Reports of Cases

JUDGMENT OF THE COURT (Eighth Chamber)

21 January 2021 *

(Reference for a preliminary ruling – Social policy – Equal treatment for men and women in matters of social security – Directive 79/7/EEC – Article 4(1) – Voluntary early retirement – Early retirement pension – Eligibility – Requirement for the pension amount to be received to be at least as much as the legal minimum amount – Proportion of workers of each sex excluded from the benefit of early retirement – Justification of a potential particular disadvantage to female workers – Social policy objectives of the Member State concerned)

In Case C-843/19,

REQUEST for a preliminary ruling under Article 267 TFEU from the Tribunal Superior de Justicia de Cataluña (High Court of Justice, Catalonia, Spain), made by decision of 12 November 2019, received at the Court on 20 November 2019, in the proceedings

Instituto Nacional de la Seguridad Social (INSS)

v

BT,

THE COURT (Eighth Chamber),

composed of N. Wahl, President of the Chamber, F. Biltgen (Rapporteur) and L.S. Rossi, Judges,

Advocate General: G. Hogan,

Registrar: A. Calot Escobar,

having regard to the written procedure,

after considering the observations submitted on behalf of:

– the Instituto Nacional de la Seguridad Social (INSS), by A. Álvarez Moreno and G. Guadaño Segovia, acting as Agents,

– BT, by I. de Gispert Català, abogado,

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

* Language of the case: Spanish.

– the Portuguese Government, by A. Pimenta, M. Carneiro, J. Marques and P. Barros da Costa, acting as Agents,

– the European Commission, by I. Galindo Martín and C. Valero, acting as Agents,

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

gives the following

Judgment

1 This request for a preliminary ruling concerns the interpretation of Article 4(1) 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 request has been made in proceedings between the Instituto Nacional de la Seguridad Social (INSS) (National Social Security Institute, Spain) and BT concerning its refusal to grant BT an early retirement pension.

Legal context

European Union law

3 Under Article 1 of Directive 79/7:

'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 Article 3(1)(a) of that directive states that it shall apply to statutory schemes which provide protection against, amongst other risks, those of 'old age'.

5 Article 4(1) of that directive 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 Article 2(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 (OJ 2006 L 204, p. 23), is worded as follows:

‘For the purpose of this directive, the following definitions shall apply:

…

(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;

…’

Spanish law

7 Article 59 of the Ley General de la Seguridad Social (General Law on Social Security), the consolidated version of which was approved by Real Decreto Legislativo 8/2015 (Royal Legislative Decree 8/2015) of 30 October 2015 (BOE No 261, 31 October 2015), in the version applicable to the facts in the main proceedings (‘the LGSS’), is entitled ‘Supplements for pensions below the minimum’. That article provides, in the first subparagraph of paragraph 1:

‘Persons receiving contributory pensions under the social security scheme, who do not receive any income from work, from capital, or from commercial activities and capital gains, in accordance with the provisions for that income in the context of personal income tax, or those who receive such income without surpassing the amount set each year by the relevant Ley de Presupuestos Generales del Estado (Law on the General Budget of the State), have the right to receive the supplements necessary in order to achieve the minimum pension amount, on the condition that they reside in Spain, in accordance with the terms laid down by legislation or regulation.’

8 Article 208 of the LGSS, entitled ‘Voluntary early retirement of the interested party’, provides:

‘A person wishing to take early retirement must satisfy the following criteria:

(a) He or she must have reached an age which is not more than 2 years below the age applicable in each case in accordance with Article 205(1)(a), while the reduction coefficients referred to in Article 206 shall not be applicable for these purposes.

(b) He or she must have completed a minimum actual contribution period of 35 years, and any proportion relating to bonuses shall not be taken into consideration …

(c) After proof has been provided in relation to the general and specific criteria applicable to the type of retirement in question, the amount of the pension to be received must be higher than the amount of the minimum pension which would be due to the person concerned in the light of his or her family situation on reaching the age of 65. Otherwise, it shall not be possible to take this form of early retirement.’

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

9 As a domestic worker, BT belonged to a Spanish special social security scheme, reserved for that category of workers ('the Special Scheme'). BT contributed to that scheme over a period of 14 054 days, with the exception of 166 days.

10 On 12 December 2016, she requested that the INSS grant her an early retirement pension, in accordance with Article 208 of the LGSS, starting from 4 January 2017, the date on which she would reach the age of 63.

11 By a decision of 19 December 2016, confirmed by the decision taken on BT's administrative appeal, the INSS rejected that request on the ground that BT had not fulfilled the eligibility criterion for an early retirement pension set out in Article 208(1)(c) of that law, since the pension amount which she would have received was lower than the minimum pension amount which she could have claimed, in the light of her family situation, at the age of 65.

12 The Juzgado de lo Social nº 10 de Barcelona (Social Court No 10, Barcelona, Spain) upheld the action brought by BT against those decisions. That court found that the aforementioned provision of the LGSS constituted indirect discrimination against women contrary to Directive 79/7, since they make up the majority of domestic workers and since a worker in that sector, even if that worker were to have contributed to the Special Scheme for 44.5 years, would not be entitled to a pension of an amount which would allow that worker to request and obtain an early retirement pension at the age of 63.

13 The INSS lodged an appeal against that judgment before the referring court, the Tribunal Superior de Justicia de Cataluña (High Court of Justice, Catalonia, Spain). That court points out that the contribution base of the Special Scheme was initially lower than the contribution base of the Spanish general social security scheme. Consequently, the pensions of persons enrolled in the Special Scheme were also lower than those of persons enrolled in the General Scheme. The contribution base of the Special Scheme was however progressively aligned with that of the General Scheme, once the former scheme was integrated into the latter in 2012.

14 According to the referring court, Article 208(1)(c) of the LGSS applies to all the workers covered by the general social security scheme. By excluding from eligibility for an early retirement pension those members who voluntarily decide to take early retirement, but for whom the amount of such a pension would not reach the legal minimum pension to which they would have been entitled at the age of 65, that provision prevents a pension supplement, which would entail costs to the national budget, being paid to them. Furthermore, it would be consistent with the objectives of the European Union with regard to pensions, which aim to achieve a sustainable balance between the time spent in work and the time spent in retirement. In that regard, it would be incompatible with the consistent trend of increasing the age of retirement and of reinforcing incentives to extend the time spent in work, encouraged by the European Union, if a worker could voluntarily reduce his or her age of retirement without any reduction to the amount of that person's pension, due to the receipt of a pension supplement. The referring court notes, furthermore, that a condition such as the one set out in that provision is not required where the early retirement is linked to a reason not attributable to the worker, such as corporate restructuring, and consequently falls within Article 207 of the LGSS.

15 The referring court points out that, according to official statistics, 89% of domestic workers enrolled in the Special Scheme are women. Nevertheless, in order to examine whether Article 208(1)(c) of that law gives rise to indirect discrimination against female workers, the referring court takes the view that it is appropriate to consider all persons enrolled in the general social security scheme, who all fall within the scope of that provision. In particular, that would thus involve taking into account, in addition to those enrolled in the Special Scheme, women who, for other reasons such as marriage, the presence of children or part-time work, have contributed a lower amount over a shorter period.

16 In that regard, the referring court notes that it is apparent from the statistics adduced by the Ministerio de Inclusión, Seguridad Social y Migraciones (Ministry of integration, social security and migration, Spain) that a larger percentage of retired women than men receive a pension supplement in order to reach the legal minimum pension, which tends to indicate that more women than men are disadvantaged by the provision in Article 208(1)(c) of the LGSS, which makes the acquisition, by a worker who decides voluntarily to take early retirement, of an early retirement pension subject to the condition that that worker is able to receive the legal minimum pension by means of his or her own contributions, without receiving such a pension supplement. The referring court highlights the fact that, in 2018, 422 112 men received a pension supplement, which represents 15.23% of men's pensions, compared to 468 822 women, or 31.45% of women's pensions.

17 In those circumstances, the Tribunal Superior de Justicia de Cataluña (High Court of Justice, Catalonia) decided to stay the proceedings and to refer the following question to the Court of Justice for a preliminary ruling:

'Must the prohibition of indirect discrimination based on sex with regard to access to social security benefits and the calculation thereof, as is established in Article 4 of Directive 79/7, be interpreted as meaning that it prevents or precludes a provision of national law such as Article 208(1)(c) of the [LGSS], which stipulates that, in order for anyone enrolled in the General Scheme to be able to take voluntary early retirement, the pension payable, calculated in the standard way without any minimum pension supplement, must be at least as much as the minimum pension, inasmuch as it indirectly discriminates against women enrolled in the General Scheme, since it affects a far greater number of women than men?'

Consideration of the question referred

18 By its question, the referring court asks, in essence, whether Article 4(1) of Directive 79/7 must be interpreted as meaning that it precludes national legislation which, in the event of a worker enrolled in the general social security scheme voluntarily taking early retirement, makes that worker's right to an early retirement pension subject to the condition that the amount of that pension is at least as much as the minimum pension amount to which that worker would be entitled at the age of 65, in so far as that legislation puts female workers at a particular disadvantage, compared with male workers.

19 It should be noted that Article 208(1)(c) of the LGSS requires, for the purposes of eligibility for early retirement at the request of the interested party, that the amount of the pension to be received be larger than the minimum pension amount applicable to that interested party when he or she reaches the age of 65. That requirement is in addition to other eligibility conditions for such an early retirement pension, laid down in subparagraphs (a) and (b) of Article 208(1), and

consisting, respectively, in the fact of having reached an age which is not more than 2 years below the age set by that law in order to receive that retirement pension, and in having completed a minimum actual contribution period of 35 years.

20 The Court has previously held that EU law, more specifically Regulation (EC) No 883/2004 of the European Parliament and of the Council of 29 April 2004 on the coordination of social security systems (OJ 2004 L 166, p. 1, and corrigendum OJ 2004 L 200, p. 1), does not, in principle, preclude a provision of national legislation such as Article 208(1)(c) of the LGSS, in accordance with which an early retirement pension is to be refused where the amount to which the applicant would be entitled in respect of such a pension is below the minimum pension that would be due upon reaching the statutory retirement age (see, to that effect, judgment of 5 December 2019, *Bocero Torrico and Bode*, C-398/18 and C-428/18, EU:C:2019:1050, paragraphs 25 to 27).

21 However, the fact remains that it is necessary to examine whether, in the main proceedings, such a choice made by the national legislature is compliant with Directive 79/7 (see, by analogy, judgment of 14 April 2015, *Cachaldora Fernández*, C-527/13, EU:C:2015:215, paragraph 26).

22 In that regard, the first indent of Article 4(1), read in conjunction with the third indent of Article 3(1)(a) of that directive, prohibits all discrimination on grounds of sex as regards, inter alia, the conditions for access to statutory schemes ensuring protection against the risks of old age (judgment of 26 June 2018, *MB (Change of gender and retirement pension)*, C-451/16, EU:C:2018:492, paragraph 32). It is not disputed that the early retirement pension scheme at issue is such a scheme.

23 It should be noted from the outset, that a rule of national law such as that at issue in the main proceedings is not directly discriminatory on grounds of sex, since it applies without distinction to both male and female workers.

24 As regards whether such a rule of law constitutes indirect discrimination, it must be recalled that that concept must, in the context of Directive 79/7, be understood in the same way as in the context of Directive 2006/54 (judgment of 8 May 2019, *Villar Láiz*, C-161/18, EU:C:2019:382, paragraph 37 and the case-law cited). It is apparent from Article 2(1)(b) of that directive that there is indirect discrimination based on sex in a situation 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.

25 The existence of such a particular disadvantage might be established, for example, if it were proved that legislation such as that at issue in the main proceedings is to the disadvantage of a significantly greater proportion of persons of one sex as compared with persons of the other sex. It is for the national court to determine whether that is the case in the main proceedings (see, inter alia, judgment of 8 May 2019, *Villar Láiz*, C-161/18, EU:C:2019:382, paragraph 38 and the case-law cited).

26 In a situation where, as in the present case, statistical evidence is available to the national court, the Court has held (i) that it is for that court to take into account all those workers subject to the national legislation in which the difference in treatment has its origin, and (ii) that the best approach to the comparison is to compare the respective proportion of workers that are and are not affected by the alleged difference in treatment among the women in the workforce who come

within the scope of that legislation with the same proportion of men in the workforce coming within its scope (see, to that effect, judgment of 24 September 2020, *YS (Occupational pensions for managerial staff)*, C-223/19, EU:C:2020:753, paragraph 52 and the case-law cited).

27 In that regard, it is for the national court to assess to what extent the statistical evidence adduced before it is valid and whether it can be taken into account, that is to say, whether, for example, it illustrates purely fortuitous or short-term phenomena, and whether it is sufficiently significant (judgment of 24 September 2020, *YS (Occupational pensions for managerial staff)*, C-223/19, EU:C:2020:753, paragraph 51 and the case-law cited).

28 In the present case, in the first place, as the referring court suggests, it is appropriate to consider not only the persons enrolled in the Special Scheme, but also all the workers who are subject to the Spanish general social security scheme, within which those persons enrolled in the Special Scheme are included. Thus, the legislation at issue in the main proceedings applies to all persons enrolled in that General Scheme.

29 In the second place, as the referring court also points out, the proportion of persons enrolled in the general social security scheme who are disadvantaged by Article 208(1)(c) of the LGSS can reliably be identified by taking into consideration the number of retired persons who receive a pension supplement in order to reach the minimum legal pension amount compared to the total number of retired persons subject to that scheme. It is precisely the persons receiving a pension supplement whose requests for an early retirement pension would have been refused under that provision, since the amount of the pension to be received at the time of submission of such a request would have been lower than the aforementioned minimum legal pension. By contrast, taking into account only those persons whose requests for an early retirement pension were actually refused in accordance with Article 208(1)(c) of that law, as the INSS and the Spanish Government suggest in their written observations, would not necessarily be indicative of the number of persons affected by that provision, in so far as it is conceivable that a significant number of those persons never submitted such a request.

30 However, in the third place, in order to determine whether, in the present case, Article 208(1)(c) of the LGSS involves, by itself, indirect discrimination contrary to Article 4(1) of Directive 79/7, it is appropriate to consider those persons whose requests for an early retirement pension would have been refused only under Article 208(1)(c), without taking into account those who do not fulfil, in addition to the condition set out in that provision, the conditions of access to such a pension with regards to age or the length of the contributory period set out in subparagraphs (a) and (b) of Article 208(1). Accordingly, as the INSS and the Spanish Government mention in their written observations, the existence or non-existence of such indirect discrimination can be established by taking into consideration, over the course of a year, the number of newly retired persons who fulfil the condition set out in Article 208(1)(b) of the LGSS, namely that contributions have been made for over 35 years, and who receive a pension supplement, compared to the total number of newly retired persons over the course of that same year.

31 It follows from the forgoing considerations that, as regards the case in the main proceedings, if the statistics adduced before the referring court were to demonstrate that, among the newly retired women subject to the general social security scheme, the proportion of those women who have made contributions for more than 35 years and who receive a pension supplement is considerably larger than the proportion found with regard to newly retired men who are subject to that same scheme, it would be necessary to hold that Article 208(1)(c) of the LGSS involves

indirect discrimination based on sex, contrary to Article 4(1) of Directive 79/7, unless it were justified by objective factors unrelated to any discrimination on grounds of sex (see, by analogy, judgment of 8 May 2019, *Villar Láiz*, C-161/18, EU:C:2019:382, paragraph 47).

32 The legislation at issue in the present case would thus be justified in particular if the referring court were to find that it reflects a legitimate social policy objective, is appropriate to achieve that objective and is necessary in order to do so, it being understood that it can be considered appropriate to achieve the stated aim only if it genuinely reflects a concern to attain that aim and is pursued in a consistent and systematic manner (see, to that effect, judgment of 24 September 2020, *YS (Occupational pensions for managerial staff)*, C-223/19, EU:C:2020:753, paragraph 56 and the case-law cited).

33 Furthermore, it should be recalled that, in choosing the measures capable of achieving the aims of their social and employment policy, the Member States have a broad margin of discretion (judgment of 24 September 2020, *YS (Occupational pensions of staff members)*, C-223/19, EU:C:2020:753, paragraph 57 and the case-law cited).

34 In the present case, the referring court points out that the Spanish legislature adopted Article 208(1)(c) of the LGSS having regard to Spanish legislation pursuant to which no one may receive a pension below the minimum pension set each year, which is considered to be a minimum means of subsistence, and which, in certain cases, gives rise to the payment of a pension supplement in accordance with Article 59 of that law. However, the legislation at issue in the main proceedings would result in a certain number of workers wishing to take early retirement voluntarily and benefit, on that basis, from an early retirement pension being denied that pension on the ground that the amount of the pension is below that of the minimum pension and that it would, accordingly, entitle the worker in question, under the applicable national law, to a pension supplement.

35 In that regard, it should be recalled from the outset that the Court has held, first, that the allocation of an income equal to the social minimum forms an integral part of the social policy of the Member States and, secondly, that the provision of a compensatory supplement meant to ensure a minimum means of subsistence for its recipient where the pension is insufficient constitutes a legitimate objective of social policy which is unrelated to any discrimination based on sex (see, to that effect, judgment of 20 October 2011, *Brachner*, C-123/10, EU:C:2011:675, paragraphs 89 to 91 and the case-law cited).

36 As regards the justification of the national legislation at issue in the main proceedings, the INSS and the Spanish Government submit, in their written observations, that by excluding access to an early retirement pension to persons who decide to take early retirement but who, in the light of the amount of that pension, would have a right to a pension supplement at the State's expense, Article 208(1)(c) of the LGSS aims to maintain the viability of the Spanish social security scheme and to achieve a sustainable balance between the time spent in work and the time spent in retirement, given that unrestricted access to early retirement pensions would have serious consequences for the financing for that scheme.

37 In that context, it is apparent, both from the order for reference and the written observations of the INSS and the Spanish Government, that the aforementioned objectives of the national legislation at issue in the main proceedings are consistent with those of the European Union, as set out in the Commission's Green Paper of 7 July 2010, entitled 'Towards adequate, sustainable and safe European pension systems' (COM(2010) 365 final) and in the Commission's White

Paper of 16 February 2012, entitled 'An agenda for adequate, safe and sustainable pensions' (COM(2012) 55 final), of achieving a sustainable balance between the length of working life and the length of retirement with regard, inter alia, to the changes in life expectancy, in order to ensure the adequacy and the viability of retirement systems.

38 The Court has previously held that, while budgetary considerations cannot justify discrimination against one of the sexes, the objectives of ensuring the long-term funding of retirement benefits may, by contrast, and having regard to the broad discretion of the Member States, be considered to constitute legitimate social-policy objectives wholly unrelated to any discrimination based on sex (see, to that effect, judgment of 24 September 2020, *YS (Occupational pensions for managerial staff)*, C-223/19, EU:C:2020:753, paragraphs 60 and 61).

39 It follows that the objectives put forward by the INSS and the Spanish Government are, in principle, capable of justifying a potential difference in treatment to the detriment of female workers which would result indirectly from the application of Article 208(1)(c) of the LGSS.

40 Such national legislation appears appropriate for the purposes of achieving those objectives. The exclusion from access to an early retirement pension of persons who voluntarily intend to take an early retirement, but for whom such a pension would give rise to a right to a pension supplement, intends to preserve the finances of the Spanish social security scheme and seeks to prolong the working life of those persons. As is apparent from the order for reference, in the absence of such an exclusion, the right of the persons concerned to receive an early retirement pension would have harmful effects on the implementation of those objectives, in so far as it would allow, inter alia, those persons to work for less time, by taking their retirement early, without however having to suffer a reduction in the amount of their future pension.

41 Furthermore, it must be considered that the national legislation at issue in the main proceedings was put in place in a coherent and systematic manner, since it applies to every worker enrolled in the Spanish general social security scheme.

42 It is also apparent that that national legislation does not give rise to measures which would go beyond what is necessary to achieve the objectives pursued. Such legislation precludes access to a pension only to those persons who voluntarily intend to take early retirement, but for whom the pension amount would entail a cost to the national social security scheme in so far as it would give rise to a payment, to them, of a pension supplement. Furthermore, it is apparent from the file submitted to the Court that that exclusion can apply only in a situation where the start of the worker's early retirement follows a deliberate decision of that worker, and not for a reason that is not attributable to that worker, for example in the event of corporate restructuring. Moreover, as the Commission has pointed out in its written observations, the national legislature could not have made a different legislative choice, consisting of a derogation from the guarantee to receive a minimum pension in the event of voluntary early retirement, without undermining the social policy objective pursued by that guarantee, as mentioned in paragraph 35 above.

43 In the light of the forgoing considerations, the answer to the question referred is that Article 4(1) of Directive 79/7 must be interpreted as meaning that it does not preclude national legislation which, in the event of voluntary early retirement of a worker enrolled in the general social security scheme, makes that worker's right to an early retirement pension subject to the condition that the amount of that pension is at least as much as the minimum pension amount to which that worker would be entitled at the age of 65, even if that law puts female workers at a particular disadvantage,

compared with male workers, which is for the referring court to determine, provided, however, that that consequence is justified by legitimate social policy objectives which are unrelated to any discrimination based on sex.

Costs

44 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(1) 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 meaning that it does not preclude national legislation which, in the event of voluntary early retirement of a worker enrolled in the general social security scheme, makes that worker's right to an early retirement pension subject to the condition that the amount of that pension is at least as much as the minimum pension amount to which that worker would be entitled at the age of 65, even if that law puts female workers at a particular disadvantage, compared with male workers, which is for the referring court to determine, provided, however, that that consequence is justified by legitimate social policy objectives which are unrelated to any discrimination based on sex.

[Signatures]