JUDGMENT OF THE COURT (Fifth Chamber)

4 October 2001 (1)

(Protection of pregnant women - Directive 92/85/EEC - Article 10 - Direct effect and scope - Dismissal - Fixed-term contract of employment)

In Case C-438/99,

REFERENCE to the Court under Article 234 EC by the Juzgado de lo Social Único de Algeciras (Spain) for a preliminary ruling in the proceedings pending before that court between

Maria Luisa Jiménez Melgar

and

Ayuntamiento de Los Barrios,

on the interpretation of Article 10 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 (tenth individual Directive within the meaning of Article 16(1) of Directive 89/391/EEC) (OJ 1992 L 348, p. 1)

THE COURT (Fifth Chamber),

composed of: A. La Pergola, President of the Chamber, M. Wathelet (Rapporteur), P. Jann, L. Sevón and C.W.A. Timmermans, Judges,

Advocate General: A. Tizzano,

Registrar: H. von Holstein, Deputy Registrar,

after considering the written observations submitted on behalf of:

- Jiménez Melgar, by J.R. Pérez Perea, abogado,
- the Spanish Government, by M. López-Monís Gallego, acting as Agent,
- the Irish Government, by L.A. Farrell, acting as Agent, assisted by N. Hyland BL,
- the Netherlands Government, by M.A. Fierstra, acting as Agent,
- the Commission of the European Communities, by H. Michard and I. Martínez del Peral, acting as Agents,

having regard to the Report for the Hearing,

after hearing the oral observations of Mme Jiménez Melgar, of the Spanish Government, of the Irish Government and of the Commission at the hearing on 29 March 2001,

after hearing the Opinion of the Advocate General at the sitting on 7 June 2001,

gives the following

Judgment

1.

By order of 10 November 1999, received at the Court on 17 November 1999, the Juzgado de lo Social Único de Algeciras (Social Court, Algeciras) referred to the Court for a preliminary ruling under Article 234 EC four questions on the interpretation of Article 10 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 (tenth individual Directive within the meaning of Article 16(1) of Directive 89/391/EEC) (OJ 1992 L 348, p. 1).

2. The four questions have been raised in proceedings between Maria Luisa Jiménez Melgar and her former employer, the Ayuntamiento de Los Barrios (Municipality of Los Barrios, hereinafter 'the Municipality'), following the non-renewal of her fixed-term employment contract.

Legal background

The Community rules

3. Article 3(1) 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) provides:

'Application of the principle of equal treatment means that there shall be no discrimination whatsoever on grounds of sex in the conditions, including selection criteria, for access to all jobs or posts, whatever the sector or branch of activity, and to all levels of the occupational hierarchy.'

4. Article 5(1) of that Directive provides:

'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.'

5. According to the 15th recital in its preamble, the aim of Directive 92/85 is in particular to protect pregnant workers, workers who have recently given birth or workers who are breastfeeding against the risk of dismissal owing to their condition, which might have harmful effects on their physical and mental state.

6. Article 10 of Directive 92/85 therefore provides:

'In order to guarantee workers, within the meaning of Article 2, the exercise of their health and safety protection rights as recognised under this Article, it shall be provided that:

1. Member States shall take the necessary measures to prohibit the dismissal of workers, within the meaning of Article 2, during the period from the beginning of their pregnancy to the end of the maternity leave ..., save in exceptional cases not connected with their condition which are permitted under national legislation and/or practice and, where applicable, provided that the competent authority has given its consent;

2. If a worker, within the meaning of Article 2, is dismissed during the period referred to in point 1, the employer must cite duly substantiated grounds for her dismissal in writing;

3. Member States shall take the necessary measures to protect workers, within the meaning of Article 2, from consequences of dismissal which is unlawful by virtue of point 1.'

7.

According to Article 14(1) of Directive 92/85, Member States were to bring into force the laws, regulations and administrative provisions necessary to comply with the Directive not later than two years after its adoption, that is to say 19 October 1994.

The national provisions

8. Article 14 of the Spanish Constitution of 27 December 1978 enshrines the principle of non-discrimination on grounds of sex in the following terms:

‘Spanish people are equal before the law; there may be no discrimination on grounds of birth, race, sex, religion, opinion or any other condition or personal or social circumstance’.

9. Article 55(5) and (6) of the Estatuto de los Trabajadores (Workers' Statute) provides, in the matter of dismissal:

‘5. Any dismissal on one of the grounds of discrimination prohibited by the Constitution or by law or occurring in breach of the fundamental rights and public freedoms of workers shall be void.

6. Nullity of a dismissal shall entail the immediate reinstatement of the worker, with payment of unpaid wages or salary’.

10. Article 108(2)(d) and Article 113(1) of the Ley de Procedimiento Laboral (Law on Employment Procedure) both reproduce, in almost identical terms, the wording of paragraphs (5) and (6) of Article 55 of the Estatuto de los Trabajadores. Article 96 of that law also provides:

‘In proceedings in which it may be deduced from the plaintiff's allegations that there is evidence of discrimination on grounds of sex, it shall be incumbent on the defendant to furnish objective, reasonable and sufficiently substantiated justification for the measures adopted and their proportionality’.

11. The national court points out that, at the time of the events in question in the main proceedings, Directive 92/85 had still not been transposed into Spanish law.

12. For that reason, amendments were made, in particular to Article 55 of the Estatuto de los Trabajadores, by Ley 39/1999 para promover la Conciliación de la Vida familiar y laboral de las Personas trabajadoras of 5 November 1999 (Law for reconciliation of family life with working life, BOE No 266 of 6 November 1999).

13. The new Article 55(5) of the Estatuto de los Trabajadores is now worded as follows:

‘Any dismissal on one of the grounds of discrimination prohibited by the Constitution or by law or occurring in breach of the fundamental rights and public freedoms of workers shall be void.

Dismissals shall also be void in the following cases:

where they occur during a period of suspension of a contract of employment on grounds of maternity, risks during pregnancy ... or any dismissal notified on a date such that the period of notice ends within that period;

when a pregnant worker is dismissed between the date of commencement of the pregnancy and the date of commencement of the period of suspension referred to in subparagraph (a) above ... .

The provisions of the two foregoing subparagraphs shall apply except where, in both cases, the decision terminating the employment relationship is declared valid for reasons unconnected with the

pregnancy ...’.

14. The national court explains, however, that no notice may be taken of those provisions in the present case, by virtue of the principle that laws may not be retroactive.

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

15. In June 1998, Mrs Jiménez Melgar was engaged by the Municipality as an employee, working 20 hours a week, as home-help for retired persons without families. The contract, which was initially concluded for a period of three months, was renewed twice, until 2 December 1998.

16. A new fixed-term part-time contract was concluded between the Municipality and Mrs Jiménez Melgar on 3 December 1998, her new task being to help with housework and the care of children of school age in school holidays during December 1998/January 1999 in families experiencing financial difficulties. That contract, which did not specify an expiry date, came to an end on 2 February 1999.

17. A third fixed-term part-time contract was concluded on 3 February 1999, the work involving the care of children and home-help for children having difficulties in reaching school during the academic year 1998/1999. That contract, which did not specify an expiry date either, came to an end on 2 May 1999.

18. On 3 May 1999, Mrs Jiménez Melgar signed a fourth fixed-term part-time contract, to act as ‘home-help for large families experiencing difficulties in the schooling of their children of pre-school age and in relation to transport to public education facilities in their locality, during the school year 1998/1999’. Like the previous contracts, this contract did not specify any expiry date. However, on 12 May 1999, Mrs Jiménez Melgar received a letter from the Municipality, which was worded as follows:

‘We hereby inform you that, in accordance with your contract, the contract will cease on 2 June 1999. Nevertheless, during the statutory period of notice for termination, you will be informed of any possibility of extension or renewal thereof, and you should go to your personnel department, before 2 June 1999, in order, if appropriate, to sign the appropriate extension or renewal or else to arrange the payment due to you for termination of the abovementioned employment contract ...’.

19. The terms of that letter were identical to those of letters previously addressed to Mrs Jiménez Melgar to inform her of the expiry of the three previous contracts.

20. In the meantime, the Municipality had been informed about Mrs Jiménez Melgar's state of pregnancy, the exact date of its cognisance of that fact not being clear from the file. Her child was born on 16 September 1999.

21. Mrs Jiménez Melgar's employment contract came to an end on 2 June 1999 and so her employment relationship with the Municipality came to an end on that date.

22. On 7 June 1999, a meeting took place with Mrs Jiménez Melgar in order to continue her employment relationship by the signature of a fifth part-time contract to provide holiday cover for staff in the home-help categories. That contract was to take effect on 3 June. However, Mrs Jiménez Melgar refused to sign it and on the day after that meeting she addressed a complaint to the Municipality in which she contended that her previous contract with the Municipality had not expired since she had been dismissed in a discriminatory way, in breach of her fundamental rights. Consequently, in her view, it was not a question of signing a new contract but simply of reinstating her in her employment.

23.

Those were the circumstances in which Mrs Jiménez Melgar brought proceedings against the Municipality before the Juzgado de lo Social Único de Algeciras.

24.

The judge at that court, whilst reserving the right to revert to the issue, did not examine the question whether, under Spanish law, the employment relationship between Mrs Jiménez Melgar and the Municipality was to be regarded as indefinite in duration, given the circumstances of the case and, in particular, the continuity in time and homogeneity of the work performed. However, he focused his examination on the possible existence of discrimination on grounds of sex in so far as the dismissal may have been motivated by the plaintiff's state of pregnancy. More particularly, the judge had doubts about whether Article 10 of Directive 92/85 was directly applicable and about its scope.

25.

On the basis of those considerations, the Juzgado de lo Social Único de Algeciras decided to stay the proceedings and to refer the following questions to the Court for a preliminary ruling:

‘1. Is Article 10 of Directive 92/85/EEC sufficiently clear, precise and unconditional to be directly effective?

2. In providing that “Member States shall take the necessary measures to prohibit the dismissal of workers ... [who are pregnant, have given birth or are breastfeeding] during the period from the beginning of their pregnancy to the end of the maternity leave ... save in exceptional cases not connected with their condition”, does Article 10 of the Directive require the Member States to lay down, on a specific and exceptional basis, the available grounds for dismissing a worker who is pregnant, has given birth or is breastfeeding, so that they must introduce into national legislation, together with the general rules on the extinguishment of employment contracts, a further special, exceptional and more limited set of rules expressly for those cases in which the worker is pregnant, has given birth or is breastfeeding?

3. What repercussions does Article 10 of the Directive have regarding non-renewal by an employer of a fixed-term contract of a woman who is pregnant under the same circumstances as prevailed in relation to earlier contracts? Does Article 10 affect the protection enjoyed by a pregnant woman in the context of temporary employment relationships, and if so, in what way, according to what parameters and to what extent?

4. Where Article 10 of the Directive states that the dismissal of a worker who is pregnant, has given birth or is breastfeeding is to take place “where applicable, provided that *the competent authority has given its consent*”, does the Directive require that a worker who is pregnant, has given birth or is breastfeeding may be dismissed only by means of a special procedure in which the appropriate competent authority gives its consent prior to the dismissal which the employer seeks?’

Admissibility of the reference for a preliminary ruling

26.

The Spanish Government and the Commission doubt whether the questions are relevant in resolving the case. First of all, given the circumstances of the case, the national court could reclassify the employment relationship between Mrs Jiménez Melgar and the Municipality as an employment contract for an indefinite period, in which case the dismissal would, as such, be unlawful under Spanish law.

27.

Second, even if it were established that Mrs Jiménez Melgar's dismissal was motivated by her state of pregnancy - which, according to the Spanish Government, is far from being certain since the Municipality, immediately after the ending of the last contract under which she had been employed, had proposed a new contract to her - Spanish law would have afforded her protection, by guaranteeing her reinstatement in her employment and requiring the Municipality to pay unpaid wages, without any recourse to Directive 92/85.

28.

In that regard, it should be recalled that, according to settled case-law, it is for the national court before which the dispute has been brought and which must assume responsibility for the subsequent judicial decision to determine, in the light of the particular circumstances of the case, both the need for a preliminary ruling in order to enable it to deliver judgment and the relevance of the questions which it submits to the Court (see, in particular, the judgment in Case C-415/93 *Bosman* [1995] ECR I-4921, paragraph 59). Nevertheless, in the past the Court has decided that it was unable to give a ruling on a question referred by national court where it was quite obvious that the interpretation or assessment of the validity of a Community rule, requested by the national court, bore no relation to the actual facts of the main action or its purpose, or where the problem was hypothetical or where the Court did not have before it the factual or legal information necessary to give a useful answer to the questions submitted to it (see the judgment in *Bosman*, cited above, paragraph 61, and in Case C-36/99 *Idéal Tourisme* [2000] ECR I-6049, paragraph 20).

29. In the circumstances of the present case, however, there is nothing in the order for reference to suggest that the preliminary questions, the relevance of which the national court has explained, are obviously hypothetical or bear no relation to the actual facts of the main proceedings or their purpose.

30. The questions submitted must therefore be answered.

The questions referred for a preliminary ruling

The first question

31. By its first question, the national court asks whether Article 10 of Directive 92/85 can have a direct effect and is to be interpreted to the effect that, in the absence of transposition measures taken by a Member State within the period laid down by that directive, it confers on individuals rights on which they may rely before a national court against the authorities of that State.

32. It is settled case-law that the Member States' obligation arising from a directive to achieve the result prescribed by the directive and their duty, under Article 5 of the EC Treaty (now Article 10 EC), to take all appropriate measures, whether general or particular, to ensure fulfilment of that obligation is binding on all the authorities of the Member States (judgments in Case C-91/92 *Faccini Dori* [1994] ECR I-3325, paragraph 26, and Case C-258/97 *HI* [1999] ECR I-1405, paragraph 25), including decentralised authorities such as municipalities (Case 103/88 *Fratelli Costanzo* [1989] ECR I839, paragraph 32, and Case C-224/97 *Ciola* [1999] ECR I-2517, paragraph 30).

33. It must therefore be concluded that the provisions of Article 10 of Directive 92/85 impose on Member States, in particular in their capacity of employer, precise obligations which afford them no margin of discretion in their performance.

34. The answer to be given to the first question must therefore be that Article 10 of Directive 92/85 has direct effect and is to be interpreted to the effect that, in the absence of transposition measures taken by a Member State within the period prescribed by that directive, it confers on individuals rights on which they may rely before a national court against the authorities of that State.

The second question

35. By its second question, the national court asks essentially whether, in allowing derogations from the prohibition of dismissal of pregnant workers, workers who have recently given birth or workers who are breastfeeding in cases ‘not connected with their condition which are permitted under national legislation and/or practice’, Article 10(1) of Directive 92/85 requires the Member States to specify the reasons for the dismissal of such workers.

36. Article 10(1) of Directive 92/85 provides: ‘Member States shall take the necessary measures to prohibit the dismissal of workers ... during the period from the beginning of their pregnancy to the end of the maternity leave ... , save in exceptional cases not connected with their condition which are permitted under national legislation and/or practice and, where applicable, provided that the competent authority has given its consent’.

37. It is clear from the wording of that provision that Directive 92/85 does not impose on the Member States any obligation to draw up a specific list of the reasons for dismissal which, by exception, would be allowed in the case of pregnant workers, workers who have recently given birth and workers who are breastfeeding. Nevertheless, that directive, which lays down minimum provisions, does not in any way prevent the Member States from providing for higher protection for those workers, by laying down specific grounds on which such workers may be dismissed.

38. The answer to be given to the second question should therefore be that, in allowing derogations from the prohibition of dismissal of pregnant workers, workers who have recently given birth or workers who are breastfeeding in cases ‘not connected with their condition which are permitted under national legislation and/or practice’, Article 10(1) of Directive 92/85 does not require the Member States to specify the particular grounds on which such workers may be dismissed.

The third question

39. The national court asks whether Article 10 of Directive 92/85 prohibits the non-renewal by the employer of a pregnant worker's fixed-term employment contract.

40. Mrs Jiménez Melgar contends that the protection under Article 10 of Directive 92/85 covers women having a contract for an indefinite term as well as women having a fixed-term contract with their employer. Any other interpretation of that provision would create discrimination incompatible with the aim of that directive.

41. Similarly, the Commission submits that non-renewal of a fixed-term employment contract, provided that it is proved that this was due to reasons connected with the pregnancy, also constitutes direct discrimination on grounds of sex. Non-renewal of such a contract amounts to a refusal to engage a pregnant women, which is clearly contrary to Articles 2 and 3 of Directive 76/207, as the Court has repeatedly held (Case C-177/88 *Dekker* [1990] ECR I-3941, paragraph 12, and Case C-207/98 *Mahlburg* [2000] ECR I-549, paragraphs 27 to 30).

42. According to the Netherlands Government, a distinction must be made between a fixed-term employment relationship ending at the stipulated time, to which Article 10 of the Directive 92/85 would not be applicable, and one terminated unilaterally by the employer, which is covered by the protection afforded by that provision.

43. In that regard, it must be concluded that Directive 92/85 makes no distinction, as regards the scope of the prohibition of dismissal of pregnant workers, workers who have recently given birth or workers who are breastfeeding, according to the duration of the employment relationship in question. If the Community legislature had intended to exclude fixed-term contracts, which represent a significant proportion of employment relationships, from the scope of that directive it would have made express provision to that effect (judgment of 4 October 2001 in Case C-109/00 *Tele Danmark* [2001] ECR I-6993, paragraph 33).

44.

It is therefore clear that the prohibition of dismissal laid down in Article 10 of Directive 92/85 applies to both fixed-term employment contracts and to those concluded for an indefinite period.

45. It is also clear that non-renewal of a fixed-term employment contract, when it comes to the end of its stipulated term, cannot be regarded as a dismissal; as such, non-renewal is not contrary to Article 10 of Directive 92/85.

46. However, as both the Advocate General, in point 50 of his Opinion, and the Commission point out, in certain circumstances, non-renewal of a fixed-term contract could be viewed as a refusal of employment. It is settled case-law that a refusal to employ a female worker, who is otherwise judged capable of performing the work concerned, based on her state of pregnancy constitutes direct discrimination on grounds of sex, contrary to Articles 2(1) and 3(1) of Directive 76/207 (*Dekker*, paragraph 12, and *Mahlburg*, paragraph 20). It is for the national court to determine whether the non-renewal of an employment contract following a succession of fixed-term contracts was in fact motivated by the worker's state of pregnancy.

47. The answer to be given to the third question must therefore be that, whilst the prohibition of dismissal laid down in Article 10 of Directive 92/85 applies to both employment contracts for an indefinite period and fixed-term contracts, non-renewal of such a contract, when it comes to an end as stipulated, cannot be regarded as a dismissal prohibited by that provision. However, where non-renewal of a fixed-term contract is motivated by the worker's state of pregnancy, it constitutes direct discrimination on grounds of sex, contrary to Article 2(1) and 3(1) of Directive 76/207.

The fourth question

48. By its fourth question, the national court asks whether, in providing that the dismissal of a pregnant worker, of a worker who has recently given birth or of a worker who is breastfeeding may take place, in exceptional circumstances ‘and, where applicable, provided that the competent authority has given its consent’, Article 10(1) of Directive 92/85 is to be interpreted as imposing on Member States an obligation to have a national authority, having found that there is an exceptional case justifying such a worker's dismissal, give its consent prior to the employer's decision to dismiss the worker.

49. Mrs Jiménez Melgar contends that the protection afforded by Directive 92/85 dictates a positive answer to that question.

50. In that regard, the Irish and Netherlands Governments, as well as the Commission, rightly point out that the actual wording of Article 10(1) of Directive 92/85 clearly does not support the interpretation contended for by the plaintiff, since the phrase ‘provided that the competent authority has given its consent’ is preceded by the adverbial phase ‘where applicable’.

51. All that Article 10(1) of Directive 92/85 does is to take account of the possible existence, in the legal systems of some Member States, of prior consent procedures, to which the dismissal of pregnant workers, workers who have recently given birth or workers who are breastfeeding would be subject. If such a procedure does not exist in a Member State, that provision does not require it to introduce one.

52. The answer to be given to the fourth question must therefore be that, in providing that the dismissal of a pregnant worker, of a worker who has recently given birth or of a worker who is breastfeeding may take place, in exceptional cases ‘and, where applicable, provided that the competent authority has given its consent’, Article 10(1) of Directive 92/85 is not to be interpreted as imposing on Member States any obligation to have a national authority, having found that there is an exceptional case

justifying the dismissal of such a worker, give its consent prior to the employer's decision to dismiss the worker.

Costs

53. The costs incurred by the Spanish, Irish and Netherlands Governments and by the Commission, which have submitted observations to the Court, are not recoverable. 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.

On those grounds,

THE COURT (Fifth Chamber),

in answer to the questions referred to it by the Juzgado de lo Social Único de Algeciras by order of 10 November 1999, hereby rules:

1. Article 10 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 (tenth individual Directive within the meaning of Article 16(1) of Directive 89/391/EEC), has direct effect and is to be interpreted to the effect that, in the absence of transposition measures taken by a Member State within the period prescribed by that directive, it confers on individuals rights on which they may rely before a national court against the authorities of that State.

2. In allowing derogations from the prohibition of dismissal of pregnant workers, workers who have recently given birth or workers who are breastfeeding in cases 'not connected with their condition which are permitted under national legislation and/or practice', Article 10(1) of Directive 92/85 does not require the Member States to specify the particular grounds on which such workers may be dismissed.

3. Whilst the prohibition of dismissal laid down in Article 10 of Directive 92/85 applies to both employment contracts for an indefinite period and fixed-term contracts, non-renewal of such a contract, when it comes to an end as stipulated, cannot be regarded as a dismissal prohibited by that provision. However, where non-renewal of a fixed-term contract is motivated by the worker's state of pregnancy, it constitutes direct discrimination on grounds of sex, contrary to Article 2(1) and 3(1) 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.

4. In providing that the dismissal of a pregnant worker, of a worker who has recently given birth or of a worker who is breastfeeding may take place, in exceptional cases 'and, where applicable, provided that the competent authority has given its consent', Article 10(1) of Directive 92/85 is not to be interpreted as imposing on Member States any obligation to have a national authority, having found that there is an exceptional case justifying the dismissal of such a worker, give its consent prior to the employer's decision to dismiss the worker.

La Pergola
Wathelet
Jann

Sevón

Timmermans

Delivered in open court in Luxembourg on 4 October 2001.

R. Grass

A. La Pergola

Registrar

President of the Fifth Chamber

1: Language of the case: Spanish.