

Case C-841/19**Summary of the request for a preliminary ruling pursuant to Article 98(1) of the Rules of Procedure of the Court of Justice****Date lodged:**

20 November 2019

Referring court:

Juzgado de lo Social n.º 41 de Madrid (Social Court No 41, Madrid, Spain)

Date of the decision to refer:

7 November 2019

Applicant:

JL

Defendant:

Fondo de Garantía Salarial (FOGASA) (Wages Guarantee Fund)

Subject matter of the main proceedings

A claim for payment from the Fondo de Garantía Salarial (FOGASA) (Wages Guarantee Fund) made by the applicant in the main proceedings, a part-time worker, due to the employer's insolvency.

Subject matter and legal basis of the request for a preliminary ruling

The compatibility of Article 33 of the Ley del Estatuto de los Trabajadores (Workers' Statute), as interpreted by the Spanish courts, with Article 4(1) of Directive 79/7/EEC and Article 2(1) of Directive 2006/54/EC.

The legal basis is Article 267 TFEU.

Question referred

The question referred is whether Article 4(1) of Directive 79/7 and Article 2(1) of Directive 2006/54/EC of the European Parliament and of the Council of 5 July 2006 should be interpreted as precluding a legislative provision of a Member State ... such as that at issue in the main proceedings, under which, as regards the amount which FOGASA is liable to pay a part-time worker, the worker's base wages, which are reduced due to the part-time nature of the employment, are reduced again when calculating FOGASA's liability under Article 33 of the Workers' Statute, because the part-time factor is applied for a second time, as compared with a comparable full-time worker, in so far as that provision disadvantages female workers as compared with male workers.

Provisions of EU law cited

Council Directive 79/7/EEC of 19 December 1978 on the progressive implementation of the principle of equal treatment for men and women in matters of social security (Article 1 and Articles 3(1) and 4(1)).

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 (recital 30 and Article 2(1)).

Charter of Fundamental Rights of the European Union (Article 21).

Judgment of the Court of Justice of 8 May 2019, *Villar Láiz* (C-161/18, EU:C:2019:382), paragraph 42.

Judgment of the Court of Justice of 26 June 2018, *MB* (Change of gender and retirement pension) (C-451/16, EU:C:2018:492), paragraph 34.

Judgment of the Court of Justice of 14 April 2015, *Cachaldora Fernández* (C-527/13, EU:C:2015:215), paragraph 28 and the case-law cited.

Judgment of the Court of Justice of 23 October 2003, *Schönheit and Becker* (C-4/02 and C-5/02, EU:C:2003:583), paragraph 93.

Provisions of national law cited

Estatuto de los Trabajadores (Workers' Statute), as amended by Royal Legislative Decree 2/2015 of 23 October 2015 approving the consolidated text of the Workers' Statute (BOE No 255 of 24 October 2015, p. 100224) (Article 33). Article 33(1) and (2) provides as follows:

- ‘1. The Wages Guarantee Fund ... shall pay workers the amount of wages that are outstanding as a result of the employer’s becoming insolvent or going into administration.

For the above purposes, wages shall mean the amount recognised as such in a conciliation procedure or in a court order in respect of all items listed in Article 26(1), and wages due in unfair dismissal cases where payable by law. The Fund may not pay out, on either grounds, whether jointly or separately, a sum greater than the sum arrived at by multiplying twice the daily minimum wage, including the proportional part of additional wage payments, by the number of days for which wages remain unpaid, up to a maximum of 120 days.

2. In the cases provided for in the previous paragraph, the Wages Guarantee Fund shall pay the sums awarded to workers under a court judgment, order or conciliation procedure or under an administrative decision as a consequence of termination of employment or termination of contract ... and the sums due in respect of termination of temporary or fixed-term contracts where provided for by law. In all cases the maximum amount payable is one year’s wages, and the daily wage that provides the base wage for the calculation may not be more than twice the daily minimum wage, including the proportional part of additional wage payments.

[...]

Judgment of the Tribunal Supremo (Supreme Court) of 29 November 2017.

Judgment of the Juzgado de lo Social n.º 41 de Madrid (Social Court No 41, Madrid) of 11 June 2018.

Brief summary of the facts and the main proceedings

- 1 The applicant in the main proceedings was employed from 27 September 2017 as a waiter by CONSTRUCCIONES Y OBRAS PÚBLICAS TOLETUM, S.L. on a part-time fixed-term employment contract, working 20 hours a week, and his wages were determined under a collective agreement.
- 2 On 26 December 2017 the company closed the premises where the applicant in the main proceedings worked and disappeared from its offices and its known address.
- 3 In a final judgment delivered on 11 June 2018, Social Court No 41, Madrid, upheld the claim filed by the applicant in the main proceedings against the aforesaid company, finding that he had been unfairly dismissed by the company, that his contract had been terminated, and that he was entitled to receive compensation of EUR 433.13 plus the wages that had accrued from the dismissal until the date of the court order, which amounted to EUR 6 170.75.

- 4 An order was made on 4 September 2018 for the enforcement of the judgment.
- 5 As the company was declared insolvent by a court order dated 20 December 2018, under Article 33 of the Workers' Statute, the Wages Guarantee Fund (FOGASA) is liable for payment of the outstanding wages and the compensation awarded to the worker.
- 6 The applicant filed a claim for the sum due with the Wages Guarantee Fund (FOGASA) under Article 33 of the Workers' Statute on the grounds of his employer's insolvency.
- 7 In the view of the referring court, in order to rule on the main proceedings it is necessary to refer a question on the interpretation of EU law to the Court of Justice of the European Union.

Main arguments of the parties to the main proceedings

- 8 None included.

Brief summary of the reasons for the request for a preliminary ruling

- 9 In the view of the referring court, the way in which Article 33 of the Workers' Statute is interpreted by the Spanish courts is contrary to Article 4(1) of Directive 79/7/EEC and Article 2(1) of Directive 2006/54/EC, because that interpretation is discriminatory, in that it affects workers on part-time contracts as compared with full-time workers and has a greater impact on women, because a far higher percentage of women are employed on part-time contracts as compared with men.
- 10 In the view of the referring court, that interpretation means that the amount which a worker on a part-time contract can claim from the Wages Guarantee Fund (FOGASA) where his employer becomes insolvent or goes into administration is reduced twice, because Article 33(1) of the Workers' Statute establishes a limit on the liability of the Wages Guarantee Fund (FOGASA) that is based on the minimum wage. Because the courts' interpretation is that the minimum wage must be reduced in cases of part-time employment, part-time workers suffer a double reduction: first there is a normal reduction, which reflects the fact that the worker is employed on a part-time contract; but then there is a second, disproportionate, reduction, due to the fact that, when calculating the amount payable by the Wages Guarantee Fund (FOGASA), the minimum wage is reduced in accordance with the percentage hours worked.

In the view of the referring court, there are no objective grounds for this reduction in the minimum wage in the case of part-time workers, whose wages are already reduced by virtue of the fact that they work part time.

- 11 In the view of the referring court, there is no direct gender-based discrimination, because the national legislation applies equally to male and female workers. However, it considers that there may be indirect discrimination, and on this point it cites Article 2(1)(b) of Directive 2006/54/EC and the judgments of the Court of Justice of 26 June 2018, *MB* (Change of gender and retirement pension) (C-451/16, EU:C:2018:492), paragraph 34; of 14 April 2015, *Cachaldora Fernández* (C-527/13, EU:C:2015:215), paragraph 28 and the case-law cited; of 8 May 2019, *Villar Láz* (C-161/18, EU:C:2019:382), paragraph 42 — which notes that, in Spain, in the first quarter of 2017 almost 75% of part-time workers were women; and of 23 October 2003, *Schönheit and Becker* (C-4/02 and C-5/02), EU:C:2003:583, paragraph 93.

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