result of legal transfers or mergers. Provisions were needed to safeguard employees' rights in the event of a change in employer. Moreover, significant differences existed with regard to the scope of employee protection in this sphere. The Council therefore adopted Directive 77/187/EEC to encourage the harmonisation of national legislation guaranteeing the retention of workers' rights and requiring transferors and transferees to inform and consult workers' representatives in good time (Council of the European Communities, 1977). This Directive was subsequently amended in the light of the impact of the internal market, legislative tendencies in the Member States with regard to helping undertakings in economic difficulty, and the Court's case law and legislation already in force in most of the Member States. Legal certainty and transparency required a clarification of the notion of transfer in the light of CJEC case law. This clarification has not, however, changed the scope of Directive 77/187/EEC as interpreted by the Court (Council of the European Union, 2001). Since the facts in the following cases arose prior to the adoption of this new Directive, it was in the light of the 1977 Directive that the Court answered the questions referred by national courts for preliminary rulings.

---

13 CJEC, ruling of 4 June 2002, *Beckmann*, C-164/00 Rec.2002 I-4893.

14 CJEC, ruling of 24 January 2002, *Temco Service Industries*, C-51/00, Rec.2002 I-969.

The first case is the following: Mrs. Beckman worked within the *National Health Service* under the GWC conditions of service (the *General Whitley Council* is a system for determining employment conditions in the public sector through joint negotiations between employers and employees). She contributed to the NHS Superannuation Scheme. On 1 June 1995, the body for which Mrs. Beckmann worked was transferred within the meaning of Article 1(1) of Directive 77/187/EEC to DWM. Mrs. Beckmann continued to work for DWM until she was dismissed for redundancy as from 6 May 1997. On this occasion, DWM paid Mrs. Beckmann the lump sum redundancy payments without any reduction to reflect payments under Section 46 of the GWC conditions. This article provides that employees aged between 50 and the retirement age having more than five years' service in the NHS Superannuation Scheme have the right to early retirement with immediate payment of pension and lump sum compensation, in the event, *inter alia*, of dismissal for redundancy. Mrs. Beckmann met these two conditions, but received none of the benefits provided for. Her case therefore came before the *High Court of Justice, Queen's Bench Division*, which referred the following two questions to the Court for a preliminary ruling:

Is the employee's entitlement to early payment of a pension and retirement lump sum and/or to the annual allowance and lump sum compensation a right to an old-age, invalidity or survivors' benefit within the meaning of Article 3(3) ([15]) of Council Directive 77/187/EEC?

If the answer to Question 1 is no, is there, derived from or implemented by statutory instruments, an obligation of the transferor arising from the contract of employment, the employment relationship or the collective agreement within the meaning of Article 3(1) and/or 3(2) ([16]) which

---

15 "*Paragraphs 1 and 2 shall not cover employees' rights to old-age, invalidity or survivors' benefits under supplementary company or inter-company pension schemes outside the statutory social security schemes in Member States […]*".

16 Article 3 states: "*1) The transferor's rights and obligations arising from a contract of employment or from an employment relationship existing on the date of a transfer […] shall, by reason of such transfer, be transferred to the transferee […]. 2) Following the transfer […], the*

transfers by reason of the transfer of the undertaking and renders the transferee liable to pay the benefits to the employee upon dismissal?

The Court maintained that although the NHS belongs to the public sector, NHS employees are covered by national employment law and are, therefore, eligible to benefit from the provisions of the Directive. An arrangement such as that under Article 46 of the GWC conditions of service provides, *inter alia* in the event of a certain form of dismissal, for an early retirement pension together with payments to enhance that benefit. Given the general objective of safeguarding the rights of employees in the event of transfers of undertakings pursued in Article 3(1) and (2), the exception to the rule relating to the transfer to the transferee of the transferor's rights and obligations must be interpreted strictly. It may apply only to the benefits listed exhaustively. It is only benefits paid from the time when an employee reaches the end of his normal working life and not benefits paid in the event of dismissal for redundancy that can be classified as old-age benefits.

The Court's answer to the second question is that the transferee is bound by the rights and obligations arising from a contract of employment or an employment relationship existing between the employee and the transferor on the date of the transfer of the undertaking, and by the terms and conditions agreed in a collective agreement. Apart from the exceptions under Article 3(3) relating to old-age, invalidity or survivors' benefits, no exception to those rules is provided for. On a proper construction of Article 3, the obligations applicable in the event of the dismissal of an employee, arising from a contract of employment, an employment relationship or a collective agreement binding the transferor as regards that employee, are transferred to the transferee regardless of the fact that those obligations derive from statutory instruments or are implemented by such instruments.

---

transferee shall continue to observe the terms and condition agreed in any other collective agreement on the same terms applicable to the transferor under that agreement […]".

In the *Temco Service Industries* case, the Court made its fourth ruling on the transfer of cleaning businesses (17). This time, it examined the scope of the Directive on the transfer of undertakings from three points of view: its scope, the contractual nature of the transfer and whether workers have the option of objecting to the transfer.

Volkswagen Brussels (VW) entrusted the cleaning of a number of its production plants to BMV from 2 May 1993 until December 1994, when it terminated the contract. BMV subcontracted the cleaning work to its subsidiary GMC. By contract signed on 14 December 1994, Volkswagen instructed Temco to provide the same services. GMC, whose only business was at Volkwagen's plants, dismissed all its staff apart from four protected employees. Pursuant to the collective agreement applicable to cleaning and disinfecting undertakings concerning the engagement of staff in the event of a transfer of contracts for daily maintenance, Temco asked BMV to forward to it the list of staff assigned to the VW contract. When GMC had forwarded that list to it, Temco re-engaged part of the staff of GMC. As GMC had ceased to pay them, the four protected employees brought proceedings against GMC, BMV and Temco before the *Tribunal de travail* in Brussels, which held that the activity of cleaning the Volkswagen plants had been transferred from GMC to Temco by a series of contracts and that there was thus a transfer of an undertaking within the meaning of the Directive.

Temco appealed against that judgment before the *Cour du travail* in Brussels. That Court raised the question of the applicability of the Directive in the light of two specific features of the dispute. First, GMC was only a subcontractor of BMV which held the cleaning contract at issue before Temco. GMC had therefore never had a contractual relationship with Volkswagen. Second, GMC continued to exist for several years after the contract for cleaning held by BMV had been terminated by Volkswagen.

---

17 CJEC, 11 April 1994, *Schmidt*, C-392/92 Rec. 1994 I-1311; CJEC, 11 March 1997, *Süzen*, C_13/95, Rec.1997 I-1259; CJEC, 10 December 1998, *Hernandez Vidal e.a.*, C-127/96, Rec.1998 I-8179.

The Court noted that the applicability of Article 1(1) of the Directive is subject to three conditions: the transfer must result in a change of employer, it must concern an undertaking, a business or part of a business, and it must be the result of a contract. In this instance, the question called for an analysis of the subject of the transfer and its contractual nature.

In the meaning of the Directive, the transfer must relate to a stable economic entity whose activity is not limited to performing one specific works contract. The term "entity" thus refers to an organised grouping of persons and assets facilitating the exercise of an economic activity which pursues a specific objective. With respect to a cleaning company, an organised grouping of wage earners who are specifically and permanently assigned to a common task may, in the absence of other factors of production, amount to an economic entity. The Court underlined that Article 1(1) may also apply to a transfer of part of a business. It is not significant that the transferor undertaking continues to exist after one of its activities is taken over by another undertaking and that it retains part of the staff engaged in that activity, since the transferred activity is an economic entity in its own right. Although GMC continued to exist as a legal entity after the termination of the cleaning contract between Volkswagen and BMV, it had ceased its only activity, which was taken over by Temco.

On the contractual nature of the contract, the Court recalled that the transfer can be effected in two successive contracts concluded by the transferor and transferee with the same legal or natural person. The fact that the transferor undertaking is not the one which concluded the first contract with the original contractor, but only the subcontractor of the original co-contractor, has no effect on the concept of legal transfer since it is sufficient for that transfer to be part of the web of contractual relations even if they are indirect.

The *Cour du travail* raised the question of whether Article 3(1) should be interpreted as meaning that it does not preclude the contract or employment relationship of a worker employed by the transferor on the date of the transfer of the undertaking from continuing with the transferor. The Directive lays down the automatic transfer to the

transferee of the rights and obligations incumbent on the transferor under the contracts of employment existing on the date of the transfer. It is not possible to derogate from this mandatory rule. However, on previous occasions, the Court has conceded that the employee has the option of refusing to have his contract of employment transferred to the transferee. It now answers that Article 3(1) does not preclude the contract or employment relationship of a worker employed by the transferor on the date of the transfer of the undertaking from continuing with the transferor where that worker objects to the transfer of his employment contract or employment relationship to the transferee (see Peltzer's commentary, 2002).

Protection of employees in the event of the insolvency of their employer: Rodriguez Caballero v. Fogasa, 12 December 2002 ([18])

Realising that measures were necessary to protect employees in the event of the insolvency of their employer, and in particular to guarantee the payment of outstanding claims, in 1980 the Council adopted a Directive to that end (Council of the European Communities, 1980). The Directive also attempted to address the need for balanced economic and social development within the Community. Moreover, there were still differences between the Member States regarding the scope of protection of employees in this sphere, which could have a direct effect on the functioning of the common market. The Directive applies to employees' claims arising from contracts of employment or employment relationships existing against employers who are in a state of insolvency within the meaning of the Directive. National law defines the notions of "employee", "pay", "right conferring immediate entitlement" and "right conferring prospective entitlement". It provides that the guarantee institutions should guarantee the payment of employees' outstanding claims for the period preceding the date of the onset of the employer's insolvency, of the notice of dismissal or date on which the contract of employment was discontinued. Nevertheless, Member States may limit these institutions' obligation to pay.

---

18 CJEC, 12 December 2002, *Caballero v. Fogasa*, C-442/00, unpublished.

As the *Caballero* case reveals, the implementation of this Directive gives rise to various difficulties. Mr. Rodriguez Caballero was dismissed by his employer on 30 March 1997. The judicial procedure prescribed in applicable Spanish law led to an agreement under which that undertaking acknowledged that the dismissal was unfair and accepted that the *"salarios de tramitación"* (remuneration due in the event of unfair dismissal and paid during the procedure provided for in Article 56 of the Workers' Statute) which it owed would be paid with effect from the date of dismissal up to the date of the conciliation. This remuneration was not paid by the undertaking. An enforcement procedure was commenced, during which the undertaking at issue was declared insolvent. Mr. Rodriguez Caballero thus requested Fogasa, the Wages Guarantee Fund, to pay it to him, which Fogasa refused by decision of 30 April 1998.

Mr. Rodriguez Caballero challenged that decision before the *Juzgado de lo Social n* °2 *de Albacete*. That court dismissed the application on the ground that, under Article 33 ([19]) of the Workers' Statute, Fogasa does not incur secondary liability in respect of the "*salarios de tramitación*" where they result from conciliation between the parties. Mr. Rodriguez Caballero appealed against that judgment to the *Tribunal Superior de Justicia de Castilla-La Mancha*. That court referred three questions to the Court of Justice for a preliminary ruling on the interpretation of Article 1 of Directive 80/987/EEC on the protection of employees in the event of the insolvency of their employer. This article provides that "this 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)".

---

19 "*The Wages Guarantee Fund, […] shall pay to workers the remuneration owing to them in the event of insolvency, suspension of payments, […]. Remuneration shall include the amount which the conciliation agreement or the judicial decision recognises […] as well as the supplementary compensation in respect of "salarios de tramitación" awarded where appropriate by the competent court […]*".

The referring court essentially raised the following question: should the *"salarios de tramitación"* payable to the employee as a result of the dismissal being unfair be regarded as falling within those claims arising from Article 1(1) of the Directive? In the affirmative, is there an obligation to determine claims by way either of a judicial decision or an administrative decision, or can they be recognised in the course of conciliation, a compulsory procedure conducted before a court? If the answer is yes, may the national court responsible for giving judgment in the proceedings refrain from applying a provision of national law which excludes the claim from the scope of matters for which the guarantee institution is responsible and apply Article 1(1) of the Directive directly?

In answer to the first two questions, the Court sought to ascertain the conditions under which claims in respect of *"salarios de tramitación"* are covered by the concept of employees' claims arising from contracts of employment or employment relationships referred to in Article 1(1) of the Directive. Only those claims relating to pay are covered within the meaning of Article 3(1). It is for national law to specify the term "pay" and define it (Article 2(2)). National legislation must nevertheless respect the general principles of law whose observance the Court ensures. Moreover, the requirements flowing from the protection of fundamental rights in the Community legal order are also binding on Member States when they implement Community rules. Fundamental rights include the general principle of equality and non-discrimination. That principle precludes comparable situations from being treated in a different manner unless the difference in treatment is objectively justified. The Court found that no convincing arguments had been submitted such as to justify the difference in treatment between claims for ordinary remuneration and claims for "*salarios de tramitación*" granted by judicial decision, on the one hand, and claims for "*salarios de tramitación*" acknowledged as the result of a conciliation procedure, on the other, for the purpose of excluding the latter claims from the scope of the Directive. The argument that this difference in treatment is justified by the desire to avoid misuse was rejected. Accordingly, claims in respect of "*salarios de tramitación*" must be regarded as employees' claims arising from contracts of employment or employment relationships and relating to pay, within the meaning of

Articles 1(1) and 3(1) of the Directive, irrespective of the procedure under which they are determined, if, according to the national legislation concerned, such claims, when recognised by judicial decision, give rise to liability on the part of the guarantee institution and if a difference in treatment of identical claims acknowledged in a conciliation procedure is not objectively justified.

As to the third question, the Court emphasised that the national court must set aside national legislation which, in breach of the principle of equality, excludes from the concept of "pay" within the meaning of Article 2(2) of the Directive claims such as those at issue; it must apply to members of the group disadvantaged by that discrimination the arrangements in force in respect of employees whose claims of the same type come, according to the national definition of "pay", within the scope of the Directive.

In conclusion, it should be noted that Directive 2002/74/EC of 23 September 2002 (European Parliament and Council of the European Union, 2002b) amended the Directive on the protection of employees in the event of the insolvency of their employer. The amendments attempt to adapt the provisions of the Directive to developments in the internal market, to new tendencies in Member States' legislation on insolvency and to the case law of the CJEC. The scope of the Directive has been modified as a result. The terms "insolvency" and "employee" have been redefined, the obligations of the guarantee institution have been revised and a section on transnational situations has been added. The Directive entered into force on the day of publication. Member States must come into conformity with it by 8 October 2005.

Minimum salaries for posted workers: Portugaia construçoes Lda, 24 January 2002 ([20])

The building sector is geographically one of the most dispersed, with very marked regional differences. It is an extremely labour-intensive area in which mobility levels are very high. Within the EU, problems

[20] CJEC, ruling of 24 January 2002, *Portugaia,* C-164/99, Rec. 2002, I-787.

concerning the posting of workers have put enormous pressure on working conditions to the extent that undertakings previously had the option of posting workers abroad and employing them there under the wage and working conditions of the country of origin. A lengthy legislative process led to the adoption of a Directive on this subject.

From 1992 onwards, the European Federation of Building and Wood Workers lobbied the Commission and the Parliament on a continuous basis with regard to posting. Several countries tried to resolve the problem by enacting their own national legislation: France passed 13 orders (1993) while Belgium, the Netherlands (1994) and Germany (1996) adopted the route of legislation and collective agreements. Germany suffered from a specific problem in that collective agreements could not be applied *erga omnes*. In 1996, Germany imposed a minimum salary for posted workers.

These systems of rules suffered from shortcomings, however. The legal framework contained in the Directive had to be created to make the *"lex loci"* rule binding in all Member States (Dufresne, 2001). After having been deadlocked for a number of years, the Directive was finally adopted in 1996 (European Parliament and Council of the European Union, 1996). Today, it applies where undertakings post workers to the territory of another Member State for the provision of a transnational service. It aims to abolish those uncertainties and obstacles which may hinder the freedom to provide services, by increasing legal certainty and allowing working conditions applying to posted workers to be defined whilst avoiding the abuse and exploitation of posted labour. The deadline fixed for its implementation in the Member States was 16 December 1999. The remuneration of posted workers is that set out in the collective agreements of the host country.

In the *Portugaia* case, the Court tackled the thorny problem of minimum salaries for posted workers. It thus had the opportunity to confirm its previous case law on posted workers in the *Finalarte* ruling ([21]).

---

21 CJEC, ruling of 25 October 2001, *Finalarte*, joint cases C-49/98, C-70/98, C-50/98, C-52/98 to 54/98, C-68/98 and C-69/98, Rec. 2001 I-7831.

Before considering the facts of the case, an overview of the relevant legislation is necessary. According to the German legislation on the posting of workers, the legal provisions laid down in a collective agreement in the construction industry declared to be of binding general application also apply to domestic employers established abroad and their employees working within the territorial scope of application of the collective agreement and must guarantee a single minimum wage for all workers within its scope of application. A breach is punishable as an offence.

The social partners in the German construction industry concluded a collective agreement laying down a minimum wage in the construction sector in the Federal Republic of Germany. The collective agreement was declared generally applicable with effect from 1 January 1997. Given that the facts in this case arose in 1997, prior to the deadline for the transposition of the above-mentioned Directive (16 January 1999), the provisions of that Directive are not applicable.

The facts are as follows. Portugaia is a company established in Portugal. Between March and July 1997, it carried out major structural building work in Tauberbischofsheim in Germany. In order to carry out that work, it posted a number of its workers to that building site. In March and May 1997, the employment office in Tauberbischofsheim carried out an investigation into the employment conditions on that building site. It concluded that Portugaia was paying the workers who had been the object of the inspection a wage lower than the minimum wage payable under the collective agreement applicable in this sector. It accordingly ordered payment of the sum outstanding, that is to say the difference between the hourly rate owing and that actually paid, multiplied by the total number of hours worked.

Portugaia lodged an objection against the recovery notice for payment of that sum before the *Amtsgericht Tauberbischofheim*, which referred to the Court of Justice of the EC the matter of the compatibility of the German rules with Community law and more specifically with the freedom to provide services.

The Court began by referring to its case law which establishes that in principle Community law does not preclude a Member State from requiring an undertaking established in another Member State which provides services in the territory of the first State to pay its workers the minimum remuneration laid down by the national rules of that State. It is therefore for the national authorities or, as the case may be, the courts of the host Member State, before applying the minimum-wage legislation to service providers established in another Member State, to determine whether that legislation does indeed, and by appropriate means, pursue an objective of public interest, namely the protection of employees. Measures restricting the freedom to provide services cannot be justified by economic aims, such as the protection of domestic businesses. It is, thus, for the national court to determine whether the rules in question ensure the protection of posted workers. It is necessary to determine whether those rules confer a genuine benefit on the workers concerned, which significantly augments their social protection.

On the question concerning the possible derogation provided for under German legislation, the Court points out that the fact that a domestic employer may, in concluding a collective agreement specific to one undertaking, pay wages lower than the minimum wage laid down by a collective agreement declared to be generally binding, whilst an employer established in another Member State cannot do so, constitutes an unjustified restriction on the freedom to provide services.

Conclusion

The number of cases on which rulings have been made, of which we have only given a brief impression, is a testimony to the intensity of activity at the Community's highest court. It also reveals the difficulties experienced by national courts in applying Community law. The year 2003 is unlikely to be an exception.

In the *Wiebke Busch* case (22), the Court will rule on the question of whether a nurse who has taken educational leave is under an obligation to inform her employer if she knows she is pregnant when she wishes to return to work before the end of that leave, given that, due to her pregnancy, she will be unable to carry out all of her duties.

In the *Dory* case (23), the CJEC will tackle the question of the compatibility with Directive 76/207/EEC of the German law rendering military service compulsory only for men. Does such service constitute illegal discrimination against men, insofar as women may undertake military service but are not obliged to do so?

Under Directive 80/987/EEC on the protection of workers in the event of the insolvency of their employer, the Court will rule on whether the competent authority of a Member State may refuse to pay salary arrears to an employee of a bankrupt company when he holds 25% of the undertaking's capital and has failed to claim this pay for more than 60 days after having become aware of the collapse in the undertaking's creditworthiness (24).

In conclusion, a good deal of ink will continue to be spilt over Regulation 1408/71. The Court will rule, amongst other matters, on whether the home child-care allowance which parents may claim if they decide not to take up a guaranteed place in a public nursery should be considered as a family benefit within the meaning of the Regulation (25). The Court will also decide whether a pensioner, or a member of his family, who is entitled to draw a pension under the legislation of one Member State but who resides in another Member State where, pursuant to the Regulation, he receives sickness insurance benefits in kind as though he were a pensioner from that Member State, such benefits being chargeable to the social security institution of the State

22 *Wiebke Busch v. Klinikum Neustadt GmbH & Co Betriebs KG*, C-320/01.

23 *Alexander Dory v. Federal Republic of Germany,* C-186/01.

24 *Maria Walcher v. Bundesamt für Soziales und Behindertenwesen Steiermark,* C-201/01.

25 *Päivikki Maaheimo*, C-333/0.

responsible for paying the pension, is entitled to travel to the territory of the latter in order to receive medical treatment ([26]).

References

Council of the European Communities (1971), Regulation (EEC) 1408/71 of the Council of 14 June 1971 on the application of social security schemes to employed persons and their families moving within the Community, OJ L 149, 5 July 1971, pp.0002-0050.

Council of the European Communities (1976), Council Directive 76/207/EEC of 9 February 1976 on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions, OJ L 39, 14 February 1976, pp.0040-0042.

Council of the European Communities (1977), Council Directive 77/187/EEC of 14 February 1977 on the approximation of the laws of the Member States relating to the safeguarding of employees' rights in the event of transfers of undertakings, businesses or parts of businesses, OJ L 61, 5 March 1977, pp.0026-0028.

Council of the European Communities (1979), Council Directive 79/7/EEC of 19 December 1978 on the progressive implementation of the principle of equal treatment for men and women in matters of social security, OJ L 6, 10 January 1979, pp.0024-0025.

Council of the European Communities (1980), 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 L 283, 28 October 1980, pp.0023-0027.

Council of the European Union (2001), Council Directive 2001/23/EC of 12 March 2001 on the approximation of the laws of the Member States relating to the safeguarding of employees' rights in the event of

26 *RP Van der Duin v. Onderlinge Waarborgmaatschappij ANOZ,* C-156/01.

transfers of undertakings, businesses or parts of undertakings or businesses, OJ L 82, 22 March 2001, pp.0016-0020.

Dehousse, R. (1997), *La Cour de Justice des Communautés européennes*, Montchrestien, Paris.

Dufresne, A. (2001), "Le chantier de la coordination syndicale: l'état des négociations collectives au plan européen dans le secteur de la construction" in Ministère français de l'Emploi et du Travail (ed.), *La négociation en 2000, Tome III, les dossiers*, Ministère français de l'emploi et de la solidarité, Paris, pp.20-45.

European Parliament and Council of the European Union (1996), Directive 96/71/EC of the European Parliament and of the Council of 16 December 1996 concerning the posting of workers in the framework of the provision of services, OJ L 18, 21 January 1997, pp.0001-0006.

European Parliament and Council of the European Union (2002a), Directive 2002/73/EC of the European Parliament and of the Council of 23 September 2002 amending Council Directive 76/207/EEC on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions, OJ L 269, 5 October 2002, pp.005-0020.

European Parliament and Council of the European Union (2002b), Directive 2002/74/EC of the European Parliament and of the Council of 23 September 2002 amending Council Directive 80/987/EEC 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 L 270, 8 October 2002, pp.0010-0013.

Peltzer, L. (2002), "Entité économique et contexte économique, caractère conventionnel et renonciation au transfert: quelques précisions", *Chronique de Droit Social*, No.2002/5, pp.255-260.

Pennings, F. (2001), *Introduction to European Social Security Law*, Kluwer Law International, The Hague.

Vonfelt, G. (2000) (ed.), *L'égalité de traitement entre hommes et femmes*, European Institute of Public Administration, Maastricht.