

JUDGMENT OF THE COURT (Third Chamber)

20 June 2019 (*)

(Reference for a preliminary ruling — Social policy — Directive 2006/54/EC — Equal treatment of men and women — Access to employment and working conditions — Article 24 — Protection against retaliatory measures — Rejection of a candidate due to her pregnancy — Employee intervening in favour of that candidate — Dismissal of that employee)

In Case C-404/18,

REQUEST for a preliminary ruling under Article 267 TFEU from the arbeidsrechtbank Antwerpen (Belgium), made by decision of 23 May 2018, received at the Court on 19 June 2018, in the proceedings

Jamina Hakelbracht,

Tine Vandenbon,

Instituut voor de Gelijkheid van Vrouwen en Mannen,

v

WTG Retail BVBA,

THE COURT (Third Chamber),

composed of A. Prechal (Rapporteur), President of the Chamber, F. Biltgen, J. Malenovský, C.G. Fernlund and L.S. Rossi, judges,

Advocate General: G. Pitruzzella,

Registrar: A. Calot Escobar,

having regard to the written procedure,

after considering the observations submitted on behalf of

- Ms J. Hakelbracht and Ms T. Vandenbon, and for the Instituut voor de Gelijkheid van Vrouwen en Mannen, by L. Vandenplas, and V. Petry, advocaten,
- WTG Retail BVBA, by T. De Meester, advocaat,
- the European Commission, by H. Kranenborg and A. Szmytkowska, 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 24 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).

2 The request has been made in the proceedings between Ms Jamina Hakelbracht and Ms Tine Vandebon and the Instituut voor de Gelijkheid van Vrouwen en Mannen (Institute for Equality of Women and Men) ('the Institute'), on the one hand, and WTG Retail BVBA, on the other, concerning the award of compensation to Ms Vandebon as a result of her dismissal.

Legal context

European Union law

3 Recitals 23, 29 and 32 of Directive 2006/54 state:

'(23) It is clear from the case-law of the Court of Justice that unfavourable treatment of a woman related to pregnancy or maternity constitutes direct discrimination on grounds of sex. Such treatment should therefore be expressly covered by this Directive.

...

(29) The provision of adequate judicial or administrative procedures for the enforcement of the obligations imposed by this Directive is essential to the effective implementation of the principle of equal treatment.

...

(32) Having regard to the fundamental nature of the right to effective legal protection, it is appropriate to ensure that workers continue to enjoy such protection even after the relationship giving rise to an alleged breach of the principle of equal treatment has ended. An employee defending or giving evidence on behalf of a person protected under this Directive should be entitled to the same protection.'

4 Article 1 of that directive, entitled 'Purpose', is worded as follows:

'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.'

5 Pursuant to Article 2(2)(c) of that directive:

'For the purposes of this Directive, discrimination includes:

...

(c) any less favourable treatment of a woman related to pregnancy or maternity leave within the meaning of [Council Directive 92/85/EEC of 19 October 1992 on the introduction of measures to encourage improvements in the safety and health at work of pregnant workers and workers who have recently given birth or are breastfeeding (OJ 1992 L 348, p. 1)].'

6 Article 14 of Directive 2006/54, headed 'Prohibition of discrimination', states:

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

- (a) conditions for access to employment, to self-employment or to occupation, including selection criteria and recruitment conditions, whatever the branch of activity and at all levels of the professional hierarchy, including promotion;

...’

7 Article 17 of Directive 2006/54, headed ‘Defence of rights’, provides, in paragraph 1:

‘Member States shall ensure that, after possible recourse to other competent authorities including where they deem it appropriate conciliation procedures, judicial procedures for the enforcement of obligations under this Directive are available to all persons who consider themselves wronged by failure to apply the principle of equal treatment to them, even after the relationship in which the discrimination is alleged to have occurred has ended.’

8 Article 24 of that directive, entitled ‘Victimisation’, provides:

‘Member States shall introduce into their national legal systems such measures as are necessary to protect employees, including those who are employees’ representatives provided for by national laws and/or practices, against dismissal or other adverse treatment by the employer as a reaction to a complaint within the undertaking or to any legal proceedings aimed at enforcing compliance with the principle of equal treatment.’

Belgian law

9 Article 22 of the wet ter bestrijding van discriminatie tussen vrouwen en mannen (Law to combat discrimination between women and men), of 10 May 2007 (*Belgisch Staatsblad*, 30 May 2007, p. 29031) (‘the Gender law’), reads as follows:

‘1. Where a complaint is lodged by or for the benefit of a person because of an infringement of this Law in the field of employment relations and supplementary social security schemes, the employer may not adopt a measure which is detrimental to that person, except for reasons that are extraneous to that complaint.

2. For the purposes of this article, a detrimental action includes the breakdown of the employment relationship, the unilateral modification of the working conditions or of the detrimental action which occurred after the termination of the employment relationship.

3. For the purposes of this article, complaint shall include:

- a reasoned complaint lodged by the person concerned at the level of the undertaking or the service employing him, in accordance with the applicable procedures;
- a reasoned complaint lodged by the Directorate-General of the Federal Public Service Employment, Labour and Social Dialogue, for the benefit of the person concerned, against the undertaking or the service employing him;
- a reasoned complaint lodged for the benefit of the person concerned with the undertaking or the service employing him, by an association representing his interests or by the Institute;
- a legal action brought by the person concerned;
- a legal action brought by the person concerned or by the Institute or by an association representing his interests.

The reasoned complaint referred to in the first to third indents of the first paragraph shall consist of a letter which is dated, signed and notified by registered post, setting out the complaints against the perpetrator of the alleged discrimination.

...

9. The protection referred to in the present article shall also apply to persons who, in the context of the investigation of the complaint referred to in paragraph 3, act as witnesses by bringing to the notice of the person with whom the complaint is lodged, in a signed and dated document, the facts which they have personally seen or heard and which relate to the situation which is the subject of the complaint, or who appear as witnesses in legal proceedings.

...'

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

- 10 Ms Vandebon was employed by WTG Retail as a manager of one of the clothes shops operated by that undertaking. In this capacity, Ms Vandebon, on 24 June 2015, gave Ms Hakelbracht a job interview for a job as a salesperson from 1 August 2015. During that interview, Ms Hakelbracht stated that she was 3 months pregnant.
- 11 On 5 July 2015, Ms Vandebon informed WTG Retail that she had found a suitable candidate in the person of Ms Hakelbracht. However, the human resources manager of that company informed her, by email of 6 July 2015, that it did not want to hire Ms Hakelbracht because of her pregnancy.
- 12 By email dated 7 July 2015, Ms Vandebon replied to WTG Retail that such a refusal to hire due to pregnancy was prohibited by law. However, on 12 August 2015, she learned that WTG Retail confirmed the refusal to recruit Ms Hakelbracht for that same reason.
- 13 On the same day, Ms Vandebon informed Ms Hakelbracht that her candidacy had not been accepted because of her pregnancy.
- 14 Ms Hakelbracht then contacted WTG Retail about her failure to be hired, stating that she was considering lodging a complaint against the company with the Institute. As WTG Retail did not subsequently change its position, Ms Hakelbracht lodged such a complaint and informed the company thereof on 26 September 2015.
- 15 On 5 October 2015, Ms Vandebon had a meeting with the head of WTG Retail concerning Ms Hakelbracht's failure to be hired, in which Ms Vandebon was blamed for being the cause of the complaint lodged by Ms Hakelbracht.
- 16 On 12 November 2015, the Institute informed WTG Retail of the receipt of Ms Hakelbracht's complaint. By email sent to the Institute on 11 December 2015, WTG Retail formally challenged that it refused to hire Ms Hakelbracht because of her pregnancy.
- 17 On 6 April 2016, WTG Retail terminated Ms Vandebon's contract of employment. On 13 April 2016, Ms Vandebon lodged a complaint with the Institute. Having been questioned by Ms Vandebon on the reasons for her dismissal, WTG Retail communicated them to her in a detailed manner by letter of 10 June 2016. Those reasons included, in particular, defective performance of assigned duties, lack of respect for safety regulations, inadequate maintenance of the shop and lack of order. The trade union to which Ms Vandebon was affiliated challenged those reasons.
- 18 Both Ms Hakelbracht and Ms Vandebon gave WTG Retail formal notice, by letter of 10 October 2016, to pay them each a lump sum in damages amounting to 6 months' salary. Failing conclusion of an agreement on that point, they requested the arbeidsrechtbank Antwerpen (Labour Court of Antwerp, Belgium) to order that undertaking to pay those damages.

- 19 As is apparent from the order for reference, it is common ground in the main proceedings that Ms Hakelbracht was indeed the victim of direct discrimination on grounds of sex, which is why the referring court awarded her damages on that basis.
- 20 With regard to Ms Vandebon's application, which is only relevant in the context of the present reference, Ms Vandebon intends to avail herself of the protection against retaliation, guaranteed in Article 22(9) of the Gender law, claiming that she has appeared as a witness in the investigation of the complaint lodged by Ms Hakelbracht. However, according to the referring court, the requirements for the legal definition to be satisfied to that effect are not met, in the present case, as Ms Vandebon cannot present any dated and signed documents relating to her witness statement.
- 21 The referring court asks, however, whether the protection provided for in Article 22(2) of the Gender law is not more restricted than that introduced in Article 24 of Directive 2006/54, in so far as such protection should not, in its view, be limited solely to official witnesses, but should also extend to persons who defend or support the person who has lodged a complaint of discrimination on grounds of sex.
- 22 In those circumstances, the arbeidsrechtbank Antwerpen (Labour Court, Antwerp, Belgium) decided to stay the proceedings and refer the following question to the Court of Justice for a preliminary ruling:
- 'Should European Union law and, more specifically, Article 24 of Directive [2006/54] be interpreted as precluding national legislation which affords protection against retaliation to persons who act as witnesses only to persons who, in the context of the investigation of a complaint, bring to the notice of the person with whom the complaint is lodged, in a signed and dated document, the facts which they have personally seen or heard and which relate to the situation which is the subject of the complaint filed or who appear as witnesses in legal proceedings?'

Consideration of the question referred

- 23 By its question, the referring court asks, in essence, whether Article 24 of Directive 2006/54 must be interpreted in the sense that it precludes national legislation, such as that at issue in the main proceedings, under which, in a situation where a person who believes to be discriminated against on grounds of sex has lodged a complaint, an employee who has supported that person in that context is protected from retaliatory measures taken by the employer solely if that employee has acted as a witness in the context of the investigation of that complaint and that that employee's witness statement satisfies formal requirements under that legislation.
- 24 At the outset, it should be noted, first, that, as the order for reference shows, WTG Retail dismissed Ms Vandebon almost 9 months after she had objected to WTG Retail's refusal to hire Ms Hakelbracht, a refusal based on Ms Hakelbracht's pregnancy. Although WTG Retail states that it had dismissed her for objective reasons unrelated to that objection, the referring court nevertheless appears to have started from the contrary premiss.
- 25 Second, the fact of not hiring a candidate on the ground that she is pregnant must be considered to be less favourable treatment of a woman related to pregnancy, which constitutes, in accordance with Article 2(2)(c) of Directive 2006/54, direct discrimination on grounds of sex, as further supported by recital 23 of that directive.
- 26 As regards the protection introduced by the EU legislature in Article 24 of Directive 2006/54, it should be recalled that that provision requires Member States to adopt such measures as are necessary to protect employees, including those who are employees' representatives, against dismissal or other adverse treatment by the employer as a reaction to a complaint within the undertaking or to any legal proceedings aimed at enforcing compliance with the principle of equal treatment.
- 27 It follows from the very terms of Article 24 that the category of employees who are entitled to the protection provided by it must be interpreted broadly and include all employees who may be subject to retaliatory measures taken by an employer in response to a complaint of discrimination on grounds of sex, without that category being otherwise delineated.

- 28 Thus, it follows from the wording of Article 24 of Directive 2006/54 that it does not limit the protection solely to employees who have lodged complaints or their representatives, or to those who comply with certain formal requirements governing the recognition of a certain status, such as that of a witness, such as those provided for by the Gender law at issue in the main proceedings.
- 29 It should also be noted that, in accordance with recital 32 of Directive 2006/54, ‘an employee defending or giving evidence on behalf of a person protected under [that] Directive should be entitled to the same protection’ as the protected person, even after the termination of the working relationship. That recital confirms, therefore, that that directive aims to circumscribe the category of employees, other than the person discriminated against, who should be able to benefit from protection against retaliation, not on the basis of formal criteria, but on the basis of the role that those employees may have played for the benefit of the protected person and which may have led the employer concerned to take adverse action against them.
- 30 Such a broad interpretation of Article 24 of Directive 2006/54 is further supported by its objective, of ensuring the implementation of the principle of equal treatment of men and women in employment and work, and which concerns, in particular, access to employment, as results from Article 1 of that directive.
- 31 In that regard, it should be stated that the effective implementation of the principle of equal treatment, as pursued by Directive 2006/54, requires, as recital 29 of that directive notes, the establishment of judicial or administrative procedures for the enforcement of the obligations imposed by that directive. Article 17(1) of the directive stipulates in that regard that such procedures must be available to all persons who consider themselves wronged by the failure to apply the principle of equal treatment to them.
- 32 The latter provision is a specific expression, in the context of that directive, of the principle of effective judicial protection, which underlies the constitutional traditions common to the Member States and which has been enshrined in Articles 6 and 13 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, signed in Rome on 4 November 1950 (see, to that effect, judgment of 22 September 1998, *Coote*, C-185/97, EU:C:1998:424, paragraph 21), that principle having, since then, been reaffirmed in Article 47 of the Charter of Fundamental Rights of the European Union.
- 33 As regards 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), which preceded Directive 2006/54, the Court has already held that the principle of effective judicial control would be deprived of an essential part of its effectiveness if the protection it provides did not cover measures which an employer might take as a reaction to legal proceedings brought by an employee with the aim of enforcing compliance with the principle of equal treatment. Fear of such measures, where no legal remedy is available against them, might deter workers who considered themselves the victims of discrimination from pursuing their claims by judicial process, and would consequently be liable seriously to jeopardise implementation of the aim pursued by the Directive (judgment of 22 September 1998, *Coote*, C-185/97, EU:C:1998:424, paragraph 24).
- 34 Similarly, the effectiveness of the protection required by Directive 2006/54 against discrimination on grounds of sex would not be assured if it did not cover the measures which an employer might take against employees having, formally or informally, defended the protected person or testified in that person’s favour. Those employees, who are ideally placed to support that person and to become aware of cases of discrimination committed by their employer, could then be discouraged from intervening on behalf of that person for fear of being deprived of protection if they do not meet certain formal requirements, such as those at issue in the main proceedings, which could seriously jeopardise attaining the objective pursued by Directive 2006/54 by reducing the likelihood that cases of discrimination on grounds of sex are detected and resolved.
- 35 Accordingly, Article 24 of Directive 2006/54 should be interpreted in the sense that employees covered by that article, other than the person who has been discriminated against on grounds of sex, must be protected to the extent that such employees are likely to be disadvantaged by their employer because of

the support they have provided, formally or informally, to the person who has been discriminated against.

- 36 To the extent that WTG Retail asserts, in essence, that the requirements laid down in Article 22(9) of the Gender law are justified in that they establish simple balanced rules of evidence for the existence and dating of witness statements, it is necessary to note that that article, taken as a whole, does not set out mere procedural rules or rules of evidence, but at least also is intended to identify the category of employees protected against retaliation in a more restrictive manner than Article 24 of Directive 2006/54, by excluding, in particular, employees who have informally supported the person who has been discriminated against.
- 37 Having regard to all the foregoing, the answer to the question referred is that Article 24 of Directive 2006/54 must be interpreted as meaning that it precludes national legislation, such as that at issue in the main proceedings, under which, in a situation where a person who believes to be discriminated against on grounds of sex has lodged a complaint, an employee who has supported that person in that context is protected from retaliatory measures taken by the employer solely if that employee has intervened as a witness in the context of the investigation of that complaint and that that employee's witness statement satisfies formal requirements laid down by that legislation.

Costs

- 38 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 (Third Chamber) hereby rules:

Article 24 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 must be interpreted as meaning that it precludes national legislation, such as that at issue in the main proceedings, under which, in a situation where a person who believes to be discriminated against on grounds of sex has lodged a complaint, an employee who has supported that person in that context is protected from retaliatory measures taken by the employer solely if that employee has intervened as a witness in the context of the investigation of that complaint and that that employee's witness statement satisfies formal requirements laid down by that legislation.

[Signatures]

* Language of the case: Dutch.