

SUMMARY

ECJ 19 October 2017, case C-531/15 (Otero Ramos), General discrimination, Gender discrimination

<p>The provisions on the burden of proof regarding the equal treatment of men and women in employment matters in Directive 2006/54 also apply to claims by breastfeeding workers based on Directive 92/85 (safety and health at work of pregnant workers and workers who have recently given birth or are breastfeeding).</p>

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Legal background

Directive 92/85 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 exposure 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.

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. It defines direct and indirect discrimination. Article 2(2)(c) treats 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 Directive 92/85, insofar as discrimination based on gender is concerned.

Facts

Ms Otero Ramos, a nurse in the accident and emergency unit of the University Hospital of A Coruña, gave birth to a child on 22 December 2011 whom she then breastfed. On 19 March 2012, she lodged a request for her working conditions to be adjusted and for preventative measures to be put in place, as the tasks required by her work were liable to have an adverse effect on her breast milk and exposed her to a health and safety risk. On 10 April 2012, the management of the University Hospital rejected her request, based on a report stating that Ms Otero Ramos's work did not pose any risk to the breastfeeding of her child.

On 8 May 2012, Ms Otero Ramos requested a medical certificate from INSS (the Spanish social security institute), as she was applying a financial allowance in respect of risk during breastfeeding. On 10 May 2012, the INSS rejected her request. The rejection was based on a statement of the director of human resources at the University Hospital that Ms Otero Ramos's job (nurse in the accident and emergency unit) had been included in the list of risk-free jobs drawn up by the University Hospital after consultation with the workers' representatives. Also, a doctor in the department of preventive medicine and occupational risks had reported that Ms Otero Ramos had been examined and declared fit to carry out her work.

National proceedings

Ms Otero Ramos challenged the INSS's decision, supported by a letter from her line manager (senior consultant of the University Hospital's accident and emergency unit) stating that the work of a nurse in that unit posed physical, chemical, biological and psychosocial risks to a breastfeeding worker and her child. On 24 October 2013, Social Court No 2 of A Coruña dismissed Ms Otero Ramos's claim, as it had found no evidence that her work posed the

alleged risks.

In the appeal, the referring court asked the ECJ (in essence) whether the rules on the burden of proof laid down in Article 19 of Directive 2006/54 applied to her claim that there was risk during breastfeeding within the meaning of Article 26(3) of Law 31/1995 (which transposed Article 5(3) of Directive 92/85 into national law), on the basis that the leave referred to in Article 5(3) of Directive 92/85 qualified as ‘employment and working conditions’ within the meaning of Article 14(1)(c) of Directive 2006/54.

Questions put to the ECJ

Does Article 19(1) of Directive 2006/54 apply to a situation in which a female worker challenges the risk assessment of her work before a court or other competent authority of a Member State, by claiming that the assessment was not conducted in accordance with Article 4(1) of Directive 92/85?

How should Article 19(1) of Directive 2006/54 be applied to a situation such as that at issue in the main proceedings?

ECJ’s findings

The risk assessment defined in Article 4(1) of Directive 92/85 requires the employer to assess the nature, degree and duration of exposure of workers to the agents, processes or working conditions of which a non-exhaustive list is given in Annex I [of the Directive], for all activities liable to involve a specific risk. Account must be taken of the Guidelines, in accordance with Article 3(2) of the Directive. According to the Guidelines, a risk assessment comprises at least three phases, being (i) the identification of hazards, (ii) the identification of worker categories which are exposed to one or several of those risks and (iii) “the most delicate phase in the process, in that the person carrying out the assessment must be competent and take due account of relevant information ... in applying appropriate methods in order to be able to conclude whether or not the hazard identified entails a risk situation for workers.” More specifically, the Guidelines state that “there could be different risks depending on whether workers are pregnant, have recently given birth or are breastfeeding”. These risks must be reviewed regularly. According to Article 4(1) of Directive 92/85, the risk assessment of the work of a breastfeeding worker must include a specific assessment taking into account the individual situation of the worker.

Article 19(4)(a) stipulates that the rules regarding the burden of proof also apply to situations covered by Directive 92/85 insofar as discrimination on grounds of sex is concerned. Where according to Article 2(2)(c) of Directive 2006/54, discrimination includes, inter alia, ‘any less

favourable treatment of a woman related to pregnancy or maternity leave'. Recital 14, Article 1 and Article 8 of Directive 92/85 make clear that workers who are breastfeeding must also be protected and hence are within the scope of Article 2(2)(c) of Directive 2006/54. Consequently, any less favourable treatment of such workers constitutes direct discrimination on grounds of sex.

Non-compliance with the requirements of the risk assessment stipulated in Article 4(1) of Directive 92/85 results in depriving a worker and her child of the protection they should receive and hence must be regarded as less favourable treatment of a woman related to pregnancy or maternity leave, resulting in direct discrimination on grounds of sex within the meaning of Article 2(2)(c) of Directive 2006/54. Article 14(1)(c) of Directive 2006/54 prohibits such discrimination, as is the case for Article 5 of Directive 92/85 (taking necessary measures to protect the safety and health of the worker).

Consequently, the rules on the burden of proof as stipulated in Article 19(1) of Directive 2006/54, apply to situations in which a breastfeeding worker challenges, before a court or other competent authority of the Member State concerned, the risk assessment of her work insofar as she claims that the assessment was not conducted in accordance with Article 4(1) of Directive 92/85. The rules on the switch of the burden of proof apply only to a worker's challenge of the risk assessment in court (or other competent authority), but not at an earlier stage (Kelly, C-104/10).

In the present case, the letter from Ms Otero Ramos's line manager seems to suggest, with reasons, that her work posed health risks to lactation. This seemed to contradict the results of the risk assessment of her work which formed the basis of the INSS's decision. The ECJ noted that the latter risk assessment appeared to lack any substantiated explanation about how its conclusions were reached, taking into account the individual situation of Ms Otero Ramos, and seemed therefore not to have been done in conformity with the requirements of Article 4(1) of Directive 92/85. This was, however, for the referring court to verify. The defendant should then try to prove that the risk assessment was conducted in accordance with the requirements of Article 4 of Directive 92/85, bearing in mind that it must be substantiated, as otherwise both that provision and the rules of evidence laid down in Article 19 of Directive 2006/54 would be deprived of all practical effect.

Further, the ECJ noted that the same rules of evidence apply in the context of Article 5 of Directive 92/85. In particular, it must be proven that the protective measures provided for in Article 5(1) and (2) were impracticable and could not reasonably be required from the employer.

Ruling

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 must be interpreted as applying to a situation such as that at issue in the main proceedings, in which a breastfeeding worker challenges, before a court or other competent authority of the Member State concerned, the risk assessment of her work insofar as she claims that the assessment was not conducted in accordance with Article 4(1) 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.

On a proper construction of Article 19(1) of Directive 2006/54, in a situation such as that at issue in the main proceedings, it is for the worker in question to provide evidence capable of suggesting that the risk assessment of her work had not been conducted in accordance with the requirements of Article 4(1) of Directive 92/85 and from which it can therefore be presumed that there was direct discrimination on grounds of sex within the meaning of Directive 2006/54, which it is for the referring court to ascertain. It would then be for the defendant to prove that that risk assessment had been conducted in accordance with the requirements of that provision and that there had, therefore, been no breach of the principle of non-discrimination.

Creator: European Court of Justice (ECJ)

Verdict at: 2017-10-19

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