

**Case C-843/19**

**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:**

Tribunal Superior de Justicia de Cataluña (High Court of Justice, Catalonia, Spain)

**Date of the decision to refer:**

12 November 2019

**Appellant:**

Instituto Nacional de la Seguridad Social (INSS) (National Social Security Institute)

**Respondent:**

BT

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**Subject matter of the main proceedings**

The granting of early retirement to a worker enrolled under the Special Arrangements for Domestic Workers under the Spanish Social Security regime (formerly the Special Scheme for Domestic Service, and subsequently the Special Scheme for Domestic Workers).

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

Whether Article 208(1)(c) of the Ley General de la Seguridad Social (General Law on Social Security), which prevents access to early retirement where the pension that would be received is less than the minimum pension, is compatible with Directives 79/7 and 2006/54.

**Question referred**

Does EU law preclude a provision of national law such as Article 208(1)(c) of the 2015 Ley General de la Seguridad Social (General Law on Social Security), which stipulates that, in order for anyone enrolled in the General Scheme to be able to take voluntary early retirement, the pension payable, calculated in the standard way without any minimum pension supplement, must be at least as much as the minimum pension, inasmuch as it indirectly discriminates against women enrolled in the General Scheme, since it affects a far greater number of women than men?

**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 (OJ 1979 L 6, p. 24). 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 (recast) (OJ 2006 L 204, p. 23). Recital 30, Article 2(1) and Article 19.

Judgment of 7 May 1991, *Commission v Belgium* (C-229/89, EU:C:1991:187, paragraph 13).

Judgment of 9 November 1992, *Molenbroek v Sociale Verzekeringsbank* (C-226/91, EU:C:1992:451, paragraph 19).

Judgment of 14 December 1995, *Nolte v Landesversicherungsanstalt Hannover* (C-317/93, EU:C:1995:438, paragraph 33).

Judgment of 8 May 2019, *Villar Láziz* (C-161/18, EU:C:2019:382, paragraphs 37 to 39).

**Provisions of national law cited**

Texto refundido de la Ley General de la Seguridad Social (consolidated text of the General Law on Social Security), approved under Real Decreto Legislativo 8/2015, de 30 de octubre (Royal Legislative Decree 8/2015 of 30 October 2015) (BOE No 261 of 31 October 2015, p. 103291; ‘the LGSS’). Articles 59, 207 and 208.

Decreto 825/1976, de 22 de abril, por el que se regula la cotización en el Régimen Especial de la Seguridad Social de los Empleados de Hogar (Decree 825/1976 of 22 April 1976 governing contributions to the Special Social Security Scheme for Domestic Workers (BOE No 99 of 24 April 1976, p. 8106).

Ley 27/2011, de 1 de agosto, sobre actualización, adecuación y modernización del sistema de Seguridad Social (Law 27/2011 of 1 August 2011 on updating, adapting and modernising the social security system) (BOE No 84 of 2 August 2011, p. 87495). Thirty-ninth additional provision.

Real Decreto-ley 28/2018, de 28 de diciembre, para la revalorización de las pensiones públicas y otras medidas urgentes en materia social, laboral y de empleo (Royal Decree-Law 28/2018 of 28 December 2018 to uprate state pensions and introduce other urgent social, labour and employment measures (BOE No 314 of 29 December 2018, p. 129875). Article 4(2).

### **Brief summary of the facts and the main proceedings**

- 1 On 12 December 2016 the applicant and respondent, BT, applied to the Instituto Nacional de la Seguridad Social (National Social Security Institute; ‘the INSS’) for a voluntary early retirement pension with effect from 4 January 2017, which was the date on which she reached the age of 63, when she would voluntarily terminate her employment contract. She has always paid contributions under the former Special Scheme for Domestic Service (now the Special Arrangements for Domestic Workers), and her contributions cover a period of 14 054 days, with the exception of 166 days.
- 2 In a decision dated 19 December 2016, in accordance with the requirements in Article 208(1)(c) of the LGSS, the INSS refused the pension because the amount of the pension she would receive is less than the amount of the minimum pension to which she would be entitled on reaching the age of 65, having regard to her family situation.
- 3 Her administrative appeal was rejected in a decision dated 10 March 2017. The reasons given in the decision were that her pension would be EUR 549.30 per month, calculated as 85% of reference earning of EUR 646.24, which is less than the minimum retirement pension of EUR 637.10, and that therefore it does not satisfy the requirements in Article 208(1)(c) of the LGSS.
- 4 On 27 April 2017 the worker lodged a claim against the INSS with the Juzgado de lo Social n.º 10 de Barcelona (Social Court No 10, Barcelona), seeking the award of a voluntary early retirement pension. The court took the view that the provision applied by the INSS constitutes indirect discrimination against women, who make up the majority of domestic workers, and that therefore, under the case-law of the Court of Justice on Directive 79/7, it cannot be applied.
- 5 The judgment notes that, according to a report from the INSS, at present, someone who has always been enrolled in the Special Scheme for Domestic Workers and who paid contributions at a flat rate until 2011 and at the highest possible rate from 2012 cannot obtain an early retirement pension at the age of 63, even with 44½ years of contributions, because the pension will not exceed the minimum pension due on reaching the age of 65. The judgment therefore concludes that this

is indirect discrimination, which is why it directly disapplied the provision of national law and granted the voluntary early retirement that had been sought.

- 6 The INSS lodged an appeal against the judgment with the referring court.

### **Main arguments of the parties to the main proceedings**

- 7 The INSS states that the statutory requirement that must be satisfied in order to obtain voluntary early retirement, namely that the pension payable must be more than the amount of the minimum pension to which the applicant would be entitled on reaching the age of 65, having regard to the applicant's family situation, is not satisfied. It considers that there is no sex discrimination, because there is an objective reason unconnected with any discrimination, namely the need to adopt the necessary measures required by the European Union in order to preserve the sustainability of the social security system, and in particular to achieve a sustainable balance between time spent in work and in retirement. If people were able to take voluntary retirement without any restrictions, this would have serious consequences for the social security system which the system would be unable to withstand, 'not only because of the larger number of pensions awarded, but because of the cost of funding the supplements that would be payable in order to bring pensions up to the minimum level'; this would be contrary to the recommendations made by the European Union and to the Toledo Pact, which implements those recommendations.
- 8 BT does not object to a reference for a preliminary ruling; the Ministerio Fiscal (Public Prosecutor's Office), which is not a party to the proceedings, considers that a reference is unnecessary, as the provision can be disapplied directly under the case-law of the European Court; and the INSS repeats its earlier arguments.

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

- 9 This case concerns the compatibility of Article 208(1)(c) of the LGSS with Directives 79/7 and 2006/54 in so far as the article applies to women. The article stipulates that 'Once the general and the specific requirements of the said form of retirement have been satisfied, the amount of the pension to be received must be greater than the amount of the minimum pension to which the applicant would be entitled on reaching the age of 65, having regard to the applicant's family situation. If this requirement is not met, the applicant will not be eligible for early retirement under this formula.'
- 10 The minimum pension is set annually in the State Budget, and no pensioner may receive a pension that is less than that minimum amount (unless the individual is in receipt of income other than social security benefits), even if the individual's entitlement, as assessed under the pension calculation rules, would be less than that amount. In those circumstances, a minimum pension supplement, funded

from the State Budget, is added to the pension, so that the individual receives what is considered to be the minimum amount needed to live on.

- 11 The purpose of the requirement in Article 208(1)(c) of the LGSS is to ensure that pensioners receive at least the minimum required to meet their needs, without the State having to provide additional funding in the form of the minimum pension supplement in order to bring their contributory pensions up to that minimum amount. However, the referring court notes that the requirement applies only to voluntary early retirement: it does not apply to compulsory early retirement, where employment is terminated on objective grounds, which is governed by Article 207 of the LGSS.
- 12 The referring court notes that, without this requirement for the pension payable to be at least as much as the minimum pension, workers would be free to retire early without losing any pension, because if their pension was less than the minimum, a supplement would be paid in order to bring it up to that minimum amount. This would mean that funding would have to be provided from the State Budget, because of something the worker had freely chosen to do, which is what the law is seeking to avoid. Moreover, as noted by the INSS, the European Union recommends that a sustainable balance should be achieved between time spent in work and in retirement, as set out in the Green Paper of 7 July 2010, COM(2010)365, 'Towards adequate, sustainable and safe European pension systems', which is a European objective.
- 13 Having made these general comments, the referring court turns now to consideration of the situation in the case at issue. BT is a worker who is enrolled in the former Special Scheme for Domestic Service. One of the characteristics of that scheme was that its members (the vast majority of whom were women) paid contributions based on a single level of reference earnings (that is, at a flat rate); that level equated to the minimum reference earnings for contributions to the General Scheme, which was the same as the national minimum wage at any time. As a result, the basis used to calculate their contributions was lower than most and, consequently, so too were their pensions.
- 14 Since 2012 there has been a phased integration into the General Social Security Scheme, in the form of Special Arrangements for Domestic Workers, which has led to increases in the base amount used to calculate contributions: first, a system was introduced under which the base amount increased in line with earnings bands, meaning that each earnings band had its own base amount for the purpose of calculating contributions; in 2021 the contributions base will be the same as actual earnings. In any event, as noted by the INSS, the likelihood of a worker achieving the minimum pension through his or her own contributions may vary depending on changes to the contribution bases established under these special arrangements and on the amount of the minimum pension: increasing the contributions bases under the Special Arrangements (or aligning them with the general scheme) would make it easier to achieve the minimum pension; by

contrast, an increase in the minimum pension would make it harder for this group of workers to qualify for early retirement.

- 15 The referring court notes that the amount of pension currently received by female workers enrolled under the former Special Scheme is a consequence of the previous contributions system and the low wages in this occupational sector, on the one hand, and of the employers' financial capacity, on the other. In practice, these workers are employed in a family rather than a business environment, where the role of employer is played by the homemaker, whose financial capacity is generally lower than in the various productive business sectors, and where, nowadays, the activity takes place in a context in which both members of a couple are working and consequently need outside help to enable them to do so. In general, therefore, the financial capacity of the sector is lower, and workers pay lower contributions and receive lower benefits.
- 16 The INSS points out that, collectively, domestic workers have been required to contribute less to funding the System and to safeguarding its sustainability, both because of their historically lower contributions under the flat-rate system and because of the ceilings subsequently imposed under the earnings bands system. It considers that this justifies the imposition of restrictions on early retirement benefits, in view of the imbalance between the funding contributed and the benefits received (where the latter are substantially the same as under the General Scheme).
- 17 However, the referring court has doubts over whether, by imposing the additional requirement in the case of voluntary retirement that the pension payable must be at least the minimum pension amount (without any minimum pension supplement), Article 208(1)(c) of the LGSS enshrines indirect discrimination against women, which is prohibited by Article 4(1) of Directive 79/7. If this requirement were to be included in provisions governing the current Special Arrangements for Domestic Workers, or were limited to members governed by those arrangements, it would clearly be a case of discrimination, inasmuch as the overwhelming majority of domestic workers are women: according to the official figures, 89% of domestic workers are women. In that case, a provision whose scope was restricted to domestic workers would clearly be discriminatory in so far as it would impose a qualification requirement for early retirement which they could not meet; the provision could therefore be disapplied directly, with no need to refer the question for a preliminary ruling, in view of the clear breach.
- 18 However, the provision applies to the entire General Scheme, which covers 14 882 318 male and female workers, as compared with the 406 864 workers who are covered by the Special Arrangements for Domestic Workers. The examination must therefore be expanded to cover the entire General Scheme. If consideration were limited to the former Special Scheme, only women who were members of that scheme would be entitled to voluntary early retirement, and other women who were in the same position for other reasons would have no such entitlement. The same could be said if the issue were considered from the perspective of each

group of women who, whether for historical reasons or for reasons that continue to apply today, have paid lower contributions and therefore receive a lower pension. If that approach were adopted, an exception would be made for the group under examination to which the claimant belonged, but not for other groups.

- 19 In this regard, the referring court notes that the provision also applies, amongst others, to part-time workers, most of whom are women; to low-skilled (and therefore low-paid) workers, given that women used to receive less education and training, which impacts on the type of work they do today; to female workers who, in the past, gave up employment or self-employment when they got married — and who, under some sectoral regulations, were even forced to stop work — and who only restarted work when their children were older, meaning that they had only a short period of contributions, with a consequent impact on their pension; and to female workers who had to care for disabled or younger members of the family. For historical reasons, and in some cases for reasons that continue to apply, all of these women have lower contributions or shorter contribution periods (or both) than male or female workers who are not in this position. The result is that a higher number and percentage of women are in receipt of minimum pension supplements and are affected by the provision at issue.
- 20 Given this situation, the referring court believes that this also seems to breach the principle of non-discrimination, in view of the statistics on people in receipt of the minimum wage and minimum wage supplements. The minimum pension is currently EUR 677.4 per month for someone without a dependant spouse, and EUR 835.75 for someone with a dependant spouse. According to the social security system's own figures, there are 422 112 men in receipt of the minimum pension, which represents 15.23% of male retirement pensions, as compared with 468 822 women, or 31.45% of female retirement pensions. Thus, while women account for only 35.55% of all retirement pensions, they make up 53.62% of all recipients of the minimum pension supplement (422 112 men, as compared with 468 822 women).
- 21 Moreover, this difference does not seem to be narrowing; rather, since 2013 it has been increasing. In September 2019 the number of male pensioners on the minimum pension is down as compared with December 2018 (having fallen from 422 112 in December 2018 to 412 931 in September 2019), while the number of women on the minimum pension has increased (from 468 822 in December 2018 to 477 490 in September 2019).