



Key Issues: Health & Safety of Workers – Breastfeeding Mother – Meaning of “night work” - Discrimination – Preliminary Ruling

Case: Isabel González Castro v Mutua Umivale

Reference: Case C-41/17, CJEU (Fifth Chamber), 19 September 2018

Legislation: Directive 92/85/EEC and Directive 2006/54/EC

Ms González Castro works as a security guard for Prosegur. On 8 November 2014, she gave birth to a boy who was then breastfed. Since March 2015, Ms González Castro has performed her duties in a shopping centre, on the basis of a variable rotating pattern of eight-hour shifts. The security service she performs at her place of work is usually performed with another security guard, except for the following shifts, which she performs alone: Monday to Thursday from midnight to 8 a.m.; Friday from 2 a.m. to 8 a.m.; Saturday from 3 a.m. to 8 a.m. and Sunday from 1 a.m. to 8 a.m.

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

Her application having been rejected by the mutual insurer Umivale, she lodged a complaint which was also rejected. Ms González Castro brought an action against that rejection before the Juzgado de lo Social No 3 de Lugo (Social Court No 3, Lugo, Spain). Her action having been dismissed, Ms González Castro brought an appeal against that decision before the referring court, the Tribunal Superior de Justicia de Galicia (High Court of Justice of Galicia, Spain) which decided to stay the proceedings and to refer a number of questions to the Court of Justice of the EU (CJEU) for a preliminary ruling.

Consideration by CJEU

The CJEU noted that, in accordance with the settled case-law of the Court, in interpreting a provision of EU law it is necessary to consider not only its wording but also its context and the objectives of the legislation of which it forms part. Under Article 7(1) of Directive 92/85, Member States must take the necessary measures to ensure that pregnant workers, workers who have recently given birth or workers who are breastfeeding are not obliged to perform night work during their pregnancy and for a period following childbirth which will be determined by the national authority competent for safety and health, subject to submission, in accordance with the procedures laid down by the Member States, of a medical certificate stating that this is necessary for the safety or health of the worker concerned. Article 7(2) states that the measures

referred to in paragraph (1) must entail the possibility, in accordance with national legislation and/or national practice, of a transfer to daytime work or of leave from work or an extension of maternity leave where such a transfer is not technically and/or objectively feasible or cannot reasonably be required on duly substantiated grounds. The wording of that provision does not however contain any details as regards the exact scope of the concept of 'night work'.

Article 19(4)(a) of Directive 2006/54 states, *inter alia*, that the rules reversing the burden of proof in Article 19(1) apply also to situations covered by Directive 92/85 in so far as discrimination based on sex is concerned. In that regard, the CJEU has held that Article 19(1) of Directive 2006/54 applies to a situation in which a breastfeeding worker challenges, before a court or other competent authority of the Member State concerned, the risk assessment of her work in so far as she claims that the assessment was not conducted in accordance with Article 4(1) of Directive 92/85. Failure to assess the risk posed by the work of a breastfeeding worker in accordance with the requirements of Article 4(1) of Directive 92/85 must indeed be regarded as less favourable treatment of a woman related to pregnancy or maternity leave, within the meaning of that directive, and thus constitutes direct discrimination on grounds of sex, within the meaning of Article 2(2)(c) of Directive 2006/54

The CJEU considered a detailed table on the risk assessment of generic hazards and associated situations which are likely to be met by most pregnant women, women who have recently given birth or women who are breastfeeding. The CJEU noted that the risks for those women vary with the type of work undertaken, working conditions and the individual concerned and, consequently, because of increased tiredness, some pregnant or breastfeeding women may not be able to work irregular or late shifts or work at night.

The CJEU held that:

1. Article 7 of Council Directive 92/85/EEC must be interpreted as applying to a situation where the worker concerned does shift work during which only part of her duties are performed at night.
2. Article 19(1) of Directive 2006/54/EC must be interpreted as applying to a situation in which a worker, who has been refused a medical certificate indicating the existence of a risk to breastfeeding posed by her work and, consequently, an allowance in respect of risk during breastfeeding, challenges, before a court or other competent authority of the Member State concerned, the risk assessment of her work, provided that that worker adduces factual evidence to suggest that that evaluation did not include a specific assessment taking into account her individual situation and thus permitting the presumption that there is direct discrimination on the grounds of sex, within the meaning of Directive 2006/54, which it is for the referring court to ascertain. It is then for the respondent to prove that that risk assessment did actually include such a specific assessment and that, accordingly, the principle of non-discrimination was not infringed.

Why is this decision important?

A responsible employer will seek to protect the health and safety of all employees. Failing to do so, in the circumstances described in this case, mean the employer could be found to have discriminated against a female employee. Employers should consider carefully any request from a pregnant woman, a woman who has recently given birth or a woman who is breastfeeding regarding a change to her shift patterns. Where appropriate, the employer should seek legal advice.

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