Case C-625/20

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:

19 November 2020

Referring court:

Juzgado de lo Social n.º 26 de Barcelona (Social Court No 26, Barcelona, Spain)

Date of the decision to refer:

13 October 2020

Applicant:

KM

Defendant:

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

Subject matter of the main proceedings

The purpose of this request for a preliminary ruling is to ascertain whether the Spanish Social Security system discriminates on grounds of sex and gender, thereby breaching EU legislation establishing the principle of equal treatment for men and women, when it deems that two benefits awarded under different social security schemes are compatible but prohibits the receipt of two benefits under a single scheme, even where the eligibility requirements for both benefits are satisfied.

Purpose and legal basis of the request for a preliminary ruling

1 This request for a preliminary ruling is made pursuant to Article 267 TFEU. Its purpose is to ascertain the validity of Article 163(1) of the [Ley General de la Seguridad Social] (General Law on Social Security, 'the LGSS'), having regard to the principle of equal treatment for men and women in matters of social security

and, in the alternative, in matters of employment and occupation, within the terms of various EU directives.

2 Article 163(1) of the LGSS states that, in the absence of express provision to the contrary, different pensions awarded to a single recipient under the General Scheme are mutually incompatible, and anyone entitled to two or more pensions must choose between them.

3 However, in the case of retirement pensions, permanent disability pensions and survivors' pensions, where the beneficiary can demonstrate periods of contributions paid, either successively or alternately, into more than one Social Security scheme, the Spanish Social Security system permits the contribution periods in question to be added together for the purposes of building up pension entitlement and determining the applicable percentage, based on the number of years of contributions, to be used in calculating the pension, provided that the periods do not overlap.

4 In addition, under the case-law, pension incompatibility is limited to pensions granted under the same Social Security scheme, meaning that benefits payable under different Social Security schemes are deemed compatible.

5 However, the proportion of scheme membership accounted for by women varies across the different Social Security schemes, ranging from 95.60% in the special system for domestic workers to 7.97% in the special scheme for coal mining. Nevertheless, in the two largest schemes, namely the general scheme ('RGSS') — which, in general terms, covers employees in any productive sector — and the Special Scheme for Self-Employed Workers ('RETA') — which, in general terms, covers self-employed workers in any productive sector — the percentages accounted for by women are 48.09% and 36.15% respectively.

6 Consequently, if benefits are compatible only where they have been earned under different schemes (usually the RGSS and the RETA), and men account for a far higher proportion of membership of the RETA than women, benefit compatibility will be much more feasible for men than for women, which would be in breach of equal treatment in matters of social security, and perhaps also in matters of employment and occupation, as required under EU legislation.

Questions referred

1. - 'Is the Spanish rule on compatibility of benefits established in Article 163(1) of the [Ley General de la Seguridad Social] (General Law on Social Security), as interpreted by case-law, which prevents two permanent disability benefits awarded under the same Social Security scheme being deemed compatible, while benefits awarded under different schemes are deemed compatible, even if, in both cases, entitlement has been earned by virtue of separate contributions, contrary to the European rules established in Article 4 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, and Article 5 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 (recast), given that the Spanish legislation may give rise to indirect discrimination on grounds of sex or gender, having regard to gender distribution in the different Spanish Social Security schemes?'

2. - If the reply to the first question is in the negative, 'could the Spanish legislation be contrary to the aforesaid European legislation if the two benefits relate to different injuries or illnesses?'

Provisions of EU law cited

Article 267 TFEU.

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 1 and 2, 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): Article 1, Article 2(1)(a), (b) and (f), and Article 5.

Provisions of national law cited

General Law on Social Security (LGSS), recast text approved by Royal Legislative Decree 8/2015 of 30 October 2015: particularly Article 163(1), but also Article 193(1) and the 26th Transitional Provision.

Real Decreto 691/1991, de 12 de abril, sobre Cómputo recíproco de cuotas entre Regímenes de Seguridad Social (Royal Decree 691/1991 of 12 April 1991 on the reciprocal calculation of contributions between Social Security schemes): Article 1, Article 4(1) and Article 5.

Judgment of the Sala de lo Social del Tribunal Supremo (Social Division of the Supreme Court, Spain) of 14 July 2014 on an appeal seeking to ensure the uniformity of case-law No 3038/2013.

Brief summary of the facts and the main proceedings

7 By decision of the INSS, the applicant was classified as having a permanent total disability caused by a non-occupational illness which prevented her from carrying on her habitual occupation of administrative assistant, and she was entitled to receive the corresponding benefit with effect from 19 November 1998. The

benefit was calculated using the contribution bases for the period from May 1989 to April 1994.

8 The applicant's current habitual occupation is that of junior employee. The applicant began a period of temporary incapacity for work on 18 July 2016. On 20 March 2018 the Provincial Directorate of the INSS issued a decision declaring that the applicant had a permanent total disability as the result of a non-industrial accident, and she was entitled to receive the corresponding benefit. The benefit was calculated using the contribution bases for the period from February 2015 to January 2017.

9 Although the applicant was awarded these two benefits in respect of different occupations and as a result of different illnesses and injuries and different contribution periods, and although different contribution bases were used to calculate the amount of the benefits, the INSS considers that the benefits are incompatible, pursuant to Article 163(1) of the LGSS.

10 According to the most authoritative case-law, the two permanent total disability pensions would, however, be compatible if they had been awarded under different schemes.

Main arguments of the parties to the main proceedings

11 The applicant considers that Article 163(1) of the LGSS does not apply to her, on the grounds that it is contrary to European law, specifically Article 4 of Directive 79/7/EEC and Article 5 of Directive 2006/54/EC.

12 In particular, she considers that, as the proportion of women in the special schemes and, particularly significantly, in the RETA, is far lower than the proportion of men (as at 31 January 2020 the proportion is 36.15%), the rules on incompatible benefits lead to indirect discrimination on grounds of sex or gender since, although the rules are apparently neutral, they make it harder for women to receive compatible benefits, since women's membership of special schemes is proportionally far lower than that of men.

13 The INSS argues that: one of the directives relied on by the applicant, Directive 2006/54, was not even applicable; it is contradictory to receive two permanent total disability benefits for different occupations given that, in view of its very nature, people can usually have only one habitual occupation, namely their most recent occupation; in assessing eligibility for the second permanent total disability pension, regard must also be had to the illness or injury that gave rise to the first pension; the rules allow for contributions made under different schemes to be included in the calculation; and the legislation on the compatibility of permanent disability benefits has very little practical impact.

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

14 The referring court considers that the current rules on the compatibility of benefits lead to indirect discrimination on grounds of sex or gender, which is prohibited under European law, since the national legislation prevents the two permanent disability benefits awarded to the applicant under the RGSS being deemed compatible.

15 The most authoritative case-law has adopted the opposite interpretation of Article 163(1) of the LGSS, while allowing two benefits awarded under different schemes (the RGSS and another scheme, usually the RETA) to be deemed compatible, even where the benefits are awarded in respect of the same illnesses or injuries, provided that sufficient contributions were made under each scheme to qualify for the benefit in question.

16 There would, in any event, be grounds for ruling that the two benefits were not compatible if they had been earned, in whole or in part, through the same contributions. Similarly, benefits awarded under different schemes could not be deemed compatible if insufficient qualifying contributions had been made under each scheme. But in the case under consideration here, the applicant has demonstrated that she has made sufficient separate contributions to qualify for both benefits, having regard to the point at which the benefits were awarded, the grounds for the benefit and the applicant's age at the time of the event that triggered payment.

17 The permanent total disability benefit awarded in 1999 was clearly awarded on the basis of prior contributions. And the benefit awarded in 2018 did not require a prior contribution period, because it was triggered by a non-industrial accident, meaning that all that was needed was to be registered in the Social Security system. But that is not all: even if the permanent total disability benefit awarded in 2018 had been triggered by a non-occupational illness, the applicant had paid enough contributions since 1999 to qualify for the benefit.

18 The outcome under consideration here, namely that benefits are deemed incompatible where they are awarded under the same scheme (usually the RGSS) and are deemed compatible where they are awarded under different schemes (usually the RGSS and the RETA), even if, in both cases, the entitlement to the benefits has been earned through separate contributions, gives rise to indirect discrimination on grounds of sex. Such discrimination would be prohibited by Article 4 of Directive 79/7/EEC and by Article 5 of Directive 2006/54/EC, in the event that the latter is applicable.

19 On the face of it, the application of the rule on incompatibility of benefits is neutral as regards sex, since it distinguishes on grounds not of sex but of scheme. But the way in which it applies in practice may have a greater impact on the female sex or gender, as demonstrated by the analysis of the composition of the different Social Security schemes by sex. We will focus solely on the RGSS and

the RETA, as these are the schemes with the most members, with the other special schemes or systems really being peripheral in comparison.

20 The RGSS is the scheme that covers employed workers in most sectors, and it has over 14.5 million members. And in this scheme the distribution between the sexes is more or less equal, with women representing 48.09%. By contrast, in the RETA, which covers self-employed workers in most sectors and which also has a large number of members (over 3 million), there is an imbalance between the sexes; here, women represent only 36.15%, which does not reflect the proportion of women in either the total national population or the active population.

21 That being so, if benefit compatibility is possible only where the benefits are earned under different schemes (usually the RGSS and the RETA), and the proportion of men in the RETA is far higher than the proportion of women, we can conclude that benefit compatibility will be far more feasible for men than women. In percentage terms, the application of the legislation on benefit incompatibility will affect women far more than men, and there is no objective reason for this.

22 Moreover, this situation would involve indirect discrimination on grounds not only of sex, but also — and perhaps principally — of gender, because the lower presence of women in the RETA reflects the fact that they have traditionally found it harder to pursue self-employment due to their societal role as carers and homemakers, which has not yet been completely eradicated. In previous generations in particular, while women were still economically active, they joined the labour market later, sometimes when the children had grown up, and they were mainly in part-time employment — so that they could combine work with looking after the home — and in lower-skilled jobs — as there was less opportunity for training and career progression.

23 Given these adverse conditions, it is therefore natural that most women in the labour market are employees rather than in self-employment; moreover, their traditional societal role as carers restricted access to the finance and capital required for self-employment.

24 A request for a preliminary ruling is considered appropriate for all the above reasons. And while there is clear and settled European Union case-law on the prohibition on direct or indirect discrimination on grounds of both sex and gender, a ruling on this matter from the Court of Justice of the European Union is considered necessary since no previous judgment has examined the specific issue of benefit compatibility.

25 The situation would be different if the second pension had been awarded on grounds of permanent absolute disability, because in that case the benefit would be compensation for incapacity to perform work of any kind, which would include incapacity to continue in a specific occupation. But that is not the case with the applicant.

26 Two permanent total disability benefits cannot be awarded in respect of the same illness or injury. But it is possible to receive two compatible permanent total disability benefits for the same illness or injury if they are awarded under two different schemes. The court therefore considers it appropriate to refer a second question, in the alternative to the main question, in the event that a rider is required to the effect that benefit incompatibility would be justified, and would not be discriminatory, only where the benefits were awarded in respect of the same injuries or illness.