Court of Justice of the European Union
**PRESS RELEASE No 99/17**
Luxembourg, 14 September 2017

Press and Information

Advocate General's Opinion in Case C-103/16
Jessica Porras Guisado v Bankia SA, Fondo Garantía Salarial and Others

# According to Advocate General Sharpston, a collective redundancy does not always qualify as an "exceptional case" permitting the dismissal of a pregnant worker

*In the context of a collective redundancy, the dismissal of pregnant workers may only occur in exceptional cases not connected to the pregnancy and when there is no plausible possibility of reassigning them to another suitable post*

On 9 January 2013, the Spanish company Bankia S.A. opened a period of consultation with the workers' representatives with a view to effecting a collective redundancy. On 8 February 2013, the negotiating committee reached an agreement setting out the criteria to be applied in selecting those workers to be dismissed and those who were to be retained in employment with Bankia.

On 13 November 2013, Bankia sent Ms Porras Guisado, who was pregnant at the time, a letter giving her notice of the termination of her contract of employment pursuant to the negotiating committee agreement. The dismissal letter stated, in particular, that in the specific case of the province where she worked an extensive adjustment to the workforce was necessary, and that in the assessment process carried out in the undertaking during the consultation period, her score had placed her among the lower scores of the province.

Ms Porras Guisado lodged an application challenging her dismissal before the Juzgado Social No 1 de Mataró (Social Court No 1 of Mataró) which found in favour of Bankia. She appealed to the Tribunal Superior de Justicia de Cataluña (High Court of Justice of Catalonia, Spain), which has asked the Court of Justice to interpret the prohibition on the dismissal of pregnant workers, and more particularly how to interpret that prohibition in the event of a collective redundancy procedure.

In her Opinion today, Advocate General Eleanor Sharpston first considers that **the Maternity Directive**[1] protects female workers "during the period from the beginning of their pregnancy to the end of the maternity leave", even though they may not yet have informed their employer of their condition. The **exception permitting the dismissal of pregnant workers only applies in exceptional cases not connected to the pregnancy.** On the other hand, the Collective Redundancies Directive[2] regulates dismissals in collective redundancies and defines them as 'dismissals effected by an employer for one or more reasons not related to the individual workers concerned'.

Regarding the interaction between the two provisions, **the Advocate General considers that** the conditions permitting a pregnant worker to be dismissed, namely 'exceptional cases not connected with [her] condition which are permitted under national legislation and/or practice', should not be interpreted as corresponding exactly to the expression 'one or more reasons not related to the individual workers concerned'. **Within the context of the Collective Redundancies Directive**

[1] 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 (tenth individual Directive within the meaning of Article 16(1) of Directive 89/391/EEC) (OJ 1992 L 348, p. 1), ('the Maternity Directive'). At the material time it was the version of that directive as amended by Directive 2007/30/EC of the European Parliament and of the Council of 20 June 2007 (OJ 2007 L 165, p. 21) which applied.
[2] Council Directive 98/59/EC of 20 July 1998 on the approximation of the laws of the Member States relating to collective redundancies (OJ 1998 L 225, p. 16) ('the Collective Redundancies Directive').

**there are situations that are, indeed, deemed to be exceptional. However, not every collective redundancy is an 'exceptional case' in the sense of the Maternity Directive.** Therefore, it is for the national court to verify whether in the present case the collective redundancy qualifies as an "exceptional case", in order to establish if the exception from the prohibition of dismissal applies.

The Advocate General further considers that **in order to rely on the "exceptional cases" exception permitting the dismissal of a pregnant worker, it is not sufficient to invoke reasons that affect her post in the event of a collective redundancy,** or indeed outside that context: **there must also be no plausible possibility of reassigning the pregnant worker to another suitable post.**

The Advocate General clarifies that "reassignment to another work post" is not the same as "retention in the undertaking". Reassignment to another work post is possible if such a post is vacant or if a vacancy can be created by transferring another worker to yet another post and then reassigning her to the post thus vacated, while retention in the undertaking means that, no matter what, that pregnant worker will continue in employment. In this respect, **the Maternity Directive does not require Member States to make specific provision for pregnant workers to be afforded priority for retention in an undertaking in the event of a collective redundancy.** If the Maternity Directive has been transposed correctly into national law, the resulting national legislation should normally ensure that a pregnant worker is indeed retained in employment in the event of a collective redundancy.

The Advocate General also considers that **the Maternity Directive requires Member States to provide pregnant workers both with protection against dismissal itself** (preventive protection) **and protection against the consequences of a dismissal prohibited that has nevertheless taken place** (reparative protection). In that context, the Advocate General states that the applicable Spanish legislation appears to provide that an unlawful dismissal is "void by operation of law". Thus, it seems to provide reparative protection rather than preventative protection. If that is right, the Spanish legislation would not appear to address the requirements of the Directive.

Finally, the Advocate General concludes that **for a notice of dismissal to fulfil the requirements of the Maternity Directive, it must both be in writing and state duly substantiated grounds regarding the exceptional cases not connected with the pregnancy that permit the dismissal.** In the context of a collective redundancy, a notice of dismissal which limits itself to providing the general reasons for the redundancies and selection criteria but does not explain why the dismissal of a pregnant worker is permissible because the specific circumstances of the collective redundancy in question make it an 'exceptional case' will not satisfy that test.

---

**NOTE:** The Advocate General's Opinion is not binding on the Court of Justice. It is the role of the Advocates General to propose to the Court, in complete independence, a legal solution to the cases for which they are responsible. The Judges of the Court are now beginning their deliberations in this case. Judgment will be given at a later date.

**NOTE:** A reference for a preliminary ruling allows the courts and tribunals of the Member States, in disputes which have been brought before them, to refer questions to the Court of Justice about the interpretation of European Union law or the validity of a European Union act. The Court of Justice does not decide the dispute itself. It is for the national court or tribunal to dispose of the case in accordance with the Court's decision, which is similarly binding on other national courts or tribunals before which a similar issue is raised.

---



*Press contact: Holly Gallagher ☎ (+352) 4303 3355*