

JUDGMENT OF THE COURT (Second Chamber)

3 June 2021 (*)

(Reference for a preliminary ruling – Social policy – Equal pay for male and female workers – Article 157 TFEU – Direct effect – Concept of ‘work of equal value’ – Claims seeking equal pay for work of equal value – Single source – Workers of different sex having the same employer – Different establishments – Comparison)

In Case C-624/19,

REQUEST for a preliminary ruling under Article 267 TFEU from the Watford Employment Tribunal (United Kingdom), made by decision of 21 August 2019, received at the Court on 22 August 2019, in the proceedings

K and Others,

L, M, N and Others,

O,

P,

Q,

R,

S,

T

v

Tesco Stores Ltd,

THE COURT (Second Chamber),

composed of A. Arabadjiev, President of the Chamber, A. Kumin, T. von Danwitz (Rapporteur), P.G. Xuereb and I. Ziemele, Judges,

Advocate General: H. Saugmandsgaard Øe,

Registrar: A. Calot Escobar,

having regard to the written procedure,

after considering the observations submitted on behalf of:

- K and Others, by K. Daurka and B. Croft, Solicitors, S. Jones QC, A. Blake and N. Connor, Barristers, and C. Barnard,
- L, M, N and Others, by E. Parkes, Solicitor, K. Bryant QC and S. Butler, N. Cunningham and C. Bell, Barristers,
- Tesco Stores Ltd, by A. Taggart, Solicitor, and P. Epstein QC,

– the European Commission, by L. Flynn 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 157 TFEU.
- 2 The request has been made in proceedings between approximately 6 000 workers and Tesco Stores Ltd, which employs or employed those workers in its stores, concerning a claim for equal pay for male and female workers.

Legal context

EU law

Provisions relating to the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union

- 3 By Decision (EU) 2020/135 of 30 January 2020 on the conclusion of the Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community (OJ 2020 L 29, p. 1), the Council of the European Union approved that agreement (OJ 2020 L 29, p. 7; ‘the Withdrawal Agreement’), which was attached to the decision, on behalf of the European Union and the European Atomic Energy Community (EAEC).

- 4 Article 86 of the Withdrawal Agreement, headed ‘Pending cases before the Court of Justice of the European Union’, provides in paragraphs 2 and 3:

‘2. The Court of Justice of the European Union shall continue to have jurisdiction to give preliminary rulings on requests from courts and tribunals of the United Kingdom made before the end of the transition period.

3. For the purposes of this Chapter, proceedings shall be considered as having been brought before the Court of Justice of the European Union, and requests for preliminary rulings shall be considered as having been made, at the moment at which the document initiating the proceedings has been registered by the registry of the Court of Justice ...’

- 5 In accordance with Article 126 of the Withdrawal Agreement, the transition period started on the date of entry into force of that agreement and ended on 31 December 2020.

Provisions relating to the principle of equal pay for male and female workers

- 6 Article 119 of the EEC Treaty (which became, after amendment, Article 141 EC, now Article 157 TFEU) was worded as follows:

‘Each Member State shall during the first stage ensure and subsequently maintain the application of the principle that men and women should receive equal pay for equal work.

For the purpose of this Article, “pay” means the ordinary basic or minimum wage or salary and any other consideration, whether in cash or in kind, which the worker receives, directly or indirectly, in respect of his employment from his employer.

Equal pay without discrimination based on sex means:

...

(b) that pay for work at time rates shall be the same for the same job.’

7 Article 157 TFEU provides:

‘1. Each Member State shall ensure that the principle of equal pay for male and female workers for equal work or work of equal value is applied.

2. For the purpose of this Article, “pay” means the ordinary basic or minimum wage or salary and any other consideration, whether in cash or in kind, which the worker receives directly or indirectly, in respect of his employment, from his employer.

Equal pay without discrimination based on sex means:

...

(b) that pay for work at time rates shall be the same for the same job.

...’

United Kingdom law

8 Section 79 of the Equality Act 2010, relating to the question of comparability, provides:

‘(1) This section applies for the purposes of this Chapter.

(2) If A is employed, B is a comparator if subsection (3) or (4) applies.

...

(4) This subsection applies if—

(a) B is employed by A’s employer or an associate of A’s employer,

(b) B works at an establishment other than the one at which A works, and

(c) common terms apply at the establishments (either generally or as between A and B).

...’

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

9 Tesco Stores is a retailer that sells its products online and in 3 200 stores located in the United Kingdom. The stores, of varying size, have a total of approximately 250 000 workers, who are hourly paid and carry out various types of jobs. That company also has a distribution network of 24 distribution centres with approximately 11 000 employees, who are also hourly paid and carry out various types of jobs.

10 The claimants in the main proceedings are employees or former employees of Tesco Stores, both female (‘the female claimants in the main proceedings’) and male, who work or used to work in its stores. They brought proceedings against Tesco Stores before the referring tribunal, the Watford Employment Tribunal (United Kingdom), from February 2018 onwards, on the ground that they had not received equal pay for equal work, contrary to the Equality Act 2010 and Article 157 TFEU.

11 The referring tribunal stayed the male parties’ claims, since it took the view that their outcome depended on the outcome of the claims brought by the female claimants in the main proceedings.

12 In support of their equal pay claims, the female claimants in the main proceedings submit, first, that their work and that of the male workers employed by Tesco Stores in the distribution centres in its network are of equal value and, second, that they are entitled to compare their work and that of those

workers, although the work is carried out in different establishments, under both the Equality Act 2010 and Article 157 TFEU. They contend that, in accordance with section 79(4) of the Equality Act 2010, common terms of employment are applicable in the stores and distribution centres. Furthermore, in accordance with Article 157 TFEU, there is a single source, namely Tesco Stores, for the terms and conditions of employment of the female claimants in the main proceedings and those workers.

- 13 Tesco Stores disputes that the female claimants in the main proceedings have any right to compare themselves with the male workers at the distribution centres in its network, on the ground, first, that there are not common terms of employment, for the purposes of section 79(4) of the Equality Act 2010. It submits, next, that Article 157 TFEU is not directly effective in the context of claims based on work of equal value, and therefore the female claimants in the main proceedings cannot rely on that provision before the referring tribunal. Finally, and in any event, Tesco Stores contends that it cannot be classified as a ‘single source’ for the terms and conditions of employment in the stores and the distribution centres in its network.
- 14 The referring tribunal states that the female claimants in the main proceedings and the male workers taken as comparators, although employed in different establishments, have the same employer. It explains, furthermore, that it has adopted orders for the management of the claims, in order to determine, by means of expert reports, whether the jobs of the female claimants in the main proceedings are of equal value to those of their comparators.
- 15 The referring tribunal observes in respect of Article 157 TFEU that there is uncertainty, within United Kingdom courts and tribunals, regarding its direct effect, connected in particular with the distinction articulated in paragraph 18 of the judgment of 8 April 1976, *Defrenne* (43/75, EU:C:1976:56), between discrimination which may be identified solely with the aid of the criteria based on equal work and equal pay and discrimination which can only be identified by reference to more explicit implementing provisions of EU or national law. The claims at issue in the main proceedings could fall within the latter category, where there is no direct effect.
- 16 In those circumstances, the Watford Employment Tribunal decided to stay the proceedings and to refer the following questions to the Court for a preliminary ruling:
- ‘(1) Is Article 157 [TFEU] directly effective in claims made on the basis that claimants are performing work of equal value to their comparators?
- (2) If the answer to Question 1 is no, is the single source test for comparability in [Article] 157 [TFEU] distinct from the question of equal value, and if so, does that test have direct effect?’

Jurisdiction of the Court

- 17 As a preliminary point, it follows from Article 86 of the Withdrawal Agreement, which entered into force on 1 February 2020, that the Court of Justice is to continue to have jurisdiction to give preliminary rulings on requests from courts and tribunals of the United Kingdom which were made before the end of the transition period set at 31 December 2020, and this is so in the case of the present request for a preliminary ruling.

Consideration of the questions referred

First question

- 18 By its first question, the referring tribunal asks, in essence, whether Article 157 TFEU must be interpreted as having direct effect in proceedings between individuals in which failure to observe the principle of equal pay for male and female workers for ‘work of equal value’, as referred to in that article, is pleaded.
- 19 As is apparent from the order for reference, Tesco Stores submitted in the main proceedings that Article 157 TFEU lacks direct effect in circumstances, such as those obtaining in those proceedings, in which the workers compared perform different work. In support of that contention, the respondent company in the main proceedings maintains, in its observations submitted to the Court, that the

criterion of ‘work of equal value’, unlike the criterion of ‘equal work’, requires definition by provisions of national or EU law. Furthermore, the findings of the Court in paragraphs 18 to 23 of the judgment of 8 April 1976, *Defrenne* (43/75, EU:C:1976:56), and the Court’s subsequent case-law, are said to bear out such an interpretation. In particular, according to that company, in essence, reliance upon the principle of equal pay for male and female workers when work of equal value is being compared is founded on a claim of discrimination that is identifiable only by reference to provisions more explicit than those of Article 157 TFEU.

- 20 It must be pointed out at the outset that the very wording of Article 157 TFEU cannot support that interpretation. That article states that each Member State is to ensure that the principle of equal pay for male and female workers for equal work or work of equal value is applied. Therefore, it imposes, clearly and precisely, an obligation to achieve a particular result and is mandatory as regards both ‘equal work’ and ‘work of equal value’.
- 21 Thus, the Court has already held that, since Article 157 TFEU is of such a mandatory nature, the prohibition on discrimination between male and female workers applies not only to the action of public authorities but also extends to all agreements which are intended to regulate paid labour collectively, as well as to contracts between individuals (judgment of 8 May 2019, *Praxair MRC*, C-486/18, EU:C:2019:379, paragraph 67 and the case-law cited).
- 22 According to the Court’s settled case-law, that provision produces direct effects by creating rights for individuals which the national courts are responsible for safeguarding (see, to that effect, judgment of 7 October 2019, *Safeway*, C-171/18, EU:C:2019:839, paragraph 23 and the case-law cited).
- 23 The principle established by that provision may be relied upon before national courts, in particular in cases of discrimination arising directly from legislative provisions or collective labour agreements, as well as in cases in which work is carried out in the same establishment or service, whether private or public (see, to that effect, judgments of 8 April 1976, *Defrenne*, 43/75, EU:C:1976:56, paragraph 40, and of 13 January 2004, *Allonby*, C-256/01, EU:C:2004:18, paragraph 45).
- 24 In paragraphs 18 and 21 to 23 of the judgment of 8 April 1976, *Defrenne* (43/75, EU:C:1976:56), the Court stated, in particular, that discrimination which has its origin in legislative provisions or collective labour agreements is among the forms of discrimination which may be identified solely by reference to the criteria based on equal work and equal pay laid down by Article 119 of the EEC Treaty (which became, after amendment, Article 141 EC, now Article 157 TFEU) – in contrast to those which can only be identified by reference to more explicit implementing provisions. It added that this is also the case where men and women receive unequal pay for equal work carried out in the same establishment or service, whether public or private, and that in such a situation the court is in a position to establish all the facts enabling it to decide whether a female worker is receiving lower pay than a male worker performing the same tasks.
- 25 The Court has specified that, in a situation of that kind, the court is in a position to establish all the facts enabling it to decide whether a female worker is receiving lower pay than a male worker engaged in equal work or work of equal value (see, to that effect, judgment of 11 March 1981, *Worringham and Humphreys*, 69/80, EU:C:1981:63, paragraph 23).
- 26 Furthermore, the Court has held that Article 119 of the EEC Treaty (which became, after amendment, Article 141 EC, now Article 157 TFEU) requires the application of the principle of equal pay for men and women in the case of equal work or, according to a consistent line of decisions of the Court, in the case of work of equal value (see, to that effect, judgment of 4 February 1988, *Murphy and Others*, 157/86, EU:C:1988:62, paragraph 9).
- 27 Moreover, that article lays down the principle that equal work or work to which equal value is attributed must be remunerated in the same way, whether it is performed by a man or a woman, a principle which is a particular expression of the general principle of equality which prohibits comparable situations from being treated differently unless the difference is objectively justified (see, to that effect, judgment of 26 June 2001, *Brunnhofner*, C-381/99, EU:C:2001:358, paragraphs 27 and 28 and the case-law cited).

- 28 It should also be noted that the terms ‘equal work’, ‘same job’ and ‘work of equal value’ in Article 157 TFEU are entirely qualitative in character in that they are exclusively concerned with the nature of the work actually performed (see, to that effect, judgment of 26 June 2001, *Brunnhofer*, C-381/99, EU:C:2001:358, paragraph 42 and the case-law cited).
- 29 Accordingly, it is apparent from settled case-law that, contrary to Tesco Stores’ submissions, the direct effect of Article 157 TFEU is not limited to situations in which the workers of different sex who are compared perform ‘equal work’, to the exclusion of ‘work of equal value’.
- 30 In that context, the question whether the workers concerned perform ‘equal work’ or ‘work of equal value’, as referred to in Article 157 TFEU, is a matter of factual assessment by the court. In that regard, it should be noted that it is for the national court, which alone has jurisdiction to find and assess the facts, to determine whether, in the light of the actual nature of the activities carried out by those workers, equal value can be attributed to them (see, to that effect, judgments of 31 May 1995, *Royal Copenhagen*, C-400/93, EU:C:1995:155, paragraph 42, and of 26 June 2001, *Brunnhofer*, C-381/99, EU:C:2001:358, paragraph 49 and the case-law cited).
- 31 It should, furthermore, be pointed out that such an assessment must be distinguished from the characterisation of the legal obligation resulting from Article 157 TFEU, which, as has been stated in paragraph 20 of the present judgment, imposes, clearly and precisely, an obligation to achieve a particular result.
- 32 The foregoing interpretation is borne out by the objective pursued by Article 157 TFEU, namely the elimination, for equal work or work of equal value, of all discrimination on grounds of sex as regards all aspects and conditions of remuneration.
- 33 In this connection, it is to be observed that the principle, referred to in that provision, of equal pay for male and female workers for equal work or work of equal value forms part of the foundations of the European Union (see, to that effect, judgment of 3 October 2006, *Cadman*, C-17/05, EU:C:2006:633, paragraph 28 and the case-law cited).
- 34 Moreover, it should be pointed out, first, that, in accordance with the second subparagraph of Article 3(3) TEU, the European Union is to promote, inter alia, equality between men and women. Second, Article 23 of the Charter of Fundamental Rights of the European Union states that equality between women and men must be ensured in all areas, including employment, work and pay.
- 35 In the light of those factors, it must be held that the interpretation that a distinction should be drawn, as regards the direct effect of Article 157 TFEU, according to whether the principle of equal pay for male and female workers is relied upon in respect of ‘equal work’ or of ‘work of equal value’ is such as to compromise the effectiveness of that article and attainment of the objective that it pursues.
- 36 Furthermore, it should be pointed out that, where the differences identified in the pay conditions of workers performing equal work or work of equal value cannot be attributed to a single source, there is no entity which is responsible for the inequality and which could restore equal treatment, with the result that such a situation does not come within the scope of Article 157 TFEU (see, to that effect, judgments of 17 September 2002, *Lawrence and Others*, C-320/00, EU:C:2002:498, paragraphs 17 and 18, and of 13 January 2004, *Allonby*, C-256/01, EU:C:2004:18, paragraph 46). It follows that a situation in which the pay conditions of workers of different sex performing equal work or work of equal value can be attributed to a single source comes within the scope of Article 157 TFEU and that the work and the pay of those workers can be compared on the basis of that article, even if they perform their work in different establishments.
- 37 Therefore, it must be held that Article 157 TFEU may be relied upon before national courts in proceedings concerning work of equal value carried out by workers of different sex having the same employer and in different establishments of that employer, provided that the latter constitutes such a single source.
- 38 In the present instance, it follows from the request for a preliminary ruling that Tesco Stores appears to constitute, in its capacity as employer, a single source to which the pay conditions of the workers

performing their work in its stores and distribution centres may be attributed and which could be responsible for any discrimination prohibited pursuant to Article 157 TFEU, which it is for the referring tribunal to determine.

- 39 In the light of all the foregoing considerations, the answer to the first question is that Article 157 TFEU must be interpreted as having direct effect in proceedings between individuals in which failure to observe the principle of equal pay for male and female workers for ‘work of equal value’, as referred to in that article, is pleaded.

Second question

- 40 In view of the answer given to the first question, there is no need to answer the second question.

Costs

- 41 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the referring tribunal, the decision on costs is a matter for that tribunal. 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 157 TFEU must be interpreted as having direct effect in proceedings between individuals in which failure to observe the principle of equal pay for male and female workers for ‘work of equal value’, as referred to in that article, is pleaded.

Arabadjiev

Kumin

von Danwitz

Xuereb

Ziemele

Delivered in open court in Luxembourg on 3 June 2021.

A. Calot Escobar

A. Arabadjiev

Registrar

President of the Second
Chamber

* Language of the case: English.