

Case C-113/22

Summary of the request for a preliminary ruling under Article 98(1) of the Rules of Procedure of the Court of Justice

Date lodged:

17 February 2022

Referring court:

Tribunal Superior de Justicia de Galicia (Spain)

Date of the decision to refer:

2 February 2022

Applicants:

DX

Instituto Nacional de la Seguridad Social (INSS)

Defendant:

Tesorería General de la Seguridad Social

Subject matter of the main proceedings

Permanent incapacity benefit – Maternity supplement – Granting of benefits to men

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

Request for a preliminary ruling on interpretation – Article 267 TFEU – Discrimination on grounds of sex – Articles 4 to 6 of Directive 79/7/EEC – Judgment of the Court of Justice finding there to be discrimination – National administrative practice which maintains discrimination – Effective date of the judicial declaration – Compensation for damages

Questions referred for a preliminary ruling

1. Must the administrative authority's practice, set out in administrative position 1/2020 of the INSS' Subdirectorato-General for Planning and Legal Services of 31 January 2020, of systematically refusing to grant the supplement at issue to men and requiring them to pursue their claims through the courts, as has happened to the applicant in the present case, be regarded, in accordance with 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, as an administrative breach of that directive, which is different from the legislative breach found to have been committed in the judgment of the Court of Justice of 12 December 2019 in *WA* (C-450/18), so that, considered in itself, that administrative breach constitutes discrimination on grounds of sex, in view of the fact that, according to Article 4 of that directive, the principle of equal treatment means that there is to be no discrimination whatsoever on ground of sex, either directly, or indirectly, and that, according to Article 5 of that directive, Member States are to take the measures necessary to ensure that any legislative or administrative provisions contrary to the principle of equal treatment are abolished?

2. In the light of the answer to the previous question, and having regard to Directive 79/7 (in particular Article 6 thereof and the principles of equivalence and effectiveness in relation to the legal consequences of non-compliance with EU law), must the effective date of the judicial recognition of the supplement be the date of the application (backdated by three months), or must the effective date be backdated to the date on which the judgment of the Court of Justice in *WA* was delivered or published, or to the date of the operative event for the permanent incapacity benefit to which the supplement at issue relates?

3. In the light of the answer to the previous questions, and having regard to the applicable directive (in particular Article 6 thereof and the principles of equivalence and effectiveness in relation to the legal consequences of non-compliance with EU law), is it appropriate to award compensation by way of reparation for the loss sustained and exemplary damages, on the ground that that loss is not addressed by the determination of the effective date of the judicial recognition of the supplement, and in any event, must the compensation cover the court fees and costs of legal representation before the Juzgado de lo Social (Social Court) and the Sala de lo Social (Social Chamber) of the referring court?

Provisions of EU law relied on

- 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 4 to 6
- Judgment of the Court of 12 December 2019, *WA v Instituto Nacional de la Seguridad Social (INSS)* (C-450/18, EU:C:2019:1075).

Provisions of national law relied on

- The Constitution, Article 14 (principle of equal treatment)
- Ley Orgánica 3/2007, de 22 de marzo, para la igualdad efectiva de mujeres y hombres (Organic Law 3/2007 of 22 March 2007 on effective equality between women and men).

Article 10: ‘Where acts ... constitute or cause discrimination on grounds of sex, they shall be regarded as null and void, and shall give rise to liability through a system of reparation or compensation that shall be real, effective and proportionate to the damage suffered, and, where necessary, through an efficient and dissuasive system of penalties that prevents the occurrence of discriminatory conduct’.

- 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 approving the revised text of the General Law on Social Security), in the version applicable *ratione temporis* to the dispute in the main proceedings:

Article 53: ‘1. The right to recognition of benefits shall be time-barred after five years with effect from the day following the day on which the operative event for the relevant benefit takes place, without prejudice to the exceptions provided for in this Law and to the fact the effective date of that recognition shall be backdated to three months before the date on which the relevant application was made. ...’

Article 60: ‘1. Women who have had biological or adopted children and are recipients of a contributory retirement, widow’s or permanent incapacity pension under any scheme within the social security system shall be granted a pension supplement on account of their demographic contribution to social security. ...’

- Ley 36/2011, de 10 de octubre, reguladora de la jurisdicción social (Law 36/2011 of 10 October governing social jurisdiction).

Brief summary of the facts and the main proceedings

- 1 Mr DX, who has two children, was granted permanent incapacity benefit with effect from 10 November 2018.
- 2 On 12 December 2019, the Court of Justice delivered its judgment in *WA* (C-450/18, EU:C:2019:1075; ‘the judgment in *WA*’), in which it held that ‘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 must be interpreted as meaning that it precludes national legislation, such as that at issue in the main proceedings, which makes provision for the right to a pension supplement for women who have had at least two

biological or adopted children and who are in receipt of contributory permanent incapacity pensions under a scheme within the national social security system, while men in an identical situation do not have a right to such a pension supplement’.

- 3 On the basis of that judgment, the Subdirectorate-General for Planning and Legal Services of the Instituto Nacional de la Seguridad Social (National Social Security Institute, ‘INSS’) published administrative position 1/2020 of 31 January 2020, in which it stated: ‘until the necessary legislative amendments are made to bring Article 50 [of the Texto Refundido de la Ley General de la Seguridad Social (Revised text of the General Law on Social Security, ‘TRLGSS’] into line with the judgment of the Court of Justice of the European Union, that administrative authority shall operate according to the following guidelines: 1. In so far as no legislative amendment is made to Article 60 TRLGSS, the supplement to permanent incapacity, retirement and widow’s pensions, regulated by that article, shall continue to be granted only to women who fulfil the requirements laid down therein, as has been the case to date. 2. The application of paragraph 1 shall naturally be without prejudice to the requirement to enforce those judgments whereby the courts grant that pension supplement to men ...’
- 4 On 10 November 2020, Mr DX applied for a maternity supplement under Article 60 of the General Law on Social Security. That application was rejected by administrative decision of 17 November 2020.
- 5 Mr DX brought an appeal against that administrative decision before the Juzgado de lo Social n.º 2 de Vigo (Social Court No 2, Vigo) which, by judgment of 15 February 2021, declared that he was entitled to the supplement. To grant the supplement, the Juzgado de lo Social n.º 2 de Vigo (Social Court No 2, Vigo) made reference to the judgment in *WA*. It stated that the supplement granted would be backdated to 10 August 2020 (three months prior to the application of 10 November 2020), in accordance with the national legislation. The court also held that Mr DX was not entitled to compensation because it was an instance of legislative discrimination.
- 6 Both Mr DX and the INSS brought an appeal against that judgment before the Tribunal Superior de Justicia de Galicia (High Court of Justice, Galicia, Spain), the referring court.

Principal arguments of the parties to the main proceedings

- 7 Mr DX argues that the INSS’ decision not to grant the supplement to men constitutes discrimination on grounds of sex, particularly since, after the judgment in *WA*, it decided that the supplement should continue to be granted only to women, and that men were to be required to pursue their claims through the courts. In accordance with Directive 79/7/EEC, this is a breach constituting discrimination on grounds of sex which is different from the breach found to have been committed in the judgment in *WA*. Therefore, Mr DX is seeking payment of

the maternity supplement with effect from the date on which his permanent incapacity pension was granted – since, if he were a woman, he would already have been informed of his right – as well as the payment of compensation for infringement of the right to non-discrimination by way of reparation for the loss sustained and exemplary damages.

- 8 The INSS disputes Mr DX's claims in so far as it considers that its approach is consistent with the principle of legality. It is an administrative body which does not have the legislative or regulatory power to transpose Directive 79/7/EEC. The judgment in *WA* does not recognise men's right to the maternity supplement. It merely states that Article 60 TRLGSS is contrary to the principle of equal treatment, which, in accordance with Article 5 of Directive 79/7, has the consequence that that provision must be abolished, but does not necessarily mean that men should be granted the supplement.

Succinct presentation of the reasons for the request for a preliminary ruling

First question referred

- 9 The fundamental doubt which arises in this case, and on which the answers to the two subsequent questions depend, is whether the INSS' practice, set out in administrative position 1/2020 following the judgment in *WA*, of systematically refusing to grant the supplement at issue to men and requiring them to pursue their claims through the courts, should be regarded, in accordance with Council Directive 79/7/EEC, as an administrative breach of that directive which is different from the legislative breach found to have been committed in that judgment, so that, considered in itself, that administrative breach constitutes discrimination on grounds of sex, contrary to Articles 4 and 5 of that Directive.
- 10 In the judgment given at first instance by the Juzgado de lo Social n.º 2 de Vigo (Social Court No 2, Vigo), it was held that this is a breach of an exclusively legislative nature. According to the referring court, on the other hand, it is a case of administrative breach rather than a legislative breach, which may have consequences as regards the date the supplement takes effect (second question referred) and as regards possible compensation for Mr DX (third question referred).

Second question referred

- 11 If it is held that there has been a breach of an exclusively legislative nature, the solution identified in the judgment of the Juzgado de lo Social n.º 2 de Vigo (Social Court No 2, Vigo) to the issue of the date from which the supplement should be paid (namely the date of the application, backdated by three months) is consistent with national legislation.

- 12 If, on the other hand, it is held that there has been an administrative breach by the authority such that it is distinguishable from a legislative breach, a doubt arises as to whether the same solution applies or whether, on the contrary, payment of the supplement should (in accordance with the right to effective judicial protection of the right to equal treatment guaranteed by Article 6 of Directive 79/7/EEC) be backdated to the date on which the judgment in *WA* was given (12 December 2019), or the date on which that judgment was published (17 February 2020), or the date of operative event for the incapacity benefit.
- 13 This could be justified in two ways.
- 14 First, it could be considered that backdating the supplement by three months, given that this is a short period by comparison to the longer limitation periods laid down in national law (five years in the case of permanent incapacity benefits), is contrary to the principle of effectiveness in that it hinders complaints about non-compliance with EU law, so, by applying the national rules on the limitation period (five years in the present case), payment of the supplement could be backdated to the date of the operative event.
- 15 Secondly, it could be considered that the breach is not limited to having refused to grant Mr DX the benefit, but that, since the date of the judgment in *WA* and until the entry into force of Royal Decree Law 3/2021 (passed in order to bring Article 60 TRLGSS into line with that judgment, but not applicable in the present case *ratione temporis*), the administrative authority has refused all claims made by men, compelling them to pursue their claims through the courts. Furthermore, those men were not informed of the rights they would have if that judgment were applied correctly and those rights were not granted to them, which contrasts with the fact that the authority even reviewed that supplement of its own motion, following the approval of Royal Decree Law 2/2021. Thus, if the administrative breach were to be considered to have arisen from the administrative practice set out in administrative position 1/2020, payment of the supplement should be backdated to the date of the judgment of the Court of Justice. It is necessary to clarify, more specifically, whether that date should be the date the judgment was delivered, or the date on which it was published.

Third question referred

- 16 In the judgment given at first instance by the Juzgado de lo Social n.º 2 de Vigo (Social Court No 2, Vigo), Mr DX's claim for compensation was dismissed. The court held that there were no damages to be compensated as a result of the infringement of the principle of gender equality, since there was no breach apart from the purely legislative breach.
- 17 If, on the other hand, it is held that there has been administrative breach which is distinguishable from the legislative breach, the claim for compensation would ultimately be based on EU law (without prejudice to the national rules transposing EU law). That would give rise to a number of doubts in relation to the right to

effective judicial protection of the right to equal treatment guaranteed by Article 6 of Directive 79/7/EEC.

- 18 First, if it were held that the supplement at issue should take effect, at the latest, on the date of the judgment in *WA*, it would be necessary to establish whether the administrative breach of EU law was already fully compensated, or whether additional compensation should be paid to make good the material and non-material damage established and to ensure a deterrent effect as regards that breach.
- 19 Furthermore, in any event, it would be necessary to determine whether, in order to ensure the effectiveness of EU law, compensation should also cover the court fees and costs of legal representation at first and second instance. On the last point, it should be clarified that, in accordance with national law, the INSS could never be ordered to pay fees and costs, since, in Spain, proceedings in employment cases are free of charge to all parties. It is only in the exceptional case of the imposition of a penalty for bad faith or recklessness, provided for in Article 97.3 of the Law governing social jurisdiction, that incidental fees and costs are added to the penalty, but that applies only if the party on which it is imposed is a company, so although the INSS could be ordered to pay a penalty for bad faith or recklessness, it would not, even in that exceptional case, be required to pay costs and fees.

WORKING DOCUMENT