

Case C-389/20**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:**

14 August 2020

Referring court:Juzgado de lo Contencioso-Administrativo n.º 2 de Vigo
(Administrative Court No 2, Vigo, Spain)**Date of the decision to refer:**

29 July 2020

Applicant:

CJ

Defendant:

Tesorería General de la Seguridad Social

Subject matter of the main proceedings

Social security — Special scheme for domestic workers — Female domestic workers — Exclusion from the payment of social security contributions in respect of unemployment — Exclusion from unemployment benefits

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

Request for a preliminary ruling on interpretation — Article 267 TFEU — Compatibility of a national provision with Directives 79/7/EEC and 2006/54/EC — Discrimination on grounds of sex

Questions referred for a preliminary ruling

Must Article 4(1) of 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, governing equal treatment, which precludes

any discrimination whatsoever on grounds of sex, either directly or indirectly, as regards the obligation to pay social security contributions, and Article 5(b) 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, which lays down the same prohibition of direct and indirect discrimination on grounds of sex as regards the scope of social security schemes and the conditions of access to those schemes and the obligation to contribute, and the calculation of contributions, be interpreted as precluding a national provision like Article 251(d) LGSS, which provides:

‘d) The protection afforded by the Special Scheme for Domestic Workers shall not include protection in respect of unemployment.’

If the answer to that question is affirmative, must that statutory provision be regarded as an example of prohibited discrimination under Article 9(1)(e) and/or (k) of Directive 2006/54/EC of the European Parliament and of the Council of 5 July 2006, in so far as the addressees of the provision at issue, Article 251(d) LGSS, are almost exclusively women?

Provisions of EU law relied on

- i. Treaty on the Functioning of the European Union, Article 157.
- ii. Charter of Fundamental Rights of the European Union, Articles 21 and 23.
- iii. 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, Articles 2, 3(a), 4, 5 and 6.
- iv. 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, Articles 1(c), 5(b), 7(1)(a)(v), and 9(1)(e).

Provisions of national law relied on

- i. Constitución Española (Spanish Constitution), Article 41:

‘The public authorities shall maintain a public social security system for all citizens, which will guarantee adequate social assistance and benefits in cases of hardship, **especially in the event of unemployment.**’
- ii. Real Decreto Legislativo 8/2015, de 30 de octubre, por el que se aprueba el texto refundido de la Ley General de la Seguridad Social

(Royal Legislative Decree 8/2015 of 30 October 2015 adopting the consolidated text of the General Law on Social Security):

‘Article 166. Situations equivalent to that of an active contributor

1. For the purposes set out in Article 165(1), a situation of total unemployment in which a worker receives unemployment benefit will be equivalent to that of an active contributor.

...’

‘Article 250. Scope:

1. Workers subject to the special employment relationship referred to in Article 2(1)(b) of the consolidated text of the Ley del Estatuto de los Trabajadores (Law on the Workers’ Statute) shall be covered by the Special Scheme for Domestic Workers.

...

2. The legal rules governing that Special Scheme shall be laid down in the present Title II and in the provisions for application and implementation thereof, together with the specific features laid down therein.’

‘Article 251. Protective function

Workers covered by the Special Scheme for Domestic Workers shall be entitled to social security benefits under the terms and conditions laid down in respect of this General Social Security Scheme but with the following specific features:

...

(d) the protection afforded by the Special Scheme for Domestic Workers shall not include protection in respect of unemployment.’

‘Article 263. Levels of protection

1. Unemployment protection is divided into a contributory level and a social assistance level, **both of which are State-administered and compulsory.**

2. The contributory level is intended to provide benefits to replace the wage income no longer received as a result of the loss of a previous job or the suspension of the contract or the reduction of working hours.

3. The social assistance level, which supplements the above, guarantees protection for unemployed workers who are in one of the situations referred to in Article 274.’

‘Article 265. Protective function.

1. Unemployment protection shall include the benefits set out below.

(a) At the contributory level:

1. total or partial unemployment benefit;
2. payment of the employer's social security contributions during the period of receipt of unemployment benefits, with the exception of the cases referred to in Article 273(2).

(b) At the social assistance level:

1. unemployment allowance;
2. payment, where appropriate, of the social security contribution in respect of retirement during the period of receipt of the unemployment allowance, in the cases referred to in Article 280;
3. entitlement to healthcare benefits and, as the case may be, family benefits, under the same conditions as workers covered by any social security scheme.

2. The protective function shall also include specific activities of training, further training, guidance, retraining and vocational reintegration for unemployed workers and any other activities aimed at the promotion of stable employment. This is without prejudice, where appropriate, to the powers to administer active employment policies which shall be implemented by the General State Administration or by the relevant autonomous administration, in accordance with the applicable legislation.

...'

‘Article 267. Legal situation of unemployment

1. Workers who come within any of the following cases shall be in a legal situation of unemployment:

a) where the worker's employment relationship is terminated

...'

Succinct presentation of the facts and procedure in the main proceedings

- 1 The applicant is a domestic worker and she works for her employer, a natural person. She has been registered in the Special Social Security Scheme for Domestic Workers provided for in Article 250 of the Ley General de la Seguridad Social (General Law on Social Security) ('the LGSS') since January 2011.

- 2 On 8 November 2019, the applicant applied to the Tesorería General de la Seguridad Social (General Social Security Fund) ('the TGSS' or 'the defendant') to pay contributions in respect of unemployment in order to acquire the right to the corresponding unemployment benefit in the event that she became unemployed in the future. Her employer's written agreement to pay the [employer's] contribution in respect of the contribution applied for was attached to the application.
- 3 By decision of 13 November 2019, the director of the TGSS administration rejected her application relying on Article 251(d) of the LGSS, which provides that 'the protection afforded by the Special Scheme for Domestic Workers shall not include protection in respect of unemployment.' The decision concluded that 'it is not currently possible for this group of workers to contribute to the social security system in respect of unemployment protection.'
- 4 The applicant brought an administrative appeal against that decision before the director's superior, the head of the appeals unit of the TGSS. On 19 December 2019, the head of the appeals unit issued a decision declaring that the appeal was inadmissible. The legal grounds for that decision again quoted Article 251(d) of the LGSS and stated that the application could not be granted because contributions in respect of unemployment are expressly prohibited by law in this case. That decision concluded the administrative procedure.
- 5 On 2 March 2020, the applicant brought an administrative law action against that decision before the referring court. The applicant claims that the decision should be declared unlawful, that the decision should be annulled and overturned, and that she should be held to be entitled, as a domestic worker, to pay contributions in respect of unemployment, with payment of those contributions being permitted with effect from 8 November 2019.
- 6 Since the referring court has doubts regarding the compatibility of Article 251(d) of the LGSS with Directives 79/7/EEC and 2006/54/EC, it decided to stay the proceedings and make the present request for a preliminary ruling to the Court of Justice.

Essential arguments of the parties to the main proceedings

- 7 The applicant has produced data which show that, as a group, domestic workers consist almost entirely of women and she contends that the contested provision, Article 251(d) of the LGSS, constitutes discrimination against women. She relies, in support of her contention, on the judgment of 22 November 2012, *Elbal Moreno* (C-385/11, EU:C:2012:746), in particular paragraph 29 thereof, which states that 'indirect discrimination for the purposes of Article 4 of Directive 79/7 arises where a national measure, albeit formulated in neutral terms, works to the disadvantage of far more women than men'.

- 8 The applicant submits that the fact that, as a result of the contested provision, domestic workers lack social protection where their employment ends for reasons not attributable to themselves, leads directly to ineligibility for unemployment benefit and also indirectly to ineligibility for other types of social assistance. Thus, in the event of sickness, although domestic workers may be protected in respect of temporary incapacity for work, in practice, if the period of incapacity for work is longer, this frequently results in the loss of their employment, either by mutual agreement or because the employer withdraws from the contract as is permitted by law; this leaves domestic workers without protection, unlike the situation in relation to the legal status of any other employee. Accordingly, since they cannot access unemployment benefit, the law does not treat domestic workers as having a status equivalent to that of an active contributor to social security, the effect of which is to disqualify them from the right to receive other benefits, such as those derived from incapacity, or any of the State allowances which require that unemployment benefit must be used up.
- 9 The defendant submits that it has no authority to dispute or call into question the statutory requirement and that it merely applies the existing legislation. The defendant states that domestic workers are a group of employees who, quantitatively speaking, are a minority in terms of the overall membership of the general scheme, but acknowledges that that group consists mainly of women. The defendant cites as a possible justification for the exclusion of domestic workers from the right to unemployment benefit the fact that the employer, the head of a family in the home who is not an undertaking which operates a traditional production unit, is treated differently, subject always to the fact that the aim of the national legislature was and is the gradual equalisation of workers in a special sector as regards rights and obligations.

Succinct presentation of the reasoning in the request for a preliminary ruling

- 10 The referring court states that, from the perspective of national law, the resolution of the dispute is quick and straightforward, since, as the defendant ruled, the applicant is requesting something which the law expressly prohibits or refuses, namely the right to pay contributions to cover the risk of unemployment in the case of workers covered by the Special Scheme for Domestic Workers.
- 11 However, from the perspective of EU law, the resolution of the dispute is not so clear, because the contested provision, Article 251(d) of the LGSS, may constitute indirect discrimination against women and, accordingly, may infringe, inter alia, Article 4(1) of Directive 79/7/EEC and Article 5(b) of Directive 2006/54/EC.
- 12 As is apparent from the evidence adduced by the applicant, and as the defendant itself acknowledges, the cohort of workers included in the Special Scheme for Domestic Workers consists almost entirely of persons of a single sex: women. The application provides data about that level of membership of the scheme which is damning and which has by no means been disputed by the defendant: nearly the

entire cohort of domestic workers in Spain is made up of women and more than one third is made up of foreign citizens.

- 13 Therefore, the addressees of the contested provision are almost exclusively female and the provision precludes women who are part of that cohort from entitlement to the social benefit in respect of unemployment by prohibiting those women from paying contributions to cover that risk, thereby excluding that situation from the protective function of the social security system.
- 14 The contested provision appears to be neutral, in that it is worded in such a way that its addressees are indistinguishable; however, in reality, they are not indistinguishable because the cohort of domestic workers is clearly female and, to a large extent, made up of foreign citizens. That leads to negative discrimination on grounds of sex which works to the disadvantage of the female sex as regards social protection in relation to employment, which may be prohibited by the EU legislation referred to. The special nature of the employment relationship applicable to this group of workers cannot lead to the unjustified — owing to a complete failure to state reasons — loss of basic rights guaranteed by both EU law and the Spanish Constitution.

WORKING DOCUMENT