Reports of Cases

JUDGMENT OF THE COURT (Fifth Chamber)

19 September 2018*

(Reference for a preliminary ruling — Directive 92/85/EEC — Articles 4, 5 and 7 — Protection of the safety and health of workers — Worker who is breastfeeding — Night work — Shift work performed in part at night — Risk assessment of her work — Prevention measures — Challenge by the worker concerned — Directive 2006/54/EC — Article 19 — Equal treatment — Discrimination on grounds of sex — Burden of proof)

In Case C-41/17,

REQUEST for a preliminary ruling under Article 267 TFEU from the Tribunal Superior de Justicia de Galicia (High Court of Justice of Galicia, Spain), made by decision of 30 December 2016, received at the Court on 25 January 2017, in the proceedings

Isabel González Castro

v

Mutua Umivale,

ProsegurEspaña SL,

Instituto Nacional de la Seguridad Social (INSS),

THE COURT (Fifth Chamber),

composed of J.L. da Cruz Vilaça, President of the Chamber, E. Levits, A. Borg Barthet, M. Berger and F. Biltgen (Rapporteur), Judges,

Advocate General: E. Sharpston,

Registrar: L. Carrasco Marco, Administrator,

having regard to the written procedure and further to the hearing on 22 February 2018,

after considering the observations submitted on behalf of:

– the Instituto Nacional de la Seguridad Social (INSS), by P. García Perea and A. Lozano Mostazo, acting as Agents,

– the Spanish Government, by S. Jiménez García, acting as Agent,

– the German Government, by T. Henze and D. Klebs, acting as Agents,

* Language of the case: Spanish.

– the European Commission, by S. Pardo Quintillán and A. Szmytkowska, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 26 April 2018,

gives the following

Judgment

1 This reference for a preliminary ruling concerns the interpretation of Article 19 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) (OJ 2006 L 204, p. 23) and Articles 4, 5 and 7 of Council Directive 92/85/EEC of 19 October 1992 on the introduction of measures to encourage improvements in the safety and health at work of pregnant workers and workers who have recently given birth or are breastfeeding (OJ 1992 L 348, p. 1).

2 The request has been made in the context of proceedings between Isabel González Castro and Mutua Umivale ('mutual insurer Umivale'), her employer, Prosegur España SL ('Prosegur') and the Instituto Nacional de la Seguridad Social (INSS) (National Social Security Institute, Spain) ('INSS') concerning their refusal to suspend her employment contract and pay her an allowance for risk during breastfeeding.

Legal context

European Union law

Directive 92/85

3 The 1st, 8th to 11th and 14th recital of Directive 92/85 state:

'Whereas Article 118a of the [EEC] Treaty provides that the Council shall adopt, by means of directives, minimum requirements for encouraging improvements, especially in the working environment, to protect the safety and health of workers;

…

Whereas pregnant workers, workers who have recently given birth or who are breastfeeding must be considered a specific risk group in many respects and measures must be taken with regard to their safety and health;

Whereas the protection of the safety and health of pregnant workers, workers who have recently given birth or workers who are breastfeeding should not treat women on the labour market unfavourably nor work to the detriment of directives concerning equal treatment for men and women;

Whereas some types of activities may pose a specific risk, for pregnant workers, workers who have recently given birth or workers who are breastfeeding, of exposure to dangerous agents, processes or working conditions; whereas such risks must therefore be assessed and the result of such assessment communicated to female workers and/or their representatives;

Whereas, further, should the result of this assessment reveal the existence of a risk to the safety or health of the female worker, provision must be made for such worker to be protected;

…

Whereas the vulnerability of pregnant workers, workers who have recently given birth or who are breastfeeding makes it necessary for them to be granted the right to maternity leave of at least 14 continuous weeks, allocated before and/or after confinement, and renders necessary the compulsory nature of maternity leave of at least 2 weeks, allocated before and/or after confinement;

…'

4 Article 1(1) of Directive 92/85 states:

'The purpose of this Directive, which is the tenth individual Directive within the meaning of Article 16(1) of [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 (OJ 1989 L 183, p. 1)], is to implement measures to encourage improvements in the safety and health at work of pregnant workers and workers who have recently given birth or who are breastfeeding.'

5 Article 2 of that directive, headed 'Definitions', provides:

'For the purposes of this Directive:

…

(c) *worker who is breastfeeding* shall mean a worker who is breastfeeding within the meaning of national legislation and/or national practice and who informs her employer of her condition, in accordance with that legislation and/or practice.'

6 Article 3 of the Directive provides:

'1. In consultation with the Member States and assisted by the Advisory Committee on Safety, Hygiene and Health Protection at Work, the Commission shall draw up guidelines on the assessment of the chemical, physical and biological agents and industrial processes considered hazardous for the safety or health of workers within the meaning of Article 2.

The guidelines referred to in the first subparagraph shall also cover movements and postures, mental and physical fatigue and other types of physical and mental stress connected with the work done by workers within the meaning of Article 2.

2. The purpose of the guidelines referred to in paragraph 1 is to serve as a basis for the assessment referred to in Article 4(1).

To this end, Member States shall bring these guidelines to the attention of all employers and all female workers and/or their representatives in the respective Member State.'

7 The guidelines mentioned in Article 3 of Directive 92/85, in the version applicable to the present case, are set out in Commission Communication of 20 November 2000 on the Guidelines on the assessment of chemical, physical and biological agents and industrial processes considered hazardous for the safety or health of pregnant workers and workers who have recently given birth or are breastfeeding (COM(2000) 466 final/2, 'the Guidelines').

8 As regards the risk assessment and informing workers of that assessment, Article 4 of Directive 92/85 provides:

'1. For all activities liable to involve a specific risk of exposure to the agents, processes or working conditions of which a non-exhaustive list is given in Annex I, the employer shall assess the nature, degree and duration of exposure, in the undertaking and/or establishment concerned, of workers within the meaning of Article 2, either directly or by way of the protective and preventive services referred to in Article 7 of [Directive 89/391], in order to:

– assess any risks to the safety or health and any possible effect on the pregnancies or breastfeeding of workers within the meaning of Article 2,

– decide what measures should be taken.

2. Without prejudice to Article 10 of [Directive 89/391], workers within the meaning of Article 2 and workers likely to be in one of the situations referred to in Article 2 in the undertaking and/or establishment concerned and/or their representatives shall be informed of the results of the assessment referred to in paragraph 1 and of all measures to be taken concerning health and safety at work.'

9 As regards action further to the risk assessment, Article 5(1) to (3) of that directive provides:

'1. Without prejudice to Article 6 of [Directive 89/391], if the results of the assessment referred to in Article 4(1) reveal a risk to the safety or health or an effect on the pregnancy or breastfeeding of a worker within the meaning of Article 2, the employer shall take the necessary measures to ensure that, by temporarily adjusting the working conditions and/or the working hours of the worker concerned, the exposure of that worker to such risks is avoided.

2. If the adjustment of her working conditions and/or working hours is not technically and/or objectively feasible, or cannot reasonably be required on duly substantiated grounds, the employer shall take the necessary measures to move the worker concerned to another job.

3. If moving her to another job is not technically and/or objectively feasible or cannot reasonably be required on duly substantiated grounds, the worker concerned shall be granted leave in accordance with national legislation and/or national practice for the whole of the period necessary to protect her safety or health.'

10 Article 7 of Directive 92/85, entitled 'Night work', provides:

'1. Member States shall take the necessary measures to ensure that workers referred to in Article 2 are not obliged to perform night work during their pregnancy and for a period following childbirth which shall be determined by the national authority competent for safety and health, subject to submission, in accordance with the procedures laid down by the Member States, of a medical certificate stating that this is necessary for the safety or health of the worker concerned.

2. The measures referred to in paragraph 1 must entail the possibility, in accordance with national legislation and/or national practice, of:

(a) transfer to daytime work;

or

(b) leave from work or extension of maternity leave where such a transfer is not technically and/or objectively feasible or cannot reasonably be required on duly substantiated grounds.'

Directive 2006/54

11 Article 1 of Directive 2006/54, entitled 'Purpose', provides:

'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:

(a) access to employment, including promotion, and to vocational training;

(b) working conditions, including pay;

(c) occupational social security schemes.

It also contains provisions to ensure that such implementation is made more effective by the establishment of appropriate procedures.'

12 Article 2 of that directive, headed 'Definitions', provides:

'1. For the purposes of this Directive, the following definitions shall apply:

(a) "direct discrimination": where one person is treated less favourably on grounds of sex than another is, has been or would be treated in a comparable situation;

(b) "indirect discrimination": where an apparently neutral provision, criterion or practice would put persons of one sex at a particular disadvantage compared with persons of the other sex, unless that provision, criterion or practice is objectively justified by a legitimate aim, and the means of achieving that aim are appropriate and necessary;

…

2. For the purposes of this Directive, discrimination includes:

…

(c) any less favourable treatment of a woman related to pregnancy or maternity leave within the meaning of [Directive 92/85].'

13 Article 14(1) of Directive 2006/54 extends the prohibition of discrimination, inter alia, to working conditions and provides as follows:

'There shall be no direct or indirect discrimination on grounds of sex in the public or private sectors, including public bodies, in relation to:

…

(c) employment and working conditions, including dismissals, as well as pay as provided for in Article 141 of the [EC] Treaty;

…'

14 As regards the burden of proof and access to the courts in the event of direct or indirect discrimination, Article 19(1) and (4) of that directive provides:

'1. Member States shall take such measures as are necessary, in accordance with their national judicial systems, to ensure that, when persons who consider themselves wronged because the principle of equal treatment has not been applied to them establish, before a court or other competent authority, facts from which it may be presumed that there has been direct or indirect discrimination, it shall be for the respondent to prove that there has been no breach of the principle of equal treatment.

…

4. Paragraphs 1, 2 and 3 shall also apply to:

(a) the situations covered by Article 141 of the [EC] Treaty and, in so far as discrimination based on sex is concerned, by Directive [92/85] and [Council Directive] 96/34/EC [of 3 June 1996 on the framework agreement on parental leave concluded by UNICE, CEEP and the ETUC (OJ 1996 L 145, p. 4)];

…'

Directive 2003/88/EC

15 Recital 14 of Directive 2003/88/EC of the European Parliament and of the Council of 4 November 2003 concerning certain aspects of the organisation of working time (OJ 2003 L 299, p. 9) provides:

'Specific standards laid down in other Community instruments relating, for example, to rest periods, working time, annual leave and night work for certain categories of workers should take precedence over the provisions of this Directive.'

16 Article 1 of that directive, entitled 'Purpose and scope', states:

'1. This Directive lays down minimum safety and health requirements for the organisation of working time.

2. This Directive applies to:

…

(b) certain aspects of night work, shift work and patterns of work.

…'

17 Article 2(3) and (4) of the Directive, entitled 'Definitions', provide:

'For the purposes of this Directive, the following definitions shall apply:

…

3. "night time" means any period of not less than seven hours, as defined by national law, and which must include, in any case, the period between midnight and 5.00;

4. “night worker” means:

(a) on the one hand, any worker who, during night time, works at least three hours of his daily working time as a normal course; and

(b) on the other hand, any worker who is likely during night time to work a certain proportion of his annual working time, as defined at the choice of the Member State concerned:
(i) by national legislation, following consultation with the two sides of industry; or
(ii) by collective agreements or agreements concluded between the two sides of industry at national or regional level;

…’

Spanish law

18 The social benefit in respect of risk during breastfeeding was incorporated into Spanish law by Ley Orgánica 3/2007 para la igualdad efectiva de mujeres y hombres (Organic Law 3/2007 on real equality between women and men) of 22 March 2007 (BOE No 71, 23 March 2007, p. 12611, ‘Law 3/2007’).

19 The object of Law 3/2007 is to promote the integration of women into the workplace by enabling them to reconcile their work life with their private and family life.

20 The 12th supplementary provision of that law amended Article 26 of Ley 31/1995 de Prevención de Riesgos Laborales (Law 31/1995 on the Prevention of Occupational Risks) of 8 November 1995 (BOE No 269, 10 November 1995, p. 32590, ‘Law 31/1995’) by providing for the protection of female workers and their newborn children in situations of risk during breastfeeding when the conditions of employment are liable to have an adverse effect on the health of the worker or the child.

21 Article 26 of Law 31/1995, which transposes, inter alia, Articles 4 and 7 of Directive 92/85 into national law, is worded as follows:

‘1. The assessment of the risks [for the safety and health of workers] referred to in Article 16 of this Law must include determination of the nature, degree and duration of exposure of pregnant workers or workers who have recently given birth to agents, processes or working conditions liable to have an adverse effect on the health of the workers or the foetus in any activity likely to present a specific risk. If the results of the assessment reveal a risk to safety or health or a possible effect on the pregnancy or breastfeeding of such workers, the employer shall adopt the measures necessary to avoid exposure to that risk by adjusting the working conditions and the working hours of the worker concerned.

Such measures shall include, where necessary, the non-performance of night work or shift work.

2. Where the adjustment of working conditions or working hours is not feasible or where, despite such adjustment, working conditions are liable to have an adverse effect on the health of the pregnant worker or the foetus and a certificate to that effect is issued by the medical department of the [INSS] or the mutual insurer, depending on the entity with which the undertaking has agreed cover for occupational risks, together with a report from the Servicio Nacional de Salud [National Health Service, Spain] medical practitioner who treats the worker, the latter will have to perform a different job or role compatible with her condition. After consultation with the workers’ representatives, the employer must determine the list of jobs that are risk-free for those purposes.

A move to another job or role shall be effected in accordance with the rules and criteria applied in cases of functional mobility and shall take effect until such time as the worker’s state of health allows her to return to her previous job.

…

3. If such a move to another job is not technically or objectively feasible or cannot reasonably be required on substantiated grounds, the worker concerned may have her contract suspended on the grounds of risk during pregnancy, pursuant to Article 45(1)(d) [of Real Decreto Legislativo 1/1995, por el que se aprueba el texto refundido de la Ley del Esatatuto de los Trabajadores (Royal Legislative Decree 1/1995 approving the consolidated text of the Law on the Workers' Statute) of 24 March 1995 (BOE No 75, 29 March 1995, p. 9654)], for the period necessary for the protection of her safety and health and for as long as it remains impossible for her to return to her previous job or move to another job compatible with her condition.

4. The provisions of paragraphs 1 and 2 of this article shall also be applicable during the period of breastfeeding if the working conditions are liable to have an adverse effect on the health of the woman concerned or her child and a certificate to that effect is issued by the medical department of the [INSS] or the mutual insurer, depending on the entity with which the company has agreed cover for occupational risks, together with a report from the National Health Service medical practitioner who treats the worker or her child. In addition, the worker concerned may have her contract suspended on the grounds of risk while breastfeeding children under nine months old, pursuant to Article 45(1)(d) of [Royal Legislative Decree 1/1995], if the conditions set out in paragraph 3 of this article are satisfied.

…'

22 The 18th supplementary provision of Law 3/2007 amended the Spanish legislation in such a way that a period of breastfeeding was expressly recognised as one of the situations covered by the Ley General de la Seguridad Social — Real Decreto Legislativo 1/1994 por el que se aprueba el texto refundido de la Ley General de la Seguridad Social (Royal Legislative Decree 1/1994 approving the consolidated text of the General Law on Social Security) of 20 June 1994 (BOE No 154, 29 June 1994, p. 20658, 'the General Law on Social Security').

23 Article 135a of the General Law on Social Security provides:

'Protected situation

For the purposes of the financial allowance in respect of risk during breastfeeding, the period of suspension of the employment contract shall be deemed a protected situation in cases where, because the female worker has to move from one job to another compatible with her condition, as provided for in Article 26(4) of Law 31/1995, such a move to another job is not technically or objectively feasible or cannot reasonably be required on substantiated grounds.'

24 Article 135b of the General Law on Social Security provides:

'Financial allowance

A female worker shall be granted, in accordance with the terms and conditions laid down in this Law governing the financial allowance in respect of risk during pregnancy, the financial allowance in respect of risk during breastfeeding, which shall cease when the child reaches the age of nine months, unless the recipient returns before then to her previous job or to another job compatible with her condition.'

25 As regards procedural law, Article 96(1) of Ley 36/2011, reguladora de la jurisdicción social (Law 36/2011 governing the social courts) of 10 October 2011 (BOE No 245, 11 October 2011, p. 106584) provides:

'Burden of proof in the case of discrimination and accidents at work

1. In proceedings in which the arguments of the parties reveal reliable evidence of discrimination on the grounds of gender, sexual orientation, racial or ethnic origin, religion or belief, disability, age, or of harassment, and in any other case of infringement of a fundamental right or public freedom, the respondent shall be required to produce an objective and reasonable justification, established to the requisite legal standard, for the measures adopted and for their proportionality.'

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

26 It is apparent from the order for reference that Ms González Castro works as a security guard for Prosegur.

27 On 8 November 2014, she gave birth to a boy who was then breastfed.

28 Since March 2015, Ms González Castro has performed her duties in a shopping centre, on the basis of a variable rotating pattern of eight-hour shifts.

29 The security service she performs at her place of work is usually performed with another security guard, except for the following shifts, which she performs alone: Monday to Thursday from midnight to 8 a.m.; Friday from 2 a.m. to 8 a.m.; Saturday from 3 a.m. to 8 a.m. and Sunday from 1 a.m. to 8 a.m.

30 Ms González Castro initiated the procedure for obtaining an allowance in respect of risk during breastfeeding, laid down in Article 26 of Law 31/1995, with the mutual insurer Umivale, a non-profit private mutual insurance company providing cover for risks relating to accidents at work and occupational diseases. To that end, she requested that mutual insurer, in accordance with national legislation, to issue her with a medical certificate indicating the existence of a risk to breastfeeding posed by her work.

31 Her application having been rejected by the mutual insurer Umivale, she lodged a complaint which was also rejected.

32 Ms González Castro brought an action against that rejection before the Juzgado de lo Social No 3 de Lugo (Social Court No 3, Lugo, Spain).

33 Her action having been dismissed, Ms González Castro brought an appeal against that decision before the referring court, the Tribunal Superior de Justicia de Galicia (High Court of Justice of Galicia, Spain).

34 In the first place, the referring court asks for an interpretation of the concept of 'night work', within the meaning of Article 7 of Directive 92/85, where, as in the case before it, that night work is combined with shift work. According to the referring court, breastfeeding shift workers who only work certain shifts at night must enjoy the same protection as breastfeeding workers who perform night work but not on the basis of shifts.

35 In the second place, the referring court considers that it is possible that the risk assessment of Ms González Castro's work, provided for under the procedure for obtaining an allowance in respect of risk during breastfeeding, in accordance with Article 26 of Law 31/1995 transposing Articles 4 and 7 of Directive 92/85, was not properly carried out and her work does in fact pose a risk to her health or safety, in particular because she performs night work and does shifts, sometimes alone, doing rounds and having to respond to emergencies, such as criminal behaviour, fire and other incidents of that kind, and there is no evidence that the workplace has anywhere suitable for breastfeeding or, as the case may be, for expressing breast milk.

36 In that context, the referring court seeks guidance as to whether it is appropriate to apply the rules reversing the burden of proof laid down in Article 19(1) of Directive 2006/54 in a situation such as that at issue in the case before it and, if so, it asks what are the conditions for the application of that provision, in particular as regards the issue whether it is for the worker concerned or the respondent, whether it be the employer or the organisation responsible for the payment of the allowance in respect of risk during breastfeeding, to demonstrate that the adjustment of the working conditions or the move of the worker concerned to another job are not technically or objectively feasible or cannot reasonably be required.

37 In those circumstances, the Tribunal Superior de Justicia de Galicia (High Court of Justice of Galicia) decided to stay the proceedings and to refer the following questions to the Court for a preliminary ruling:

'(1) Should Article 7 of [Directive 92/85] be interpreted as meaning that the night work, which those workers referred to in Article 2, including workers who are breastfeeding, must not be obliged to perform, includes not only work performed entirely during the night, but also shift work when, as in this case, some of those shifts are worked at night?

(2) In proceedings in which the existence of a situation of risk for a worker who is breastfeeding is at issue, do the special rules on burden of proof in Article 19(1) of [Directive 2006/54], transposed into Spanish law by, inter alia, Article 96(1) of [Ley 36/2011], apply in conjunction with the requirements set out in Article 5 of [Directive 92/85], transposed into Spanish law by Article 26 of [Law 31/1995], relating to the granting of leave to a breastfeeding worker and, as the case may be, payment of the relevant allowance under national legislation by virtue of Article 11(1) of [Directive 92/85]?

(3) In proceedings in which the existence of a risk during breastfeeding giving entitlement to leave, as provided for in Article 5 of [Directive 92/85] and transposed into Spanish law by Article 26 of [Law 31/1995], is at issue, can Article 19(1) of [Directive 2006/54] be interpreted as meaning that the following are "facts from which it may be presumed that there has been direct or indirect discrimination" in relation to a breastfeeding worker: (1) the fact that the worker does shift work as a security guard with some shifts being worked at night and alone; (2) in addition, that the work entails doing rounds and, where necessary, dealing with emergencies (criminal behaviour, fire and other incidents); and (3) furthermore that there is no evidence that the workplace has anywhere suitable for breastfeeding or, as the case may be, for expressing breast milk?

(4) In proceedings in which the existence of a risk during breastfeeding giving entitlement to leave is at issue, when "facts from which it may be presumed that there has been direct or indirect discrimination" have been established in accordance with Article 19(1) of [Directive 2006/54] in conjunction with Article 5 of [Directive 92/85], transposed into Spanish law by Article 26 of [Law 31/1995], can a breastfeeding worker be required to demonstrate, in order to be granted leave in accordance with the domestic legislation transposing Article 5(2) and (3) of [Directive 92/85], that the adjustment of her working conditions and/or working hours is not technically and/or objectively feasible, or cannot reasonably be required and that moving her to another job is not technically and/or objectively feasible or cannot reasonably be required or are these matters for the respondents (the employer and the [Mutua Umivale] providing the social security benefit associated with the suspension of the contract of employment) to prove?'

Consideration of the questions referred

The first question

38 By its first question, the referring court asks, in essence, whether Article 7 of Directive 92/85 must be interpreted as applying to a situation, such as that at issue in the main proceedings, where the worker concerned does shift work in the context of which only part of her duties are performed at night.

39 In order to answer that question, it must be noted that, in accordance with the settled case-law of the Court, in interpreting a provision of EU law it is necessary to consider not only its wording but also its context and the objectives of the legislation of which it forms part (see, inter alia, judgment of 17 April 2018, *Egenberger*, C-414/16, EU:C:2018:257, paragraph 44 and the case-law cited).

40 Under Article 7(1) of Directive 92/85, Member States must take the necessary measures to ensure that pregnant workers, workers who have recently given birth or workers who are breastfeeding are not obliged to perform night work during their pregnancy and for a period following childbirth which will be determined by the national authority competent for safety and health, subject to submission, in accordance with the procedures laid down by the Member States, of a medical certificate stating that this is necessary for the safety or health of the worker concerned.

41 Article 7(2) states that the measures referred to in paragraph (1) must entail the possibility, in accordance with national legislation and/or national practice, of a transfer to daytime work or of leave from work or an extension of maternity leave where such a transfer is not technically and/or objectively feasible or cannot reasonably by required on duly substantiated grounds.

42 The wording of that provision does not however contain any details as regards the exact scope of the concept of ‘night work’.

43 In that regard, it is apparent from Article 1 of Directive 92/85 that that directive is part of a series of directives, adopted on the basis of Article 118A of the EEC Treaty, seeking to set minimum requirements, especially as regards improvements in the working environment to protect the safety and health of workers.

44 As the Advocate General noted in point 44 of her Opinion, this is also true of Directive 2003/88, which sets minimum safety and health requirements for the organisation of working time and applies, in particular, to certain aspects of night work, shift work and patterns of work.

45 Directive 2003/88 defines, in Article 2(4), a night worker as ‘any worker, who, during night time, works at least three hours of his daily working time as a normal course’ and ‘any worker who is likely during night time to work a certain proportion of his annual working time’. Furthermore, Article 2(3) of that article states that the concept of ‘night time’ means ‘any period of not less than seven hours, as defined by national law, and which must include, in any case, the period between midnight and 5.00’.

46 It follows from the wording of those provisions, and in particular the use of the expressions ‘any period’, ‘at least three hours of his … working time’ and ‘a certain proportion of his … working time’, that a worker who, as in the case in the main proceedings, does shift work in the context of which only part of her duties are performed at night must be regarded as performing work during ‘night time’ and must therefore be classified as a ‘night worker’ within the meaning of Directive 2003/88.

47 It must be noted that, since it is in the interest of pregnant workers, workers who have recently given birth or are breastfeeding to be subject, in accordance with Recital 14 of Directive 2003/88, to the specific provisions laid down by Directive 92/85 relating to night work, in particular in order to

strengthen the protection that those workers must enjoy in that regard, those specific provisions must not be interpreted less favourably than the general provisions of Directive 2003/88 which are applicable to other categories of workers.

48 Consequently, it must be held that a worker such as that at issue in the main proceedings carries out 'night work' within the meaning of Article 7 of Directive 92/85 and that she is covered by that provision.

49 That interpretation is supported by the purpose of Article 7 of Directive 92/85.

50 That provision aims to strengthen the protection enjoyed by pregnant workers and workers who have recently given birth or are breastfeeding by enshrining the principle that they are not obliged to perform night work when that work poses a risk to their health or safety.

51 If a breastfeeding worker who, as in the main proceedings, performs shift work were to be excluded from the scope of Article 7 of Directive 92/85 on the ground that only part of her duties are performed at night, that provision would be deprived in part of its effectiveness. The worker concerned may be exposed to a risk to her health or safety and the protection she is entitled to under that provision would be considerably reduced.

52 As regard the conditions for the application of Article 7 of Directive 92/85 to a situation such as that at issue in the main proceedings, it must be stated that, to benefit from the protection measures set out in Article 7(2), namely transfer to daytime work or, failing that, leave from work, the worker concerned must submit a medical certificate stating the need for such a measure for her safety or health, in accordance with the procedures laid down by the Member State in question. It is for the national court to determine whether that is the case in the main proceedings.

53 In the light of the foregoing, the answer to the first question is that Article 7 of Directive 92/85 must be interpreted as applying to a situation, such as that at issue in the main proceedings, where the worker concerned does shift work in the context of which only part of her duties are performed at night.

The second to fourth questions

54 As a preliminary point, it should be observed that, according to settled case-law, in the procedure laid down by Article 267 TFEU providing for cooperation between national courts and the Court of Justice, it is for the latter to provide the national court with an answer which will be of use to it and enable it to determine the case before it. To that end, the Court may have to reformulate the questions referred to it and, in that context, to interpret all provisions of EU law which national courts require in order to decide the actions pending before them, even if those provisions are not expressly indicated in the questions referred to the Court by those courts (judgment of 19 October 2017, *Otero Ramos*, C-531/15, EU:C:2017:789, paragraph 39 and the case-law cited).

55 Consequently, even if, formally, the referring court has limited its second to fourth questions to the interpretation of Article 19(1) of Directive 2006/54 and of Article 5 of Directive 92/85, it is for the Court to extract from all the information provided by the national court, in particular from the grounds of the decision to make the reference, the points of EU law which require interpretation in view of the subject matter of the dispute (see, to that effect, judgment of 19 October 2017, *Otero Ramos*, C-531/15, EU:C:2017:789, paragraph 40 and the case-law cited).

56 In the present case, it is apparent from the order for reference that the relevant national legislation in the case in the main proceedings, namely Article 26 of Law 31/1995, transposes into national law, without any clear distinction, inter alia, Articles 4 and 7 of Directive 92/85 and that legislation

provides, in particular, that the suspension of the employment contract for risk during breastfeeding and the grant of the related allowance are possible only if it is established, following the assessment of the work of the worker concerned, that it poses such a risk and that it is not feasible to adjust the working conditions of that worker or move her to another job.

57 The referring court starts from the premiss that it is possible that, if the risk assessment of the work of the worker concerned provided for by the national legislation has been carried out properly, the existence of a risk to the health or safety of that worker might have been revealed, in particular in the light of Article 7 of Directive 92/85, on the basis that that worker performs night work and does shifts, sometimes alone, doing rounds and having to respond to emergencies, such as criminal behaviour, fire and other incidents of that kind and there is no evidence that the workplace has anywhere suitable for breastfeeding or, as the case may be, for expressing breast milk.

58 In that context, the referring court asks whether the rules of reversal of the burden of proof under Article 19(1) of Directive 2006/54 must be applied in a situation such as that at issue in the main proceedings, in which a worker, who has been refused a medical certificate indicating the existence of a risk to breastfeeding posed by her work and, accordingly, an allowance in respect of risk during breastfeeding, challenges, before a court or other competent authority of the Member State concerned, the risk assessment of her work. If so, the referring court asks what are the conditions for the application of that provision, in particular as regards whether it is for the worker concerned or the respondent, whether it be the employer or the organisation responsible for payment of the financial allowance in respect of risk during breastfeeding, to demonstrate that the adjustment of working conditions or the move of the worker concerned to another job are not technically or objectively feasible or cannot reasonably be required.

59 In the light of those considerations, it must be understood that, by its second to fourth questions, which it is appropriate to consider together, the referring court is asking, is essence, whether Article 19(1) of Directive 2006/54 must be interpreted as applying to a situation, such as that at issue in the main proceeding, in which a worker, who has been refused a medical certificate indicating the existence of a risk to breastfeeding posed by her work and, consequently, an allowance in respect of risk during breastfeeding, challenges, before a court or other competent authority of the Member State concerned, the risk assessment of her work and, if so, what are the conditions for application of that provision in such a situation.

60 It should be noted, in the first place, that under Article 19(1) of Directive 2006/54, Member States must take such measures as are necessary, in accordance with their national judicial systems, to ensure that, when persons who consider themselves wronged because the principle of equal treatment has not been applied to them establish, before a court or any other competent authority, facts from which it may be presumed that there has been direct or indirect discrimination, it will be for the respondent to prove that there has been no breach of the principle of equal treatment.

61 Article 19(4)(a) of Directive 2006/54 states, inter alia, that the rules reversing the burden of proof in Article 19(1) apply also to situations covered by Directive 92/85 in so far as discrimination based on sex is concerned.

62 In that regard, the Court has held that Article 19(1) of Directive 2006/54 applies to a situation in which a breastfeeding worker challenges, before a court or other competent authority of the Member State concerned, the risk assessment of her work in so far as she claims that the assessment was not conducted in accordance with Article 4(1) of Directive 92/85 (judgment of 19 October 2017, *Otero Ramos*, C-531/15, EU:C:2017:789, paragraph 65).

63 Failure to assess the risk posed by the work of a breastfeeding worker in accordance with the requirements of Article 4(1) of Directive 92/85 must indeed be regarded as less favourable treatment of a woman related to pregnancy or maternity leave, within the meaning of that directive, and thus

constitutes direct discrimination on grounds of sex, within the meaning of Article 2(2)(c) of Directive 2006/54 (judgment of 19 October 2017, *Otero Ramos*, C-531/15, EU:C:2017:789, paragraphs 62 and 63).

64 The Court stated, in that regard, that in order to be in conformity with the requirements of Article 4(1) of Directive 92/85, the risk assessment of the work of a breastfeeding worker must include a specific assessment taking into account the individual situation of the worker in question in order to ascertain whether her health or safety or that of her child is exposed to a risk (judgment of 19 October 2017, *Otero Ramos*, C-531/15, EU:C:2017:789, paragraph 51).

65 In the second place, it must be noted that the risk assessment provided for in Article 4 of Directive 92/85 is intended to protect pregnant workers and workers who have recently given birth or are breastfeeding and their children in that, when that assessment reveals that the work of such a worker poses a risk for her health or safety, or has an effect on her pregnancy or the breastfeeding of her child, the employer must, in accordance with Article 5 of that directive, take the necessary measures to ensure that the exposure to that risk is avoided.

66 As the Advocate General observed in point 61 of her Opinion, Article 4 of Directive 92/85 is the general provision which sets out the action to be taken in relation to all activities liable to involve a specific risk to pregnant workers and workers who have recently given birth or are breastfeeding. Article 7, on the other hand, is a specific provision which applies in cases of night work, which the legislature has singled out as liable to present a particular risk to pregnant workers and workers who have recently given birth or are breastfeeding.

67 Whereas Articles 4 and 7 of Directive 92/85 pursue the same aim of protecting pregnant workers and workers who have recently given birth or are breastfeeding against the risks posed by their jobs, Article 7 of Directive 92/85 aims, more specifically, to strengthen that protection by establishing the principle that pregnant workers and workers who have recently given birth or are breastfeeding are not obliged to perform night work as long as they submit a medical certificate indicating the need for such protection on the basis on their safety or health.

68 The risk assessment of the work of pregnant workers and workers who have recently given birth or are breastfeeding provided for under Article 7 of Directive 92/85 cannot, therefore, be subject to less stringent requirements than those that apply under Article 4(1) of that directive.

69 That interpretation is supported by the fact that the guidelines, the purpose of which is, in accordance with Article 3(2) of Directive 92/85, to serve as a basis for the assessment referred to in Article 4(1) of that directive, expressly refer to night work.

70 It follows, in particular, from the detailed table on the risk assessment of generic hazards and associated situations which are likely to be met by most pregnant women, women who have recently given birth or women who are breastfeeding, set out at page 13 of those guidelines, that night work may have a significant effect on the health of pregnant women, women who have recently given birth or women who are breastfeeding, the risks for those women vary with the type of work undertaken, working conditions and the individual concerned and, consequently, because of increased tiredness, some pregnant or breastfeeding women may not be able to work irregular or late shifts or work at night. That table also provides for preventive measures as regards night work.

71 Furthermore, it follows from the Guidelines that the risk assessment of the work of a breastfeeding worker must include a specific assessment taking into account the individual situation of the worker in question (judgment of 19 October 2017, *Otero Ramos*, C-531/15, EU:C:2017:789, paragraphs 46 and 51).

72 Consequently, it must be considered, as the Advocate General noted at point 50 of her Opinion, that the risk assessment of the work of the worker concerned, carried out under Article 7 of Directive 92/85, must include a specific assessment taking into account the individual situation of the worker in question in order to ascertain whether her health or safety or that of her child is exposed to a risk. If there is no such assessment, the situation amounts to less favourable treatment of a woman related to pregnancy or maternity leave, within the meaning of that directive, and constitutes direct discrimination on grounds of sex, within the meaning of Article 2(2)(c) of Directive 2006/54, enabling the application of Article 19(1) of that directive.

73 As regards the conditions for the application of that provision, it should be recalled that the rules of evidence that it provides do not apply at the time that the worker in question requests an adjustment of her working conditions or, as in the case in the main proceedings, an allowance in respect of risk during breastfeeding, and a risk assessment of her work must, accordingly, be carried out in accordance with Article 4(1) of Directive 92/85 or, where appropriate, Article 7 of Directive 92/85. It is only at a later stage, when a decision relating to that risk assessment is challenged by the worker in question before a court or any other competent authority, that those rules of evidence are to be applied (see, to that effect, judgment of 19 October 2017, *Otero Ramos*, C-531/15, EU:C:2017:789, paragraph 67).

74 Nevertheless, in accordance with Article 19(1) of Directive 2006/54, it is for a worker who considers herself wronged because the principle of equal treatment has not been applied to her to raise, before a court or any other competent authority, facts or evidence from which it may be presumed that there has been direct or indirect discrimination (see, to that effect, judgment of 19 October 2017, *Otero Ramos*, C-531/15, EU:C:2017:789, paragraph 68 and the case-law cited).

75 In a situation such as that at issue in the main proceedings, that means that the worker in question must adduce, before a court or any other competent authority of the Member State concerned, facts or evidence capable of indicating that the risk assessment of her work provided for under the national legislation transposing, in particular, Articles 4 and 7 of Directive 92/85 into national law did not include a specific assessment taking into account her individual situation and she has, therefore, been discriminated against.

76 In the present case, it is apparent from the order for reference and the documents before the Court that Ms González Castro initiated the procedure for obtaining an allowance in respect of risk during breastfeeding with the mutual insurer Umivale and, to that end, submitted, on 9 March 2015, a request for a medical certificate indicating the existence of a risk for breastfeeding posed by her work by means of a form provided by the mutual insurer in that regard.

77 In the context of that procedure, Prosegur sent, on 13 March 2015, to the mutual insurer Umivale a declaration in which it stated that it had not tried to adapt the working conditions of Ms González Castro's work or to move her to another job since it considered that the duties she performed and her working conditions did not affect breastfeeding.

78 That declaration, which takes the form of a standard form provided by the mutual insurer Umivale, does not contain any reasons indicating how Prosegur reached that conclusion and it does not appear to be based on a specific assessment taking into account the individual situation of the worker concerned.

79 As regards the decision by which the mutual insurer Umivale dismissed the application made by Ms González Castro, it merely states that 'there is no risk inherent to her work which may be harmful, after an exhaustive analysis of the documentation provided by the worker herself'. In the conclusions set out in the Annex to that decision, the mutual insurer Umivale referred to the Spanish Paediatric Association 'Guidance on assessing workplace risk during breastfeeding' published by the INSS, to conclude that they indicate that shift work or night work do not pose a risk to breastfeeding.

The mutual insurer Umivale claims also, without any further explanation, that Ms González Castro is not exposed to substances which are harmful to her child and that her working conditions do not affect breastfeeding.

80 In these circumstances, it is apparent, as the Advocate General noted in points 70 and 77 of her Opinion, that the risk assessment of Ms González Castro's work did not include a specific assessment taking into account her individual situation and that she was discriminated against. It is ultimately for the referring court, which alone has jurisdiction to assess the facts of the case before it, to verify whether that is indeed the case.

81 If so, it will be for the respondent in the main proceedings to prove that the risk assessment provided for by national legislation transposing, inter alia, Articles 4 and 7 of Directive 92/85 into national law included a specific assessment taking into account the individual situation of Ms González Castro, bearing in mind that documents such as a declaration by the employer that the duties performed by that worker and her working conditions do not affect breastfeeding, without any explanations capable of substantiating that assertion, combined with the fact that her work is not included in the list of jobs posing a risk to breastfeeding drawn up by the competent body of the Member State concerned, cannot alone provide an irrebuttable presumption that such is the case. Otherwise, both Articles 4 and 7 of Directive 92/85 and the rules of evidence provided for in Article 19 of Directive 2006/54 would be deprived of any useful effect (see, to that effect, judgment of 19 October 2017, *Otero Ramos*, C-531/15, EU:C:2017:789, paragraph 74).

82 It should be noted that the same rules of evidence are applicable in the context of Article 5, or, where appropriate, Article 7(2) of Directive 92/85. In particular, in so far as a breastfeeding worker requests leave from work for the whole of the period necessary to protect her safety or health and provides evidence capable of showing that the protective measures provided for in Article 5(1) and (2) or the first subparagraph of Article 7(2) were impracticable, it is for the employer to establish that those measures were technically or objectively feasible and could reasonably be required in the situation of the worker concerned.

83 In the light of all the above considerations, the answer to the second to fourth questions is that Article 19(1) of Directive 2006/54 must be interpreted as applying to a situation, such as that at issue in the main proceeding, in which a worker, who has been refused a medical certificate indicating the existence of a risk to breastfeeding posed by her work and, consequently, an allowance in respect of risk during breastfeeding, challenges, before a court or other competent authority of the Member State concerned, the risk assessment of her work, provided that that worker adduces factual evidence to suggest that that evaluation did not include a specific assessment taking into account her individual situation and thus permitting the presumption that there is direct discrimination on the grounds of sex, within the meaning of Directive 2006/54, which it is for the referring court to ascertain. It is then for the respondent to prove that that risk assessment did actually include such a specific assessment and that, accordingly, the principle of non-discrimination was not infringed.

Costs

84 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 (Fifth Chamber) hereby rules:

1. **Article 7 of Council Directive 92/85/EEC of 19 October 1992 on the introduction of measures to encourage improvements in the safety and health at work of pregnant workers and workers who have recently given birth or are breastfeeding must be interpreted as applying to a situation, such as that at issue in the main proceedings, where the worker concerned does shift work during which only part of her duties are performed at night.**

2. **Article 19(1) 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) must be interpreted as applying to a situation, such as that at issue in the main proceeding, in which a worker, who has been refused a medical certificate indicating the existence of a risk to breastfeeding posed by her work and, consequently, an allowance in respect of risk during breastfeeding, challenges, before a court or other competent authority of the Member State concerned, the risk assessment of her work, provided that that worker adduces factual evidence to suggest that that evaluation did not include a specific assessment taking into account her individual situation and thus permitting the presumption that there is direct discrimination on the grounds of sex, within the meaning of Directive 2006/54, which it is for the referring court to ascertain.**

   It is then for the respondent to prove that that risk assessment did actually include such a specific assessment and that, accordingly, the principle of non-discrimination was not infringed.

[Signatures]