

**Case C-441/23**

**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:**

12 July 2023

**Referring court:**

Tribunal Superior de Justicia de Madrid (Spain)

**Date of the decision to refer:**

7 June 2023

**Appellant:**

LM

**Respondents:**

Omnitel Comunicaciones, S. L.

Microsoft Ibérica, S. R. L.

Fondo de Garantía Salarial (FOGASA)

Indi Marketers, S. L.

Leadmarket, S. L.

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**Subject matter of the main proceedings**

Temporary agency work – Contract for services – Distinction – Pregnant worker – Dismissal – Nullity of the dismissal – Consequences of the nullity of the dismissal

**Subject matter and legal basis of the request**

Request for a preliminary ruling on interpretation – Article 267 TFEU – Directive 2008/104/EC – Applicability of the directive – Concepts of temporary agency worker, temporary-work agency and user undertaking – Salary – Directive

2006/54/EC – Maternity leave – Return to work – Dismissal – Consequence of the nullity of the dismissal

### Questions referred for a preliminary ruling

A) Whether Directive 2008/104/EC is applicable to an undertaking which assigns a worker to another undertaking, even if the first undertaking is not recognised by domestic legislation as a temporary-work agency on account of the fact that it does not have the relevant administrative authorisation;

B) Where Directive 2008/104/EC is applicable to undertakings which, without being recognised under domestic law as temporary-work agencies, assign workers [to other undertakings], if, in a situation such as that described above, the worker must be regarded as a temporary agency worker within the meaning of Article 3(1)(c) of Directive 2008/104/EC, must the undertaking Leadmarket S. L. be regarded as a temporary-work agency within the meaning of Article 3(1)(b) of that directive and must the undertaking Microsoft Ibérica be regarded as a user undertaking within the meaning of Article 3(1)(d) of the same directive; in particular, whether it may be understood that the undertaking Leadmarket retained the supervision and direction of the work (thereby precluding the existence of an assignment of the worker), on account of the fact that the director of that undertaking received a monthly activity report from the worker and also signed off the worker's leave, holiday and hours, even if the day-to-day provision of the worker's services consisted in attending to Microsoft customers, resolving incidents by frequently contacting Microsoft managers, and working from her home with a computer made available to the worker by Microsoft and attending the Microsoft workplace once a week;

C) If it is the case that Directive 2008/104/EC is applicable and we find ourselves dealing with an assignment of the worker, whether, as a consequence of the application of Article 5(1) of Directive 2008/104/EC, the salary of the worker must be at least the same as she would be entitled to if she had been recruited by Microsoft Ibérica directly;

D) Whether, in the circumstances of the case, the right of the worker, under Article 15 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, to return to her job or another equivalent position following maternity leave is applicable. And whether, even though the contract between Microsoft Ibérica and Leadmarket had ended, since there is no equivalent position at Leadmarket, the worker's return to work must take place at Microsoft Ibérica.

E) Where Directive 2008/104/EC is applicable on account of the fact that we are dealing with an assignment, whether, as a consequence of the application of Article 5(1) of Directive 2008/104/EC, the Spanish legal provisions which establish the nullity of dismissal in the case of pregnant workers and nursing

mothers must lead to the temporary-work agency and the user undertaking being declared jointly and severally liable for the consequences laid down by law for a dismissal that is null and void, specifically: reinstatement of the worker to her job, payment of the salary not received from dismissal to reinstatement, and the obligation to pay the appropriate compensation arising from the unlawfulness of the dismissal.

### **Provisions of European Union law relied on**

Directive 2008/104/EC of the European Parliament and of the Council of 19 November 2008 on temporary agency work ('Directive 2008/104'): Article 1(1), Article 3(1)(a), (b), (c), (d), (e) and (f), and Article 5(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) ('Directive 92/85'): Articles 2 and 10.

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 ('Directive 2006/54'): Article 2(2), Article 14(1), and Article 15.

Charter of Fundamental Rights of the European Union: Articles 21, 23 and 30.

### **Provisions of national law relied on**

Real Decreto Legislativo 2/2015, de 23 de octubre, por el que se aprueba el texto refundido de la Ley del Estatuto de los Trabajadores (Royal Legislative Decree 2/2015, of 23 October 2015, approving the recast text of the Law on the Workers' Statute; 'the Workers' Statute'): Article 13, Article 43(1), (2), (3) and (4), Article 43(1)(d) and Articles 53 and 55.

Ley 14/1994, de 1 de junio, por la que se regulan las empresas de trabajo temporal (Law 14/1994, of 1 June 1994, regulating temporary-work agencies; 'Law 14/1994'): Articles 1 and 2, Article 2(2)(a) and Articles 12 and 15.

Ley 31/1995, de 8 de noviembre, de Prevención de Riesgos Laborales (Law 31/1995, of 8 November 1995, on the prevention of occupational risks; 'Law 31/1995'): Article 28.

Real Decreto-ley 28/2020, de 22 de septiembre, de trabajo a distancia, sustituido por la Ley 10/2021, de 9 de julio, de trabajo a distancia (Royal Decree-law 28/2020, of 22 September 2020, on remote working, replaced by Law 10/2021, of 9 July 2021, on remote working; 'Law 10/2021'): Articles 11 and 12.

Under Spanish legislation:

- a) The assignment of workers is a legal transaction which, as a general rule, is only considered lawful when carried out by a temporary-work agency;
- b) Temporary-work agencies appear [to be?] identified as such, because they must have prior administrative authorisation in order to carry on their activity;
- c) The contract for the assignment of workers is characterised by the fact that the temporary-work agency recruits the worker, pays his or her salary and registers him or her with the social security system, but the worker is under the supervision and direction of the user undertaking;
- d) The temporary-work agency is also responsible for the worker's training in relation to occupational risk prevention and for watching over the workers' health, without that resulting in it ceasing to be an assignment;
- e) Accordingly, the temporary-work agency is not a fictitious or non-existent undertaking, but rather it must have an organisational structure which allows it to fulfil its obligations.

In addition to possible administrative or even criminal penalties, the existence of an assignment of workers not carried out by a duly authorised temporary-work agency implies:

- a) That both undertakings, the assigning undertaking and the user undertaking, are jointly and severally liable for the obligations assumed in relation to the workers and the social security system (Article 43(3) of the Workers' Statute).
- b) The assigned worker is regarded as a permanent employee and may choose between continuing as a worker of the assigning undertaking or being regarded as a worker of the user undertaking, in which his or her rights and obligations will be those applicable to a worker providing services in the same or an equivalent position, although the length of service is calculated from the start of the unlawful assignment (Article 43(4) of the Workers' Statute).

With regard to the declaration of the dismissal as null and void in the case of individuals in receipt of benefits for the birth of and care for a child, the Workers' Statute (Articles 53 and 55) provides that the dismissal (objective or disciplinary) must be found to be null and void, among other circumstances, in the case of pregnant workers, from the start date of the pregnancy, and also in the case of workers after they have returned to work at the end of the period of suspension of the contract on account of the birth of and care for a child, provided that no more than 12 months have elapsed since the date of the birth. However, the dismissal must not be declared null and void if it is considered legitimate on account of the

existence of reasons that justify it in law, such that ‘the dismissal is declared legitimate on grounds unrelated to the pregnancy or to the exercise of the right to the leave and extended leave referred to’.

According to the Tribunal Constitucional (Constitutional Court, Spain), the nullity of the dismissal provided for in those provisions is an objective guarantee, established to protect fundamental rights, which must operate even when the undertaking was not aware, at the time of dismissal, that the worker was pregnant.

Moreover, the dismissal must also be declared null and void if it is considered to have as a motive any of the forms of discrimination prohibited in the Constitution or by law, or it has violated the worker’s fundamental rights and civil liberties.

The declaration of the dismissal as null and void entails the undertaking being ordered ‘to reinstate the worker immediately, with payment of the salary not received’ (Article 55(6) of the Workers’ Statute), without the employer being able to choose to compensate the worker instead of reinstating him or her to the relevant position.

As regards remote working and teleworking arrangements, they are defined as ‘[arrangements] where the work is predominantly done in the home of the worker, or in a place freely chosen by the worker, as an alternative to it being done in person at the workplace of the undertaking’ (Article 13 of the Workers’ Statute). Under Spanish law, the technical means necessary for remote working must be provided by whomever is regarded as the employer.

### **Succinct presentation of the facts and procedure in the main proceedings**

- 1 Ms LM (‘Ms LM’ or ‘the worker’) completed a traineeship at Microsoft Ibérica from September 2010 to June 2011. Subsequently, she was contracted by three undertakings in succession: Omnitel Comunicaciones S. L. (between 24 August 2011 and 24 January 2012, and also between 21 July 2014 and 23 December 2014), Indi Marketers S. L. (between 4 March 2015 and 31 May 2017) and Leadmarket (from 1 August 2017 until her dismissal in April 2021). Those undertakings had contracts for various services with Microsoft Ibérica and Ms LM was tasked with working on the provision of the services contracted for between those undertakings and Microsoft Ibérica.
- 2 Ms LM entered into three consecutive short-term contracts with Omnitel Comunicaciones, for the duration of which she carried out Microsoft Customer Partner Experience duties.
- 3 With Indi Marketers, the worker carried out marketing duties for the campaigns ‘Datamining Breath Microsoft’ and ‘Telemarketing Azure partner Microsoft’. During that contract, she carried out database maintenance and cleaning duties, working remotely, working the hours she chose and attending the offices of Microsoft once a week.

- 4 During the time that she was contracted by Leadmarket, Ms LM worked as a graduate consultant/sales representative for Microsoft's Original Equipment Manufacturer (OEM) department, doing marketing work to provide support to Microsoft partner accounts. There were no Microsoft workers carrying out those same duties, which were performed exclusively through external contracts. The provision of services contracted for had the following characteristics:
- a) The worker's contract of employment was with Leadmarket, which in turn had a contract with Microsoft Ibérica to provide the service of off-site or remote assistance to OEM customers, a service which was performed by the worker.
  - b) The worker provided services remotely, from her home, although she attended the offices of Microsoft Ibérica once a week, for which purpose she had an access card for external staff provided by Microsoft Ibérica.
  - c) In order to provide the services, she used a computer provided by Microsoft Ibérica, which that undertaking gave her to use for reasons of information security, although, at first, she used another computer that did not belong to Microsoft.
  - d) The service consisted of off-site or remote assistance for customers of Microsoft's OEM products. The worker contacted the customers directly and had a microsoft.com email account, with no other Microsoft Ibérica worker also performing that service.
  - e) For anything related to the performance of the service, she frequently contacted the managers of the relevant department of Microsoft.
  - f) Furthermore, she reported monthly to the director of Leadmarket, who was the person who organised her holiday, leave, working week and hours and communicated that [information] to Microsoft Ibérica. It was also that person from Leadmarket who provided her with training.
- 5 The worker became pregnant in 2020. When she was in the seventh month of that pregnancy, Microsoft informed Leadmarket that the contract would end on 30 September 2020 and would not be extended for budgetary reasons.
- 6 On 22 September 2020, the worker began a period of temporary incapacity for work and on 8 December 2020 her daughter was born, initiating the rest period for the birth of and care for a child. That rest period was subsequently combined with her breastfeeding leave and use of annual leave, all of which lasted until 29 March 2021. The day that she was due to return to work, on 29 April 2021, she received a letter from the director of Leadmarket informing her of the termination of her employment contract with effect from 27 April 2021, citing objective grounds, in particular, the reduction in demand as a result of the loss of projects that had been expected, since the undertaking did not have any service where she could be placed.

- 7 On 14 June 2021, the worker brought a claim against Microsoft Ibérica and Leadmarket, asking that her dismissal be declared null and void or, alternatively, unfair. She asked that Leadmarket and Microsoft Ibérica be found jointly and severally liable for the consequences of that declaration. She also sought compensation of EUR 110 000 for violation of her fundamental rights (discrimination on grounds of sex) and payment of wages yet to be paid, amounting to EUR 1 100.
- 8 In a judgment of 30 November 2021, the Juzgado de lo Social número 39 de Madrid (Madrid Social Court No 39, Spain) held that it was not a case of an assignment of workers, given that it was Leadmarket who organised the claimant's working week and hours, paid her her salary, provided her with training, authorised leave and holiday and managed her maternity leave. It also held that the reason for which Microsoft Ibérica ended the contract with Leadmarket was an insufficient budget and not the worker's pregnancy and subsequent maternity. Accordingly, it found Microsoft Ibérica not liable in relation to the dismissal and the violation of fundamental rights and it expressly rejected the claim that the worker's salary had to be that which she would have had, had she been recruited by Microsoft Ibérica directly.
- 9 With regard to Leadmarket, that judgment held that the objective grounds for termination explained in the dismissal letter were 'generic, vague and insufficient' and that, consequently, the dismissal was unlawful, since Spanish law required that the dismissal be declared null and void, as it occurred in the period following leave for the birth of and care for a child.
- 10 Having found that the real reason for the termination of the contract was unrelated to discrimination on grounds of maternity, the claim for compensation was rejected. Finally, that court ordered Leadmarket to pay the worker the salary yet to be paid for the proportional part of the final month of work and holiday entitlement accrued and unused.
- 11 Ms LM lodged an appeal against the judgment of the Madrid Social Court with the Tribunal Superior de Justicia de Madrid (High Court of Justice, Madrid, Spain; 'the referring court').

### **The essential arguments of the parties in the main proceedings**

- 12 Ms LM argues that her situation at Leadmarket was an assignment of her services as an employee to Microsoft Ibérica, and therefore, in her view, that undertaking must be held jointly and severally liable for the consequences of the dismissal declared null and void, including reinstatement to her job. She also maintains that the salary must be the same as she would have received if she had been recruited by Microsoft Ibérica directly.
- 13 Moreover, she claims that the application of the legal rules regarding nullity of dismissal in the case of pregnant workers or workers who have returned to work

after maternity leave must lead to an award of compensation for violation of fundamental rights, for which Microsoft Ibérica and Leadmarket should have been held jointly and severally liable.

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

- 14 Under Spanish law, only an undertaking that has the assignment of workers as its fundamental activity and has a specific administrative authorisation allowing it to operate as a temporary-work agency is considered to be a temporary-work agency. If any undertaking, regularly or occasionally, assigns workers without having such an authorisation, it is not considered to be a temporary-work agency. Activity carried on in that way is prohibited and gives rise to the worker's right to choose between joining either the user undertaking or the assigning undertaking as a permanent employee, and to the joint and several liability of both undertakings for employment and social security obligations, together with various penalties.
- 15 However, Directive 2008/104 defines a temporary-work agency as any natural or legal person who, in compliance with national law, concludes contracts of employment or employment relationships with temporary agency workers in order to assign them to user undertakings to work there temporarily under their supervision and direction. It therefore appears to be sufficient for an undertaking to assign a worker to another undertaking, even if it is on an occasional basis, for it to be regarded by Directive 2008/104 as a temporary-work agency, without it being required, as it is in Spanish law, to be an undertaking which has the assignment of workers as its fundamental activity and which has an administrative authorisation for that activity.
- 16 By its first question, the referring court asks whether Directive 2008/104 is applicable to an undertaking which assigns a worker to another undertaking, even if it does so without being recognised by domestic legislation as a temporary-work agency by means of an administrative authorisation.
- 17 If the answer is in the affirmative, the referring court asks whether, in the present case, an assignment of the applicant, by Leadmarket to Microsoft Ibérica, has taken place such that the worker must be regarded as a temporary agency worker within the meaning of Article 3(1)(c) of Directive 2008/104, the undertaking Leadmarket must be regarded as a temporary-work agency within the meaning of Article 3(1)(b) of that directive, and the undertaking Microsoft Ibérica must be regarded as a user undertaking within the meaning of Article 3(1)(d) of that directive.
- 18 Article 3(1) of Directive 2008/104 defines those concepts on the basis that the worker recruited by the temporary-work agency provides his or her services 'under the supervision and direction' of the user undertaking.
- 19 The doubt raised is whether, in view of all the elements which characterise the work done by the worker, as set out in paragraph 4 above, the undertaking

Leadmarket may be understood to have retained the supervision and direction of the work, such that we would not be dealing with an assignment of the worker, on account of the fact that the director of that undertaking received a monthly activity report and also signed off on the worker's leave, holiday and hours.

- 20 If Directive 2008/104 is applicable to the case, then it seems clear that the typical remuneration of the user undertaking would form part of the 'basic working and employment conditions' and, in accordance with Article 5(1) of that directive, it would be necessary to uphold the worker's claim that her salary should be at least that which would apply if she had been recruited directly by Microsoft Ibérica to occupy the same position.
- 21 The next problem which arises is that relating to the reinstatement of the worker once her dismissal has been declared null and void by the Social Court and [the fact that] that declaration of nullity implies the right of the worker to return to her job prior to the dismissal. Under Article 15 of Directive 2006/54, a woman on maternity leave is entitled, after the end of her period of maternity leave, to return to her job or to an equivalent post on terms and conditions which are no less favourable to her and to benefit from any improvement in working conditions to which she would have been entitled during her absence.
- 22 The contractual relationship between Leadmarket and Microsoft Ibérica had been terminated when the worker returned to work and was dismissed by Leadmarket, such that she would only be able return to her job and duties prior to maternity leave if that return to work took place at Microsoft Ibérica, as Leadmarket does not have any position to offer as an alternative. In fact, Leadmarket is in default in the proceedings and has not appeared in court, having presumably disappeared; therefore, it cannot be considered that there is an equivalent position on the staff of that undertaking.
- 23 Furthermore, it must be borne in mind that, if we were dealing with an assignment regulated by Directive 2008/104, among the basic working and employment conditions the application of which to assigned workers must be guaranteed, Article 5(1) of that directive includes the rules in force in the user undertaking relating to the protection of pregnant women and nursing mothers, and also those relating to equal treatment for men and women and any action to combat any discrimination based on sex, 'as established by legislation, regulations, administrative provisions, collective agreements and/or any other general provisions'. A legal rule in force in Spain, for both the user undertaking and the assigning undertaking, is the obligation to reinstate workers who have been dismissed after having returned to work at the end of periods of suspension of the contract on account of childbirth, adoption, fostering with a view to adoption or fostering, provided that no more than 12 months have elapsed since the date of the birth, the adoption, the fostering with a view to adoption or the fostering, and to pay them the salary they have not received. That rule is established by Spanish legislation for any case of objective or disciplinary dismissal, except where the dismissal is declared legitimate.

- 24 Accordingly, if the worker assigned to Microsoft Ibérica had been recruited by that undertaking directly and were dismissed by it after returning to work following the suspension of the contract on account of the birth of and care for a child and if that dismissal were not justified and legitimate, the dismissal would be declared null and void and Microsoft Ibérica would be obliged to reinstate the worker to her job, paying her the salary she had not received from the date of the dismissal until her reinstatement. The problem is whether, on account of her not having been recruited by Microsoft Ibérica directly but rather by Leadmarket, that right which she would have to return to her job at Microsoft disappears, with Leadmarket having sole responsibility for her reinstatement, or whether, on the contrary, the application of Article 5(1) of Directive 2008/104 means that the reinstatement obligation and all of the consequences of the dismissal declared null and void are likewise enforceable against the user undertaking, Microsoft Ibérica.