

SUMMARY

## **ECJ 14 July 2016, case C-335/15 (Ornano), Maternity leave**

***&lt;p&gt;EU law does not give an employee on maternity a right to full pay while on leave.&lt;/p&gt;***

### **Summary**

EU law does not give an employee on maternity a right to full pay while on leave.

### **Facts**

In 2007, Ms Ornano, an Italian judge, requested payment of an expense allowance that she was not paid during two periods of maternity leave in 1997/1998 and 2000/2001. Until 2005, Italian law provided that judges were not eligible for this allowance during periods of maternity leave. For this reason, Ms Ornano's request was denied.

### **National proceedings**

Ms Ornano appealed to the Consiglio di Stato. It requested the ECJ to pronounce on whether the Italian law, as it stood before 2005, was compatible with EU law, including the Maternity Directive 92/85 and the Treaty provisions on gender equality.

### **ECJ's findings**

-

Article 11(2)(b) of Directive 92/85 provides that, in the case of maternity leave, the maintenance of a payment to, and/or entitlement to an adequate allowance for, workers must be ensured. Article 11(3) provides that the allowance referred to in paragraph 2(b) is to be

deemed adequate if it guarantees income at least equivalent to that which the worker concerned would receive in the event of a break in her activities on grounds connected with her state of health, subject to any ceiling laid down under national legislation. The concept of 'pay' used in Article 11 encompasses the consideration paid directly or indirectly by the employer during the worker's maternity leave in respect of her employment. By contrast, the concept of an 'allowance,' to which Article 11 also refers, includes all income received by the worker during her maternity leave not paid to her by her employer pursuant to the employment relationship (§ 29-30).

-

According to the Court's settled case-law, workers cannot rely on Article 11(2) and (3) of Directive 92/85 to claim that they should continue to receive full pay while on maternity leave as though they were actually working. It is thus necessary to distinguish the concepts of 'payment' referred to in Article 11(2) and (3) of Directive 92/85 from the concept of 'full pay' received when the person is actually working and which, in the present case, includes the special judicial allowance related to expenses that ordinary judges incur in the performance of their professional functions (§ 31-32).

-

As is clear from Directive 92/85 and the case-law of the Court, the legislature of the European Union wished to ensure that, during her maternity leave, the worker should receive an income of an amount at least equivalent to that of the allowance provided for by national social security legislation in the event of a break in her activities on health grounds. When a worker is absent from work because she is on maternity leave, the minimum protection required by Article 11(2) and (3) of Directive 92/85 does not therefore require that the person concerned should continue to receive full pay (§ 33-34).

-

Benefits which the employer pays, whether under legislative provisions or an employment contract, to a worker on maternity leave constitute pay within the meaning of Article 119 of the EC Treaty (subsequently Article 141 EC) and Article 1 of Directive 75/117. According to the Court's settled case-law, however, discrimination involves the application of different rules to comparable situations or the application of the same rule to different situations. Women taking maternity leave provided for by national legislation are in a special position which requires them to be afforded special protection, but which is not comparable either to that of a man or to that of a woman actually at work (§ 38-39).

-

Therefore, the principle of equal pay between men and women laid down in Article 119 of the EC Treaty (subsequently Article 141 EC) and set out in detail in Directive 75/117 neither requires that women should continue to receive full pay during their maternity leave nor lays down specific criteria for determining the amount of benefit payable to them during that period, provided that the amount is not set so low as to jeopardise the purpose of maternity leave. However, to the extent that it is calculated on the basis of pay received by a woman before the commencement of maternity leave, the amount of benefit must include pay rises awarded between the beginning of the period covered by the reference pay and the end of maternity leave, as from the date on which they take effect. It follows from that case-law that the mere fact that an ordinary judge was not entitled to the special judicial allowance during a period of compulsory maternity leave, unlike her male colleagues who were working, does not constitute discrimination on the grounds of sex within the meaning of Article 119 of the EC Treaty (§ 40-41).

## **Judgment**

Article 119 of the EC Treaty (subsequently Article 141 EC), Article 1 of Council Directive 75/117 [...] and Article 11(2)(b) and 11(3) of Council Directive 92/85 [...] must be interpreted, in a situation where the Member State concerned did not provide for the maintenance of all the elements of pay to which an ordinary judge was entitled before her maternity leave, as not precluding a national law, such as that at issue in the main proceedings, under which, in the case of a period of compulsory maternity leave taken prior to 1 January 2005, an ordinary judge is not entitled to receive an allowance in respect of costs that ordinary judges incur in the performance of their professional functions, provided that the worker received, during that period, an income in an amount at least equivalent to that of the benefit provided for under national social security legislation which she would have received in the event of a break in her activities on grounds connected with her state of health, this being a matter for the national court to determine.

---

**Creator:** European Court of Justice (ECJ)

**Verdict at:** 2016-07-14

**Case number:** C-335/15 (Ornano)