

JUDGMENT OF THE COURT (Second Chamber)

30 September 2010 (*)

(Social policy – Equal treatment for male and female workers – Directive 76/207/EEC – Articles 2 and 5 – Right to leave for employed mothers – Possible use by an employed mother or an employed father – Mother self-employed – Exclusion of the right to leave for an employed father)

In Case C-104/09,

REFERENCE for a preliminary ruling under Article 234 EC from the Tribunal Superior de Justicia de Galicia (Spain), made by decision of 13 February 2009, received at the Court on 19 March 2009, in the proceedings

Pedro Manuel Roca Álvarez

v

Sesa Start España ETT SA,

THE COURT (Second Chamber),

composed of J.N. Cunha Rodrigues, President of the Chamber, P. Lindh (Rapporteur), A. Rosas, U. Löhmus and A. Ó Caoimh, Judges,

Advocate General: J. Kokott,

Registrar: R. Grass,

having regard to the written procedure,

after considering the observations submitted on behalf of:

- the Spanish Government, by B. Plaza Cruz, acting as Agent,
- Ireland, by D. O'Hagan, acting as Agent,
- the Commission of the European Communities, by M. van Beek and S. Pardo Quintillán, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 6 May 2010,

gives the following

Judgment

- 1 This reference for a preliminary ruling concerns the interpretation of Article 2(1), (3) and (4) and Article 5 of Council Directive 76/207/EEC of 9 February 1976 on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions (OJ 1976 L 39, p. 40).
- 2 The reference has been made in proceedings between Mr Roca Álvarez and his employer, the company Sesa Start España ETT SA, concerning the company's refusal to accord him so-called 'breastfeeding' leave.

Legal context

European Union legislation

3 Article 1(1) of Directive 76/207 is worded as follows:

'The purpose of this Directive is to put into effect in the Member States the principle of equal treatment for men and women as regards access to employment, including promotion, and to vocational training and as regards working conditions and, on the conditions referred to in paragraph 2, social security. This principle is hereinafter referred to as "the principle of equal treatment".'

4 Article 2 of that directive states:

'1. For the purposes of the following provisions, the principle of equal treatment shall mean that there shall be no discrimination whatsoever on grounds of sex either directly or indirectly by reference in particular to marital or family status.

...

3. This Directive shall be without prejudice to provisions concerning the protection of women, particularly as regards pregnancy and maternity.

4. This Directive shall be without prejudice to measures to promote equal opportunity for men and women, in particular by removing existing inequalities which affect women's opportunities in the areas referred to in Article 1(1).'

5 Under Article 5 of that directive:

'1. Application of the principle of equal treatment with regard to working conditions, including the conditions governing dismissal, means that men and women shall be guaranteed the same conditions without discrimination on grounds of sex.

2. To this end, Member States shall take the measures necessary to ensure that:

(a) any laws, regulations and administrative provisions contrary to the principle of equal treatment shall be abolished;

(b) any provisions contrary to the principle of equal treatment which are included in collective agreements, individual contracts of employment, internal rules of undertakings or in rules governing the independent occupations and professions shall be, or may be declared, null and void or may be amended;

(c) those laws, regulations and administrative provisions contrary to the principle of equal treatment when the concern for protection which originally inspired them is no longer well founded shall be revised; and that where similar provisions are included in collective agreements labour and management shall be requested to undertake the desired revision.'

6 Directive 76/207 was amended by Directive 2002/73/EC of the European Parliament and of the Council of 23 September 2002 (OJ 2002 L 269, p. 15) and repealed by 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).

National legislation

7 According to Article 1(1) of Law 8/1980 on the Workers Statute (Estatuto de los trabajadores) of 10 March 1980, as amended by Royal Legislative Decree 1/1995 of 24 March 1995 (BOE No 75 of 29 March 1995, p. 9654; 'the Workers' Statute'), that statute applies to persons who voluntarily offer their services in return for payment by another within an organisation and under the direction of a natural or legal person, known as the 'employer'.

8 Article 1(3) of the Workers' Statute makes clear that any activity performed outside the scope of Article 1(1) is to be excluded from the scope of the Workers' Statute.

9 Article 37(4) of the Workers' Statute provides for the granting of 'breastfeeding' leave. In the version in force on the day of the reference in the main proceedings it was worded as follows:

'Female workers shall be entitled to take one hour off work, which they may divide into two parts, in order to breastfeed a child under the age of nine months. The woman may, if she wishes, replace this entitlement with a half-hour reduction in her working day for the same purpose. This time off work may be taken by the mother or the father without distinction, provided that they are both employed.'

10 That measure was amended by Basic Law 3/2007 on effective equality between women and men (Ley Orgánica de Igualdad efectiva entre mujeres y hombres) of 22 March 2007 (BOE No 71 of 23 March 2007, p. 12611), that is, after the events at issue in the main proceedings. It now reads as follows:

'Female workers shall be entitled, for the purpose of feeding an unweaned child under nine months of age, to take an hour off from work, which they may divide into two parts. In the event of a multiple birth, the duration of the leave shall increase proportionately.

The woman may, if she wishes, replace this entitlement with a half-hour reduction in her working day for the same purpose or accumulate it into whole days on the terms laid down in the collective agreement or in the agreement which she reaches with the employer in accordance, as appropriate, with the terms agreed in the collective agreement.

This leave may be taken by the mother or the father without distinction provided that they are both employed.'

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

11 Mr Roca Álvarez has been employed by the company Sesa Start España ETT SA since July 2004. On 7 March 2005 he requested his employer that he be granted the right to take the leave provided for under Article 37(4) of the Workers' Statute for the period from 4 January 2005 to 4 October 2005. He was refused leave on the ground that the mother of Mr Roca Álvarez's child was not employed but self-employed and the mother's employment was an essential condition of entitlement to that leave.

12 Mr Roca Álvarez brought an action before the Juzgado de lo Social de A Coruña challenging his employer's refusal. The court held that the leave in question is reserved for 'female employees' and so is exclusively conferred on mothers. Moreover, the right to take this leave is only recognised for mothers whose status is that of employee and the mother of Mr Roca Álvarez's child does not fulfil that condition. Consequently, his request was refused.

13 Mr Roca Álvarez brought an appeal against that decision before the Tribunal Superior de Justicia de Galicia (High Court of Justice of Galicia).

14 That court finds that the national legislation has been correctly interpreted. However, it holds that the leave provided for by the legislation has been detached from the biological fact of breastfeeding, so that it can be considered as time purely devoted to the child. In addition, it points out that another mechanism to protect the female employee exists in cases of 'risk

during breastfeeding'. It observes further that currently the legislation in question allows either the father or the mother to make use of this leave but only provided 'they are both employed' and that therefore the father will be entitled to leave in place of the mother only if the mother is employed, and so on that basis has a right to breastfeeding leave.

15 The referring court wonders whether the right to leave should not be accorded to men in the same way as women and whether the fact of restricting it to employed women and the fathers of their children is not a discriminatory measure contrary to the principle of equal treatment and to Directive 76/207.

16 The referring court considers, furthermore, that the leave provided for under Article 37(4) of the Workers' Statute amounts to 'parental leave' within the meaning of 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)

17 In those circumstances, the Tribunal Superior de Justicia de Galicia decided to stay the proceedings and to refer the following question to the Court for a preliminary ruling:

'Does a national law (specifically Article 37(4) of the Workers' Statute) which recognises only employed mothers, but not employed fathers, as holders of the right to paid time off work for the purpose of feeding an unweaned child – time off which consists in a half-hour reduction in the working day or an hour taken off work that may be divided into two parts, which is voluntary, paid for by the employer and may be taken until the child is nine months old – offend against the principle of equal treatment, which prohibits discrimination on grounds of sex and is enshrined in Article 13 EC, in Directive 76/207 ... and in Directive 2002/73 ...?'

The question referred for a preliminary ruling

Directive 76/207

18 By its question the referring court asks, in essence, whether Directive 76/207 must be interpreted as precluding a national measure such as the one at issue in the main proceedings, which provides that female workers who are mothers and whose status is that of an employed person are entitled, in various ways, to take leave during the first nine months following the child's birth, whereas male workers who are fathers with that same status are not entitled to the same leave unless the child's mother is also an employed person.

19 Article 1(1) of Directive 76/207 states that the purpose of that directive is to put into effect in the Member States the principle of equal treatment for men and women as regards, in particular, working conditions.

20 This principle is defined in Articles 2 to 5 of the directive. Article 2(1) states that the principle of equal treatment means that there is to be no discrimination whatsoever on grounds of sex, either directly or indirectly, by reference in particular to marital or family status. Article 5(1) of the directive provides that the application of that principle, with regard to working conditions, means that men and women shall be guaranteed the same conditions without discrimination on grounds of sex.

21 It should be noted that the measure at issue in the main proceedings provides that 'breastfeeding' leave specifically takes the form of permission to be absent during the working day or a reduction of its duration. That measure has the effect of changing working hours. It therefore affects 'working conditions' within the meaning of Article 5 of Directive 76/207 (see, to that effect, Case C-187/00 *Kutz-Bauer* [2003] ECR I-2741, paragraphs 44 and 45).

22 Furthermore, in principle that measure restricts the right to leave at issue in the main proceedings to mothers, the child's father being entitled to this leave only on the condition that both parents are employed persons.

- 23 It follows that mothers whose status is that of an employed person are always entitled to 'breastfeeding' leave whilst fathers whose status is that of an employed person are only so entitled if the child's mother is also an employed person. Thus, for men whose status is that of an employed person the fact of being a parent is not sufficient to gain entitlement to leave, whereas it is for women with an identical status.
- 24 However, the positions of a male and a female worker, father and mother of a young child, are comparable with regard to their possible need to reduce their daily working time in order to look after their child (see by analogy, in relation to the position of male and female workers assuming the upbringing of their children, Case C-366/99 *Griesmar* [2001] ECR I-9383, paragraph 56, and, in relation to their position as regards use of nursery services, Case C-476/99 *Lommers* [2002] ECR I-2891, paragraph 30).
- 25 It must be stated that the measure at issue in the main proceedings establishes a difference on grounds of sex, within the meaning of Article 2(1) of Directive 76/207, as between mothers whose status is that of an employed person and fathers with the same status.
- 26 As concerns justification for such a difference in treatment, Article 2(3) and (4) of Directive 76/207 states that its application is without prejudice to provisions concerning the protection of women, particularly as regards pregnancy and maternity, and to measures to promote equal opportunities for men and women, in particular by removing existing inequalities which affect women's opportunities in respect of working conditions.
- 27 First of all, as regards the protection of women in connection with pregnancy and maternity, the Court has repeatedly held that, by reserving to Member States the right to retain or introduce provisions which are intended to ensure that protection, Article 2(3) of Directive 76/207 recognises the legitimacy, in terms of the principle of equal treatment of the sexes, first, of protecting a woman's biological condition during and after pregnancy and, second, of protecting the special relationship between a woman and her child over the period which follows childbirth (see Case 184/83 *Hofmann* [1984] ECR 3047, paragraph 25; Case C-32/93 *Webb* [1994] ECR I-3567, paragraph 20; Case C-394/96 *Brown* [1998] ECR I-4185, paragraph 17; and Case C-203/03 *Commission v Austria* [2005] ECR I-935, paragraph 43).
- 28 According to the referring court, the leave provided for in Article 37(4) of the Workers' Statute was originally instituted in 1900 to facilitate breastfeeding by the mother. By no longer mentioning breastfeeding, amendments to the legislation have caused the leave to be detached from that purpose. Moreover, the courts have accepted for many years that entitlement to this leave may be granted even in cases of bottle feeding. The referring court notes that the leave has been detached from the biological fact of breastfeeding, so that it can be considered as time purely devoted to the child and as a measure which reconciles family life and work following maternity leave.
- 29 The fact that the evolution of the national legislation and its interpretation by the courts has little by little detached the granting of 'breastfeeding' leave from the biological fact of breastfeeding precludes a finding that this measure ensures the protection of a woman's biological condition following pregnancy, within the meaning of the case-law cited at paragraph 27 of this judgment. As is apparent from the order for reference, the leave at issue in the main proceedings may be taken by the mother or the father without distinction, on the sole condition that the father's status is that of an employed person.
- 30 This situation can be distinguished from that which gave rise to the judgment in *Hofmann* in which the national legislation at issue provided for the granting of additional maternity leave, after the expiry of the protective period, and reserved that leave to the mother, to the exclusion of any other person (see *Hofmann*, paragraph 26).
- 31 The fact that the leave at issue in the main proceedings might be taken by the employed father or the employed mother without distinction means that feeding and devoting time to the child can be carried out just as well by the father as by the mother. Therefore this leave

seems to be accorded to workers in their capacity as parents of the child. It cannot therefore be regarded as ensuring the protection of the biological condition of the woman following pregnancy or the protection of the special relationship between a mother and her child.

32 Secondly, as regards the promotion of equal opportunities for men and women and the reduction of the factual inequalities that affect women's opportunities in the area of working conditions, the Spanish Government submitted in its observations that the objective pursued in reserving for mothers entitlement to the leave at issue in the main proceedings is to compensate for the genuine disadvantages suffered by women, in comparison to men, in keeping their jobs following the birth of a child. According to the Spanish Government, it is more difficult for mothers of young children to enter the world of work or to remain in it.

33 As the Court has consistently held, Article 2(4) of Directive 76/207 is specifically and exclusively designed to authorise measures which, although discriminatory in appearance, are in fact intended to eliminate or reduce actual instances of inequality which may exist in society. That provision thus authorises national measures relating to access to employment, including promotion, which give a specific advantage to women with a view to improving their ability to compete on the labour market and to pursue a career on an equal footing with men (see Case C-450/93 *Kalanke* [1995] ECR I-3051, paragraphs 18 and 19; Case C-409/95 *Marschall* [1997] ECR I-6363, paragraphs 26 and 27; Case C-158/97 *Badeck and Others* [2000] ECR I-1875, paragraph 19; and *Lommers*, paragraph 32).

34 The aim of Article 2(4) is to achieve substantive, rather than formal, equality by reducing de facto inequalities which may arise in society and, thus, in accordance with Article 157(4) TFEU, to prevent or compensate for disadvantages in the professional career of the relevant persons (see, to that effect, *Kalanke*, paragraph 19; Case C-407/98 *Abrahamsson and Anderson* [2000] ECR I-5539, paragraph 48; and Case C-319/03 *Briheche* [2004] ECR I-8807, paragraph 25).

35 As stated in paragraph 21 of this judgment, the leave at issue in the main proceedings takes the form of permission to be absent during the working day or a reduction of its duration. Certainly, such a measure could have the effect of putting women at an advantage by allowing mothers whose status is that of an employed person to keep their job and to devote time to their child. That effect is reinforced by the fact that if the father of the child is himself an employed person, he is entitled to take this leave in the place of the mother, who would not suffer adverse consequences for her job as a result of care and attention devoted to the child.

36 However, to hold, as the Spanish Government submits, that only a mother whose status is that of an employed person is the holder of the right to qualify for the leave at issue in the main proceedings, whereas a father with the same status can only enjoy this right but not be the holder of it, is liable to perpetuate a traditional distribution of the roles of men and women by keeping men in a role subsidiary to that of women in relation to the exercise of their parental duties (see, to that effect, *Lommers*, paragraph 41).

37 As the Advocate General points out at point 47 of her Opinion, to refuse entitlement to the leave at issue in the main proceedings to fathers whose status is that of an employed person, on the sole ground that the child's mother does not have that status, could have as its effect that a woman, such as the mother of Mr Roca Álvarez's child, who is self-employed, would have to limit her self-employed activity and bear the burden resulting from the birth of her child alone, without the child's father being able to ease that burden.

38 Consequently, a measure such as that at issue in the main proceedings cannot be considered to be a measure eliminating or reducing existing inequalities in society within the meaning of Article 2(4) of Directive 76/207, nor as a measure seeking to achieve substantive as opposed to formal equality by reducing the real inequalities that can arise in society and thus, in accordance with Article 157(4) TFEU, to prevent or compensate for disadvantages in the professional careers of the relevant persons.

39 It follows from all those considerations that Article 2(1), (3) and (4) and Article 5 of Directive 76/207 must be interpreted as precluding a national measure such as the one at issue in the main proceedings, which provides that female workers who are mothers and whose status is that of an employed person are entitled, in various ways, to take leave during the first nine months following the child's birth, whereas male workers who are fathers with that same status are not entitled to the same leave unless the child's mother is also an employed person.

Directives 2002/73 and 96/34

40 Concerning Directive 2002/73, the referring court raised the question whether that directive, which amended Directive 76/207, should be interpreted as precluding the measure at issue in the main proceedings.

41 Although Directive 2002/73 came into force on the day of its publication, it had to be transposed at the latest by 5 October 2005, which is after the facts at issue in the main proceedings. Therefore it does not apply *ratione temporis* to those facts. In any event, if Directive 76/207, as amended by Directive 2002/73, were applicable *ratione temporis*, that would not change the interpretation given in paragraph 39 of this judgment.

42 It should be noted that in its observations the Commission of the European Communities submitted that the measure at issue in the main proceedings is contrary to Directive 96/34.

43 However, in the absence of details in the order for reference about the national legislation on parental leave, and in the absence of a specific request to that effect, there is no need to interpret Directive 96/34.

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 (Second Chamber) hereby rules:

Article 2(1), (3) and (4) and Article 5 of Council Directive 76/207/EEC of 9 February 1976 on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions, must be interpreted as precluding a national measure such as the one at issue in the main proceedings, which provides that female workers who are mothers and whose status is that of an employed person are entitled, in various ways, to take leave during the first nine months following the child's birth, whereas male workers who are fathers with that same status are not entitled to the same leave unless the child's mother is also an employed person.

[Signatures]