# Case C-531/23 [Loredas] [i]

## 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:**

5 July 2023

**Referring court:**

Tribunal Superior de Justicia del País Vasco (Spain)

**Date of the decision to refer:**

20 June 2023

**Appellant:**

HJ

**Respondents:**

US

MU

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**Subject matter of the main proceedings**

Social policy – Equal treatment in employment and occupation – Working time – Time recording – Special rules for domestic workers

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

Request for a preliminary ruling on validity – Article 267 TFEU – Compatibility of a national provision with EU law – Discrimination on grounds of sex



[i] The name of the present case is a fictitious name. It does not correspond to the real name of any party to the proceedings.

## Question referred for a preliminary ruling

‘Must Articles 3, 5, 6, 16, 17, 17(4)(b), 19 and 22 of Directive 2003/88 on the organisation of working time, Article 31(2) of the Charter of Fundamental Rights of the European Union, read in the light of the EU case-law (judgment of the Court of Justice of 14 May 2019, C-55/18), Articles 20 and 21 of the Charter of Fundamental Rights of the European Union, Article 3(2) of the EC Treaty, Articles 1 and 4 of Directive 2010/41/EU of the European Parliament and of the Council of 7 July 2010 on the application of the principle of equal treatment between men and women engaged in an activity in a self-employed capacity, Articles 1, 4 and 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, and Articles 2 and 3 of Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation, also read in the light of the EU case-law (judgment of the Court of Justice of 2[4] February 202[2], C-389/20), be interpreted as precluding a legislative provision such as Article 9(3) of Real Decreto (Royal Decree) 1620/2011, which exempts an employer from the obligation to keep a record of a worker’s working time?’

## Provisions of European Union law relied on

TFEU: Article 267

TEU: Articles 2 and 3

Charter of Fundamental Rights of the European Union: Articles 20, 21 and 31(2)

Directive 2006/54/EC: Article 14

Directive 2000/78/EC: Articles 2 and 3

Directive 2003/88/EC: Articles 3, 5 and 6

Judgments of the Court of Justice in Case C-55/18, paragraphs 44 to 49, and Case C-389/20

## Provisions of national law relied on

Estatuto de los Trabajadores (Workers’ Statute) (Real Decreto Legislativo (Royal Legislative Decree) 2/2015) (‘the ET’): Articles 34 and 35(5)

Real Decreto (Royal Decree) 1620/2011: Article 9

Real Decreto Ley (Royal Decree Law) 8/2019

Ley Reguladora de la Jurisdicción Social (Law governing the social courts): Article 94

Ley de Enjuiciamiento Civil (Law on civil procedure): Article 217

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

1 On 31 March 2021, the appellant worker, Ms HJ, brought an action against her dismissal and a claim for payment against the natural persons Ms US and Mr MU. That action was allocated to the Juzgado de lo Social No 2 de Bilbao (Social Court No 2, Bilbao, Spain).

2 By order of 18 November 2021, that court ordered the co-respondents to produce to it the worker's time records and work schedule, failing which the facts relied on by the appellant could be accepted as established.

3 The documents required by the court were not produced by the co-respondents.

4 On 11 January 2023, the Juzgado de lo Social No 2 de Bilbao (Social Court No 2, Bilbao) gave judgment, upholding in part the action against dismissal and the claim for payment, ruling that the dismissal was unfair and ordering the respondents to pay the appellant the sum of EUR 364.39 by way of compensation and EUR 934.89 by way of holiday pay and special payments.

5 The judgment accepted as established that the worker had been employed by the respondents, since 15 September 2020, as a domestic worker at a monthly salary of EUR 1 108.33, with prorated special payments, and that the respondents had not registered the worker for social security and paid her EUR 1 000 per month by bank transfer.

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

6 The worker appealed against the judgment given by Juzgado de lo Social de Bilbao (Social Court, Bilbao), arguing that it denied her legal protection and infringed her right to an effective remedy, meaning that, having regard to the principle of the ease of producing evidence, a new judgment must be given based on the established facts that she was seeking to prove.

7 The co-respondents did not enter an appearance in the proceedings and have not contested the appellant's appeal.

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

8 The judgment of the court of first instance held that the actual time worked by the worker and the salary claimed had not been established, and therefore it was not

possible to uphold the claim for salary differences on the grounds that the salary was effectively paid in line with the salary as established.

9 The judgment under appeal states that the evidence adduced by the appellant is wholly insufficient and that her claims cannot be upheld merely on the grounds of failure to produce the time records, since Royal Decree Law 8/2019 provides for a number of exceptions to clocking in and out at the beginning and end of the working day in special employment relationships, such as that of domestic workers.

10 The matter in dispute consists of determining whether domestic workers are not entitled to have a record kept of their working hours, that is, whether employers are not required to make available to domestic workers a record of their working time and hours of work, unlike the usual practice for other undertakings and employers. The judgment examined by the present chamber states that there is no obligation to keep a time record in respect of domestic workers, such that failure to produce those records, which were requested by the court, is of no significance.

11 The ultimate effect of the judgment is that the worker has no proof of the working time she claims or of her salary, which, owing to the lack of evidence, has led to the setting of a lower amount of compensation for her dismissal and to the dismissal of a large part of her salary claim. The judgment leaves the appellant without any proof, on the basis that there is no obligation to record working time in the domestic employment sector.

12 The judgment under appeal is directly concerned with EU law and the Court of Justice's interpretation of it, from a twofold perspective: (a) the obligation to comply with the maximum duration of working time and periods of work and the resulting obligation of employers to record that working time (Directive 2003/88); (b) the prohibition of discrimination on grounds of sex against women, who form 95% of domestic workers as a group (judgment of the Court of Justice of 24 February 2002, C-389/20) and who should be treated equally to men in all areas, including in relation to working hours (Directive 2006/54).

It is necessary to determine whether a Spanish legislative provision, specifically Article 9(3) of Royal Decree 1620/11, which governs the employment relationship of domestic workers, is compatible with EU law and the principles underlying it. That provision exempts domestic employers from the obligation to record working time, unlike the situation of employers and undertakings in other sectors, which are subject to that obligation (Articles 34(9) and 35(5) of the ET). That difference in treatment in respect of domestic workers must be examined by the Court of Justice because it may infringe the EU legislation on equal treatment and the organisation of working time.

The Chamber for Labour and Social Matters of the Tribunal Superior de Justicia del País Vasco (High Court of Justice of the Basque Country, Spain) has serious

doubts as to the compatibility of Article 9(3) of Royal Decree 1620/2011 with EU law, from a twofold perspective:

(a) From the perspective of Directive 2003/88. The obligation to keep a record of working time is essential in order to monitor compliance with the limits on maximum working time and in order to claim for overtime. There is also a risk that working hours may not have due regard for compulsory rest periods, entailing a risk to health, and that situations may arise involving abuse of the weaker party in the employment relationship. Where domestic workers are excluded from that obligation to keep a record, it is very difficult for those workers to prove the hours they have actually worked and it places them in a particularly complicated situation when it comes to substantiating their claims. That is a consequence which may be contrary to Directive 2003/88 and to the Court of Justice's interpretation of that provision, inter alia in its judgment in Case C-55/18, in accordance with which the burden of proving time worked rests with the employer. As paragraph 60 of that judgment of the Court of Justice states, Member States must require employers to set up a system enabling the duration of time worked each day to be measured. The Court of Justice added, in paragraph 44 of that judgment, that the worker is the weaker party in the employment relationship and that it is therefore necessary to prevent the employer from being in a position to impose on the worker a restriction of his or her rights. In accordance with paragraph 49 of that judgment, the objective and reliable determination of the number of hours worked each day and each week is essential in order to establish, first, whether the maximum weekly working time was complied with and, second, whether the minimum daily and weekly rest periods were complied with.

(b) From the perspective of the principle of equal treatment and non-discrimination laid down in Articles 20 and 21 of the Charter of Fundamental Rights of the European Union. The present chamber considers that it is essential to bear in mind the fact that the appellant worker is a woman. She is a woman who is included in the group of domestic workers, which is clearly a 'female-dominated' group, that is, it is made up almost entirely of women. As the judgment of the Court of Justice in Case C-389/20 states, women comprise 95% of domestic workers as a group. That being so, the difference in treatment with regard to the recording of working time as compared with men raises serious questions. The right to have a record kept of working time is guaranteed for all male workers but is not available to domestic workers pursuant to Article 9(3) of Royal Decree 1620/11. That difference in treatment must be examined in the light of EU law. There must be a guarantee of no indirect discrimination on grounds of sex in Royal Decree 1620/11 and it must be determined whether that apparently neutral provision creates indirect discrimination on grounds of sex against the appellant worker.