Reports of Cases

JUDGMENT OF THE COURT (Eighth Chamber)

22 November 2012*

(Article 157 TFEU — Directive 79/7/EEC — Directive 97/81/EC — Framework Agreement on part-time work — Directive 2006/54/EC — Contributory retirement pension — Equal treatment for male and female workers — Indirect discrimination on grounds of sex)

In Case C-385/11,

REFERENCE for a preliminary ruling under Article 267 TFEU from the Juzgado de lo Social de Barcelona (Spain), made by decision of 4 July 2011, received at the Court on 19 July 2011, in the proceedings

Isabel Elbal Moreno

v

Instituto Nacional de la Seguridad Social (INSS),

Tesorería General de la Seguridad Social (TGSS),

THE COURT (Eighth Chamber),

composed of C. Toader, acting as President of the Eighth Chamber, A. Prechal (Rapporteur) and E. Jarašiūnas, Judges,

Advocate General: E. Sharpston,

Registrar: M. Ferreira, Principal Administrator,

having regard to the written procedure and further to the hearing on 27 September 2012,

after considering the observations submitted on behalf of:

— the Instituto Nacional de la Seguridad Social (INSS), by F. de Miguel Pajuelo, acting as Agent, assisted by A. Álvarez Moreno and J. Ignacio del Valle de Joz, abogados,

— the Spanish Government, by S. Centeno Huerta and S. Martínez-Lage Sobredo, acting as Agents,

— the Belgian Government, by L. Van den Broeck and M. Jacobs, acting as Agents,

— the European Commission, by G. Valero Jordana and M. van Beek, acting as Agents,

having decided, after hearing the Advocate General, to proceed to judgment without an Opinion,

* Language of the case: Spanish.

gives the following

Judgment

1 This reference for a preliminary ruling concerns the interpretation of Clause 4 of the Framework Agreement on part-time work, concluded on 6 June 1997, which is set out in the Annex to Council Directive 97/81/EC of 15 December 1997 concerning the Framework Agreement on part-time work concluded by UNICE, CEEP and the ETUC (OJ 1998 L 14, p. 9), as amended by Council Directive 98/23/EC of 7 April 1998 (OJ 1998 L 131, p. 10) ('the Framework Agreement'), of Article 157 TFEU, of Article 4 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 (OJ 2006 L 204, p. 23) and of 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 (OJ 1979 L 6, p. 24).

2 The reference has been made in proceedings between Ms Elbal Moreno and the Instituto Nacional de la Seguridad Social ('INSS') (National Institute of Social Security) and the Tesorería General de la Seguridad Social ('TGSS') (General Social Security Fund) in relation to entitlement to a retirement pension.

Legal context

European Union (EU) legislation

3 Article 1 of Directive 79/7 states:

'The purpose of this Directive is the progressive implementation, in the field of social security and other elements of social protection provided for in Article 3, of the principle of equal treatment for men and women in matters of social security, hereinafter referred to as "the principle of equal treatment".'

4 Under Article 3(1) of directive 79/7:

'This Directive shall apply to:

(a) statutory schemes which provide protection against the following risks:

...

— old age,

...'

5 Article 4(1) of Directive 79/7 provides:

'The principle of equal treatment means that there shall be no discrimination whatsoever on ground of sex either directly, or indirectly by reference in particular to marital or family status, in particular as concerns:

— the scope of the schemes and the conditions of access thereto,

— the obligation to contribute and the calculation of contributions,

— the calculation of benefits including increases due in respect of a spouse and for dependants and the conditions governing the duration and retention of entitlement to benefits.'

6 Under Clause 4 of the Framework Agreement, entitled 'Principle of non-discrimination':

'1. In respect of employment conditions, part-time workers shall not be treated in a less favourable manner than comparable full-time workers solely because they work part time unless different treatment is justified on objective grounds.

...'

7 Article 1 of Directive 2006/54, entitled 'Purpose', states:

'The purpose of this Directive is to ensure the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation.

To that end, it contains provisions to implement the principle of equal treatment in relation to:

...

(b) working conditions, including pay;

(c) occupational social security schemes.

...'

The Spanish legislation

8 As appears from the order for reference, the provisions of the General Law on Social Security (ley general de seguridad social), approved by Royal Legislative Decree No 1/94 of 20 June 1994 (BOE No 154 of 29 June 1994, p. 20658; 'the LGSS') applicable to the main proceedings are the following:

'Article 160.

Concept

Contributory retirement benefits shall be unique to each beneficiary and shall consist in a pension for life under the conditions and in the amount and form determined by law when a person reaches the prescribed age and ceases or has ceased to be employed.

Article 161.

Beneficiaries

1. A person covered by this General Scheme shall be entitled to a contributory retirement pension if he satisfies the general condition laid down in Article 124(1), and if:

(a) he has reached the age of 65 years.

(b) he has completed a minimum period of contribution of 15 years...

Article 162.

Basis for calculation of the retirement pension

1. The basis for calculation of the retirement pension, under the contributory scheme, shall be the quotient given by dividing by 210 the contribution bases of the interested party during the 180 months immediately before the month preceding the event giving rise to the entitlement ...

Seventh Additional Provision. Rules applicable to part-time workers

1. Social protection deriving from part-time employment contracts shall be governed by the principle of assimilation of the part-time worker to the full-time worker and specifically by the following rules:

One. Contributions.

(a) The basis of social security contributions and of the amounts collected together with the instalments thereof shall always be monthly and shall be constituted by the payments actually received for the hours worked, both ordinary and overtime.

(b) The contribution basis thus determined cannot be lower than the amounts determined by law.

(c) Contributions in respect of hours of overtime shall be made to social security on the same bases and at the same rates as ordinary hours.

Two. Contribution periods.

(a) In order to give proof of the contribution periods needed to give entitlement to retirement pensions, permanent invalidity allowances, death and survivors' benefits, temporary invalidity allowances, and maternity and paternity allowances, only the contributions made in respect of the hours worked, both ordinary and overtime, shall be taken into account and their equivalent number of theoretical days of contributions shall be calculated. To that end, the number of hours actually worked shall be divided by 5, which corresponds to 1 day if a total of 1 826 hours per annum is taken into account.

(b) In order to give entitlement to retirement pensions and permanent invalidity allowances, a multiplier of 1.5 shall be applied to the number of theoretical days of contribution obtained in accordance with point (a) of this rule, and the result shall constitute the number of days regarded as credited for the purposes of determining the minimum contribution periods. Under no circumstances may a higher number of days covered by contributions be taken into account than the number that would be obtained if the services had been provided full-time.

Three. Bases for calculation

(a) The basis for calculating retirement pensions and permanent invalidity allowances shall be calculated in accordance with the general rule ...'

The dispute in the main proceedings and the questions referred for a preliminary ruling

9 On 8 October 2009, aged 66 years, Ms Elbal Moreno – the applicant in the main proceedings – applied to the INSS for a retirement pension. Previously, she had worked exclusively as a cleaner for a Residents' Association part-time for four hours a week (10% of the 40-hour statutory working week in Spain) for 18 years.

10 By decision of 13 October 2009, Ms Elbal Moreno's application for a pension was refused on the ground that she had not completed the minimum contribution period of 15 years, required for entitlement to a retirement pension, as provided under Article 161(1)(b) of the LGSS.

11 A complaint lodged by Ms Elbal Moreno on 30 November 2009 was dismissed by decision of the INSS on 9 December 2009. Whereas, in Ms Elbal Moreno's case, proof was required of a minimum contribution period of 4 931 days, the decision recognised that she had completed a contribution period 1 362 days, broken down as follows:

— 41 days: from 24 October 1960 to 3 December 1960, full-time;

— 336 days: by assimilation, on account of three childbirths (3 x 112);

— 656 days: from 1 November 1991 to 30 October 2009, which is a period of 6 564 days, calculated at 10% on the basis of the part-time work;

— 329 days: by assimilation, the result of the correcting factor (1.5) established in the 7th Additional Provision of the LGSS.

12 Following the dismissal of her complaint, Ms Elbal Moreno brought an action before the Juzgado de lo Social de Barcelona (Social Court of Barcelona) in which she submitted that the Seventh Additional Provision of the LGSS, under which her application for a pension had been refused, entailed a breach of the principle of equality. That provision requires a part-time worker to pay contributions for a longer period than a full-time worker, even with the correcting factor represented by the 1.5 multiplier, in order to obtain a pension which is already proportionately lower. Ms Elbal Moreno also submitted that that rule entails indirect discrimination, since it is an indisputable statistical fact that women workers are the principal users of this type of contract (approximately 80%).

13 Concerning the Seventh Additional Provision, the Juzgado de lo Social de Barcelona states that the legislation is based on the principle that only the hours actually worked are to be taken into consideration for determining the contribution periods required, although that is attenuated by two correcting rules with the aim of facilitating the access of part-time workers to social security protection.

14 Thus, first, a general concept of 'theoretical day of contribution', equivalent to five hours a day of actual work, or 1 826 hours a year, is established. The contributions made are taken into account in respect of the hours worked, by calculating the equivalent number of theoretical days of contribution.

15 Secondly, in order to give entitlement to retirement pensions and permanent invalidity allowances, a specific correcting rule is applied, consisting in a multiplier of 1.5 applied to the number of theoretical days of contribution. The latter are thus increased, thereby facilitating access to protection.

16 However, according to the Juzgado de lo Social de Barcelona, so long as the Seventh Additional Provision of the LGSS takes into account only the hours worked and not the contribution period (the days worked), this ultimately results in the double application – albeit corrected – of the *pro rata temporis* principle. It proportionally requires a longer contribution period for entitlement to a retirement pension which will also be proportionally lower in its basis of assessment owing to the part-time nature of the working day. It follows that, in relation to contributions, a longer qualifying period is required from the part-time worker in inverse proportion to the reduction in his working hours in order to obtain a pension the amount of which is already directly and proportionately lower owing to the part-time nature of the work.

17 The Juzgado de lo Social de Barcelona further states that, in the case of Ms Elbal Moreno, the application of the Seventh Additional Provision of the LGSS means that 18 years covered by contributions at the rate of 10% of the working day are treated, on the basis of the contribution period required for entitlement to a pension, as equal to less than 3 years of contributions. Accordingly, on the basis of a part-time contract of 4 hours a week, Ms Elbal Moreno would have to work for 100 years to complete the minimum necessary qualifying period of 15 years which would give her access to a pension of EUR 112.93 a month.

18 In those circumstances, the Juzgado de lo Social de Barcelona decided to stay the proceedings and to refer the following questions to the Court for a preliminary ruling:

‘(1) Does a contributory retirement pension such as the one provided for under the Spanish social security system on the basis of the contributions made by and on behalf of the worker during the entirety of his working life fall within the concept of “employment conditions” to which the prohibition of discrimination in Clause 4 of the Framework Agreement annexed to Directive 97/81 refers?

(2) If Question 1 were to be answered in the affirmative and a contributory retirement pension such as that governed by the Spanish social security system were to be regarded as falling within the concept of “employment conditions” referred to in Clause 4 of the Framework Agreement annexed to Directive 97/81, is the prohibition of discrimination laid down in that clause to be interpreted as preventing or precluding national legislation which – as a consequence of the double application of the “*pro rata temporis* principle” – requires a proportionally greater contribution period from a part-time worker than from a full-time worker for the former to qualify, if appropriate, for a contributory retirement pension in an amount reduced in proportion to the part-time nature of his work?

(3) As a supplementary question to the previous ones, may rules such as the Spanish rules (contained in the 7th Additional Provision of the LGSS) governing the method of contribution, access and quantification with regard to the contributory retirement pension for part-time workers be considered to be among the “aspects and conditions of remuneration” to which the prohibition of discrimination in Article 4 of Directive 2006/54, and Article 157 TFEU …, refer?

(4) As an alternative question to the previous ones, in the event that the Spanish contributory retirement pension were not regarded either as a “condition of employment” or as “pay”: is the prohibition of discrimination on grounds of sex, either directly or indirectly, laid down in Article 4 of Directive 79/7 to be interpreted as preventing or precluding national legislation which – as a consequence of the double application of the “*pro rata temporis* principle” – requires a proportionally greater contribution period from part-time workers (the vast majority of whom are women) than from full-time workers for the former to qualify, if appropriate, for a contributory retirement pension in an amount reduced in proportion to the part-time nature of their work?’

Consideration of the questions referred

Preliminary observations

19 The preliminary issue raised by the questions referred by the national court is whether a pension such as that at issue in the main proceedings falls within the scope of Clause 4 of the Framework Agreement, Article 157 TFEU, Article 4 of Directive 2006/54 and/or of Article 4 of Directive 79/7.

20 In that regard, it should be noted that 'pay' within the meaning of Article 157(2) TFEU covers pensions which depend on the employment relationship between worker and employer, excluding those deriving from a statutory scheme, to the financing of which workers, employers and possibly the public authorities contribute in a measure determined less by the employment relationship than by considerations of social policy (Joined Cases C-395/08 and C-396/08 *Bruno and Others* [2010] ECR I-5119, paragraph 41 and the case-law cited). Accordingly, that concept cannot be extended to encompass social security schemes or benefits – such as retirement pensions – which are directly governed by statute to the exclusion of any element of negotiation within the undertaking or occupational sector concerned and which are obligatorily applicable to general categories of employee (see Case C-366/99 *Griesmar* [2001] ECR I-9383, paragraph 27 and the case-law cited).

21 Similarly, 'employment conditions' for the purposes of Clause 4(1) of the Framework Agreement covers pensions which depend on an employment relationship between worker and employer, excluding statutory social security pensions, which are determined less by that relationship than by considerations of social policy (*Bruno and Others*, paragraph 42).

22 As it is, a pension such as that at issue in the main proceedings – which, as the Spanish Government has observed, is the most general of the pensions regulated by Spanish law – appears to be determined less by an employment relationship between worker and employer than by considerations of social policy, in accordance with the case-law cited in paragraphs 20 and 21 above, and to which Article 157 TFEU and Clause 4 of the Framework Agreement therefore do not apply.

23 It is true that considerations of social policy, of State organisation, of ethics, or even the budgetary concerns which influenced or may have influenced the establishment by the national legislature of a scheme cannot prevail if the pension concerns only a particular category of worker, if it is directly related to the period of service completed or if its amount is calculated by reference to the last salary (*Bruno and Others*, paragraph 47).

24 However, in any event, the first of those three conditions does not appear to be satisfied in so far as the documents submitted to the Court disclose no evidence that a pension such as that at issue in the main proceedings applies only to a specific category of worker.

25 Consequently, as correctly noted by the INSS, the Spanish and Belgian Governments and European Commission, neither Article 157 TFEU nor, in consequence, Article 4 of Directive 2006/54, the purpose of which is to implement Article 157 TFEU, nor Clause 4 of the Framework Agreement can be regarded as applicable to a pension such as that at issue in the main proceedings.

26 On the other hand, a pension of that nature may fall within the scope of Directive 79/7, since it forms part of a statutory scheme providing protection against one of the risks listed in Article 3(1) of that directive – namely, old age – and it is directly and effectively linked to protection against that risk (see, to that effect, Case C-123/10 *Brachner* [2011] ECR I-10003, paragraph 40).

27 In those circumstances, only Question 4 need be answered.

On Question 4

28 By Question 4, the referring court asks, in essence, whether Article 4 of Directive 79/7 must be interpreted as precluding, in circumstances such as those of the case before it, legislation of a Member State which requires a proportionally greater contribution period from part-time workers, the vast majority of whom are women, than from full-time workers for the former to qualify, if appropriate, for a contributory retirement pension in an amount reduced in proportion to the part-time nature of their work.

29 In that respect, it should be noted that, according to the settled case-law of the Court, indirect discrimination for the purposes of Article 4 of Directive 79/7 arises where a national measure, albeit formulated in neutral terms, works to the disadvantage of far more women than men (see, inter alia, *Brachner*, paragraph 56).

30 As it is, it emerges from the order for reference and, in particular, from the explanations of the referring court set out in paragraph 17 above, that legislation such as that at issue in the main proceedings works to the disadvantage of part-time workers, such as Ms Elbal Moreno, who have worked part-time for a long time, since, in practice, such legislation excludes those workers from any possibility of obtaining a retirement pension because of the method used to calculate the requisite contribution period.

31 Secondly, the referring court itself notes that it is an indisputable statistical fact that legislation such as that at issue in the case before it affects women far more than men, given that, in Spain, at least 80% of part-time workers are women.

32 It follows that such legislation is contrary to Article 4(1) of Directive 79/7, unless it is justified by objective factors unrelated to any discrimination on grounds of sex. That will be the case where the measures chosen reflect a legitimate social-policy objective of the Member State whose legislation is at issue, they are appropriate to achieve that aim and they are necessary in order to do so (see, to that effect, *Brachner*, paragraph 70).

33 The INSS and the Spanish Government contend that the requirement that a certain number of prior contribution periods must have been completed in order to qualify for certain benefits reflects a general social-policy objective pursued by the national legislature, since that requirement is essential in the context of a contributory social security system, inter alia in order to ensure the financial equilibrium of the system.

34 In that regard, it should be noted that, as emerges from the order for reference, the part-time workers concerned have paid contributions designed, in particular, to finance the pension system. Furthermore, it is common ground that, if they were to receive a pension, the amount of that pension would be reduced in proportion to the time worked and the contributions paid.

35 However, as the Belgian Government and the Commission correctly noted, there is nothing in the documents before the Court to suggest that, in those circumstances, the exclusion of part-time workers, such as Ms Elbal Moreno, from any possibility of obtaining a retirement pension is a measure genuinely necessary to achieve the objective of protecting the contributory social security system, to which the INSS and the Spanish Government refer, and that no other measure less onerous for those workers is capable of achieving the same objective.

36 That interpretation is not affected by the argument put forward by the INSS and the Spanish Government that the purpose of the two correcting rules set out in paragraphs 14 and 15 above is to facilitate access to a retirement pension for part-time workers. It does not appear that those two corrective measures have any positive effect whatsoever on the situation of part-time workers such as Ms Elbal Moreno.

37 As regards the reference made by the Spanish Government to Case C-537/07 *Gómez-Limón Sánchez-Camacho* [2009] ECR I-6525, it is sufficient to state that, as the Commission correctly noted, that judgment concerns in essence – as is clear from paragraph 60 – the interpretation of Article 7(1)(b) of Directive 79/7, by virtue of which Member States may exclude from the scope of that directive the acquisition of entitlements to social security benefits under statutory schemes following periods of interruption of employment owing to the bringing up of children. However, it does not appear from the order for reference that that provision is applicable to the main proceedings.

38 Consequently, the answer to Question 4 is that Article 4 of Directive 79/7 must be interpreted as precluding, in circumstances such as those of the case before the referring court, legislation of a Member State which requires a proportionally greater contribution period from part-time workers, the vast majority of whom are women, than from full-time workers for the former to qualify, if appropriate, for a contributory retirement pension in an amount reduced in proportion to the part-time nature of their work.

Costs

39 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Eighth Chamber) hereby rules:

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 must be interpreted as precluding, in circumstances such as those of the case before the referring court, legislation of a Member State which requires a proportionally greater contribution period from part-time workers, the vast majority of whom are women, than from full-time workers for the former to qualify, if appropriate, for a contributory retirement pension in an amount reduced in proportion to the part-time nature of their work.

[Signatures]