



Press and Information

Court of Justice of the European Union
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Judgment in Case C-104/09
Roca Álvarez v Sesa Start España ETT SA

Employed fathers are entitled to 'breastfeeding' leave irrespective of the professional status of their child's mother

Spanish legislation according to which an employed father is only entitled to make use of the leave in place of the mother of his child if she is an employee establishes an unjustified discrimination on grounds of sex

In Spain, the Workers' Statute provides that mothers whose status is that of employee are entitled, during the first nine months following the birth of their child, to 'breastfeeding' leave. That leave allows an absence from the workplace for an hour – which may be divided into two parts – or a half-hour reduction in the working day. It is expressly stated that the leave may be taken by the mother or the father without distinction provided that they are both employees.

Pedro Manuel Roca Álvarez is an employee at the company Sesa Start España ETT SA. His request to be granted breastfeeding leave was refused on the ground that the mother of his child was not employed but self-employed. He therefore challenged his employer's decision before the national courts.

The Tribunal Superior de Justicia de Galicia (High Court of Justice of Galicia, Spain), hearing the case on appeal, found that developments in national legislation and case-law have caused the leave to be detached from the biological fact of breastfeeding. Whilst it was instituted in 1900 to facilitate breastfeeding by the mother, for many years it has been granted in cases of bottle feeding. It should now be considered as time purely devoted to the child and as a measure which reconciles family life and work following maternity leave. However, the position remains that the father will be entitled to leave in place of the mother only if the mother is an employee, and so on that basis has herself a right to breastfeeding leave.

In that context, the Court of Justice was asked whether the right to breastfeeding leave should not be accorded to men in the same way as women and whether the fact of restricting it to employed women and the fathers of their children is not a discriminatory measure contrary to the principle of equal treatment of men and women afforded by the directives implementing this principle in the field of work and employment¹.

In today's judgment, the Court states that those directives **preclude a national measure which provides that employed mothers are entitled to breastfeeding leave whereas employed fathers are not entitled to the same leave unless the child's mother is also an employed person.**

The Court observes, first, that this leave, which has the effect of changing working hours, affects the working conditions governed by directives which prohibit all forms of discrimination on grounds of sex.

¹ Council Directive of 9 February 1976 on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions (76/207/EEC) (OJ 1976 L 39, p.40), amended by Directive 2002/73/EC of the European Parliament and of the Council of 23 September 2002 (OJ 2002 L 269, p.15) and repealed by 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) (OJ 2006 L 204, p.23)

Second, the Court holds that the positions of a male and a female worker, father and mother of a young child, are comparable with regard to their possible need to reduce their daily working time in order to look after their child. However, under the Spanish Workers' Statute, for men whose status is that of an employed person the fact of being a parent is not sufficient to gain entitlement to leave, whereas it is for women with an identical status. Thus, **the Spanish legislation establishes a difference in treatment on grounds of sex between mothers and fathers who both have the status of an employed person.**

Lastly, the Court considers that this discrimination **is not justified by the objective of the protection of women nor by the promotion of equal opportunities for men and women.**

The leave does not seek to ensure the protection of the biological condition of the woman following pregnancy or the protection of the special relationship between a mother and her child. The fact that the leave might be taken by the father or the mother without distinction means that feeding and devoting time to the child can be carried out just as well by the father as by the mother, so that this leave is accorded to workers in their capacity as parents of the child.

Such legislation does not have the effect of eliminating or reducing existing inequalities for women in society. Nor does it seek to prevent or compensate for disadvantages in their professional careers.

It is true that this measure could have the effect of putting women at an advantage by allowing employed mothers to keep their job and to be able to devote time to their child. That effect is even reinforced by the fact that, if the father is entitled to take this leave in the place of the mother, she would not suffer adverse consequences for her job as a result of care and attention devoted to the child.

However, the fact that only the employed mother is the holder of the right to qualify for the leave, whereas a father with the same status is not directly entitled to it, is liable to perpetuate a traditional distribution of the roles of men and women by keeping men in a role subsidiary to that of women in relation to the exercise of their parental duties. Furthermore, that could have as its effect that a self-employed woman such as the mother of Mr Roca Álvarez's child – the father not being entitled to the leave – would have to limit her self-employed activity and bear the burden resulting from the birth of her child alone, without the child's father being able to ease that burden.

NOTE: A reference for a preliminary ruling allows the courts and tribunals of the Member States, in disputes which have been brought before them, to refer questions to the Court of Justice about the interpretation of European Union law or the validity of a European Union act. The Court of Justice does not decide the dispute itself. It is for the national court or tribunal to dispose of the case in accordance with the Court's decision, which is similarly binding on other national courts or tribunals before which a similar issue is raised.

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The [full text](#) of the judgment is published on the CURIA website on the day of delivery.

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