Case C-678/23

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:

14 November 2023

Referring court:

Curtea de Apel Iași (Romania)

Date of the decision to refer:

10 October 2023

Appellant (applicant at first instance):

JU

Respondent (defendant at first instance):

Spitalul Clinic de Pneumoftiziologie Iași

Subject matter of the main proceedings

Appeal brought against the judgment of the Tribunalul Iași (Iași Regional Court, Romania) dismissing the action by which the appellant JU requested that the respondent Spitalul Clinicul de Pneumoftiziologie Iași be ordered to classify her workplace in the corresponding category of 'particular working conditions' as from 2007 and to pay the difference in social security contributions.

Subject matter and legal basis of the request

On the basis of Article 267 TFEU, the referring court seeks an interpretation of Articles 9 and 11(6) of Directive 89/391, in conjunction with Article 31(1) and Article 47 of the Charter of Fundamental Rights of the European Union.

Questions referred for a preliminary ruling

1) Do Article 9 and Article 11(6) of Council Directive 89/391/EEC on the introduction of measures to encourage improvements in the safety and health of

workers at work preclude mandatory national legislation and practice under which workers do not have the right to bring an action directly before the authority responsible for safety and health protection at work if they consider that the measures taken and the means employed by the employer are inadequate for the purposes of ensuring safety and health at work and cannot bring an action before the courts if they consider that the employers have not fulfilled their obligations with regard to classification as workplaces [exposing workers to] particular working conditions, either for the period of time already worked or for the future period of the employment relationship?

2) Does Article 11(6) of Directive 89/391 have vertical direct effect and, in conjunction with Article 31(1) and the Article 47 of the Charter of Fundamental Rights of the European Union, does that article recognise the right of workers to judicial protection in the event of failure by those legally responsible to fulfil their obligations under the legislation?

Provisions of European Union law relied on

Council Directive 89/391/EEC of 12 June 1989 on the introduction of measures to encourage improvements in the safety and health of workers at work: Article 9(1) and (2) and Article 11(6);

Charter of Fundamental Rights of the European Union, Articles 31(1) and 47.

Provisions of national law relied on

The national legislation in the pensions sector in force until 1 April 2001 – Legea nr. 27/1966 (Law No 27/1966) – established three categories of workplaces: those classified as workplaces [exposing workers to] normal conditions, those classified in Work Group II and those classified in Work Group I. After that date, the new pensions law, Legea nr. 19/2000 (Law No 19/2000), replaced the previous categories with new ones, namely workplaces classified as workplaces [exposing workers to] normal conditions, workplaces classified as workplaces [exposing workers to] particular conditions and workplaces classified as workplaces [exposing workers to] special conditions. This classification was maintained by Legea nr. 226/2006 (Law No 226/2006) on the classification of workplaces as workplaces [exposing workers to] special conditions.

According to the relevant legislation, classification as workplaces [exposing workers to] particular or special conditions confers certain economic benefits on the persons concerned, namely an increase in their pension points by 25% and 50%, respectively, for the periods during which they worked under such conditions. Furthermore, employees who have [been exposed to] special conditions for a contribution period of at least 25 years are entitled to a retirement pension 15 years earlier than the standard pension age provided for by Romanian pension legislation.

The criteria and arrangements for classification as workplaces [exposing workers to] particular conditions were initially laid down in Hotărârea Guvernului nr. 261/2001 (Government Decision No 261/2001). According to Article 2 of that decision, the criteria for classification as workplaces [exposing workers to] particular conditions are essentially the presence in the working environment of harmful agents/factors of a physical nature (noise, vibrations, electromagnetic waves, pressure, ionising radiation, heat radiation, powerful unshielded laser radiation), as well as harmful agents/factors of a chemical or biological nature, as specified in the general rules for the protection of work and which exceed the limits permitted by those rules, the body's specific response to the effects of harmful agents/factors, demonstrated by evidence of exposure and/or biological effects and the existence of occupational disease recorded in the workplace over the preceding 15 years.

As regards the arrangements, the classification procedure begins with identification of the workplaces in question by the employer together with the trade unions or employees' representatives and continues with an inspection carried out by the local authorities responsible for employment on the basis of technical and medical expert reports.

Article 4 of that decision specifies what documents are required in order to obtain a permit from the regional labour inspectorate for the classification of workplaces [exposing workers to] particular conditions and states that the period of validity of that permit is a maximum of three years with the possibility of extension.

Subsequently, Hotărârea Guvernului nr. 246/2007 (Government Decision No 246/2007) established the possibility of renewing permits for classification as workplaces [exposing workers to] particular conditions – granted in accordance with Government Decision No 261/2001 – and determined the corresponding arrangements.

Under Article 2(1) of that decision, the renewal of a permit for classification as workplaces [exposing workers to] particular conditions is granted by the regional labour inspectorate on the basis of an application signed by the employer's legal representative or another person authorised by the employer, along with the representatives of corresponding trade unions or, as the case may be, the employees' representatives, submitted within a maximum period of 30 days from the date on which the decision entered into force. The request must be accompanied by reports on the presence of harmful agents/factors in the workplaces, drawn up by authorised laboratories, attesting to the fact that the occupational exposure limit values in workplaces classified as [exposing workers to] particular conditions have been exceeded, and by the prevention and protection plan, which guarantees the improvement of the level of safety and health protection of workers.

Article 4 of that decision provides for the possibility for employers to appeal: 'Employers that have not been granted a renewal of a permit for classification as

workplaces [exposing workers to] particular conditions may lodge a complaint within 15 days from the date of notification with the labour inspectorate, which will make a decision within a period of 30 days, or apply directly to the competent court, in accordance with the law'.

The possibility of renewing permits was regulated in the subsequent Hotărârea Guvernului nr. 1622/2008 (Government Decision No 1622/2008) and Hotărârea Guvernului nr. 1014/2015 (Government Decision No 1014/2015).

Legea securității și sănătății în muncă nr. 319/2006 (Occupational Safety and Health Law No 319/2006), Articles 12 and 18, transposing Articles 9 and 11 of Directive 89/391.

Article 12: '(1) Employers have the following obligations:

a) to carry out and maintain an assessment of the risks to safety and health at work, including for groups sensitive to specific risks;

b) to decide on the protective measures to be taken and, if necessary, the protective equipment to be used;

…

(2) A decree enacted by the Minister of Labour, Social Solidarity and Family Affairs will determine, in the light of the nature of the activities and size of the undertakings, the obligations to be met by the different categories of undertakings in respect of the drawing-up of the documents provided for in paragraph (1)'.

Article 18(7): 'Workers' representatives with specific responsibilities in the field of workers' safety and health and/or workers themselves have the right to appeal to the competent authorities if they consider that the measures taken and the means employed by the employer are inadequate for the purposes of ensuring safety and health at work'.

Decision No 12 of 23 May 2016 of the Înalta Curte de Casație și Justiție (High Court of Cassation and Justice), ruling on an appeal on a point of law intended to unify the case-law ['appeal in the interest of the law'], which is binding, held that 'in interpreting and applying Article 19 of Law No 19/2000 …, Article 29(1) of Law No 263/2010 …, read in conjunction with … Government Decision No 261/2001 …, and … Government Decision No 246/2007, on the procedures for the renewal of permits for the classification of workplaces [exposing workers to] particular conditions, as amended and supplemented, it is not possible to bring an ordinary action to establish the particular conditions of work in which the workers carried out their activities after 1 April 2001, or any action to require employers to classify workplaces as covered by such conditions, where those employers have not obtained or, as the case may be, have not renewed permits for classification of workplaces as covered by such conditions'.

Succinct presentation of the facts and procedure in the main proceedings

1 The appellant is a general practitioner – specialising in respiratory medicine – who has been employed for over 30 years at the Spitalul Clinic de Pneumoftiziologie Iași (the Iași Clinical Hospital for Respiratory Medicine and Respiratory Physiopathology, 'the hospital'), the respondent in the present case, which is a health care facility with public beds, with legal personality, run by local administrative authority. From 1 July 1989 to 31 March 2001, the appellant was classified in Work Group II, and from 1 April 2001 to 31 December 2006, her activities were classified in the category of 'particular working conditions'.

2 The appellant claims to have learned by chance that, since 2007, she had not been paid social security contributions for her work under particular conditions. She states that her workplace, conditions and her professional risks and responsibilities have not changed to date.

3 The appellant therefore brought an action before the Tribunalul Iași (Iași Regional Court), requesting that her employer – the hospital – be ordered to classify her activities [in the category of] particular working conditions as from 2007 and that the employer pay the difference in social security contributions.

4 The appellant alleges negligence or bad faith on the part of the employer, which had not initiated the procedure for renewal of the authorisation for classification of her activity [in the category of] particular working conditions since 2007.

5 The Iași Regional Court dismissed the action and held that the respondent could not be required to classify the appellant's work [in the category of] particular working conditions when it had not followed the procedure laid down by law for the renewal of the required permit. To reject the respondent's arguments concerning the necessary activities undertaken by it in respect of the public health authorities and the labour inspectorate, the court of first instance notes that, if it had received no response from the competent bodies, the respondent would have had the option of bringing an action against them in order to induce them to fulfil their obligation to issue a permit.

6 The appellant appealed the judgment of the Iași Regional Court before the referring court, the Curtea de Apel Iași (Iași Court of Appeal).

7 At the request of the referring court, the Inspectoratul Teritorial de Muncă Iași (Iași Regional Labour Inspectorate) stated that the employer, the hospital, had not submitted the required documents within 90 days and that, as a result, the labour inspectorate had not issued a new permit for the classification of the workplaces indicated by the respondent [in the category of] particular conditions. Furthermore, that inspectorate notes that according to Government Decision No 246/2007, it is possible to obtain only the extension of permits existing before the date when the legislative act was adopted, not the issuance of new permits.

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

8 According to the referring court, the decision on the appeal against the judgment dismissing the action depends solely on the determination of the meaning and scope of the State's discretion in the process of transposing Article 11(6), in conjunction with Article 9, of Directive 89/391.

9 An activity classified as being [in the category of] particular working conditions is carried out according to the risk factors of occupational disease and this presupposes the existence of harmful agents/factors that directly affect the workers' bodies in the medium or long term.

10 To offset these effects, employees working under such conditions are granted the right to additional rest leave and they are covered by a reduced contribution period for their old-age pensions. On the other hand, for the employer, the classification of the activity [in the category of] particular working conditions entailed an additional tax burden – more specifically, higher rates of social security contributions for employees working under particular working conditions.

11 The classification of working conditions is the responsibility of the employer, which makes such decisions with representative trade unions or, as the case may be, workers' representatives, within the framework of an administrative procedure involving technical assessment of health and safety risks, on the basis of a permit issued by the labour inspectorate. Employers that have not been granted a permit for classification as workplaces [exposing workers to] particular conditions may lodge a complaint within 15 days from the date of notification with the labour inspectorate, which will make a decision within a period of 30 days.

12 Furthermore, Government Decision No 246/2007 established only the possibility of renewing classification permits, which was granted only to employers that had valid classification permits as workplaces [exposing workers to] particular conditions and had not, through the measures implemented up to that date, brought working conditions into compliance. After 9 March 2007, the date on which Government Decision No 246/2007 came into force, it is no longer possible to issue permits for classification as workplaces [exposing workers to] particular conditions. There is only the possibility of renewing permits already issued.

13 The referring court has noted that, although the national provision transposing Article 11(6) of Directive 89/391 – namely Article 18(7) of Law No 319/2006 – expressly lays down a right for workers to appeal to any competent authority to verify whether the measures taken and the means employed by the employer are inadequate for the purposes of ensuring safety and health at work, that provision has not been reproduced in the secondary legislation concerning the assessment of medium- or long-term occupational risks for workers. Therefore, in domestic law, neither workers nor trade union representatives have any procedural means to request the verification or examination of the workplace with regard to the existence and intensity of harmful agents/factors, or to claim additional legal

protection relating to classification as workplaces [exposing workers to] particular working conditions. The legislative provisions grant the possibility only to an employer that has not obtained a renewal of a permit for classification as workplaces [exposing workers to] particular conditions to challenge the public authority's refusal with the labour inspectorate or directly through the competent court.

14 This interpretation of the national legislation is binding by virtue of Decision No 12/2016 following the appeal on a point of law intended to unify the case-law delivered by the High Court of Cassation and Justice, which stated that: 'If the process of permit issuance has not been concluded with the issuance of a renewable permit, the conditions laid down in Government Decision No 246/2007, … and Government Decision No 1014/2015 relating to the initiation of a workplace reassessment procedure are also not met, given the express statement that the reassessment procedure applies only to establishments that have a classification permit. Consequently, it is beyond the power of the ordinary court to rule on the classification/reassessment of the workplace, since the legislature has not, in this situation, established an instrument of ordinary law authorising the court to assume the powers of the administrative body in the corresponding procedure (with regard to the technical, scientific and medical assessment and authorisation of the workplace as classifiable [in the category of] particular/special working conditions)'.

15 The Curtea Constituțională (Constitutional Court) confirmed this interpretation when it held that the provisions of Article 20(2) and (3) of Legea nr. 19/2000 privind sistemul public de pensii și alte drepturi de asigurări sociale (Law No 19/2000 on the public pension system and other social security rights), Article 1(1) and (2) and Article 2(2) of Legea nr. 226/2006 privind încadrarea unor locuri de muncă în condiții speciale (Law No 226/2006 on the classification of workplaces as workplaces [exposing workers to] special conditions) and Article 30(1)(e) of Legea nr. 263/2010 privind sistemul unitar de pensii publice (Law No 263/2010 on the unified system of public pensions), as interpreted by the High Court of Cassation and Justice – the institution competent to rule on the appeal on a point of law seeking to unify the case-law by Decision No 12 of 23 May 2016 – are constitutional.

16 Although the application of the national legislation in the binding interpretation of the High Court of Cassation and Justice does not generate any debate in domestic case-law, the referring court, as the court of last instance in these proceedings, nevertheless has doubts as to the compliance of the national practice with the overriding provisions applicable at EU level. In that respect, the short deadlines for the initial assessment of workplaces for the purpose of classification [in the categories of] working conditions, combined with the exclusive establishment of a procedure for the renewal of permits and the restrictive interpretation adopted by the High Court of Cassation and Justice, confirmed by the judgment of the Constitutional Court, have resulted in practice in there being no possibility for

workers to appeal in order to obtain the legal benefits deriving from the recognition of particular working conditions.

17 As far as concerns Article 12 of Law No 319/2006, which transposed Article 9 of Directive 89/391, the referring court notes that employers' obligations relating to occupational safety and health risks have not been linked to an obligation of truthful and accurate classification of working conditions at company level and that no subsequent secondary legislative act has established the effects of a breach of the obligations to assess and monitor occupational risks by companies in which there are serious risks to the health of workers.

18 In its judgment in *Podilă and Others* (C-133/17 and C-134/17), concerning two disputes relating to the classification of workplaces for the purposes of determining old-age pensions, the Court of Justice of the European Union held that Article 114(3) of the EC Treaty and Articles 151 and 153 TFEU, along with the provisions of Directive 89/391, must be interpreted as not being applicable to national laws, such as those at issue in the main proceedings, which lay down strict deadlines and procedures not allowing national courts to review or establish the classification of the activities of workers in various risk groups, on the basis of which the retirement pensions of those workers are calculated. However, the present case does not concern the determination of pension rights, but rather the recognition of the specific occupational risks of particular working conditions in the context of the appellant's activities, and the appellant's access to the courts in accordance with national law and practice is not possible with regard to either the past or the future.

19 As regards the second question, the referring court seeks to clarify whether Article 11(6) of Directive 89/319 has vertical effect and, more specifically, whether the rule is unconditional, complete and precise in nature, such that it can apply directly to the legal relationship at issue. The principle that national law must be interpreted in conformity with EU law precludes the application of the legislation on classification [in the categories of] working conditions as sought by the appellant, given the extremely restrictive nature of the legislation. At the same time, no national source of law has been identified which can achieve the result required by the text of the directive.

20 Even assuming that the rule in Article 11(6) of Directive 89/391 fulfils the criteria in the case-law for categorisation as having vertical direct effect, this does not seem sufficient for recognition of an effective remedy before a court, if the applicability of Article 47 of the Charter of Fundamental Rights of the European Union, in conjunction with Article 31(1) of the Charter itself, which enshrines the right of workers to healthy, safe and dignified working conditions, is not established. Thus, according to the case-law of the court of Justice, the right to an effective remedy before an impartial tribunal presupposes – on the basis of Article 47(1) of the Charter – that the person invoking it avails himself or herself of rights or freedoms guaranteed by EU law.