JUDGMENT OF THE COURT (Fifth Chamber)

9 November 2017 (*)

(Reference for a preliminary ruling — Directive 97/81/EC — Framework Agreement on part-time work concluded by UNICE, CEEP and the ETUC — Clause 4 — Male and female workers — Equal treatment in matters of social security — Directive 79/7/EEC — Article 4 — ‘Vertical’ part-time worker — Unemployment benefit — National legislation excluding days not worked from the contribution period for the purpose of establishing the duration of the benefit

In Case C-98/15,

REQUEST for a preliminary ruling under Article 267 TFEU from the Juzgado de lo Social No 33 de Barcelona (Social Court No 33, Barcelona, Spain), made by decision of 6 February 2015, received at the Court on 27 February 2015, in the proceedings

María Begoña Espadas Recio

v

ServicioPúblico de Empleo Estatal (SPEE),

THE COURT (Fifth Chamber),

composed of F. Biltgen (Rapporteur), acting as President of the Chamber, A. Tizzano, Vice-President of the Court, E. Levits, A. Borg Barthet and M. Berger, Judges,

Advocate General: E. Sharpston,

Registrar: V. Tourrès, Administrator,

having regard to the written procedure and further to the hearing on 15 June 2016,

after considering the observations submitted on behalf of:

– Maria Begoña Espadas Recio, by A. Calvo Calmache, abogado,

– the Spanish Government, by A. Gavela Llopis, V. Ester Casas, L. Banciella Rodríguez-Miñón and A. Rubio González, acting as Agents,

– the European Commission, by S. Pardo Quintillán, A. Szmytkowska and M. van Beek, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 16 March 2017,

gives the following

Judgment

1 This request for a preliminary ruling concerns the interpretation, on the one hand, of Clause 4 of the framework agreement on part-time work, concluded on 6 June 1997 (‘the Framework Agreement’), which is set out in the Annex to Council Directive 97/81/EC of 15 December 1997 concerning the Framework Agreement on part-time work concluded by UNICE, CEEP and the ETUC (OJ 1998 L 14, p. 9) and, on the other hand, of Article 4 of Council Directive 79/7/EEC of 19 December 1978 on the

progressive implementation of the principle of equal treatment for men and women in matters of social security (OJ 1979 L 6, p. 24).

2 The request has been made in the course of proceedings between Ms María Begoña Espadas Recio and the Servicio Público de Empleo Estatal (SPEE) (Public Employment Service, Spain), concerning the determination of the basis for the calculation of the duration of unemployment benefit for 'vertical' part-time workers.

Legal context

EU law

3 Recital 4 of the Framework Agreement is worded as follows:

'Whereas the conclusions of the European Council meeting in Essen emphasized the need for measures to promote both employment and equal opportunities for women and men, and called for measures aimed at 'increasing the employment intensiveness of growth, in particular by more flexible organization of work in a way which fulfils both the wishes of employees and the requirements of competition'.

4 Clause 1(a) of the Framework Agreement provides that the purpose of that agreement is 'to provide for the removal of discrimination against part-time workers and to improve the quality of part-time work'.

5 According to Clause 2(1) of the Framework Agreement, the agreement 'applies to part-time workers who have an employment contract or employment relationship as defined by the law, collective agreement or practice in force in each Member State'.

6 Clause 3(1) of the Framework Agreement defines 'part-time worker' as an employee whose normal hours of work, calculated on a weekly basis or on average over a period of employment of up to one year, are less than the normal hours of work of a comparable full-time worker.

7 Clause 4(1) and (2) of the Framework Agreement provides:

'1. In respect of employment conditions, part-time workers shall not be treated in a less favourable manner than comparable full-time workers solely because they work part time unless different treatment is justified on objective grounds.

2. Where appropriate, the principle of *pro rata temporis* shall apply.'

8 Clause 5(1)(a) of the Framework Agreement provides:

'In the context of Clause 1 of this Agreement and of the principle of non-discrimination between part-time and full-time workers:

(a) Member States, following consultations with the social partners in accordance with national law or practice, should identify and review obstacles of a legal or administrative nature which may limit the opportunities for part-time work and, where appropriate, eliminate them'.

9 According to Article 2 of Directive 79/7, that directive applies, inter alia, to workers whose activity is interrupted by involuntary unemployment.

10 Pursuant to Article 3 of that directive, statutory schemes providing protection against unemployment also fall within its scope.

11 Article 4(1) of the same directive states:

'The principle of equal treatment means that there shall be no discrimination whatsoever on ground of sex either directly, or indirectly by reference in particular to marital or family status, in particular as concerns:

– the scope of the schemes and the conditions of access thereto;

– the obligation to contribute and the calculation of contributions;

– the calculation of benefits including increases due in respect of a spouse and for dependants and the conditions governing the duration and retention of entitlement to benefits.'

Spanish law

12 Articles 203 to 234 of the Ley General de la Seguridad Social (General Law on Social Security), approved by Real Decreto Legislativo (Royal Legislative Decree) 1/1994 of 20 June 1994 (BOE No 154, of 29 June 1994, p. 20658) ('the LGSS'), regulate unemployment protection.

13 Pursuant to Article 204(1) of the LGSS, unemployment protection is divided into a contributory level and a social assistance level, both of which are State-administered and compulsory. The case in the main proceedings concerns the contributory level.

14 Article 204(2) of the LGSS defines the contributory level as '[being] intended to provide benefits to replace the wage income no longer received as result of the loss of a previous job or of the reduction of working hours'.

15 As regards the duration of the unemployment benefit in its contributory form, Article 210(1) of the LGSS is worded as follows:

'The duration of unemployment benefit shall be based on the periods of employment in respect of which contributions have been paid in the six years preceding the legal situation of unemployment or the time when the obligation to pay contributions ceased, in accordance with the following scale:

Contribution period (in days)/ Benefit period (in days)

from 360 to 539: 120

from 540 to 719: 180

from 720 to 899: 240

from 900 to 1 079: 300

from 1 080 to 1 259: 360

from 1 260 to 1 439: 420

from 1 440 to 1 619: 480

from 1 620 to 1 799: 540

from 1 800 to 1 979: 600

from 1 980 to 2 159: 660

from 2 160: 720'

16 With regard to part-time workers, regulatory provisions were adopted by the Real Decreto 625/1985 por el que se desarrolla la Ley 31/1984, de 2 de agosto, de Protección por Desempleo (Royal Decree 625/1985 implementing Law 31/1984 of 2 August on unemployment protection), of 2 April 1985 (BOE No 109 of 7 May 1985, p. 12699, 'RD 625/1985').

17 Article 3(4) of RD 625/1985 stipulates that, when contributions relate to part-time work or actual work in cases of a reduction in working hours, every day worked shall be calculated as a day in respect of which contributions have been paid, whatever the length of the working day.

The facts of the dispute in the main proceedings and the questions referred

18 Ms Espadas Recio worked as a cleaner part time from 23 December 1999 to 29 July 2013 continuously. Her working hours were distributed as follows: two and a half hours on Mondays, Wednesdays and Thursdays every week and four hours on the first Friday of every month.

19 After her contract of employment was terminated, Ms Espadas Recio applied for unemployment benefit. By decision of the SPEE of 30 September 2013, she was granted that benefit for a period of 120 days.

20 Being of the opinion that she was entitled to unemployment benefit for 720 days and not for 120 days only, Ms Espadas Recio challenged that decision.

21 By decision of 9 December 2013, the SPEE granted Ms Espadas Recio 420 days' unemployment benefit. In deciding on that period of 420 days, the SPEE relied on the fact that, in accordance with the combined provisions of Article 210 of the LGSS and Article 3(4) of RD 625/1985, in the case of part-time work, although the duration of the unemployment benefit is based on the number of days for which contributions were paid in the preceding six years, account was to be taken only of the days actually worked, in this case 1 387, and not the six years of contributions in their totality.

22 Taking the view that the six previous years had been fully covered by contributions, Ms Espadas Recio brought an appeal before the Juzgado de lo Social n^{o} 33 de Barcelona (Social Court No 33, Barcelona, Spain) in order to challenge the individual calculations made by the SPEE.

23 Ms Espadas Recio's claim concerns the duration of employment benefits granted to her by the SPEE. She claims that, because she worked for six consecutive years, during which contributions were paid for 30 or 31 days per month (for a total of 2 160 days), she is entitled to unemployment benefit for a duration of 720 days rather than the 420 days she was granted, that is to say, three fifths of the maximum duration. In her view, excluding the days not worked for the purpose of calculating her unemployment benefit establishes a difference in treatment to the detriment of 'vertical' part-time workers. Part-time work is called 'vertical' when the person performing it concentrates his working hours on certain working days of the week, and 'horizontal' when the person performing it works on every working day of the week. In the present case, Ms Espadas Recio's hours of work were concentrated mainly on three days per week.

24 The referring court notes that the applicant has proved that contributions were paid in full for the six years preceding the termination of her employment contract and that the contributions, paid monthly, were calculated on the basis of the salary earned during the month as a whole (that is to say over 30 or 31 days), and not on the hours or days worked. The same court nevertheless notes that, in the case of a 'vertical' part-time worker such as the applicant, the national legislation at issue in the main proceedings permit only the days worked to be taken into account, and not the entire six-year contribution period. Thus, the mandatory contribution days would not be taken into account in full for the purpose of determining the duration of the unemployment benefit.

25 According to the court making the reference, this category of worker is in fact doubly penalised, given that, in the case of 'vertical' part-time work, the principle *pro rata temporis* is applied twice: first, the lower monthly salary owing to part-time work leads to a proportionally lower amount of unemployment benefit and, second, the duration of that benefit is reduced because only the days worked are taken into account, even though the contribution period is longer.

26 Conversely, other workers, whether they work 'horizontal' part time (working on every working day) or work full time (regardless of the distribution of working hours during a week), would be granted unemployment benefit for a period calculated on the basis of all the days for which contributions had been made.

27 The referring court adds that it is established that the legislation in question in the main proceedings affects a much larger proportion of women than men.

28 It is in those circumstances that the Juzgado de lo Social no 33 de Barcelona (Social Court No 33, Barcelona) decided to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:

‘(1) In accordance with the case-law laid down in the judgment [of 10 June 2010] *Bruno and Others* (C-395/08 and C-396/08, EU:C:2010:329), must Clause 4 of the [Framework Agreement] be interpreted as applying to a contributory unemployment benefit such as that provided for in Article 210 of the [LGSS], funded exclusively by the contributions paid by the worker and the undertakings having employed her, and based on the periods of employment in respect of which contributions were paid in the six years preceding the legal situation of unemployment?

(2) If the previous question is answered in the affirmative, in accordance with the case-law laid down in the judgment [of 10 June 2010,] *Bruno and Others* (C-395/08 and C-396/08, EU:C:2010:329), must Clause 4 of the Framework Agreement be interpreted as precluding a national provision such as Article 3(4) of [RD 625/1985], to which rule 4 of paragraph 1 of the seventh additional provision of the [LGSS] refers, which — in the case of “vertical” part-time work (work carried out only three days per week) — disregards, for the purposes of calculation of the duration of unemployment benefit, days not worked even though contributions were paid in respect of those days, with the resulting reduction in the duration of the benefit granted?

(3) Must the prohibition of direct and indirect discrimination on grounds of sex laid down in Article 4 of Directive 79/7 be interpreted as prohibiting or precluding a national provision such as Article 3(4) of [RD 625/1985] which, in the case of “vertical” part-time work (work carried out only three days per week), excludes days not worked from the calculation of days in respect of which contributions have been paid, with the resulting reduction in the duration of unemployment benefit?’

Consideration of the questions referred

The first question

29 By its first question the referring court asks, in essence, whether Clause 4 of the Framework Agreement applies to a contributory unemployment benefit such as that at issue in the main proceedings.

30 According to the settled case-law of the Court, in respect of employment conditions Clause 4.1 of the Framework Agreement prohibits part-term workers being treated less favourably than comparable full-time workers solely because they work part-time, unless different treatment is justified on objective grounds (judgment of 13 July 2017, *Kleinsteuber*, C-354/16, EU:C:2017:539, paragraph 25).

31 In addition, the Court has ruled, first, that it is clear from its preamble that the Framework Agreement relates to the ‘employment conditions of part-time workers, recognising that matters concerning statutory social security are for decision by the Member States’ (judgment of 14 April 2015, *Cachaldora Fernández*, C-527/13, EU:C:2015:215, paragraph 36).

32 It has found, second, that the term ‘employment conditions’, within the meaning of the Framework Agreement, covers pensions that depend on an employment relationship between the worker and the employer, excluding statutory social security pensions, which are determined less by that relationship than by considerations of social policy (judgments of 22 November 2012, *Elbal Moreno*, C-385/11, EU:C:2012:746, paragraph 21, and of 14 April 2015, *Cachaldora Fernández*, C-527/13, EU:C:2015:215, paragraph 37).

33 In the present case, it is clear from the case file before the Court that, although the sole source of finance for the unemployment benefit at issue is the contributions paid by the worker and the employer, those contributions are paid pursuant to national legislation and are not, therefore, governed by the employment contract between the worker and the employer. Thus, as the Advocate General noted in point 38 of her Opinion, such an arrangement is closer to a State-administered social security scheme,

within the meaning of the case-law cited in the preceding paragraph. As a result, those contributions cannot be included in the concept of 'employment conditions'.

34 Therefore, the answer to the first question must be that Clause 4(1) of the Framework Agreement is not applicable to a contributory unemployment benefit such as that at issue in the main proceedings.

The second question

35 In the light of the answer given to the first question, there is no need to answer the second question.

The third question

36 By its third question, the referring court asks, in essence, whether Article 4(1) of Directive 79/7 must be interpreted as precluding legislation of a Member State which, in the case of 'vertical' part-time work, excludes days not worked from the calculation of days in respect of which contributions have been paid and therefore reduces the unemployment benefit payment period, when it is established that the majority of vertical part-time workers are women who are adversely affected by such national measures.

37 In answering that question, it must be noted that, if it is not in dispute that EU law does not detract from the power of the Member States to organise their social security systems, and that, failing any harmonisation at EU level, it is for the legislation of each Member State to determine the conditions for the grant of social security benefits, when exercising that power Member States must comply with EU law (see, to that effect, judgments of 16 May 2006, *Watts*, C-372/04, EU:C:2006:325, paragraph 92 and the case-law cited, and of 5 November 2014, *Somova*, C-103/13, EU:C:2014:2334, paragraphs 33 to 35 and the case-law cited).

38 As regards the question whether legislation such as that at issue in the main proceedings constitutes indirect discrimination against women, as the referring court suggests, it is apparent from the settled case-law of the Court that indirect discrimination arises when a national measure, although neutrally formulated, works to the disadvantage of far more women than men (judgments of 20 October 2011, *Brachner*, C-123/10, EU:C:2011:675, paragraph 56 and the case-law cited, and of 22 November 2012, *Elbal Moreno*, C-385/11, EU:C:2012:746, paragraph 29).

39 In the present case, it must be noted that the provision of national law at issue in the main proceedings concerns the class of part-time workers, which, as the referring court has held, is made up of a very large majority of female workers. The question asked must therefore be answered on the basis of those findings.

40 In that respect, it is important to clarify that the case in the main proceedings can be distinguished from the case that gave rise to the judgment of 14 April 2015, *Cachaldora Fernández* (C-527/13, EU:C:2015:215), in which the Court held that the legislation at issue, concerning the determination of the basis for the calculation of a pension for total permanent invalidity, did not involve discrimination within the meaning of Article 4(1) of Directive 79/7. In that judgment, the Court considered, on the one hand, that it did not have irrefutable statistical information regarding the number of part-time workers who had had a gap in their contributions or showing that that group of workers was principally made up of women (see, to that effect, judgment of 14 April 2015, *Cachaldora Fernández*, C-527/13, EU:C:2015:215, paragraph 30) and, on the other, that the provision at issue had random effects, since some part-time workers — the group allegedly disadvantaged by the provision — could even benefit from the application of that provision.

41 In the present case, in addition to the statistical data provided by the referring court not being contested, it is clear from the case file before the Court that 'vertical' part-time workers falling within the scope of the national measure at issue in the main proceedings are all adversely affected by this national measure, as, because of that measure, the period during which they may claim unemployment benefit is reduced compared to the period recognised in respect of 'horizontal' part-time workers. Indeed, it has been established that no worker forming part of that group could derive any advantage from the application of such a measure.

42 Moreover, in the case in the main proceedings, the referring court took care to note that the statistical data relating to part-time work covers all part-time workers equally, whether their part-time work is structured horizontally or vertically. Thus, according to the referring court, while 70 to 80% of 'vertical' part-time workers are women, the same proportion is found among 'horizontal' part-time workers. It can be deduced from that information that a much greater proportion of women than of men are adversely affected by the national measure at issue in the main proceedings.

43 The inevitable conclusion, given the above, is that a measure such as that at issue in the main proceedings constitutes a difference in treatment to the detriment of women within the meaning of the case-law referred to in paragraph [38] of the present judgment.

44 A measure of such a nature is contrary to Article 4(1) of Directive 79/7, unless it is justified by objective factors unrelated to any discrimination on grounds of sex. That will be the case if those measures reflect a legitimate social-policy objective, are appropriate to achieve that aim and are necessary in order to do so (see, to that effect, judgment of 22 November 2012, *Elbal Moreno*, C-385/11, EU:C:2012:746, paragraph 32).

45 In the present case, it must be noted that, although the request for a preliminary ruling contains no reference to the aim pursued by the measure at issue in the main proceedings, the Kingdom of Spain claimed, during the hearing, that the principle of 'contribution to the social security system' justifies the existence of the difference in treatment found. Thus, since the right to unemployment benefits and the duration of that benefit are based solely on the period during which an employee has worked or was registered in the social security system, it is necessary, in order to observe the principle of proportionality, for account to be taken only of the days actually worked.

46 In that regard, and even though it is for the national courts to assess whether that aim is actually what is pursued by the national legislature, it is sufficient to note that the national measure at issue in the main proceedings does not appear to be appropriate for ensuring the correlation that must, according to the Spanish Government, exist between the contributions paid by the worker and the rights to which he is entitled in respect of unemployment benefit.

47 Indeed, as the Advocate General noted in point 59 of her Opinion, a 'vertical' part-time worker who paid contributions for each day of every month of the year receives unemployment benefit for a shorter period than a full-time worker who paid the same contributions. With respect to the first of those two workers, the correlation relied upon by the Spanish Government is thus clearly not guaranteed.

48 Yet, as the Advocate General noted in point 58 of her Opinion, that correlation could be ensured if, as regards 'vertical' part-time workers, the national authorities allowed for other factors, such as, for example, the period during which those workers and their employers made contributions, the total amount of contributions paid or the hours worked, since those factors are, according to the referring court, taken into account for all workers whose working hours are structured horizontally, whether they work full time or part time.

49 In the light of all those reasons, the answer to the third question is that Article 4(1) of Directive 79/7 must be interpreted as precluding legislation of a Member State which, in the case of 'vertical' part-time work, excludes days not worked from the calculation of days in respect of which contributions have been paid and therefore reduces the unemployment benefit payment period, when it is established that the majority of 'vertical' part-time workers are women who are adversely affected by such legislation.

Costs

50 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 (Fifth Chamber) hereby rules:

1) **Clause 4(1) of the Framework Agreement on part-time work concluded on 6 June 1997, which is annexed to Council Directive 97/81/EC of 15 December 1997 concerning the framework agreement on part-time work concluded by UNICE, CEEP and the ETUC, is not applicable to a contributory unemployment benefit such as that at issue in the main proceedings.**

2) **Article 4(1) of Council Directive 79/7/EEC of 19 December 1978 on the progressive implementation of the principle of equal treatment for men and women in matters of social security must be interpreted as precluding legislation of a Member State which, in the case of 'vertical' part-time work, excludes days not worked from the calculation of days in respect of which contributions have been paid, and therefore reduces the unemployment benefit payment period, when it is established that the majority of vertical part-time workers are women who are adversely affected by such legislation.**

[Signatures]

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* Language of the case: Spanish.