Anonymised version

Case C-105/20

Request for a preliminary ruling

Date lodged:

27 February 2020

Referring court:

Tribunal du travail de Nivelles (Belgium)

Date of the decision to refer:

3 February 2020

Applicant:

UF

Defendant:

Union Nationale des Mutualités Libres (Partenamut) (UNMLibres)

Tribunal du travail du Brabant wallon (Labour Court, Walloon Brabant, Belgium)

Nivelles Division

Fifth Chamber

Judgment

IN THE CASE:

UF, ...,

applicant and applicant in the proceedings to join other parties,

....

v

1. Partena, Assurances Sociales pour Travailleurs Indépendants ASBL,

...

first defendant,

....

2. Institut national d'assurances sociales pour travailleurs indépendants, 'INASTI',

...

second defendant,

...

and

Union Nationale des Mutualités Libres (Partenamut), 'UNMLibres', an insurance institution specialising in compulsory sickness and invalidity insurance; ... 'UNML' or 'Partenamut',

defendant in the proceedings to join other parties,

...

* * *

...

I. INFORMATION ON THE PROCEEDINGS

... [national proceedings]

II. SUBJECT MATTER OF THE PROCEEDINGS

By application dated 23 October 2006, UF sought an order that Partena ASBL, UNMLibres (to which Partenamut belongs) and INASTI, jointly and severally, ... pay EUR 2 041.91 by way of a lump-sum maternity allowance for self-employed workers.

... [claim for costs]

III. FACTS ...

...

– ...

– By judgment of 11 May 2017, this court, sitting in a different formation:

  – ...

  – ... referred two questions to the Court of Justice of the European Union ... for a preliminary ruling ...:

  ... [wording of the questions referred for a preliminary ruling is identical to the questions contained in the operative part]

  – ....

– On 5 October 2017 [order of 5 October 2017, C-327/17, not published, EU:C:2017:741], the Court of Justice of the European Union declared the request for a preliminary ruling ... manifestly inadmissible for the following reasons:

  – the factual context of the dispute in the main proceedings is presented in a manner which contains significant gaps. ...;

  – the order for reference does not state the reasons why UF would not be entitled to the lump-sum allowance provided for as part of maternity insurance for self-employed persons;

  – the relevant legislation in the dispute in the main proceedings ... [:] the referring court makes reference, in its questions, to the Royal Decree of 20 July 1971. Nevertheless, it does not set out, in its decision, the tenor of the provisions of that decree that are applicable in the case in the main proceedings;

  – the referring court does not set out with the requisite precision and clarity the reasons why it considers that interpretation to be necessary or useful for the purpose of resolving the case in the main proceedings. Moreover, there is no explanation of the link between EU law and the national legislation applicable to the dispute in the main proceedings.

  The Court concluded ...: '*It should be noted, however, that the referring court retains the right to submit a new request for a preliminary ruling when it is in a position to provide the Court with all the information enabling the Court to give a ruling (see, to that effect, order of 12 May 2016,* Security Service and Others, *C-692/15 to C-694/15, EU:C:2016:344, paragraph 30 and the case-law cited)*'.

– On 28 December 2018, UF requested that the case be determined before this court, stating that it is for the court which has referred a question to the Court

of Justice of the European Union for a preliminary ruling to specify the factual context of the dispute and the Belgian legislation.

.... [national procedure]

IV. EXAMINATION

A. Factual context

...

The applicant proposes that the following information be brought to the attention of the Court of Justice of the European Union:

1 Between January 2002 and December 2010, UF carried out two occupational activities and fell concurrently within the scope of two separate schemes:

– she was employed half-time (50%) as an assistant at the University,

– she was self-employed on a supplementary basis, working as a lawyer at the Brussels Bar.

During that period, UF contributed to the scheme for self-employed workers and paid social security contributions as a person who was self-employed on a supplementary basis.

However, taking into account the amount of income she received in her self-employed role, those contributions were calculated not on the basis of self-employed work carried out on a supplementary basis, but on the basis of the scheme for workers whose primary activity was in self-employment, and therefore amounted to EUR 4 234.16 for 2006.

2 On 1 March 2006, UF gave birth to a child ....

3 In her capacity as employee, in May 2006 she received a maternity allowance of EUR 3 458.54 gross.

That amount was calculated on the basis of the scheme for employed persons, thus at 82% of the amount of her salary for her half-time [activity] at the university for the first 30 days and then at 75% of that same salary for the following 2 months.

The maternity allowance therefore covers only a part of UF's occupational activity, namely her paid employment, and corresponds in the present case to approximately EUR 1 000 net per month for three months.

In respect of her self-employed activity, UF will not receive any maternity allowance and will not only have to stop working, but will continue to pay her

social security contributions as a self-employed worker, since no dispensation from paying those contributions is provided for during maternity leave.

The amount actually received is therefore significantly below the income that UF was receiving at that time, if account is taken of her salary from the university and her income as a lawyer.

For the nine months in which she worked in 2006 (the remaining three having been taken as maternity leave), UF received EUR 11 274.02 gross as her salary from the university and EUR 27 480 gross in fees in her capacity as lawyer.

...

4 In order to cover her period of maternity leave adequately, UF applied, in her capacity as a self-employed worker … for a lump-sum allowance under her maternity insurance.

That lump-sum allowance amounts to EUR 2 041.95 gross.

Neither Partena, Partenamut nor UNMLibres followed up on that application.

During the period covered by that allowance, however, UF was prohibited from carrying out any form of occupational activity.

UF was on maternity leave and, having taken all of the pre- and post-natal leave period, did not work for three months, thus from the end of February 2006 until mid-June 2006.

During that period, she nevertheless continued to pay her social security contributions as a self-employed worker since those contributions are calculated on a quarterly basis (UF having worked as a self-employed person until the end of February 2006 and from mid-June 2006 onwards).

5 By letter of 4 September 2006, UF's counsel questioned Partena with regard to the application for the lump-sum allowance under her maternity insurance.

Partena responded by letter of 25 September 2006, stating that the maternity allowance had been reimbursed by UF's insurance fund.

UF brought an action against that decision ... on 23 October 2006.

6 On 25 October 2006, Partenamut sent UF a form to apply for the maternity allowance under the scheme for self-employed persons.

7 On 9 October 2006, Partena confirmed to UF's counsel that it was refusing to pay the maternity allowance.

By application ... dated 23 October 2006, UF sought an order that Partena ASBL, the Union Nationale des Mutualités Libres ('UNMLibres') (to which Partenamut

belongs) and INASTI, jointly and severally ... pay EUR 2 041.91 by way of a lump-sum maternity allowance for self-employed workers.

... [claim for costs]

8 ...

– .... [national procedural elements]

9 By judgment of 11 May 2017, the Tribunal du travail du Brabant wallon (Labour Court, Walloon Brabant), Nivelles Division:

– ...;

– Before giving judgment, referred two questions to the Court of Justice of the European Union ... for a preliminary ruling ...:

... [repetition of the wording of the questions referred for a preliminary ruling]

The court intends to refer to that assessment of the facts.

B. Legal framework of the question referred for a preliminary ruling

1. Lump-sum allowance provided for as part of maternity insurance and adequate allowance

The applicant states ...:

1 In Belgium, the social security system was originally part of the 'Bismarckian' tradition. It is essentially designed as 'insurance':

1. It covers workers and their families against the consequences of a loss of work, that is to say, in the event of unemployment, incapacity for work, the worker's death or reaching of pensionable age.

2. It is financed by social security contributions paid by workers and employers.

3. It is open to those persons who have contributed to its financing, that is to say, those who have worked and paid contributions over a sufficient period.

4. It is managed by workers' and employers' representatives.

The 'insurance principle' has consequences for the nature of the entitlement to benefits and for the obligation to pay contributions.

First, **the benefits constitute consideration for participating in the financing of the system.** In principle, entitlement is therefore dependent on only two questions:

has the worker sufficiently participated in the financing? Has the risk materialised? Admittedly, many detailed rules pertain to that entitlement. However, the system is designed not to take into account conditions relating inter alia to merit or the state of need.

Secondly, **the payment of contributions guarantees that the person will be covered by the insurance should the risk covered occur.** It confers entitlement to benefits. The same applies in respect of private insurance premiums. Therefore, a worker who has paid his or her contributions may assert an individual right to the social security benefit, as is governed by the legislation. On the other hand, that worker does not have an individual right in respect of the contributions: he or she cannot claim reimbursement of them or a benefit equivalent to the contributions paid.

The social security benefit in the event of maternity leave

2 In Belgium, maternity leave falls within the scope of compulsory health insurance. The Belgian courts (Cour constitutionnelle (Constitutional Court), judgment of 28 March 2013, No 51/2013) have already had occasion to rule that, in the context of compulsory health insurance, the Belgian legislation infringes Articles 10 and 11 of the Constitution as it does not allow someone who works half-time as an employee and half-time as a self-employed worker to be incapacitated for work only in respect of one of those two roles, obliging that worker to cease all activities even though the incapacity to work stems solely from one of his or her roles.

Belgian law provides for two separate schemes depending on the worker's activity and whether he or she is subject to the social security scheme for employed persons or for self-employed persons.

Under the compensation scheme for employed workers, the relevant provisions of Belgian law are the following:

– **First, the Loi du 14 juillet 1994 relative à l'assurance obligatoire soins de santé et indemnités (Law of 14 July 1994 on compulsory insurance for health care and benefits)** provides for the payment of a benefit known as 'maternity allowance' to employed workers, on the express condition that they have ceased all activities (Article 113);

– Secondly, the Arrêté royal du 3 juillet 1996 portant exécution de la loi relative à l'assurance obligatoire soins de santé et indemnités (Royal Decree of 3 July 1996 implementing the Law on compulsory insurance for health care and benefits) (in the version applicable at the material time) provides that: '*The maternity allowance rate shall be fixed at 79.5% of the lost earnings referred to in the third subparagraph of Article 113 of the coordinated law, for the first 30 days of the period of maternity leave as defined in Articles 114 and 115 of the coordinated law, and at 75% of those same earnings from the 31st day of that period onwards.*

However, for the first 30 days of the (maternity protection) period, the holders referred to in Article 86(1)(1)(a) and (b) of the coordinated law shall receive a maternity allowance of 82% of the abovementioned lost earnings without the need to apply the restriction on remuneration provided for in the abovementioned third subparagraph of Article 113' [Article 216 thereof] ...

With regard to self-employed workers, the relevant provisions of Belgian law are the following:

– Article 94 et seq. of the Arrêté royal du 20 juillet 1971 instituant une assurance indemnités et une assurance maternité en faveur des travailleurs indépendants et des conjoints aidants (Royal Decree of 20 July 1971 establishing benefits insurance and maternity insurance for self-employed workers and assisting spouses) (in force since 1 January 2003) provides for the grant of a lump-sum maternity allowance for self-employed workers;

– Article 97 of that royal decree, however, provides that: '*The maternity allowance shall be reduced by the amount of allowances that the holder can claim under the Coordinated Law of 14 July 1994 on compulsory insurance for health care and benefits (the weeks of maternity leave referred to in Article 93)*'.

Throughout the period of maternity leave, the self-employed worker is obliged to continue to pay social security contributions and thus to participate in the financing of the scheme for self-employed workers.

So far as concerns the situation of a worker who pays contributions as an employee and as a self-employed worker on a supplementary basis, the appropriate legislation is contained in the Royal Decree of 20 July 1971. That decree excludes workers who are self-employed on a supplementary basis from entitlement to the maternity allowance on the ground that they do not pay contributions in respect of a primary occupation (which is not the situation in the present case) and that, in principle, they are entitled to a maternity allowance under a different social security scheme.

Article 3 of the Royal Decree of 20 July 1971 provides for the exclusion as follows:

'*The following shall be holders of the insurance established by the present decree:*

1. self-employed workers who are subject to Royal Decree No 38 of 27 July 1967, with the exception of ...

b) persons who, under Article 12(21) of that royal decree, <u>are not required to pay any contribution or are liable to pay only a reduced contribution</u>' (emphasis added).

Article 12(2) of Arrêté royal No 38 du 27 juillet 1967 organisant le statut social des travailleurs indépendants (Royal Decree No 38 of 27 July 1967 establishing the social security scheme for self-employed persons) sets out how the amount to be paid by persons who are self-employed on a supplementary basis is to be determined, and is worded as follows:

'*Persons who, in addition to the activity giving rise to their being subject to the present decree, carry out another occupational activity habitually and as a main occupation, shall not be liable to pay any contributions if their professional income from their work as a self-employed person, earned during the contribution year referred to in Article 11(2), is less than EUR 405.60. Where that income reaches at least EUR 405.60, the person shall be liable to pay the following annual contributions ...*'.

It therefore stipulates that a person who carries out self-employed work on a supplementary basis either is not liable to pay any contributions or is to pay reduced social security contributions.

As a result, the Royal Decree of 20 July 1971 does not take account of the actual amount of the social security contributions paid by the self-employed worker and therefore does not allow account to be taken of the actual situation of a worker who is self-employed on a supplementary basis, even though she is in the same situation as a worker who is primarily self-employed and who, like her, contributes an amount at the main rate.

Moreover, the Royal Decree of 20 July 1971 refers to self-employed workers who pay a reduced contribution, which is not the case in respect of workers who are self-employed on a supplementary basis who must pay contributions calculated in the same way as those paid by workers who are primarily selfemployed, on the ground that their income exceeds a certain threshold (which changes annually).

2. Basis of the inequality in this case: Royal Decree of 20 July 1971

UF states ...:

1 The Royal Decree of 20 July 1971 on which Partena relies in order to refuse UF entitlement to the maternity allowance cannot be applied: it is not in conformity with the principle of non-discrimination and the provisions concerning maternity protection.

In particular, the Royal Decree of 20 July 1971:

(1) introduces discrimination between self-employed female workers who work part-time on a supplementary basis (who pay contributions as a worker who is primarily an employee) and self-employed female workers who primarily work part-time, since those whose main occupation is as a self-employed part-time worker receive the full amount of the maternity allowance whereas self-employed workers who work part-time on a supplementary basis and

who are liable to pay contributions in respect of their main occupation do not receive a maternity allowance.

That discriminatory situation must be examined in conjunction with the maternity protection provided for by 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, which imposes the maintenance of a payment of and/or entitlement to an adequate allowance for workers during maternity leave; only self-employed female workers working primarily part-time receive an adequate allowance;

(2) introduces direct discrimination between employed workers who work full-time and workers who, on a full-time basis, combine paid employment with a self-employed activity, in that only the former are granted an adequate allowance.

2 During her maternity leave, UF received a maternity allowance on the basis of the Law of 14 July 1994 on compulsory insurance for health care and benefits. Specifically, she received a percentage of her income calculated on the basis of her work as a half-time employee, thus EUR 3 458.54 gross, which covered three months of maternity leave, giving a net amount of approximately EUR 1 000 per month.

During that same period (and until December 2010), she continued to pay social security contributions in her capacity as person self-employed on a supplementary basis. The social security contributions paid in that respect were calculated on the basis of a self-employed activity carried out as a main occupation (thus an amount of EUR 1 058 per quarter).

However, during her maternity leave, she was no longer receiving any income as a self-employed worker as she had stopped work in order to look after her child during her maternity leave.

In addition, as stated above, throughout the period of maternity leave, the self-employed worker is obliged to continue to pay social security contributions, in particular where, as was the case in respect of UF, the maternity leave is spread over two quarters (the first and second quarters of 2006), during which the self-employed person works both before and after the maternity leave.

To supplement her replacement income in her capacity as half-time employee, UF therefore made an application for entitlement to maternity allowance on the basis of the Royal Decree of 20 July 1971 establishing benefits insurance and maternity insurance for self-employed workers.

3 Partena refused to grant her that allowance on the ground that Article 97 of the abovementioned royal decree provides that that maternity allowance is to be reduced by the amount of allowances that the holder can claim under the

Coordinated Law of 14 July 1994 on compulsory insurance for health care and benefits.

Following Partena's reasoning, a worker who qualifies for a sickness and invalidity insurance allowance (in the present case, a maternity allowance), has several part-time jobs (in the present case, as an employee and as a self-employed worker) and pays social security contributions for each of her jobs is entitled only to a reduced maternity allowance and only for one of her part-time jobs (in the present case, a reduced proportion of her income as an employee).

That same worker is moreover obliged to cease all activities but is not entitled to maternity allowance covering all of the work she performs.

It follows from the foregoing that the reduced maternity allowance granted to a worker who has two part-time jobs and who pays social security contributions for each of those roles cannot be regarded as a benefit established at a level enabling that worker to support herself and her child healthily and at an adequate standard of living.

In refusing to pay that lump-sum allowance to UF, Partena has precluded UF from entitlement in concreto to an adequate allowance that covers her maternity leave, even though she was actually paying contributions into two social security schemes as an employee and as self-employed worker.

The court endorses those explanations given by the applicant.

It considers them to respond to the observations of the Court of Justice of the European Union which, by order of 5 October 2017, declared the request for a preliminary ruling manifestly inadmissible ... [summary of the reasons which led the Court of Justice to declare the request inadmissible]

The court also recalls that the Court of Justice of the European Union concluded its order as follows: '*It should be noted, however, that the referring court retains the right to submit a new request for a preliminary ruling when it is in a position to provide the Court with all the information enabling the Court to give a ruling*'.

The court considers that to be the case: as already noted, the explanations given by the applicant respond to the observations of the Court of Justice, to which it is appropriate to refer the two questions set out below for a preliminary ruling:

ON THOSE GROUNDS,

The court,

...

1) **refers** the following two questions to the Court of Justice of the European Union for a preliminary ruling:

[1)] ‘Does the Royal Decree of 20 July 1971 establishing insurance for allowances and maternity insurance for self-employed workers and spouses infringe Articles 21 and 23 of the Charter of Fundamental Rights, 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, 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), Council Directive 86/613/EEC of 11 December 1986 on the application of the principle of equal treatment between men and women engaged in an activity, including agriculture, in a self-employed capacity, and on the protection of self-employed women during pregnancy and motherhood and the Framework Agreement on part-time work implemented by Council Directive 97/81/EC of 15 December 1997 concerning part-time work in not providing for an adequate allowance in the context of maternity leave for a self-employed woman who works part-time on a supplementary basis but pays contributions as a worker on a primary basis, whereas a self-employed woman who works part-time on a primary basis receives the full amount of the maternity allowance?

[(2)] Does the Royal Decree of 20 July 1971 establishing insurance for allowances and maternity insurance for self-employed workers and spouses infringe Articles 21 and 23 of the Charter of Fundamental Rights, 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, 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), Council Directive 86/613/EEC of 11 December 1986 on the application of the principle of equal treatment between men and women engaged in an activity, including agriculture, in a self-employed capacity, and on the protection of self-employed women during pregnancy and motherhood and the Framework Agreement on part-time work implemented by Council Directive 97/81/EC of 15 December 1997 concerning part-time work in not providing for an adequate allowance in the context of maternity leave for a female worker who, on a full-time basis, combines paid employment with a self-employed activity, whereas a self-employed woman working full-time receives the full amount of the maternity allowance?’.

2) ... [overview of the information presented]

...

[stay of proceedings]