JUDGMENT OF THE COURT (Fourth Chamber)

20 June 2013 (*)

(Social policy – Directive 76/207/EEC – Equal treatment for male and female workers – Directive 96/34/EC – Framework Agreement on Parental Leave – Abolishment of officials' posts due to national economic difficulties – Assessment of a female worker who took parental leave as compared to workers who remained in active service – Dismissal at the end of parental leave – Indirect discrimination)

In Case C-7/12,

REQUEST for a preliminary ruling under Article 267 TFEU from the Augstākās tiesas Senāts (Latvia), made by decision of 27 December 2011, received at the Court on 4 January 2012, in the proceedings

Nadežda Riežniece

v

Zemkopības ministrija,

Lauku atbalsta dienests,

THE COURT (Fourth Chamber),

composed of L. Bay Larsen, President of the Chamber, J. Malenovský, U. Lõhmus, M. Safjan (Rapporteur) and A. Prechal, Judges,

Advocate General: Y. Bot,

Registrar: A. Calot Escobar,

having regard to the written procedure,

after considering the observations submitted on behalf of:

– the Latvian Government, by I. Kalniņš and A. Nikolajeva, acting as Agents,

– the Netherlands Government, by C. Wissels, acting as Agent,

– the Polish Government, by B. Majczyna and M. Szpunar, acting as Agents,

– the European Commission, by C. Gheorghiu, and by M. van Beek and E. Kalniņš, 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 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), as amended by Directive 2002/73/EC of the European Parliament and of the Council of 23 September 2002 (OJ 2002 L 269, p. 15) ('Directive 76/207'), and of the Framework Agreement on

Parental Leave, concluded on 14 December 1995 (‘the Framework Agreement on Parental Leave’), contained in the Annex to 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), as amended by Council Directive 97/75/EC of 15 December 1997 (OJ 1998 L 10, p. 24) (‘Directive 96/34’).

2 The request has been made in proceedings between Ms Riežniece and the Zemkopības ministrija (Ministry of Agriculture) and the Lauku atbalsta dienests (Rural Support Service) concerning her dismissal following her return to work after taking parental leave.

Legal context

European Union legislation

Directive 76/207

3 Directive 76/207 was 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 (OJ 2009 L 204, p. 23), with effect from 15 August 2009. However, in view of the dates of the facts of the dispute in the main proceedings, Directive 76/207 still applies to it.

4 Article 4(1) of Directive 76/207 states:

‘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”.’

5 Article 2 of the Directive is worded as follows:

‘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.

2. For the purpose of this Directive, the following definitions apply:

– “direct discrimination”: where one person is treated less favourably, on grounds of sex, than another is, has been or would be treated in a comparable situation;

– “indirect discrimination”: where an apparently neutral provision, criterion or practice would put persons of one sex at a particular disadvantage compared with persons of the other sex, unless that provision, criterion or practice is objectively justified by a legitimate aim, and the means of achieving that aim are appropriate and necessary;

...

7. ...

This Directive shall be without prejudice to the provisions of [Directive 96/34] …’

6 Article 3(1) of Directive 76/207 reads as follows:

‘Application of the principle of equal treatment means that there shall be no direct or indirect discrimination on the grounds of sex in the public or private sectors, including public bodies, in relation to:

...

(c) employment and working conditions, including dismissals, as well as pay as provided for in [Council Directive 75/117/EEC of 10 February 1975 on the approximation of the laws of the Member States relating to the application of the principle of equal pay for men and women] (OJ 1975 L 45, p. 19)];

...'

The Framework Agreement on Parental Leave

7 Directive 96/34 was repealed with effect from 8 March 2012 under Article 4 of Council Directive 2010/18/EU of 8 March 2010 implementing the revised Framework Agreement on parental leave concluded by BUSINESSEUROPE, UEAPME, CEEP and ETUC and repealing Directive 96/34/EC (OJ 2010 L 68, p. 13). However, in view of the dates of the facts of the dispute in the main proceedings, Directive 96/34 and the Framework Agreement on Parental Leave still apply to it.

8 The first recital in the preamble to the Framework Agreement on Parental Leave states:

'The enclosed framework agreement represents an undertaking by UNICE [Union of Industrial and Employers' Confederations of Europe], CEEP [European Centre of Employers and Enterprises] and the ETUC [European Trade Union Confederation] to set out minimum requirements on parental leave …, as an important means of reconciling work and family life and promoting equal opportunities and treatment between men and women.'

9 Paragraph 5 of the general considerations of the Framework Agreement is worded as follows:

'… the Council Resolution of 6 December 1994 recognises that an effective policy of equal opportunities presupposes an integrated overall strategy allowing for better organisation of working hours and greater flexibility, and for an easier return to working life, and notes the important role of the two sides of industry in this area and in offering both men and women an opportunity to reconcile their work responsibilities with family obligations'.

10 Clause 1 of the Framework Agreement states as follows:

'1. This agreement lays down minimum requirements designed to facilitate the reconciliation of parental and professional responsibilities for working parents.

2. This agreement applies to all workers, men and women, who have an employment contract or employment relationship as defined by the law, collective agreements or practices in force in each Member State.'

11 Clause 2 of the Framework Agreement states:

'1. This agreement grants, subject to clause 2.2, men and women workers an individual right to parental leave on the grounds of the birth or adoption of a child to enable them to take care of that child, for at least three months, until a given age up to 8 years to be defined by Member States and/or management and labour.

...

4. In order to ensure that workers can exercise their right to parental leave, Member States and/or management and labour shall take the necessary measures to protect workers against dismissal on the grounds of an application for, or the taking of, parental leave in accordance with national law, collective agreements or practices.

5. At the end of parental leave, workers shall have the right to return to the same job or, if that is not possible, to an equivalent or similar job consistent with their employment contract or employment relationship.

...'

Latvian legislation

12 The Labour Code (Darba likums, *Latvijas Vēstnesis*, 2001, No 105), in the version thereof applicable to the facts of the main proceedings, provides in Article 156:

‘1. All workers shall be entitled to parental leave in the event of birth or adoption of a child. That leave shall be granted for a maximum period of 18 months, until the date of the child’s eighth birthday.

...

3. The period during which the worker is on parental leave shall be considered to be a period of work.

4. Workers taking parental leave shall retain their previous employment. If that is not possible, the employer shall guarantee them similar or equivalent employment, on working and employment conditions which cannot be less favourable.’

13 Point 2 of Instruction No 2 of the Latvian Council of Ministers of 13 February 2001 on the performance of public officials and procedure for assessing their results (Ministru kabineta instrukcija Nr. 2 – Ierēdņa darbības un tās rezultātu novērtēšanas kārtība) (*Latvijas Vēstnesis*, 2001, No 27) is worded as follows:

‘The purpose of assessing the performance of public officials and their results is to evaluate the performance of public officials and their results over the course of a certain period and to determine their needs in terms of training and career development in order to improve and promote their performance with a view to achieving the objectives set for the ministries and the exercise of their functions. The results of the assessment serve as a basis for decisions as to whether to grant the status of public official, the non-suitability of the public official for the posts held, transfers to posts and the attribution of grades.’

14 Article 2(4) of the Law on public officials (Valsts civildienesta likums), in the version thereof applicable to the dispute in the main proceedings, states:

‘Unless otherwise provided for herein, legal relationships in the civil service shall be governed by the legal and statutory provisions governing employment-law relationships which lay down the principles of equal treatment and non-discrimination, the prohibition on creating unfavourable working conditions, and rules governing working hours and rest time, remuneration, workers’ financial liability and time-limits.’

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

15 It is apparent from the order for reference that, by decision of the Lauku atbalsta dienests of 14 November 2005, Ms Riežniece was appointed to the post of principal adviser in the Legal Affairs Division of the Administrative Department.

16 In 2006, Ms Riežniece was given an annual performance appraisal in her capacity as a public official, with a view to assessing the quality of her work and improving and promoting her professional development (‘the 2006 performance appraisal’). The appraisal questionnaire comprised five criteria, each of which was made up of a number of sub-criteria. An overall mark was given at the end of the appraisal.

17 Ms Riežniece took parental leave from 14 November 2007 to 6 May 2009.

18 In 2009, as part of a structural reorganisation of the Lauku atbalsta dienests, a post of principal adviser in the Legal Affairs Division of the Administrative Department was abolished, although the post to be abolished made no reference to any particular official.

19 In order to determine which official would be affected by the abolishment of that post, the performance and qualifications of four officials, including Ms Riežniece, were assessed using identical criteria and

the same scale of assessment ('the 2009 performance appraisal'). Of the eight criteria used for that assessment as compared with the 2006 performance appraisal, three were new whilst five had already been used, either in their current form or as part of existing criteria. Two of the criteria used for the 2006 performance appraisal were not used in 2009.

20 Two of the officials assessed in 2009, a man and a woman who had remained working, were assessed for the period from 1 February 2008 to 26 February 2009.

21 Ms Riežniece and another worker, who had also taken parental leave, were assessed on the basis of the last annual performance appraisal conducted before they took parental leave. Ms Riežniece, who obtained a lower overall mark than what she had been given in her 2006 performance appraisal, was ranked last. The other female worker who had taken parental leave obtained the highest mark, which was the same as the female worker who had remained in active service.

22 Consequently, on 7 May 2009 the Lauku atbalsta dienests notified Ms Riežniece that her employment was being terminated on the ground that the post which she occupied was being abolished, whilst at the same time offering her another post as a principal adviser in the Development of Information Systems Unit in the Information Department. Ms Riežniece accepted the transfer to that other post immediately.

23 On 18 May 2009, due to national economic difficulties, new measures requiring structural changes in the Lauku atbalsta dienests were adopted.

24 On 26 May 2009, the Lauku atbalsta dienests notified Ms Riežniece that her employment in the Public Administration would be terminated on the ground that her post in the Development of Information Systems Unit was being abolished. Ms Riežniece's employment as a public official was, consequently, terminated, the lawfulness of which was upheld by a decision of the Zemkopības ministrija.

25 Ms Riežniece brought an action before the Administratīvā rajona tiesa (District Administrative Court) seeking: (i) a declaration that the decision of the Zemkopības ministrija which upheld the Lauku atbalsta dienests's notice of 26 May 2009 was unlawful; (ii) compensation for material and non-material damage; and (iii) costs. By judgment of 21 October 2009, the Administratīvā rajona tiesa upheld Ms Riežniece's action in part.

26 By judgment of 20 December 2010, the Administratīvā apgabaltiesa (Regional Administrative Court) before which Ms Riežniece had appealed and the Zemkopības ministrija had cross-appealed, dismissed her appeal.

27 The Administratīvā apgabaltiesa held, firstly, that Ms Riežniece had been assessed objectively in terms of her work and qualifications. Secondly, it found that the administration had acted lawfully in offering Ms Riežniece another post when she returned to work, inter alia because the Lauku atbalsta dienests could not have foreseen that posts allocated to the Development of Information Systems Unit in the Information Department were going to be abolished.

28 Ms Riežniece brought an appeal against the judgment of the Administratīvā apgabaltiesa before the Augstākās tiesas Senāts (Senate of the Supreme Court). She argued, inter alia, that under European Union law, female workers taking parental leave have a right, at the end of that leave, to return to their post or an equivalent post. Consequently, the Administratīvā apgabaltiesa was incorrect in holding that the Lauku atbalsta dienests was free to terminate her employment as a public official or to transfer her to another post. Moreover, that court misinterpreted the principle of non-discrimination in holding that workers in active service and workers on parental leave could be assessed on the basis of different principles.

29 It is on that basis that the Augstākās tiesas Senāts decided to stay proceedings and to refer the following questions to the Court for a preliminary ruling:

'1. Must the provisions of [Directive 76/207] … and of the Framework Agreement on Parental Leave … be interpreted as meaning that an employer is precluded from undertaking any action (in particular, the assessment of an employee while absent) which might result in a female employee on parental leave losing her post after returning to work?

2. Does the answer to the previous question differ if the reason for such action is the fact that, due to the economic recession in a Member State, in all the administrations of the State the number of civil servants has been optimised and posts abolished?

3. Must the assessment of [a female worker's] work and qualifications which takes into account her latest annual performance appraisal as a civil servant and results before parental leave be regarded as indirect discrimination when compared to the fact that the work and qualifications of other civil servants who have continued in active employment (taking the opportunity, moreover, to achieve further merit) are assessed according to fresh criteria?'

Consideration of the questions referred

30 By its three questions, which it is appropriate to consider together, the referring court asks, in essence, whether Directive 76/207 and the Framework Agreement on Parental Leave must be interpreted as precluding:

– a situation where, as part of an assessment of workers in the context of abolishment of public officials' posts due to national economic difficulties, a female worker who has taken parental leave is assessed in her absence on the basis of the last annual performance appraisal done before she took parental leave, using new criteria, whilst workers who remained in active service are assessed on the basis of a more recent period, and

– a situation where that female worker who has been transferred to another post at the end of her parental leave following that assessment is dismissed due to the abolition of that new post.

31 As is apparent from the first recital in the preamble to the Framework Agreement on Parental Leave and from paragraph 5 of its general considerations, the Framework Agreement constitutes an undertaking by management and labour to introduce, through minimum requirements, measures to promote equal opportunities and treatment between men and women, by offering them an opportunity to reconcile their work responsibilities with family obligations (Case C-116/08 *Meerts* [2009] ECR I-10063, paragraph 35, and Case C-149/10 *Chatzi* [2010] ECR I-8489, paragraph 56).

32 To that end, the Framework Agreement on Parental Leave enables new parents to take a break from work to devote themselves to their family responsibilities, whilst giving them the assurance, set out in clause 2.5 of that agreement, that they will be entitled to return to the same job at the end of the leave. During a period freely set by each Member State subject to a minimum duration of three months, and in accordance with detailed rules left to national legislatures to determine, the new parents are thus able to provide their child with the assistance that his or her age requires and to make provision for measures organising family life with a view to their return to work (*Chatzi*, paragraph 57).

33 It is appropriate to begin by examining whether an employer may, in the context of abolishing a post, proceed with the assessment of a worker who has taken parental leave.

34 As stated in clause 2.4 of the Framework Agreement on Parental Leave, workers must be protected against dismissal 'on the grounds of' an application for, or the taking of, parental leave in accordance with national law, collective agreements or practices.

35 It follows from that provision that, in circumstances such as those of the main proceedings, subject to clause 2.5 of the Framework Agreement on Parental Leave, an employer is not prohibited from dismissing a worker who has taken parental leave provided that the worker was not dismissed on the grounds of the application for, or the taking of, parental leave.

36 Consequently, the Framework Agreement on Parental Leave does not preclude a situation where an employer, in the context of the abolishment of a post, proceeds with the assessment of a worker who has taken parental leave with a view to transferring that worker to an equivalent or similar post consistent with that worker's employment contract or relationship. This also holds true where the employer intends to reduce the number of workers in all of the State administrative departments due to national economic difficulties. An employer is allowed to reorganise its departments in order to ensure

efficient management of its organisation, subject to compliance with the applicable rules of European Union law.

37 Secondly, the issue must be considered whether the assessment of a female worker who has taken parental leave, carried out in the context of a post being abolished, is liable to infringe the principle of non-discrimination.

38 It should be borne in mind in that regard that Article 3(1)(c) of Directive 76/207 prohibits discrimination on grounds of sex as regards working conditions, which include the conditions applicable to a worker who has taken parental leave returning to work (see, to that effect, Case C-320/01 *Busch* [2003] ECR I-2041, paragraph 38).

39 The Court has consistently held that indirect discrimination arises where a national measure, albeit formulated in neutral terms, works to the disadvantage of far more women than men (see, in particular, Case C-1/95 *Gerster* [1997] ECR I-5253, paragraph 30, and Case C-123/10 *Brachner* [2011] ECR I-10003, paragraph 56).

40 Moreover, as observed previously by the Court in Case C-333/97 *Lewen* [1999] ECR I-7243, paragraph 35, on the basis of indications by the national court, women take parental leave far more often than men. It is for the national court to ascertain whether, in the Member State concerned, a much higher number of men than women take parental leave, with the result that women are more likely than men to be affected by measures such as those at issue in the main proceedings.

41 If that turns out to be the case, it then follows, as pointed out by the Latvian and Polish Governments and the European Commission, that, in order to avoid any discrimination and ensure equal opportunities for men and women, the method for assessing workers in the context of the abolishment of a post must not place workers who have taken parental leave in a less favourable situation than workers who have not taken parental leave.

42 In the main proceedings, the employer proceeded with the assessment of the workers concerned in the light of their most recent period of actual work. Although the assessment of workers over two different periods may not be a perfect solution, it is nevertheless appropriate, given that workers who have taken parental leave are absent during the period immediately preceding the assessment, provided that the assessment criteria used are not such as to place those workers at a disadvantage.

43 In order not to place workers who have taken parental leave at such a disadvantage, the assessment must comply with a certain number of requirements. In particular, it must encompass all workers liable to be affected by the abolishment of the post. Such an assessment must also be based on criteria which are absolutely identical to those which apply to workers in active service. Moreover, the implementation of those criteria must not involve the physical presence of the workers, a condition which a worker on parental leave is unable to fulfil.

44 In the present case, the five criteria used for the 2006 performance appraisal overlap only partially with the criteria used for the 2009 performance appraisal. Moreover, the two assessments did not have the same objectives, as the first one was aimed at assessing the quality of work and promoting professional development, whilst the second one was carried out in the context of the abolishment of a post.

45 In those circumstances, the referring court must ascertain more specifically, firstly, whether the 2009 performance appraisal was carried out in such a manner that the overall mark given to Ms Riežniece might result from the use of criteria which she could not satisfy because she was absent from work and, secondly, whether her results from the 2006 performance appraisal were used objectively for the 2009 performance appraisal.

46 Moreover, in its third question the referring court bases itself on the premiss that the fact of being in active service allowed the officials concerned to bring up their qualification levels. The Netherlands Government submits in this respect that Ms Riežniece, who was deprived of the opportunity to improve her work, was placed at a disadvantage as compared to her colleagues who did not take parental leave.

47 It should be observed in regards to that argument that, unlike workers who have taken parental leave, it is true that workers who have remained in active service have had the opportunity to acquire more experience, which generally enables those workers to perform their duties better (see, to that effect, Case C-17/05 *Cadman* [2006] ECR I-9583, paragraphs 34 and 35). However, the fact of being able to perform one's duties better is merely a possibility for those workers who have remained in active service, since mere presence at work does not guarantee that a worker's results will necessarily improve.

48 In the light of the foregoing, the conclusion must be that, in the main proceedings, if there was a failure in the 2009 performance appraisal to observe the principles and assessment criteria referred to in paragraph 43 above, thereby placing Ms Riežniece at a disadvantage, such a situation gives rise to indirect discrimination within the meaning of Article 2(2) of Directive 76/207, which it is for the national court to verify.

49 Thirdly, it must be examined whether Ms Riežniece's employer could have transferred her to another post following the results of the 2009 performance appraisal.

50 Under clause 2.5 of the Framework Agreement on Parental Leave, at the end of parental leave the worker has the right to return to his or her post or, where this is not possible, to an equivalent or similar job consistent with their employment contract or employment relationship.

51 It is therefore for the referring court to ascertain whether, in circumstances such as those of the main proceedings, it was not possible for the employer to return Ms Riežniece to her post and, if so, whether the work to which she was assigned was equivalent or similar and consistent with her employment contract or employment relationship.

52 In particular, Ms Riežniece argued before the referring court that the Lauku atbalsta dienests was informed of the imminent structural changes in the Information Department and that, in offering her a post which was already due to be abolished, the Lauku atbalsta dienests did not comply with its obligation to offer her an equivalent post.

53 If that should turn out to be the case, then it is clear that such a scenario, which is such as to deprive Ms Riežniece of the protection guaranteed to her under clause 2.4 and 2.5 of the Framework Agreement on Parental Leave, cannot be accepted.

54 The employer may not render nugatory the right of a worker who has taken parental leave to be transferred to another post, in accordance with the conditions laid down in clause 2.5 of the Framework Agreement on Parental Leave, by offering that worker a post which is due to be abolished.

55 It is accordingly for the referring court to ascertain in particular whether Ms Riežniece's employer was informed, at the time it offered her a new post, that that post was due to be abolished and would effectively lead to her dismissal.

56 In the light of the foregoing observations, the answer to the questions referred is that Directive 76/207, where a much higher number of women than men take parental leave, which it is for the national court to verify, and the Framework Agreement on Parental Leave contained in the Annex to Directive 96/34, must be interpreted as precluding:

– a situation where, as part of an assessment of workers in the context of abolishment of officials' posts due to national economic difficulties, a worker who has taken parental leave is assessed in his or her absence on the basis of assessment principles and criteria which place him or her in a less favourable position as compared to workers who did not take parental leave; in order to ascertain whether or not that is the case, the national court must inter alia ensure that the assessment encompasses all workers liable to be concerned by the abolishment of the post, that it is based on criteria which are absolutely identical to those applying to workers in active service and that the implementation of those criteria does not involve the physical presence of workers on parental leave; and

– a situation where a female worker who has been transferred to another post at the end of her parental leave following that assessment is dismissed due to the abolishment of that new post, where it was not impossible for the employer to allow her to return to her former post or where the work assigned to her was not equivalent or similar and consistent with her employment contract or employment relationship, inter alia because, at the time of the transfer, the employer was informed that the new post was due to be abolished, which it is for the national court to verify.

Costs

57 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 (Fourth Chamber) hereby rules:

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, as amended by Directive 2002/73/EC of the European Parliament and of the Council of 23 September 2002, where a much higher number of women than men take parental leave, which it is for the national court to verify, and the Framework Agreement on Parental Leave, concluded on 14 December 1995, contained in the Annex to Council Directive 96/34/EC of 3 June 1996 on the framework agreement on parental leave concluded by UNICE, CEEP and the ETUC, as amended by Council Directive 97/75/EC of 15 December 1997, must be interpreted as precluding:

– **a situation where, as part of an assessment of workers in the context of abolishment of officials' posts due to national economic difficulties, a worker who has taken parental leave is assessed in his or her absence on the basis of assessment principles and criteria which place him or her in a less favourable position as compared to workers who did not take parental leave; in order to ascertain whether or not that is the case, the national court must inter alia ensure that the assessment encompasses all workers liable to be concerned by the abolishment of the post, that it is based on criteria which are absolutely identical to those applying to workers in active service and that the implementation of those criteria does not involve the physical presence of workers on parental leave; and**

– **a situation where a female worker who has been transferred to another post at the end of her parental leave following that assessment is dismissed due to the abolishment of that new post, where it was not impossible for the employer to allow her to return to her former post or where the work assigned to her was not equivalent or similar and consistent with her employment contract or employment relationship, inter alia because, at the time of the transfer, the employer was informed that the new post was due to be abolished, which it is for the national court to verify.**

[Signatures]

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* Language of the case: Latvian.