Case C-584/23

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:

21 September 2023

Referring court:

Juzgado de lo Social n.º 3 de Barcelona (Spain)

Date of the decision to refer:

18 September 2023

Applicants:

Asepeyo Mutua Colaboradora de la Seguridad Social n.º 151

KT

Defendants:

Instituto Nacional de la Seguridad Social (INSS)

Tesorería General de la Seguridad Social (TGSS)

Alcampo S. A., successor to Supermercados Sabeco, S. A.

Subject matter of the main proceedings

Social security – Accident at work – Pension for total permanent invalidity resulting from an accident at work – Pension calculation – Basic pension amount in the case of a reduction in the working day to care for a child – Principle of equal treatment for men and women in matters of social security – Indirect discrimination on grounds of sex

Subject matter and legal basis of the request

Request for a preliminary ruling on interpretation – Article 267 TFEU – Compliance of a series of national provisions relating to social security with

primary EU law and with Directives 79/7/EEC and 2006/54/EC – Indirect discrimination on grounds of sex

Questions referred for a preliminary ruling

1. Is the Spanish rule on calculating the basic amount of benefits for permanent invalidity resulting from an accident at work, established in Article 60 of the Decreto de 22 de junio de 1956 (Decree of 22 June 1956), contrary to the EU 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), in so far as this would constitute a case of indirect discrimination on grounds of sex, since it is mostly women who reduce their working hours to care for children and therefore the benefit entitlement is clearly lower?

2. Bearing in mind that the Spanish rule establishing the method used to calculate benefits for permanent invalidity resulting from an accident at work – Article 60(2) of the Decree of 22 June 1956 – takes account of the salary actually received at the time of the accident, and that the Spanish public social security system establishes, as a contributory family benefit – Article 237(3) of the Ley General de la Seguridad Social (General Social Security Law) – that, during the first two years of the period when working hours are reduced to care for a child, as provided for in Article 37(6) of the Estatuto de los Trabajadores (Statute of Workers' Rights), [the contributions] are increased to 100%, and that, according to statistical data, 90% of the persons applying for a reduction of working hours to care for a child are women, are the above-mentioned Spanish rules contrary to Article 8 of the Treaty on the Functioning of the European Union, Articles 21 and 23 of the Charter of Fundamental Rights of the European Union, Article 4 of Directive 79/7/EEC and Article 5 of Directive 2006/54/EC, and do they constitute indirect discrimination on grounds of sex?

Provisions of European Union law relied on

Treaty on the Functioning of the European Union, Article 8

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

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, 3 and 4

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, Articles 1, 2, 5, 7 and 9.

Judgment of 16 July 2009, *Gómez-Limón Sánchez-Camacho*, (C-537/07, EU:C:2009:462): paragraphs 58 to 62

Judgment of 18 September 2019, *Ortiz Mesonero*, C-366/18, EU:C:2019:757

Provisions of national law relied on

Decreto de 22 de junio de 1956 por el que se aprueba el texto refundido de la legislación de accidentes del trabajo y Reglamento para su aplicación (Decree of 22 June 1956 approving the consolidated text of the legislation on accidents at work and the relevant implementing regulations), Article 60 of the section entitled 'Aplicación del Reglamento de seguro de accidentes del Trabajo' (Implementation of the Regulation on insurance against accidents at work)

Consolidated text of the Ley del Estatuto de los Trabajadores (Law on the Statute of Workers' Rights), approved by Real Decreto Legislativo 2/2015, de 23 de octubre (Royal Legislative Decree No 2/2015 of 23 October 2015), Article 37(6)

Consolidated text of the Ley General de la Seguridad Social (General Social Security Law), approved by Real Decreto Legislativo 8/2015, de 30 de octubre (Royal Legislative Decree No 8/2015 of 30 October 2015), Article 237(1) and (3) (in the wording in force prior to the amendment of the latter paragraph by Real Decreto-Ley 2/2023 (Royal Decree-Law No 2/2023))

Succinct presentation of the facts and procedure in the main proceedings

1 Ms KT ('the worker') worked as a cashier for the company Supermercados Sabeco (Sabeco Supermarkets) ('the company'). From 2 January 2008, she worked, under Article 37(6) of the consolidated text of the Statute of Workers' Rights, on a reduced working-day basis, at 50% of the normal working day, to care for her son, who was under 12 years of age. That situation of reduced working hours for childcare came to an end on 6 October 2019.

2 On 13 April 2019, she suffered an accident at work, specifically a fall at her workplace, which initially did not require any medical leave, but which resulted in temporary invalidity from 29 October 2019. As a result of various complications of her injuries, which led to surgery, the Instituto Nacional de la Seguridad Social (National Social Security Institute; 'the INSS') took a decision on 2 August 2021 declaring that the worker had a total occupational invalidity in respect of her usual occupation, with entitlement to a pension of 75% of the basic amount, an amount which, in accordance with Article 60(2) of the Spanish Decree of 22 June 1956, is

calculated on the basis of the actual salary of the injured person at the time of the accident and was set at EUR 8 341.44 per annum. The previous claims brought by both the mutual insurance company Asepeyo Mutua Colaboradora de la Seguridad Social n.º 151 ('the mutual insurance company') and the worker against that decision were dismissed on 10 February 2022.

3 Two actions have been brought in the context of the present dispute and have been joined by the referring court, one by the mutual insurance company challenging the INSS decision referred to in the previous paragraph on the grounds that the injuries suffered by the worker are non-disabling permanent injuries and therefore do not constitute permanent invalidity, and the other by the worker, whose employment relationship with the company was terminated by dismissal on 14 June 2019. The action brought by the insurance company is not the subject of the reference for a preliminary ruling.

The essential arguments of the parties in the main proceedings

4 In her application, the worker is seeking to have the basic amount of the pension for total permanent invalidity in respect of her usual occupation resulting from an accident at work set without taking into account the fact that her working hours were reduced by 50% in order to care for her child, and thus that her salary be calculated at 100% for that purpose and that the basic amount of the pension be set at EUR 1 353 per month, or, EUR 16 236 per annum (instead of the EUR 8 341.44 per annum set by the INSS in its decision of 2 August 2021). The worker submits that if the reduced salary were to be calculated based on the working day actually worked, that would result in indirect discrimination on grounds of sex, since 90% of the people who request reduced working hours to care for children are women. She is therefore claiming that an apparently neutral provision – which lays down the method for calculating the basic benefit amount – is prejudicial to women and places them at a particular disadvantage compared with men, and is therefore contrary to Directive 79/7.

5 The INSS is defending the decision of 2 August 2021 and maintains that the basic amount of the worker's pension was set according to the information contained in the wage certificate issued by the company and ratified by the mutual insurance company.

6 The INSS argues that if the accident had occurred within the first two years when the worker's working hours were reduced (since the reform of Article 237(3) of the consolidated text of the General Social Security Law by Royal Decree-Law No 2/2023, this is currently three years), the contribution base that would have been taken into account in calculating the basic amount would have been 100% of the amount that would have applied to the worker if she had not reduced her working hours. However, because more than two years had elapsed since the worker's working hours were reduced, the contribution base to be taken as a reference was that corresponding to the working day actually worked, that is to

say, the reduced working hours. It therefore submits that it was fully justified in determining the amount of the benefits under the public social security scheme in accordance with the part-time worker's actual remuneration, and the reduction in working hours to care for her child does not justify a solution other than that supported by paragraphs 58 and 59 of the judgment of the Court of Justice of 16 July 2019 in Case C537/07, *Gómez-Limón Sánchez-Camacho* (EU:C:2009:462). It therefore submits that neither primary EU law (Article 8 TFEU and Articles 21 and 23 of the Charter of Fundamental Rights of the European Union) nor secondary EU law (Directive 79/7, Directive 2010/18 or Directive 2019/1158, currently in force) is applicable in the present case.

7 The mutual insurance company, which is also a defendant in the proceedings in which the worker is the applicant, opposes the latter's claim, arguing that the basic amount was calculated based on the salary actually received, according to the wage certificate issued by the company. It submits that the different regime is not based on any condition or circumstance that could imply discrimination or disadvantageous treatment of female workers.

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

8 According to the referring court, the Spanish legislation (Article 60(2) of the Decree of 22 June 1956) establishes that the basic amount of benefits for permanent invalidity resulting from an accident at work is determined based on the salary that the worker was receiving at the time of the accident, because it is calculated on the basis of the contribution base for the working day actually worked. That means that, if the right to reduce working hours to care for a child has been exercised, the salary to be taken into account is that corresponding to that reduced number of working hours, which in the present case meant a reduction of 50% for the worker, with the consequent impact on the basic pension amount.

9 The referring court cites the judgment of the Court of Justice of 16 July 2019 in Case C537/07 *Gómez-Limón Sánchez-Camacho* (EU:C:2009: 462), in order, first, to state – referring in particular to paragraphs 60 to 62 of that judgment – that Directive 79/7 does not in any event require Member States to grant special social security benefits to persons who have taken care of their children, and second, to state that Council Directive 2010/18/EU of 8 March 2010 implementing the revised Framework Agreement on parental leave concluded by BUSINESSEUROPE, UEAPME, CEEP and ETUC and repealing Directive 96/34/EC is not applicable in the present case. The referring court also considers that this is not a situation involving conversion from a full-time contract to a part-time contract, so Council Directive 97/81/EC of 15 December 1997 concerning the Framework Agreement on part-time work concluded by UNICE, CEEP and the ETUC does not apply.

10 However, according to the referring court, the judgment cited in the previous paragraph did not go so far as to assess – because it was not argued – whether the

relevant Spanish social security legislation might amount to indirect discrimination on grounds of sex. The statistical factor of the gender incidence of requests for reduced working hours for childcare was also not examined.

11 According to the statistics provided by the Tesorería General de la Seguridad Social (General Social Security Treasury, 'the TGSS'), 224 513 people were continuously in a situation of reduced working hours between 2020 and 2022 under the provisions of Article 37(6) of the consolidated text of the Law on the Statute of Workers' Right. Of those, 22 110 are male (9.85%) and 202 403 are female (90.15%). The referring court states that the question at issue is whether a rule that is apparently neutral as regards social security but which adversely affects women to a very large extent, given that it is mainly women who take advantage of the right to reduced working hours, might give rise to indirect discrimination on grounds of sex.

12 Moreover, the referring court states that, in cases where a full-time contribution base is recognised artificially (a period which, at the time when the worker's permanent invalidity was recognised, was the first two years of reduced working hours to care for a child and which, since Article 237(3) of the consolidated text of the General Social Security Law was amended by Royal Decree-Law 2/2023, is now three years), the cost of the difference between the pension calculated using a reduced base and that resulting from the (notional) base calculated at 100% (a cost borne by the social security management body) is legally considered to be a contributory public benefit and does not entail any cost for the companies concerned or for the cooperating mutual insurance companies. This is a further aspect that was not analysed in the judgment of the Court of Justice of 16 July 2019, *Gómez-Limón Sánchez-Camacho* (C537/07, EU:C:2009:462).

13 The referring court mentions the possibility that that benefit might be excluded from the scope of Directive 79/7 (Article 3(2)) because it is a family benefit. However, it states that, even if it is a family benefit, it is the risk covered by that directive that takes precedence, namely an accident at work. Thus, in its view, it is a contributory public benefit that covers a risk provided for in Directive 79/7. Although it is apparently neutral, as it is intended for all persons of both sexes, the statistical reality is that it overwhelmingly affects women negatively: the benefit is much lower – in the present case 50% lower – for women who have exercised their right to reduced working hours and who are entitled to a permanent invalidity pension due to an accident at work.

14 In the light of the foregoing, the court considers it necessary to refer these questions for a preliminary ruling so it can rule on the case before it.