SUMMARY

ECJ 20 December 2017, case C-103/16 (Porras Guisado), Unfair dismissal, Collective redundancies

<p>Directive 92/85 does not preclude national legislation that allows an employer to dismiss a pregnant worker in the context of a collective redundancy.</p>

Summary

Directive 92/85 does not preclude national legislation that allows an employer to dismiss a pregnant worker in the context of a collective redundancy.

Legal framework

Article 10(1) of Directive 92/85 protects female employees, during pregnancy, after delivery and during breastfeeding against dismissal, except in situations not connected with their condition which are permitted under national law and/or practice and, where applicable, provided that the competent authority has given its consent. Directive 98/59 is also relevant, as it concerns collective redundancies.

Facts

During 2013, Bankia SA were considering carrying out a collective redundancy and it agreed some selection criteria and criteria for priority status for retention, with staff representatives. On 13 November 2013, Ms Guisado – who was pregnant at the time – was notified of her dismissal by a letter stating that it was necessary to reduce the number of staff in the province where she worked. As Ms Guisado had scored amongst the lowest in the province on the criteria, her employment contract would be terminated.

National proceedings

Ms Guisado challenged her dismissal before the Juzgado de lo Social No 1 de Mataró (Social Court No 1, Mataró, Spain), which ruled in favour of Bankia. She appealed against that judgment to the Tribunal Superior de Justicia de Cataluña (High Court of Justice of Catalonia, Spain). The High Court of Justice sought clarification of the position of pregnant workers during collective redundancy procedures.

Questions put to the ECJ1

Must Article 10(1) of Directive 92/85 be interpreted to the effect that the 'exceptional cases not connected with their condition which are permitted under national legislation and/or practice…', as an exception to the prohibition against dismissing pregnant workers and workers who have recently given birth or are breastfeeding, do not correspond to the '… one or more reasons not related to the individual workers concerned…' referred to in Article 1(1)(a) of Directive 98/59, but are more restricted than the latter?

Must Article 10(2) of Directive 92/85 be interpreted as precluding national legislation which allows an employer to dismiss a pregnant worker in the context of a collective redundancy without giving her any grounds other than those justifying the collective redundancy and without informing her of exceptional circumstances?

Must Article 10(1) of Directive 92/85 be interpreted as precluding national legislation which does not, in principle, prohibit the dismissal of a worker who is pregnant, has recently given birth or is breastfeeding, as a preventative measure, but which provides, by way of reparation, only for that dismissal to be declared void when it is unlawful?

Must Article 10(1) of Directive 92/85 be interpreted as precluding national legislation which, in the context of a collective redundancy within the meaning of Directive 98/59, makes no provision for pregnant workers and workers who have recently given birth or are breastfeeding to be afforded, prior to that dismissal, priority status in relation to being either retained or reassigned to another post?

ECJ's findings

A pregnant worker who is dismissed, including after childbirth and during breastfeeding, within the context of a collective redundancy procedure, is protected both by Directive 92/85 and Directive 98/59. Consequently, the pregnant worker should benefit from the complementary rights provided for by those directives.

The prohibition against dismissal in Article 10(1) of Directive 92/85 aims to prevent any harmful effects on the physical and mental state of pregnant workers and workers who have recently given birth or who are breastfeeding that could result from being at risk of dismissal for reasons associated with their condition. For example, deciding to terminate the pregnancy. Therefore, dismissal is prohibited during the period from the beginning of pregnancy to the end of maternity leave.

However, a dismissal decision may not be in breach of Article 10(1) if the employer can provide substantiated grounds for the dismissal (unconnected with the pregnancy) in writing and the dismissal is permitted under national legislation and/or practice. A dismissal which results from a collective redundancy procedure within the meaning of Directive 98/59 – and which is not related to the individual workers – is covered by the exceptional situations referred to in Article 10(1) of Directive 92/85.

As for the second (rephrased) question, Article 10(2) of Directive 92/85 requires employers to cite substantiated grounds for the dismissal of a pregnant worker and to inform the worker of the reasons, not related to that worker, for making collective redundancies within the meaning of Article 1(1)(a) of Directive 98/59. Those reasons can be, inter alia, economic, technical or relating to the undertaking's organisation or production. In addition, the employer must inform the pregnant worker of the objective criteria chosen to identify the workers to be made redundant.Directive 92/85 precludes national legislation which does not prohibit the dismissal of a worker who is pregnant, has recently given birth or is breastfeeding, as a preventative measure, but only provides for such a dismissal to be declared void when it is unlawful. Article 10 of Directive 92/85 makes an express distinction between protection against dismissal as a preventative measure and protection from the consequences of dismissal. Member States are required to establish such 'double protection'. Preventive protection is of particular importance in the context of Directive 92/85, because of the harmful effects which the risk of dismissal may have on the physical and mental state of pregnant workers, including the particularly serious risk that a pregnant worker may be prompted to terminate her pregnancy. This concern is addressed by the prohibition of dismissal. On that basis, the ECJ considered that protection by way of reparation, even if it leads to the reintegration of the dismissed worker and the payment of wages not received because of dismissal, cannot replace

preventative protection. As a result, Member States cannot confine themselves to providing, by way of reparation, only for such a dismissal to be declared void when it is not justified.

Finally, Directive 92/85 does not preclude national legislation which in the context of a collective redundancy makes no provision for pregnant workers and workers who have recently given birth or who are breastfeeding to be afforded, prior to that dismissal, priority status in relation to either being retained or redeployed. Directive 92/85 does not require Member States to provide for such a priority status. Nevertheless, since the directive contains only minimum requirements, Member States are free to grant higher protection to pregnant workers and workers who have recently given birth or are breastfeeding.

Ruling

Article 10(1) of Council Directive 92/85/EEC of 19 October 1992 on the introduction of measures to encourage improvements in the health and safety at work of pregnant workers and workers who have recently given birth or are breastfeeding (tenth individual Directive within the meaning of Article 16(1) of Directive 89/391/EEC) must be interpreted as not precluding national legislation which permits the dismissal of a pregnant worker because of a collective redundancy within the meaning of Article 1(1)(a) of Directive 98/59/EC of 20 July 1998 on the approximation of the laws of the Member States relating to collective redundancies.

Article 10(2) of Directive 92/85 must be interpreted as not precluding national legislation which allows an employer to dismiss a pregnant worker in the context of a collective redundancy without giving any grounds other than those justifying the collective dismissal, provided that the objective criteria chosen to identify the workers to be made redundant are cited.

Article 10(1) of Directive 92/85 must be interpreted as precluding national legislation which does not prohibit, in principle, the dismissal of a worker who is pregnant, has recently given birth or is breastfeeding as a preventative measure, but which provides, by way of reparation, only for that dismissal to be declared void when it is unlawful.

Article 10(1) of Directive 92/85 must be interpreted as not precluding national legislation which, in the context of a collective redundancy within the meaning of Directive 98/59, makes no provision for pregnant workers and workers who have recently given birth or who are breastfeeding to be afforded, prior to that dismissal, priority status in relation to being either retained or redeployed, but as not excluding the right of Member States to provide for a higher level of protection for such workers.

1 As interpreted by the ECJ.

Creator: European Court of Justice (ECJ)
Verdict at: 2017-12-20
Case number: C-103/16 (Porras Guisado)