Reports of Cases

JUDGMENT OF THE COURT (Seventh Chamber)

19 December 2024*

(Reference for a preliminary ruling – Social policy – Protection of the safety and health of workers – Organisation of working time – Daily and weekly rest – Article 31(2) of the Charter of Fundamental Rights of the European Union – Directive 2003/88/EC – Articles 3, 5, 6, 16, 17, 19 and 22 – Requirement to establish a system enabling the duration of time worked by domestic workers to be measured – Derogation – National legislation exempting domestic workers from the obligation to record actual time worked)

In Case C-531/23 [Loredas],[i]

REQUEST for a preliminary ruling under Article 267 TFEU from the Tribunal Superior de Justicia del País Vasco (High Court of Justice of the Basque Country, Spain), made by decision of 20 June 2023, received at the Court on 5 July 2023, in the proceedings

HJ

v

US,

MU,

intervening parties:

Fondo de Garantía Salarial (FOGASA),

THE COURT (Seventh Chamber),

composed of F. Biltgen (Rapporteur), President of the First Chamber, acting as President of the Seventh Chamber, M.L. Arastey Sahún, President of the Fifth Chamber, and J. Passer, Judge,

Advocate General: M. Szpunar,

Registrar: A. Calot Escobar,

having regard to the written procedure,

* Language of the case: Spanish.

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

after considering the observations submitted on behalf of:

– the Spanish Government, by M. Morales Puerta, acting as Agent,

– the European Commission, by I. Galindo Martín, D. Recchia and E. Schmidt, 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 Articles 3, 5, 6 and 16, Article 17(4)(b) and Articles 19 and 22 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), of Articles 1 and 4 of Directive 2010/41/EU of the European Parliament and of the Council of 7 July 2010 on the application of the principle of equal treatment between men and women engaged in an activity in a self-employed capacity and repealing Council Directive 86/613/EEC (OJ 2010 L 180, p. 1), of Articles 1, 4 and 5 of Directive 2006/54/EC of the European Parliament and of the Council of 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (OJ 2006 L 204, p. 23), of Articles 2 and 3 of Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation (OJ 2000 L 303, p. 16), of Article 3(2) EC and of Articles 20 and 21 and Article 31(2) of the Charter of Fundamental Rights of the European Union ('the Charter').

2 The request has been made in proceedings between, on the one hand, HJ, a domestic worker, and, on the other, US and MU, her employers, concerning her dismissal and payment for hours of overtime worked and days of leave not taken.

Legal context

European Union law

Directive 2003/88

3 Article 1(1) of Directive 2003/88 provides:

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

4 Article 2 of that directive is worded as follows:

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

1. "working time" means any period during which the worker is working, at the employer's disposal and carrying out his activity or duties, in accordance with national laws and/or practice;

…’

5 Article 3 of that directive, entitled ‘Daily rest’, provides:

‘Member States shall take the measures necessary to ensure that every worker is entitled to a minimum daily rest period of 11 consecutive hours per 24-hour period.’

6 Article 5 of that directive, entitled ‘Weekly rest period’, provides:

‘Member States shall take the measures necessary to ensure that, per each seven-day period, every worker is entitled to a minimum uninterrupted rest period of 24 hours plus the 11 hours’ daily rest referred to in Article 3.

If objective, technical or work organisation conditions so justify, a minimum rest period of 24 hours may be applied.’

7 Article 6 of Directive 2003/88, entitled ‘Maximum weekly working time’, provides:

‘Member States shall take the measures necessary to ensure that, in keeping with the need to protect the safety and health of workers:

(a) the period of weekly working time is limited by means of laws, regulations or administrative provisions or by collective agreements or agreements between the two sides of industry;

(b) the average working time for each seven-day period, including overtime, does not exceed 48 hours.’

8 Article 17 of that directive, entitled ‘Derogations’, provides in paragraphs 1 and 4:

‘1. With due regard for the general principles of the protection of the safety and health of workers, Member States may derogate from Articles 3 to 6, 8 and 16 when, on account of the specific characteristics of the activity concerned, the duration of the working time is not measured and/or predetermined or can be determined by the workers themselves, and particularly in the case of:

(a) managing executives or other persons with autonomous decision-taking powers;

(b) family workers; or

…

4. In accordance with paragraph 2 of this Article derogations may be made from Articles 3 and 5:

(a) in the case of shift work activities, each time the worker changes shift and cannot take daily and/or weekly rest periods between the end of one shift and the start of the next one;

(b) in the case of activities involving periods of work split up over the day, particularly those of cleaning staff.’

9 Article 22 of that directive, entitled ‘Miscellaneous provisions’, provides in paragraphs 1 and 3:

‘1. A Member State shall have the option not to apply Article 6, while respecting the general principles of the protection of the safety and health of workers, and provided it takes the necessary measures to ensure that:

(a) no employer requires a worker to work more than 48 hours over a seven-day period, calculated as an average for the reference period referred to in Article 16(b), unless he has first obtained the worker’s agreement to perform such work;

(b) no worker is subjected to any detriment by his employer because he is not willing to give his agreement to perform such work;

(c) the employer keeps up-to-date records of all workers who carry out such work;

(d) the records are placed at the disposal of the competent authorities, which may, for reasons connected with the safety and/or health of workers, prohibit or restrict the possibility of exceeding the maximum weekly working hours;

(e) the employer provides the competent authorities at their request with information on cases in which agreement has been given by workers to perform work exceeding 48 hours over a period of seven days, calculated as an average for the reference period referred to in Article 16(b).

…

3. If Member States avail themselves of the options provided for in this Article, they shall forthwith inform the [European] Commission thereof.’

Directive 2006/54

10 Article 1 of Directive 2006/54 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.’

11 Article 2(1) of that directive provides:

‘For the purposes 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;

…’

12 The first paragraph of Article 4 of that directive, entitled ‘Prohibition of discrimination’, provides:

‘For the same work or for work to which equal value is attributed, direct and indirect discrimination on grounds of sex with regard to all aspects and conditions of remuneration shall be eliminated.’

13 Article 14(1) of that directive provides:

‘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 [157 TFEU];

…’

Spanish law

The Workers’ Statute

14 Article 34(9) of the Estatuto de los Trabajadores (Workers’ Statute), in the version resulting from Real Decreto-ley 8/2019, de medidas urgentes de protección social y de lucha contra la precariedad laboral en la jornada de trabajo (Royal Decree-Law 8/2019 laying down urgent measures for social protection and combating job insecurity) of 8 March 2019 (BOE No 61 of 12 March 2019, p. 23156) (‘the Workers’ Statute’), provides:

‘The undertaking shall ensure the daily recording of working time, which must include the exact start and end of the working day of each worker, without prejudice to the flexibility provided for in this article.

Such recording of working time shall be organised and drawn up by collective bargaining or company agreement or, failing that, by decision of the employer following consultation with the workers’ legal representatives in the undertaking.

The records referred to in this provision shall be kept by the undertaking for four years and shall remain available to workers, their legal representatives and the Labour and Social Security Inspectorate.'

15 Article 35 of that statute, under the heading 'Overtime', provides in paragraph 5:

'For the purpose of calculating overtime, every worker's working time shall be recorded on a daily basis and the total calculated at the time fixed for payment of remuneration. Workers shall be given a copy of the summary with the corresponding payslip.'

Royal Decree 1620/2011

16 Article 9 of Real Decreto 1620/2011, por el que se regula la relación laboral de carácter especial del servicio del hogar familiar (Royal Decree 1620/2011 on the special employment relationship of domestic workers) of 14 November 2011 (BOE No 277 of 17 November 2011, p. 119046), provides for an exception to the provisions of the Workers' Statute in the following terms:

'1. Maximum weekly working time shall normally be 40 hours of time actually worked, without prejudice to time spent at the workplace, at the employer's disposal, which may be agreed between the parties. Working hours shall be established by mutual agreement between the parties.

After completing the daily working time and, where appropriate, the time agreed upon to be spent at the workplace, the employee shall not be required to remain at the employer's home.

2. With due regard for maximum working time and minimum rest periods, the duration of the time to be spent at the workplace and the remuneration or compensation to which it is subject shall be determined according to the same conditions agreed by the parties. In any event, unless it is agreed that the worker shall be compensated by equivalent paid rest periods, time spent at the workplace may not exceed an average of 20 hours per week during a one-month reference period and shall be remunerated by a salary of not less than that corresponding to ordinary hours.

3. The rules on overtime are those laid down in Article 35 of the Workers' Statute, subject to the provisions set out in paragraph 5 of that article.

3 bis. As regards part-time workers, the obligations to record working time laid down in Article 12(5)(h) of the Workers' Statute do not apply.

…'

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

17 As from 15 September 2020, HJ was recruited as a domestic worker for US and MU.

18 Following her dismissal on 17 February 2021, HJ brought an action on 31 March 2021 before the Juzgado de lo Social nº 2 de Bilbao (Social Court No 2, Bilbao, Spain) seeking a declaration that her dismissal was unfair and an order that her employers pay her for the overtime she had worked and the days of leave she had not taken. In that action, HJ states, inter alia, that she was employed full-time with a gross monthly salary of EUR 2 363.04 and that she worked 46 hours per week until 18 October 2020 and 79 hours per week from 19 October 2020.

19 By judgment of 11 January 2023, that court upheld that action in part, declaring the dismissal unfair and ordering the defendants in the main proceedings to pay HJ the sum of EUR 364.39 by way of compensation and the sum of EUR 934.89 in respect of days of leave not taken and extra payments. By contrast, that court held that neither the hours worked nor the pay claimed had been proved by the applicant in the main proceedings, since her claims could not be regarded as established solely on the basis of the failure, by the defendants in the main proceedings, to produce daily records of the time worked by the worker in so far as Royal Decree 1620/2011 exempts certain employers, including households, from the obligation to record the actual time worked by their employees.

20 The applicant in the main proceedings brought an appeal against that judgment before the Tribunal Superior de Justicia del País Vasco (High Court of Justice of the Basque Country, Spain), which is the referring court.

21 That court has doubts as to the compatibility of the national legislation on the special rules for domestic workers with EU law.

22 First, given that the exception to the general obligation to record working time places domestic workers in a situation that makes it difficult to prove working time, such a situation could be regarded as contrary to Directive 2003/88 and the case-law of the Court in that regard, in particular the judgment of 14 May 2019, *CCOO* (C-55/18, EU:C:2019:402), especially since the applicant in the main proceedings is neither a family worker, within the meaning of the derogation provided in Article 17(1)(b) of Directive 2003/88, nor a worker whose activity involves periods of work split up over the day, within the meaning of Article 17(4)(b) of that directive, as HJ was employed full-time.

23 Secondly, the referring court notes, as is apparent from the judgment of 24 February 2022, *TGSS (Domestic worker unemployment)* (C-389/20, EU:C:2022:120), that, in Spain, the group of domestic workers is female-dominated, with 95% of domestic workers being women. Consequently, the difference in treatment as regards recording working time as compared with men raises questions as to compliance with Articles 20 and 21 of the Charter and Directive 2006/54.

24 In those circumstances, the Tribunal Superior de Justicia del País Vasco (High Court of Justice of the Basque Country) decided to stay the proceedings and to refer the following question to the Court of Justice for a preliminary ruling:

‘Must Articles 3, 5, 6, 16, … [Article]17(4)(b), [and Articles] 19 and 22 of Directive [2003/88 and] Article 31(2) of the [Charter], read in the light of the EU case-law (judgment [of 14 May 2019, *CCOO*, C-55/18, EU:C:2019:402]), Articles 20 and 21 of the [Charter], Article 3(2) [EC], Articles 1 and 4 of Directive [2010/41], Articles 1, 4 and 5 of Directive [2006/54], and Articles 2 and 3 of [Directive 2000/78], also read in the light of the EU case-law (judgment of [of 24 February 2022, *TGSS (Domestic worker unemployment)*, C-389/20, EU:C:2022:120]), be interpreted as precluding a legislative provision such as Article 9(3) of [Royal Decree 1620/2011], which exempts an employer from the obligation to keep a record of a worker’s working time?’

Consideration of the question referred

25 By its question, the referring court asks, in essence, whether Articles 3, 5 and 6 of Directive 2003/88, read in conjunction with Directives 2000/78, 2006/54 and 2010/41, and with Articles 20 and 21 and Article 31(2) of the Charter, must be interpreted as precluding national legislation under which domestic employers are exempt from the obligation to establish a system for measuring the length of time worked by domestic employees.

26 As a preliminary point, it should be noted that the order for reference contains nothing to suggest that the situation at issue in the main proceedings falls within the scope of the provisions of Directive 2000/78, relating to equal treatment in employment and in work in general, or of those of Directive 2010/41 concerning self-employed workers.

27 At the outset, it must be recalled that the right of every worker to a limitation of maximum working hours and to daily and weekly rest periods not only constitutes a rule of EU social law of particular importance, but is also expressly enshrined in Article 31(2) of the Charter, which Article 6(1) TEU recognises as having the same legal value as the Treaties (judgment of 14 May 2019, *CCOO*, C-55/18, EU:C:2019:402, paragraph 30 and the case-law cited).

28 The provisions of Directive 2003/88, in particular Articles 3, 5 and 6, which give specific form to that fundamental right, must be interpreted in the light of that fundamental right and may not be interpreted restrictively at the expense of the rights that workers derive from it (see, to that effect, judgment of 14 May 2019, *CCOO*, C-55/18, EU:C:2019:402, paragraphs 31 and 32 and the case-law cited).

29 It should also be borne in mind that the purpose of Directive 2003/88 is to lay down minimum requirements intended to improve the living and working conditions of workers through approximation of national provisions concerning, in particular, the duration of working time (judgment of 14 May 2019, *CCOO*, C-55/18, EU:C:2019:402, paragraph 36 and the case-law cited).

30 That harmonisation at EU level in relation to the organisation of working time is intended to guarantee better protection of the health and safety of workers by ensuring that they are entitled to minimum rest periods – particularly daily and weekly – as well as adequate breaks, and by providing for a ceiling on the duration of the working week (judgment of 14 May 2019, *CCOO*, C-55/18, EU:C:2019:402, paragraph 37 and the case-law cited).

31 Thus, the Member States are required, first, under Articles 3 and 5 of Directive 2003/88, to take the measures necessary to ensure that every worker is entitled to a minimum daily rest period of 11 consecutive hours per 24-hour period and, during each 7-day period, to a minimum uninterrupted rest period of 24 hours and, secondly, under Article 6(b) of that directive, to fix a 48-hour limit for average weekly working time, including overtime (see, to that effect, judgment of 14 May 2019, *CCOO*, C-55/18, EU:C:2019:402, paragraphs 38 and 39 and the case-law cited).

32 In order to ensure that Directive 2003/88 is fully effective, the Member States must ensure that those minimum rest periods are observed and prevent the maximum weekly working time laid down in Article 6(b) of Directive 2003/88 from being exceeded (judgment of 14 May 2019, *CCOO*, C-55/18, EU:C:2019:402, paragraph 40 and the case-law cited).

33 Since Articles 3 and 5 and Article 6(b) of Directive 2003/88 do not however establish the specific arrangements by which the Member States must ensure the implementation of the rights that they lay down, the Member States have a margin of discretion for the purpose of adopting the specific arrangements by which they intend to ensure the implementation of the rights provided for by that directive. Having regard to the essential objective pursued by that directive, which is to ensure the effective protection of the living and working conditions of workers and better protection of their safety and health, the Member States are required to ensure that the effectiveness of those rights is guaranteed in full, by ensuring that workers actually benefit from the minimum daily and weekly rest periods and the limitation on the duration of average weekly working time laid down in that directive (see, to that effect, judgment of 14 May 2019, *CCOO*, C-55/18, EU:C:2019:402, paragraphs 41 and 42 and the case-law cited).

34 In the exercise of that discretion, Member States may determine the specific arrangements for implementing a system for measuring the duration of time worked each day by each worker, in particular the form that it must take, having regard, as necessary, to the particular characteristics of each sector of activity concerned, or the specific characteristics of certain undertakings concerning, inter alia, their size, and without prejudice to Article 17(1) of Directive 2003/88, which permits Member States, while having due regard for the general principles of the protection of the safety and health of workers, to derogate, inter alia, from Articles 3 to 6 of that directive, when, on account of the specific characteristics of the activity concerned, the duration of the working time is not measured and/or predetermined or can be determined by the workers themselves (see, to that effect, judgment of 14 May 2019, *CCOO*, C-55/18, EU:C:2019:402, paragraph 63).

35 However, the arrangements made by the Member States to implement the requirements of Directive 2003/88 must in no circumstances be liable to render the rights enshrined in Article 31(2) of the Charter and Articles 3 and 5 and Article 6(b) of that directive meaningless (see, to that effect, judgment of 14 May 2019, *CCOO*, C-55/18, EU:C:2019:402, paragraph 43 and the case-law cited).

36 In that regard, it must be recalled that the worker is regarded as the weaker party in the employment relationship and that it is therefore necessary to prevent the employer from being in a position to impose a restriction of his or her rights on him or her (judgment of 14 May 2019, *CCOO*, C-55/18, EU:C:2019:402, paragraph 44 and the case-law cited).

37 Similarly, it must be observed that, on account of that position of weakness, a worker may be dissuaded from explicitly claiming his or her rights vis-à-vis his or her employer where, in particular, doing so may expose him or her to measures taken by the employer likely to affect the employment relationship in a manner detrimental to that worker (judgment of 14 May 2019, *CCOO*, C-55/18, EU:C:2019:402, paragraph 45 and the case-law cited).

38 In the absence of a system for objectively and reliably measuring both the number of hours worked by the worker and their distribution over time as well as the number of hours worked in excess of normal working time as overtime, it appears to be excessively difficult, if not impossible in practice, for workers to ensure compliance with the rights conferred on them by Article 31(2) of the Charter and by Directive 2003/88, with a view to actually benefiting from the limitation on weekly working time and minimum daily and weekly rest periods provided for by that directive (see, to that effect, judgment of 14 May 2019, *CCOO*, C-55/18, EU:C:2019:402, paragraphs 47 and 48).

39 The Court has held that allowing the worker to rely on other sources of evidence in order to provide indications of a breach of his or her rights and to reverse the burden of proof is not capable of replacing such a system objectively and reliably establishing the number of hours the worker worked each day and each week, since the worker is liable to prove reluctant to give evidence against his or her employer owing to a fear of measures being taken by the latter which might affect the employment relationship to his or her detriment (see, to that effect, judgment of 14 May 2019, *CCOO*, C-55/18, EU:C:2019:402, paragraphs 54 and 55).

40 It is in the light of those considerations that the Court ruled, in the judgment of 14 May 2019, *CCOO* (C-55/18, EU:C:2019:402, paragraphs 59 and 71), that Directive 2003/88, and more specifically Articles 3, 5 and 6 thereof, precludes national legislation, such as the Spanish legislation in force at the time of the facts at issue in the case that gave rise to that judgment, and its interpretation by the national courts, according to which employers are not required to establish a system enabling the duration of time worked each day by each worker to be measured.

41 It is apparent from the documents before the Court that, following that judgment, the Spanish legislature, by Royal Decree-Law 8/2019, amended the Workers' Statute by introducing, in Article 34(9), a general obligation on employers to establish a system for recording the actual time worked by each worker.

42 In that regard, the Spanish Government states, in its written observations, that, although the Workers' Statute classifies the employment relationship of domestic workers as a special employment relationship, the provisions of that statute, including those relating to the obligation to record working time, are applicable to domestic workers, in so far as there are no specific derogating provisions.

43 According to that government, as regards the recording of working time, the only derogating provisions of Royal Decree 1620/2011 are those in Article 9(3) and (3 bis), which concern, first, the recording obligations laid down in Article 35(5) of the Workers' Statute, relating to the monitoring of overtime and, secondly, Article 12(4)(c) of that statute, relating to the monitoring of hours worked under part-time employment contracts.

44 Since Article 34(9) of the Workers' Statute is not covered by Article 9(3) and (3 bis) of Royal Decree 1620/2011, there is no derogation from the obligation to record the daily working time of domestic workers, contrary to what would appear to follow from a judicial interpretation of Article 9(3), or from an administrative practice based on that provision, exempting employers in the domestic labour sector from the obligation to record daily working time.

45 In that regard, it should be noted that it is not for the Court, in the context of a reference for a preliminary ruling, to give a ruling on the interpretation of provisions of national law or to decide whether the interpretation given by the national court of those provisions is correct. The Court must take account, under the division of jurisdiction between the EU Courts and the national courts, of the factual and legislative context in which the questions put to it are set, as described in the order for reference (judgment of 23 April 2009, *Angelidaki and Others*, C-378/07 to C-380/07, EU:C:2009:250, paragraph 48 and the case-law cited).

46 The question referred for a preliminary ruling must therefore be understood as referring not only to Article 9(3) of Royal Decree 1620/2011 as such, but also to the interpretation of that provision by the national courts or national administrative practice based on that provision.

47 In that regard, it must be recalled that, according to settled case-law, the Member States' obligation arising from a directive to achieve the result envisaged by that directive and their duty, under Article 4(3) TEU, to take all appropriate measures, whether general or particular, to ensure the fulfilment of that obligation are binding on all the authorities of the Member States, including, for matters within their jurisdiction, the courts (judgment of 14 May 2019, *CCOO*, C-55/18, EU:C:2019:402, paragraph 68).

48 It follows that, in applying national law, national courts called upon to interpret that law are required to consider the whole body of rules of national law and to apply methods of interpretation that are recognised by those rules in order to arrive, so far as possible, at an interpretation consistent with the wording and the purpose of the directive concerned in order to achieve the result sought by the directive. The requirement to interpret national law in a manner that is consistent with EU law includes the obligation for national courts to change their established case-law, where necessary, if it is based on an interpretation of national law that is incompatible with the objectives of a directive (judgment of 14 May 2019, *CCOO*, C-55/18, EU:C:2019:402, paragraphs 69 and 70).

49 In the light of the case-law referred to in paragraphs 38 to 40 above, it must be held that the judicial interpretation of a provision of national law or an administrative practice based on such a provision, under which employers are exempt from establishing a system enabling the duration of the daily working time of each domestic worker to be measured, and which therefore deprive domestic workers of the possibility of determining objectively and reliably the number of hours worked and their distribution over time, clearly does not comply with the provisions of Directive 2003/88, and more specifically with the rights flowing from Article 3, 5 and 6 of that directive, read in the light of Article 31(2) of the Charter.

50 However, it is apparent from the case-law referred to in paragraph 34 above that the general obligation to record working time does not preclude national legislation from laying down specific features either because of the sector of activity concerned or because of the specific characteristics of certain employers, in particular their size, provided that such legislation provides employees with effective means of ensuring compliance with the rules relating, in particular, to the maximum weekly working time.

51 Thus, a system requiring employers to measure the daily working time of each domestic worker may, on account of the particular features of the domestic work sector, provide for derogations in respect of overtime and part-time work, provided that those derogations do not render the legislation in question devoid of substance, which it is, in the present case, for the referring court, which alone has jurisdiction to interpret and apply national law, to determine.

52 As regards the alleged indirect discrimination on grounds of sex, it should be recalled that it is clear from Article 2(1)(b) of Directive 2006/54 that such discrimination occurs 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.

53 The existence of such a particular disadvantage may be established, for example, if it were proved that that provision, criterion or practice is to the disadvantage of a significantly greater proportion of individuals of one sex as compared with individuals of the other sex. It is for the national court to assess to what extent the statistical evidence adduced before it is valid and whether it takes into

account, on the one hand, all those workers subject to the national legislation at issue and, on the other, the respective proportion of workers that are and are not affected by the alleged difference in treatment (see, to that effect, judgment of 24 February 2022, *TGSS (Domestic worker unemployment)*, C-389/20, EU:C:2022:120, paragraphs 41 and 43 and the case-law cited).

54 The national court must not only take into account all those workers subject to the national legislation in which the difference in treatment has its origin, but also 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 February 2022, *TGSS (Domestic worker unemployment)*, C-389/20, EU:C:2022:120, paragraph 42 and the case-law cited).

55 In the present case, the referring court appears to rely on the judgment of 24 February 2022, *TGSS (Domestic worker unemployment)* (C-389/20, EU:C:2022:120), and the statistics set out therein in order to assume that the applicant in the main proceedings belongs to a group of workers that is clearly female-dominated.

56 It follows that the judicial interpretation of a provision of national law and/or an administrative practice based on such a provision, under which employers are exempt from their obligation to establish a system enabling the duration of the daily working time of each domestic worker to be measured, would put female workers at a particular disadvantage compared with male workers.

57 Such a judicial interpretation and/or such an administrative practice would constitute indirect discrimination based on sex, unless it is justified by objective factors unrelated to any discrimination on grounds of sex. That is the case if the provision concerned 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 (judgment of 24 February 2022, *TGSS (Domestic worker unemployment)*, C-389/20, EU:C:2022:120, paragraph 48 and the case-law cited).

58 As regards the existence of an objective factor capable of justifying indirect discrimination, it must be borne in mind that, in accordance with the case-law, such discrimination is permissible only if it pursues a legitimate aim compatible with the Treaty and is justified by overriding reasons in the public interest. Even if that were so, the application of the measure in question would still have to be such as to ensure achievement of the objective in question and not go beyond what is necessary in order to attain it, 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 February 2022, *TGSS (Domestic worker unemployment)*, C-389/20, EU:C:2022:120, paragraphs 48 and 51 and the case-law cited).

59 In that context, the Court has repeatedly held that although, in choosing the measures capable of achieving the aims of their social and employment policy, the Member States have a broad margin of discretion, it is however for the Member State concerned, as the author of the allegedly discriminatory rule, to show that that rule is justified by objective factors unrelated to any discrimination on grounds of sex (see, to that effect, judgment of 24 February 2022, *TGSS (Domestic worker unemployment)*, C-389/20, EU:C:2022:120, paragraph 52 and the case-law cited).

60 In the present case, the request for a preliminary ruling contains no reference to the objective pursued by the practice at issue in the main proceedings and the Spanish Government has not submitted any observations in that regard.

61 Consequently, it is ultimately for the referring court to ascertain whether the situation at issue in the main proceedings also constitutes indirect discrimination on grounds of sex within the meaning of Article 2(1)(b) of Directive 2006/54.

62 In the light of the foregoing, the answer to the question referred is that Articles 3, 5 and 6 of Directive 2003/88, read in the light of Article 31(2) of the Charter, must be interpreted as precluding national legislation, and its interpretation by the national courts or an administrative practice based on such legislation, under which domestic employers are exempt from the obligation to establish a system enabling the duration of time worked by domestic workers to be measured, thereby depriving those workers of the possibility of determining objectively and reliably the number of hours worked and their distribution over time.

Costs

63 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the referring 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 (Seventh Chamber) hereby rules:

Articles 3, 5 and 6 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, read in the light of Article 31(2) of the Charter of Fundamental Rights of the European Union,

must be interpreted as precluding national legislation, and its interpretation by the national courts or an administrative practice based on such legislation, under which domestic employers are exempt from the obligation to establish a system enabling the duration of time worked by domestic workers to be measured, thereby depriving those workers of the possibility of determining objectively and reliably the number of hours worked and their distribution over time.

[Signatures]