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who is posted by his employer to work in another Member State, is replaced by another worker posted by another employer, the latter worker must be regarded as being 'sent to replace another person' within the meaning of that provision so that he cannot benefit from the specific rule laid down in that provision in order to remain subject to the legislation of the Member State in which his employer normally carries on its activities? Is it, in that regard, relevant that the fact that the employers of the two workers concerned have their registered office in the same Member State or the fact that they may have personal or organisational ties?

Ruling

1. Article 5(1) of Regulation (EC) No 987/2009 of the European Parliament and of the Council of 16 September 2009 laying down the procedure for implementing Regulation (EC) No 883/2004, as amended by Commission Regulation (EU) No 1244/2010 of 9 December 2010, read together with Article 19(2) of Regulation No 987/2009, as amended by Regulation No 1244/2010, must be interpreted as meaning that an A1 certificate, issued by the competent institution of a Member State under Article 12(1) of Regulation (EC) No 883/2004 of the European Parliament and of the Council of 29 April 2004 on the coordination of social security systems, as amended by Regulation No 1244/2010, binds not only the institutions of the Member State in which the activity is carried out, but also the courts of that Member State.
2. a. Article 5(1) of Regulation No 987/2009, as amended by Regulation No 1244/2010, read together with Article 19(2) of Regulation No 987/2009, as amended by Regulation No 1244/2010, must be interpreted as meaning that an A1 certificate issued by the competent institution of a Member State under Article 12(1) of Regulation No 883/2004, as amended by Regulation No 1244/2010, is binding on both the social security institutions of the Member State in which the activity is carried out and the courts of that Member State so long as the certificate has not been withdrawn or declared invalid by the Member State in which was issued, even though the competent authorities of the latter Member State and the Member State in which the activity is carried out have brought the matter before the Administrative Commission for the Coordination of Social Security Systems which held that that certificate was incorrectly issued and should be withdrawn.
   b. Article 5(1) of Regulation No 987/2009, as amended by Regulation No 1244/2010, read together with Article 19(2) thereof, as amended by Regulation No 1244/2010, must be interpreted as meaning that an A1 certificate issued by the competent institution of a Member State under Article 12(1) of Regulation No 883/2004, as amended by Regulation No 1244/2010, binds both social security institutions of the Member State in which the activity is carried out and the courts of that Member State, if appropriate with retroactive effect, even though that certificate was issued only after that Member State determined that the worker concerned was subject to compulsory insurance under its legislation.
3. Article 12(1) of Regulation No 883/2004, as amended by Regulation No 1244/2010, must be interpreted as meaning that, if a worker who is posted by his employer to carry out work in another Member State is replaced by another worker posted by another employer, the latter employee must be regarded as being 'sent to replace another person', within the meaning of that provision, so that he cannot benefit from the special rules laid down in that provision in order to remain subject to the legislation of the Member State in which his employer normally carries out its activities.

The fact that the employers of the two workers concerned have their registered offices in the same Member State or that they may have personal or organisational links is irrelevant in that respect.

ECJ 6 September 2018, case C-17/17 (Grenville Hampshire), Insolvency

Grenville Hampshire – v – The Board of the Pension Protection Fund, British case

Legal background

Directive 2008/94/EC offers protection to employees whose (ex-)employers become insolvent. Article 8 provides that Member States must also protect pensions, regardless whether these are immediate or prospective. The UK implemented the Directive in the Pensions Act 2004. It established a statutory fund known as the Pension Protection Fund (PPF). The PPF assumes responsibility for pension claims when an employer becomes insolvent. There are various ceilings and limitations, which cap the amounts to which employees are entitled.

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Facts

Mr Hampshire was employed by Turner & Newall plc (T&N) and participated in its pension scheme from 1971 to 1998. He retired in 1998 and became entitled to an early retirement pension. His ex-employer became insolvent in 2001. While his 'normal' pension would have been GBP 60,240, his pension fell by approximately 67% due to the insolvency. Even worse, as the annual increases were limited in time as well, he would lose 75% compared to the pension he would have received, were not for the insolvency. Mr Hampshire's pension was paid by his original pension fund, but (under the applicable rules) the amount was calculated by the PPF.
Mr Hampshire challenged the valuation, but this was rejected. He then brought an appeal before the High Court of Justice (England & Wales) Chancery Division. After this was dismissed, he appealed to the Court of Appeal (England & Wales) Civil Division. Mr Hampshire argued that Article 8 of Directive 2008/94, as interpreted by the ECJ, implied that an employee must receive at least 50% of the value of their acquired entitlements to old-age benefits. The PPF however argued that case law provided that this 50% was to be calculated on average rather than on an individual basis. The court decided to stay proceedings and refer questions to the ECJ, including the question of whether Article 8 of the Directive was directly effective in the present circumstances.

Questions

1. Must Article 8 of Directive 2008/94 be interpreted as meaning that every individual employee must receive compensation corresponding to at least 50% of the value of his or her accrued entitlement under a supplementary occupational pension scheme in the event of the employer's insolvency, or whether it is sufficient that such compensation is guaranteed for the great majority of employees, but, owing to certain limitations imposed by national law, some of the employees nevertheless receive compensation of less than 50% of the value of their accrued entitlement?
2. Does Article 8 of Directive 2008/94 have direct effect?

Consideration

According to Article 8 of Directive 2008/94, Member States must protect the interests of (former) employees and their pensions in cases of insolvency. They have a considerable amount of freedom and are not obliged to guarantee pensions fully. For legitimate social and economic objectives, and while observing the proportionality principle, they can reduce the accrued entitlements.

However, benefits limited to less than half the entitlement accrued cannot be considered to fall within the definition of the word 'protect' used in Article 8 (e.g. *Robins and Others*, C-278/05). This is an individual minimum guarantee for each employee. Otherwise, the purpose of the Directive to protect each employee would be seriously undermined. Contrary to what the UK government has argued, this is of general application.
Further, there can be situations in which losses of less than 50% could still be regarded as manifestly disproportionate. Lastly, the 50% must be calculated by reference to envisaged pension growth.
As regards direct effect, provisions that are unconditional and sufficiently precise can be invoked against Member States and all organs of their administration, as well as against organisations or bodies that are subject to the authority or control of the State or which possess special powers beyond those resulting from the normal rules applicable to relations between individuals (*Farell*, C-413/15).
It follows that Article 8 of the Directive, as interpreted by the ECJ, is clear and precise, directed to the State and unconditional. Article 8 allows a broad discretion in terms of how it is implemented in order that it fulfil its aim. However the exercise of this discretion cannot prevent an individual from relying on the minimum protection. In this case, the UK has delegated responsibility to the PPF, which serves as an organ of State. Consequently, Article 8 can be invoked against the PPF.

Ruling

1. 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 every individual employee must receive old-age benefits corresponding to at least 50% of the value of their accrued entitlement under a supplementary occupational pension scheme in the event of the employer's insolvency.
2. In circumstances such as those in this case, Article 8 of Directive 2008/94 has direct effect and may therefore be invoked before a national court by an individual employee in order to challenge a decision of a body such as the Board of the Pension Protection Fund.

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