

# ECJ 19 December 2019, case C-168/18 (Pensions- Sicherungs-Verein VVaG), Insolvency, pension

Pensions-Sicherungs-Verein VVaG – v – Günther  
Bauer, German case

## Summary

A reduction of old-age pensions under Directive 2008/94 is manifestly disproportionate if the former employee lives or would have to leave below Eurostat's at-risk-of-poverty threshold, even if s/he receives at least half of the amounts of the benefits from his/her acquired rights.

## Legal background

Directive 2008/94 aims to protect employees if their employer is insolvent. According to Article 1, it applies to employees' claims arising from contracts of employment or employment relationships and existing against employers who are in a state of insolvency. Article 8 stipulates that 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.

Germany has inter alia implemented the Directive in the Law on Occupational Pensions. The insolvency insurance institution, PSV, covers occupational pensions in case of insolvency. If the occupational pensions are decreased, the (former) employer must offset these contributions by way of compensations. While PSV covers insolvency of the pension fund, it does not cover the employer's compensations for lower pensions if the employer becomes insolvent.

## Facts

In 2000, Mr Bauer got entitled to an occupational old-age pension, paid by the Pensionskasse. However, since 2003, the Pensionskasse experienced financial difficulties. It therefore had (in accordance with law) to reduce the amount of pension benefits paid several times. For

Mr Bauer, this implied that his monthly pension (amounting to EUR 599.49 in June 2003) was reduced by 13.8% or EUR 82.74 – total pension benefits, including a Christmas bonus, were reduced by 7.4% – between 2003 and 2013. Mr Bauer's former employer initially offset the reductions in benefits paid by the Pensionskasse but became insolvent in January 2012. PSV took over responsibility off the pension supplement of EUR 398.90 per month and the annual Christmas bonus of EUR 1451.05. However, it refused to offset the reductions applied to the old-age pension. Mr Bauer then started proceedings. Ultimately, the Bundesarbeitsgericht (Federal Labour Court) asked preliminary questions.

## Questions

1. Must Article 8 of Directive 2008/94 be interpreted as applying to a situation in which an employer, which provides occupational old-age pension benefits through an inter-occupational institution, cannot, on account of its insolvency, offset losses resulting from a reduction in the benefits paid by the inter-occupational institution, a reduction which was authorised by the State supervisory authority for financial services which is the prudential regulator for that institution?
2. Under what specific circumstances a reduction in the amount of occupational old-age pension benefits paid to a former employee, on account of the insolvency of his or her former employer, must be regarded, for the purposes of applying Article 8 of Directive 2008/94, as manifestly disproportionate, giving rise to the obligation on Member States to ensure a minimum degree of protection, even though the former employee receives at least half of the amount of the benefits arising from his or her acquired rights to an occupational old-age pension?
3. Is Article 8 of Directive 2008/94 capable of having direct effect, so that it may be relied upon against an institution governed by private law that is designated by the State as the institution which guarantees occupational pensions against the risk of an employer's insolvency?

## Consideration

### Question 1

Article 1(1) provides that the directive applies to employees' claims arising from contracts of employment or employment relationships and existing against employers who are in a state of insolvency. Article 8 provides that Member States are to ensure that the necessary measures are taken to protect the interests from the employees if their employer becomes insolvent.

Mr Bauer is a former employee, his former employer is in a state of insolvency, and at the date of the onset of

his employer's insolvency and on account thereof, his immediate entitlement to old-age benefits was compromised. After all, his employer was no longer able to offset the reductions. As its substantive conditions are satisfied, article 8 applies to the situation.

### Question 2

Member States have considerable latitude in determining both means and level of protection. Article 8 does not require a full guarantee. In the pursuit of legitimate social and economic objectives, the entitlements of employees can be reduced, if they have due regard for, inter alia, the principle of proportionality. In principle, Member States must provide a minimum degree of protection [*Webb-Sämann*, C-454/15 and *Hampshire*, C-17/17].

The Court has already held that Article 8 requires a former employee to receive at least half of the old-age benefits arising out of the accrued pension rights under a supplementary occupational pension scheme [*Robins and Others*, C-278/05, paragraph 57; *Hogan and Others*, C-398/11, paragraph 51; *Webb-Sämann*, C-454/15, EU:C:2016:891, paragraph 35; and *Hampshire*, C-17/17, paragraph 50]. In addition, the losses suffered may also not be manifestly disproportionate considering the obligation to protect the interests of employees [*Webb-Sämann*, C-454/15, paragraph 35 and *Hampshire*, C-17/17, paragraph 50].

The explanatory memorandum to the original proposal (COM(78) 141 final) makes it apparent that the objective was to offer protection in circumstances which represent a threat to the livelihood of an employee and his or her family. The present Article 8 in particular intends to protect the employee from particular hardship caused by the loss of rights conferring immediate entitlement to benefits under a supplementary pension scheme. Consequently, a reduction in a former employee's old-age benefits are manifestly disproportionate where it follows from that reduction and, as the case may be, from how it is expected to develop, that the former employee's ability to meet his or needs is seriously compromised. That would be the case if a reduction in old-age benefits were suffered by a former employee who, as a result of the reduction, is living, or would have to live, below the at-risk-of-poverty threshold determined by Eurostat for the Member State concerned.

Article 8 of Directive 2008/94 requires, as an obligation to provide a minimum degree of protection, that a Member State guarantee, to a former employee exposed to such a reduction in his or her old-age benefits, compensation in an amount which, without necessarily covering all of the losses suffered, is such as to prevent them from being manifestly disproportionate.

### Question 3

Provisions of a directive that are unconditional and sufficiently precise may be relied upon by individuals against a Member State and all the organs of its administration, as well as against organisations or bodies which are subject to the authority or control of the State or

which possess special powers beyond those which result from the normal rules applicable to relations between individuals [*Hampshire*, C-17/17, paragraph 54 and the case-law cited]. Organisations or bodies that are required, by a public body, to perform a task in the public interest and have been given, for that purpose, special powers may also be treated as comparable to the State [*Farrell*, C-413/15, paragraph 34, and *Hampshire*, C-17/17, paragraph 55].

Three points must be considered:

1. is Article 8 of Directive 2008/94 is unconditional and sufficiently precise, namely the identity of the persons entitled to the protection provided for;
2. the content of that protection; and
3. the identity of the person liable to provide the protection.

This leads to the following results.

1. It is clear from the wording that the directive is intended to protect employees and former employees affected by the insolvency of their employer or former employer. This fulfils the requirements.
2. The purpose of Article 8 is to provide each and every employee with a minimum level of protection [*Hampshire*, C-17/17, paragraphs 46-47 and the case-law cited]. Without exception, the compensation must be at least 50% of the value of the acquired rights under a supplementary occupational pension scheme, which is a clear, precise and unconditional obligation imposed on Member States, intended to confer rights to individuals. [*Hampshire*, C-17/17, paragraph 60]. The same applies to guarantee a minimum degree of protection against reductions which are manifestly disproportionate.
3. PSV was designated as an institution which guarantees occupational pensions against the risk of an employer's insolvency. It is subject to prudential regulation by the State supervisory authority for financial services. It also levies the mandatory contributions required for insolvency insurance from employers under public law procedures and can establish the conditions for enforcement by way of an administrative act. Against this background, PSV must be treated as comparable to the State, so that, in principle, the unconditional and sufficiently precise provisions laid down in Article 8 of Directive 2008/94 may be relied upon against it. However, as the Advocate General pointed out in point 96 of his Opinion, this is only the case if the Member State has delegated to PSV the obligation of Article 8 to provide a minimum degree of protection in respect of old-age benefits, which is a matter for the referring court to determine. It appears that the guarantee for which PSV is responsible does not extend to benefits paid by pension funds such as the pension funds at issue in the main proceedings.

## 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 applying to a situation in which an employer, which provides occupational old-age pension benefits through an inter-occupational institution, cannot, on account of its insolvency, offset losses resulting from a reduction in the amount of those benefits paid by the inter-occupational institution, a reduction which was authorised by the State supervisory authority for financial services which is the prudential regulator for that institution.
2. Article 8 of Directive 2008/94 must be interpreted as meaning that a reduction in the amount of occupational old-age pension benefits paid to a former employee, on account of the insolvency of his or her former employer, is regarded as being manifestly disproportionate, even though the former employee receives at least half of the amount of the benefits arising from his or her acquired rights, where, as a result of the reduction, the former employee is already living, or would have to live, below the at-risk-of-poverty threshold determined by Eurostat for the Member State concerned.
3. Article 8 of Directive 2008/94, which lays down an obligation to provide a minimum degree of protection, is capable of having direct effect, so that it may be relied upon against an institution governed by private law that is designated by the State as the institution which guarantees occupational pensions against the risk of an employer's insolvency where, in the light of the task with which it is vested and the circumstances in which it performs the task, that institution can be treated as comparable to the State, provided that the task of providing a guarantee with which the institution is vested actually covers the type of old-age benefits in respect of which the minimum degree of protection provided for in Article 8 is sought.

## ECJ 19 December 2019, case C-460/18 P (HK – v – Commission), Miscellaneous

HK – v – European Commission, Council of the European Union, EU case

### Summary

Denial of surviving spouse pension found legitimate, as living together cannot be considered equal to marriage or registered non-marital partnership.

### Ruling

The Court:

1. Sets aside the judgment of the General Court of the European Union of 3 May 2018, HK v Commission (T-574/16, not published, EU:T:2018:252);
2. Dismisses HK's action seeking annulment of European Commission's decision refusing to grant him the benefit of the survivor's pension and to pay compensation for the material and non-material damage alleged;
3. Orders HK, the European Commission and the Council of the European Union to bear their own costs at first instance and on appeal.

65

## ECJ 19 December 2019, case C-465/18 (Comune di Bernareggio), Miscellaneous

AV, BU – v – Comune di Bernareggio (intervener: CT), Italian case

### Summary

An unconditional right of pre-emption to pharmacists employed by the municipal pharmacy in a tendering procedure is contrary to the freedom of establishment.