

SUMMARY

ECJ 19 September 2013, case C-5/12 (Marc Betriu Montull - v - INSS), Gender discrimination

Facts

The Spanish Workers' Statute grants maternity leave lasting 16 weeks. Of these, six must be taken by the mother immediately following the birth of the child. Article 48(4) of the Workers' Statute provides that the mother may elect for the father to take all or part of the remaining ten weeks of leave; in other words, she may transfer ten weeks to the father. The parent(s) are entitled to certain social security payments (maternity benefits) during their leave. The Workers' Statute applies only to employees, not to self-employed persons (unless they have elected voluntarily to be covered by the state social security legislation).

Ms Ollé was a self-employed lawyer. She was not covered by the state social security scheme. She gave birth to a child and granted ten weeks of leave to her husband Mr Montull, who was an employee and therefore covered by the state social security scheme. He applied to the social security institute (the INSS) for the maternity benefit payments for the period of ten weeks following the six weeks after the date of birth. The application was turned down on the ground that the right to leave is a right of mothers who are covered by the state social security scheme and that the father does not have his own autonomous, separate right to leave, independent of the mother's right. As Ms Ollé was not covered by the state social security scheme, she did not have a primary right to leave, meaning that Mr Montull did not have a derived right.

National proceedings

Mr Montull brought proceedings before the local *Juzgado de lo Social*, seeking a ruling to the effect that he was entitled to maternity benefits for ten weeks. He argued that his right to equal treatment had been breached. The court first asked the Spanish Constitutional Court

whether said Article 48(4) is constitutional. The Constitutional Court replied affirmatively, whereupon the court referred questions to the ECJ, namely whether Article 48(4) is compatible with Directive 76/207 on sex discrimination and Directive 96/34 on parental leave. The court noted that, although the situation of a father and that of a mother who are both employees (and therefore covered by the state social security scheme) are comparable, they are treated differently insofar as the father's right to maternity benefits is framed as a right which derives from that of the mother, and not as an autonomous right. In addition, Article 48(4) treats biological fathers and adoptive fathers differently, in that, in the case of adoption, an employed father can take all 16 weeks' leave and receive the corresponding benefit, even where the mother is self-employed and not covered by the state social security scheme.

ECJ's findings

1. In order to respond usefully to the referring court, it is necessary to take into account Directive 92/85 on occupational safety and health of pregnant workers and workers who have recently given birth, even though the referring court has limited its questions to Directives 76/207 and 96/34 (§ 40-46).
2. Article 8 of Directive 92/85 provides that Member States are to take the necessary steps to ensure that women workers are entitled to a continuous period of maternity leave of at least 14 weeks, which period must include compulsory leave of at least two weeks directly before or after confinement. With the exception of these two weeks, the worker may waive the right to leave. Consequently, Directive 92/85 does not preclude an employed mother from transferring her right to leave to the father, with the exception of said two weeks (§ 48-58).
3. A situation where a father is not entitled to maternity leave because the mother has chosen not to be covered by the state social security scheme does not fall within the scope of Directive 92/85 (§ 59).
4. The measure at issue establishes a difference on grounds of sex within the meaning of Directive 76/207, as between mothers who are employed persons and fathers with the same status. However, that directive is without prejudice to provisions concerning the protection of women, and a measure such as that at issue is intended to protect a woman's biological condition during and after pregnancy. A mother who is self-employed and not covered by a State social security scheme does not enjoy any primary right to maternity leave. It follows that Directive 76/207 does not preclude a measure such as that at issue (§ 60-66).
5. At the time of the facts in the main proceedings there was no prohibition in EU law of discrimination between the adoptive father and the biological father in relation to maternity leave (§ 67-75).

Ruling

Directives 92/85 and 76/207 must be interpreted as not precluding a national measure, such as that at issue in the main proceedings, which provides that the father of a child, who is an employed person, is entitled, with the consent of the mother, who is also an employed person, to take maternity leave for the period following the compulsory leave of six weeks which the mother must take after childbirth except where her health would be at risk. By contrast, a father of a child who is an employed person is not entitled to take such leave where the mother of his child is not an employed person and is not covered by a State social security scheme.

Creator: European Court of Justice (ECJ)

Verdict at: 2013-09-19

Case number: C-5/12