SUMMARY

ECJ 19 September 2018, C-41/17 (González Castro), Gender discrimination, working time

<p>Isabel González Castro – v – Mutua Umivale, ProsegurEspaña SL, Instituto Nacional de la Seguridad Social (INSS), Spanish case</p>
<p>Even if a breastfeeding worker only works for part of her shift at night, the rules on the health and safety of pregnant and breastfeeding workers and those having recently given birth set out in Directive 92/85 apply, meaning that an assessment of her individual situation is necessary. If the worker brings a claim before the court, once she has provided a prima facie case of discrimination, the burden of proof switches to the employer. In other words, reversal of the burden of proof is also applicable to Article 7 (night work) of Directive 92/85/EEC.</p>

Legal background

Directive 92/85/EEC contains measures to encourage improvements in the health and safety at work of pregnant workers and workers who have recently given birth or are breastfeeding. Article 4 requires employers to conduct a risk assessment to assess any risks to health or safety and any possible effect on the pregnancies or breastfeeding of workers, and to decide what measures should be taken. Article 5 stipulates that the necessary measures shall be taken to ensure that the exposer of a worker to such risks is avoided. These measures may include temporarily adjusting working conditions and/or working hours, or – if these are not feasible or cannot reasonably be required on duly substantiated grounds – moving the worker to another job. If this is not possible, the worker must be granted leave in accordance with

national legislation and/or practice for the whole of the period necessary to protect her health. Article 7 stipulates that Member States shall take the necessary measures to ensure that workers are not obliged to perform night work during their pregnancy and after childbirth for a certain period (to be determined by a national authority competent for safety and health). These measures must entail the possibility to transfer to daytime work or leave from work or extension of maternity leave where such a transfer is not technically and/or objectively feasible or cannot be reasonably be required on duly substantiated grounds.

Directive 2006/54 has the purpose of ensuring implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation. Article 2(2)(c) qualifies any less favourable treatment of a woman related to pregnancy or maternity leave within the meaning of Directive 92/85 as discrimination. Article 14(1) of the Directive forbids discrimination on the grounds of sex in relation to employment and working conditions, including dismissals, as well as pay. Article 19(1) requires Member States to ensure that it is for the defendant to prove that there has been no breach of the principle of equal treatment, once the plaintiff has demonstrated facts from which it may be presumed that there has been direct or indirect discrimination. Following Article 19(4), Article 19(1) also applies to situations covered by the above-mentioned Directive 92/85, insofar as discrimination based on gender is concerned.

Directive 2003/88/EC lays down minimum safety and health requirements for the organisation of working time. Article 2(3) defines night time as "any period of not less than seven hours [...] which must include, in any case, the period between midnight and 5.00". Article 2(4) defines a night worker *inter alia* as "any worker who is likely during night time to work a certain proportion of his annual working time [...]".

Facts

Ms González Castro worked as security guard for Prosegur. She gave birth in November 2014 to a boy who was then breastfed. Since March 2015, she worked in a shopping centre in a variable rotating pattern of eight-hour shifts. Some of these shifts partly took place during nightly hours. Ms González Castro initiated the (Spanish) procedure for obtaining an allowance in respect of risk during breastfeeding. To that end, she requested the insurer to issue a medical certificate indicating the existence of a risk to breastfeeding posed by her work. The insurer rejected her request, as well as her complaint. She then brought an action with the Social Court in Lugo, Spain, which was dismissed. She then appealed with the referring court, the High Court of Justice of Galicia, Spain. That court wondered about the explanation of the concept of 'night work' within the meaning of Article 7 of Directive 92/85. It also sought guidance on whether it was appropriate to apply the rules regarding the burden of

proof. It therefore decided to stay proceedings and asked preliminary questions.

Questions

Must Article 7 of Directive 92/85 be interpreted as applying to a situation, such as that at issue in the main proceedings, where the worker concerned does shift work in the context of which only part of her duties are performed at night?
Must Article 19(1) of Directive 2006/54 be interpreted as applying to a situation, such as that at issue in the main proceeding, in which a worker, who has been refused a medical certificate indicating the existence of a risk to breastfeeding posed by her work and, consequently, an allowance in respect of risk during breastfeeding, challenges, before a court or other competent authority of the Member State concerned, the risk assessment of her work and, if so, what are the conditions for application of that provision in such a situation?

Consideration

Article 7 of Directive 92/85 is unclear about the exact scope of the concept of 'night work'. However, it follows from Article 1 that the directive is part of a series of directives (based on Article 118a of the EEC Treaty) seeking to set minimum requirements, especially as regards improvements in the working environment to protect the safety and health of workers. This also applies to Directive 2003/88/EC. This Directive provides a definition of 'night worker'. It is in the interest of pregnant workers that the provisions about night work in Directive 92/85 must not be interpreted less favourably than in Directive 2003/88. This is supported by the purpose of Article 7, which aims to strengthen the protection of pregnant workers. This purpose would be undermined if it would allow for a different interpretation.

As for the second question, the ECJ had previously held that Article 19(1) of Directive 2006/54 applies to a situation in which a breastfeeding worker challenges (before a court or other competent authority of the Member State concerned) the risk assessment of her work, in so far as she claims that the assessment was not conducted in accordance with Article 4(1) of Directive 92/85. Failure to do so constitutes less favourable treatment and is therefore discriminatory. The risk assessment include a specific assessment taking into account the individual situation of the employee (*Otero Ramos*, C-531/15).

Article 4 of Directive 92/85 is the general provision which sets out the cation to be taken. Article 7 aims, more specifically, to strengthen that protection by establishing the principle that pregnant workers and workers who recently gave birth or are breastfeeding are not obliged to perform night work as long as they submit a medical certificate indicating the need for such protection. It therefore cannot be subject to less stringent requirements. This is

supported by the guidelines, which expressly refer to night work and the need for a specific assessment for breastfeeding workers. Consequently, the lack of such assessment would constitute direct discrimination on grounds of sex. Therefore, article 19 of Directive 2006/54 (on the burden of proof) applies as well.

It follows from the facts that there was no specific assessment taking into account the Ms González Castro's specific situation. The fact that her work is not included in the list of 'dangerous activities' (which is annexed to Directive 92/85) does not mean that no assessment should take place, as Articles 4 and 7 of Directive 92/85 and Article 19 of Directive 2006/54 would be useless. It also should be noted that the same rules of evidence apply in the context of Article 5, or, where appropriate, Article 7(2) of Directive 92/85.

Ruling

Article 7 of Council Directive 92/85/EEC of 19 October 1992 on the introduction of measures to encourage improvements in the safety and health at work of pregnant workers and workers who have recently given birth or are breastfeeding must be interpreted as applying to a situation, such as that at issue in the main proceedings, where the worker concerned does shift work during which only part of her duties are performed at night.
Article 19(1) of Directive 2006/54/EC of the European Parliament and of the Council of 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (recast) must be interpreted as applying to a situation, such as that at issue in the main proceeding, in which a worker, who has been refused a medical certificate indicating the existence of a risk to breastfeeding posed by her work and, consequently, an allowance in respect of risk during breastfeeding, challenges, before a court or other competent authority of the Member State concerned, the risk assessment of her work, provided that that worker adduces factual evidence to suggest that that evaluation did not include a specific assessment taking into account her individual situation and thus permitting the presumption that there is direct discrimination on the grounds of sex, within the meaning of Directive 2006/54, which it is for the referring court to ascertain. It is then for the respondent to prove that that risk assessment did actually include such a specific assessment and that, accordingly, the principle of non-discrimination was not infringed.

Creator: European Court of Justice (ECJ)
Verdict at: 2018-09-19
Case number: C-41/17