Reports of Cases

JUDGMENT OF THE COURT (Third Chamber)

22 February 2018 *

(Reference for a preliminary ruling — Social policy — Directive 92/85/EEC — Measures to encourage improvements in the safety and health of pregnant workers and workers who have recently given birth or are breastfeeding — Article 2(a) — Article 10(1) to (3) — Prohibition of dismissal of a worker during the period from the beginning of her pregnancy to the end of her maternity leave — Scope — Exceptional cases not connected with the pregnant worker's condition — Directive 98/59/EC — Collective redundancies — Article 1(1)(a) — Reasons not related to the individual workers concerned — Pregnant worker dismissed in the context of a collective redundancy procedure — Reasons for the dismissal — Priority for retention of the post of the pregnant worker — Priority for redeployment)

In Case C-103/16,

REQUEST for a preliminary ruling under Article 267 TFEU from the Tribunal Superior de Justicia de Cataluña (High Court of Justice of Catalonia, Spain), made by decision of 20 January 2016, received at the Court on 19 February 2016, in the proceedings

Jessica Porras Guisado

v

Bankia SA,

Sección Sindical de Bankia de CCOO,

Sección Sindical de Bankia de UGT,

Sección Sindical de Bankia de ACCAM,

Sección Sindical de Bankia de SATE,

Sección Sindical de Bankia de CSICA,

Fondo de Garantía Salarial (Fogasa),

joined party:

Ministerio Fiscal,

* Language of the case: Spanish.

THE COURT (Third Chamber),

composed of L. Bay Larsen, President of the Chamber, J. Malenovský, M. Safjan (Rapporteur), D. Šváby and M. Vilaras, Judges,

Advocate General: E. Sharpston,

Registrar: M. Ferreira, Principal Administrator,

having regard to the written procedure and further to the hearing on 26 January 2017,

after considering the observations submitted on behalf of:

– Bankia SA, by C. Rodríguez Elias and V. García González, abogados,

– the Spanish Government, by M.J. García-Valdecasas Dorrego and A. Gavela Llopis, acting as Agents,

– the European Commission, by C. Valero, A. Szmytkowska and S. Pardo Quintillán, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 14 September 2017,

gives the following

Judgment

1 This request for a preliminary ruling concerns the interpretation of Article 10(1) and (2) 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), as well as Article 1(1)(a) of Council Directive 98/59/EC of 20 July 1998 on the approximation of the laws of the Member States relating to collective redundancies (OJ 1998 L 225, p. 16).

2 The request has been made in proceedings between, on the one hand, Ms Jessica Porras Guisado and, on the other hand, Bankia SA, various trade union branches and the Fondo de Garantía Salarial (Fogasa) (Wages Guarantee Fund, Spain) concerning the legality of Ms Porras Guisado's dismissal, in the context of a collective redundancy, while she was pregnant.

Legal context

EU law

Directive 92/85

3 According to the first, seventh, eighth and 15th recitals of Directive 92/85:

'Whereas Article 118a of the [EEC] Treaty provides that the Council shall adopt, by means of directives, minimum requirements for encouraging improvements, especially in the working environment, to protect the safety and health of workers;

…

Whereas Article 15 of Council Directive 89/391/EEC of 12 June 1989 on the introduction of measures to encourage improvements in the safety and health of workers at work [(OJ 1989 L 183, p. 1)] provides that particularly sensitive risk groups must be protected against the dangers which specifically affect them;

Whereas pregnant workers, workers who have recently given birth or who are breastfeeding must be considered a specific risk group in many respects, and measures must be taken with regard to their safety and health;

…

Whereas the risk of dismissal for reasons associated with their condition may have harmful effects on the physical and mental state of pregnant workers, workers who have recently given birth or who are breastfeeding; whereas provision should be made for such dismissal to be prohibited'.

4 Article 1 of Directive 92/85, entitled 'Purpose', provides in paragraph 1:

'The purpose of this Directive, which is the tenth individual Directive within the meaning of Article 16(1) of Directive 89/391/EEC, is to implement measures to encourage improvements in the safety and health at work of pregnant workers and workers who have recently given birth or who are breastfeeding.'

5 Article 2 of Directive 92/85, entitled 'Definitions', states:

'For the purposes of this Directive:

(a) *pregnant worker* shall mean a pregnant worker who informs her employer of her condition, in accordance with national legislation and/or national practice;

(b) *worker who has recently given birth* shall mean a worker who has recently given birth within the meaning of national legislation and/or national practice and who informs her employer of her condition, in accordance with that legislation and/or practice;

(c) *worker who is breastfeeding* shall mean a worker who is breastfeeding within the meaning of national legislation and/or national practice and who informs her employer of her condition, in accordance with that legislation and/or practice.'

6 Article 10 of that directive, entitled 'Prohibition of dismissal', provides that:

'In order to guarantee workers, within the meaning of Article 2, the exercise of their health and safety protection rights as recognized 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 referred to in Article 8(1), 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.'

Directive 98/59

7 According to recitals 2 to 4 and 7 of Directive 98/59:

'(2) Whereas it is important that greater protection should be afforded to workers in the event of collective redundancies while taking into account the need for balanced economic and social development within the Community;

(3) Whereas, despite increasing convergence, differences still remain between the provisions in force in the Member States concerning the practical arrangements and procedures for such redundancies and the measures designed to alleviate the consequences of redundancy for workers;

(4) Whereas these differences can have a direct effect on the functioning of the internal market;

…

(7) Whereas this approximation must therefore be promoted while the improvement is being maintained within the meaning of Article 117 of the [EEC] Treaty'.

8 Article 1 of that directive, entitled 'Definitions and scope', provides, in paragraph 1(a):

'For the purposes of this Directive:

(a) "collective redundancies" means dismissals effected by an employer for one or more reasons not related to the individual workers concerned where, according to the choice of the Member States, the number of redundancies is:
(i) either, over a period of 30 days:

– at least 10 in establishments normally employing more than 20 and less than 100 workers,

– at least 10% of the number of workers in establishments normally employing at least 100 but less than 300 workers,

– at least 30 in establishments normally employing 300 workers or more,
(ii) or, over a period of 90 days, at least 20, whatever the number of workers normally employed in the establishments in question'.

9 Article 2 of that directive, entitled 'Information and consultation', provides, in paragraphs 1 to 3:

'1. Where an employer is contemplating collective redundancies, he shall begin consultations with the workers' representatives in good time with a view to reaching an agreement.

2. These consultations shall, at least, cover ways and means of avoiding collective redundancies or reducing the number of workers affected, and of mitigating the consequences by recourse to accompanying social measures aimed, inter alia, at aid for redeploying or retraining workers made redundant.

Member States may provide that the workers' representatives may call on the services of experts in accordance with national legislation and/or practice.

3. To enable workers' representatives to make constructive proposals, the employers shall in good time during the course of the consultations:

(a) supply them with all relevant information and

(b) in any event notify them in writing of:
(i) the reasons for the projected redundancies;
(ii) the number and categories of workers to be made redundant;
(iii) the number and categories of workers normally employed;
(iv) the period over which the projected redundancies are to be effected;
(v) the criteria proposed for the selection of the workers to be made redundant in so far as national legislation and/or practice confers the power therefor upon the employer;
(vi) the method for calculating any redundancy payments other than those arising out of national legislation and/or practice.

The employer shall forward to the competent public authority a copy of, at least, the elements of the written communication which are provided for in the first subparagraph, point (b), subpoints (i) to (v).'

The relevant provisions of Spanish law

10 Article 51 of the texto refundido de la Ley del Estatuto de los Trabajadores, aprobado por el Real Decreto Legislativo 1/1995 (consolidated text of the Workers' Statute, adopted by Royal Legislative Decree No 1/1995) of 24 March 1995 (BOE No 75 of 29 March 1995, p. 9654) in its version applicable at the material time ('the Workers' Statute'), which concerns collective redundancies, provides:

'1. For the purposes [of the Workers' Statute], "collective redundancy" shall mean the termination of contracts of employment for economic, technical or organisational reasons or reasons related to production, where, over a period of 90 days, the termination affects at least:

(a) 10 workers in undertakings employing fewer than 100 workers;

(b) 10% of the number of workers in undertakings employing between 100 and 300 workers;

(c) 30 workers in undertakings employing more than 300 workers.

Economic grounds shall be deemed to have been established where a negative economic situation is apparent from the financial performance of the undertaking, in cases where losses are actually sustained or forecast or where there is a persistent reduction in the level of ordinary revenue or sales. In any event, a reduction shall be deemed to be persistent if, for three consecutive quarters, the level of ordinary revenue or sales in each quarter is lower than that recorded in the same quarter of the preceding year.

…

2. Collective redundancy must be preceded by a period of consultation with the workers' legal representatives for a maximum period of 30 calendar days or 15 days in the case of undertakings with fewer than 50 workers. Consultation with workers' legal representatives must include, as a minimum, consideration of the possibilities of avoiding or reducing collective redundancy and of mitigating the consequences thereof by recourse to social support measures, such as outplacement or vocational

training or retraining to improve employability. The consultation shall be conducted in a special negotiating group on the understanding that where there are several places of work, this group is restricted to areas affected by the collective redundancy procedure. …

…

Notification of the commencement of the consultation period shall be given by letter sent by the employer to the workers' legal representatives, and a copy of the letter shall be forwarded to the employment authority. That document shall set out the following particulars:

(a) an indication of the reasons for the collective redundancies in accordance with paragraph 1;

(b) the number of workers affected by the redundancies and the professional categories to which they belong;

(c) the number of workers normally employed during the last year and professional categories to which they belong;

(d) when the redundancies are expected to take place;

(e) the criteria for selecting the workers to be made redundant;

(f) a copy of the notice of intention to initiate a collective redundancy procedure sent by the company management to the workers or their representatives;

(g) the identity of the workers' representatives forming part of the special negotiating body or, if appropriate, indication that the special negotiating body was not formed within the legal deadlines;

…

5. In cases to which this Article refers, the workers' legal representatives enjoy priority status in relation to being retained by the undertaking concerned. Priority status in relation to being retained may be afforded to other groups, such as workers with dependants, older workers and people with disabilities, through collective agreement or an agreement reached during the consultation period.

…'

11 Article 52 of the Workers' Statute, concerning termination of the contract on objective grounds provides:

'An employment contract may be terminated:

…

(c) when one of the causes set out in Article 51(1) [of the Workers' Statute] occurs and the termination affects fewer workers than the threshold laid down by this provision.

…'

12 Article 53 of the Workers' Statute, concerning the form and effects of the termination of an employment contract on objective grounds, is worded as follows:

'1. The adoption of a decision terminating the employment contract under the provisions of the preceding article is subject to the following conditions:

(a) The employee must be notified in writing of the reason for termination;

(b) At the same time as it gives written notification of termination, the employer must pay the worker a severance payment equal to 20 days' remuneration per year of service, periods shorter than a year being calculated pro rata on a monthly basis, up to a maximum of 12 monthly payments.

If the dismissal decision based on Article 52(c) [of the Workers' Statute] is based on economic reasons and that economic situation prevents the employer paying the employee the severance payment provided for in the preceding paragraph, the employer may refrain from making that payment, indicating in the written communication that it is unable to, without prejudice to the worker's right to claim the payment when the dismissal takes effect.

(c) The employer must give a period of notice of 15 days, from delivery of the personal notification to the worker until termination of the employment contract. In the situation referred to in Article 52(c), a copy of the written notice must be sent to the workers' legal representatives.

…

3. The dismissal decision may be appealed as if it were a dismissal for disciplinary reasons.

4. When the employer's decision to terminate the employment contract is motivated by any of the grounds of discrimination prohibited by the Constitution or by law, or was adopted in breach of the worker's fundamental rights and public freedoms, the dismissal decision shall be invalid, in which event it shall be for the judicial authority to make a declaration to that effect, *ex officio*.

Decisions to dismiss shall also be void in the following cases:

(a) when they are taken during the period of suspension of a contract of employment on grounds of maternity, risk during pregnancy, risk during breastfeeding, illness caused by pregnancy, childbirth or breastfeeding, adoption, fostering or paternity referred to in Article 45(1)(d) [of the Workers' Statute], or when it is notified on a date such that the notice period will end within that period of suspension;

(b) 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 the previous subparagraph, or when a worker who has applied for or is benefiting from leave of a kind referred to in Article 37(4), (4a) and (5) [of the Workers' Statute] or who has applied for or is benefiting from unpaid leave under Article 46(3) of this law is dismissed; when a worker who is a victim of domestic violence is dismissed for exercising her rights to a reduction or reorganisation of her working time, to geographical mobility, to a change of place of work or a suspension of the employment contract, in the terms and conditions recognised by [the Workers' Statute];

(c) when a worker is dismissed after returning to work following periods of suspension of the employment contract for reasons of maternity, adoption or fostering or paternity when less than nine months have elapsed since the birth, adoption or fostering of the child.

The provisions of the foregoing paragraphs shall apply except where, in those cases, the decision terminating the employment relationship is declared valid for reasons unconnected with the pregnancy or with the exercise of the right to the leave, paid or unpaid, referred to above.

The dismissal decision shall be considered justified if the reason on which it is based is evidenced and the conditions set out in paragraph 1 of the present article have been met. If that is not the case, it shall be declared unfounded.

Failure to give notice or excusable miscalculation of the compensation does not, however, result in a dismissal being unfounded, without prejudice to the obligation of the employer to pay the wages corresponding to that period or the correct amount of compensation, irrespective of the other consequences thereof.

5. A decision of the court declaring the dismissal decision to be invalid, valid or lacking foundation has the same effects as those set out for disciplinary dismissals, subject to the following modifications:

(a) When the dismissal decision is declared to be valid, the worker shall be entitled to the severance payment provided for in paragraph 1 of the present Article, which retains its validity if already received, and shall be considered unemployed for reasons beyond his control.

(b) When the dismissal decision is declared invalid and the employer reinstates the worker, the worker shall be required to reimburse the severance payment received. If financial compensation is substituted for reinstatement, that compensation shall be reduced by the amount of the severance payment received.'

13 Article 55 of the Workers' Statute, concerning the form and effects of termination for disciplinary reasons states, in paragraphs 5 and 6:

'5. Dismissal motivated by any of the grounds of discrimination prohibited by the Constitution or by law, or which has been carried out in breach of the worker's fundamental rights and public freedoms, shall be void.

Dismissals shall also be void in the following cases:

(a) where they occur during the period of suspension of a contract of employment on grounds of maternity, risk during pregnancy, risk during breastfeeding, illness caused by pregnancy, childbirth or breastfeeding, adoption, fostering or paternity referred to in Article 45(1)(d) [of the Workers' Statute], or when it is notified on a date such that the notice period will end within that period of suspension;

(b) 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 the previous subparagraph, or when a worker who has applied for or is benefiting from leave of a kind referred to in Article 37(4), (4a) and (5) [of the Workers' Statute] or who has applied for or is benefiting from unpaid leave under Article 46(3) of this law is dismissed; when a worker who is a victim of domestic violence is dismissed for exercising her rights to a reduction or reorganisation of her working time, to geographical mobility, to a change of place of work or a suspension of the employment contract, in the terms and conditions recognised by [the Workers' Statute];

(c) when a worker is dismissed after returning to work following periods of suspension of the employment contract owing to maternity, adoption or fostering or paternity when less than nine months have elapsed since the birth, adoption or fostering of the child.

The provisions of the foregoing paragraphs shall apply except where, in those cases, the termination of the employment relationship is declared valid for reasons unconnected with the pregnancy or with the exercise of the right to the leave, paid or unpaid, referred to above.

6. Dismissals declared void shall entail the immediate reinstatement of the worker and the payment of earnings not received.'

14 Article 13 of the Real Decreto 1483/2012, por el que se aprueba el Reglamento de los procedimientos de despido colectivo y de suspensión de contratos y reducción de jornada (Royal Decree 1483/2012 approving the regulations for collective redundancy procedures and for suspension of contracts and reduction of daily working time) of 29 October 2012 (BOE No 261 of 30 October 2012, p. 76292) provides:

'1. In accordance with the provisions of Article 51(5) and Article 68(b) of the [Workers' Statute] as well as Article 10(3) of the Ley Orgánica 11/1985 de Libertad Sindical [(Organic Law 11/1985 on the freedom of association)], of 2 August 1985, the workers' legal representatives shall enjoy priority status in relation to being retained over other workers affected by the collective redundancy procedure.

2. Priority status in relation to being retained shall also be enjoyed by workers belonging to other groups, for example workers with dependants, older workers and people with disabilities, where this has been agreed by collective agreement or in the agreement or in the agreement reached during the consultation period.

3. The undertaking must give reasons in the final collective redundancy decision referred to in Article 12 for the assignment of workers enjoying priority for retention in the undertaking.'

15 Article 122(2) of the Ley 36/2011, reguladora de la jurisdicción social (Law 36/2011 governing the social courts) of 10 October 2011 (BOE No 245 of 11 October 2011, p. 106584), in its version applicable at the time of the facts in the main proceedings, provides:

'A decision to dismiss shall be void:

…

(b) when it was taken in circumvention of the law, without regard to the provisions laid down for collective redundancies, in the cases referred to in the last line of Article 51(1) [of the Workers' Statute];

(c) where it occurs during the period of suspension of a contract of employment on grounds of maternity, risk during pregnancy, risk during breastfeeding, illness caused by pregnancy, childbirth or natural breastfeeding, adoption, fostering or paternity referred to in Article 45(1)(d) [of the Workers' Statute], or when it is notified on a date such that the notice period will end within that period of suspension;

(d) 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 (c) above, or when a worker who has applied for or is benefiting from leave of a kind referred to in Article 37(4), (4a) and (5) [of the Workers' Statute] or who has applied for or is benefiting from unpaid leave under Article 46(3) of this law is dismissed; when a worker who is a victim of domestic violence is dismissed for exercising her rights to a reduction or reorganisation of her working time, to geographical mobility, to a change of place of work or a suspension of the employment contract, in the terms and conditions recognised by [the Workers' Statute];

(e) when a worker is dismissed after returning to work following periods of suspension of the employment contract for reasons of maternity, adoption or fostering or paternity when less than nine months have elapsed since the birth, adoption or fostering of the child.

The provisions set out above in subparagraphs (c), (d), and (e) shall apply except where, in those cases, the decision terminating the employment relationship is declared valid for reasons unconnected with the pregnancy or with the exercise of the right to the leave, paid or unpaid, referred to above.

…'

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

16 On 18 April 2006, Ms Porras Guisado was engaged by Bankia.

17 On the 9th January 2013, Bankia opened a period of consultation with the workers' representatives, namely the CCOO, UGT, ACCAM, SATE and CSICA trade unions, with a view to effecting a collective redundancy.

18 On 8 February 2013, the special negotiating body, as referred to in Article 51(2) of the Workers' Statute, reached an agreement covering, inter alia, the collective redundancy to be carried out, changes to working conditions and functional and geographical mobility ('the agreement of 8 February 2013').

19 It is clear from the order for reference that, according to the minutes relating to that agreement, the criteria to be taken into account by the undertaking in determining the persons affected by the dismissal were the following:

'(1) The area of application will be the province or the groups or functional units of the central services where workers are employed.

(2) In that connection, once a decision has been made regarding the work posts to be eliminated as a result of the procedure for acceptance [into the compensated redundancy scheme], and without account being taken of those persons who are affected by geographic mobility and redeployment procedures in order to cover the needs arising from the voluntary departures …, the undertaking shall designate the persons affected by the collective redundancy in the corresponding area of application having regard to the scores resulting from the skills assessment and evaluation of potential carried out by the undertaking.'

20 In the same document, the following are also laid down as criteria for priority status in relation to being retained:

'(1) Where two persons are married or cohabiting as a couple, only one of the two may be affected, as per their choice, in accordance with functional needs and required profiles, with the possibility of a geographical change being necessary in order for this condition to be fulfilled.

(2) Regarding workers with a degree of disability higher than 33%, as recognised and certified by the relevant bodies of each autonomous community, if their post is eliminated the undertaking will consider redeploying them, subject to the new post corresponding to their profile.'

21 On 13 November 2013, Bankia notified Ms Porras Guisado of her dismissal by letter, in which it is stated as follows:

'In the specific case of the Province of Barcelona[, Spain,] where you work, following completion of the procedure for acceptance of the programme of dismissals attracting compensation, disregarding persons affected by geographic mobility procedures and changes of work post, a more extensive adjustment to the workforce has become necessary, requiring the termination of the employment contracts of persons designated directly by the undertaking, in accordance with the provisions of [the agreement of 8 February 2013].

In that regard, as a result of the assessment process carried out in the undertaking during the consultation period, this being a relevant factor in the adoption of the agreement of 8 February 2013, of which it formed an integral part, your score is 6 points, placing you among the lower scores of the Province of Barcelona, where you work.

Therefore, in application of the assessment criteria set out and for the reasons stated, I inform you that it has been decided to terminate your contract of employment with effect from 10 December 2013.'

22 On the day of notification of that letter of dismissal, Ms Porras Guisado received from Bankia a sum of money by way of compensation.

23 At the time of her dismissal, Ms Porras Guisado was pregnant.

24 On 9 January 2014 Ms Porras Guisado requested a conciliation procedure, but this was unsuccessful.

25 On 3 February 2014, Ms Porras Guisado challenged her dismissal before the Juzgado de lo Social No 1 de Mataró (Social Court No 1, Mataró, Spain), which dismissed her action by judgment of 25 February 2015.

26 Ms Porras Guisado appealed against that judgment to the referring court, namely the Tribunal Superior de Justicia de Cataluña (High Court of Justice of Catalonia, Spain).

27 That court notes that the request for a preliminary ruling does not concern the protection from discrimination established 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 2006 L 204, p. 23). Rather, it seeks to determine whether the Spanish legislation constitutes a correct transposition of Article 10 of Directive 92/85 which prohibits, except in exceptional cases, the dismissal of pregnant workers.

28 It is in that context that the Tribunal Superior de Justicia de Cataluña (High Court of Justice of Catalonia) decided to stay the proceedings and to refer the following questions to the Court for a preliminary ruling:

'(1) Should the expression "exceptional cases not connected with their condition which are permitted under national legislation and/or practice …" in Article 10(1) of Directive [92/85], which constitutes an exception to the prohibition against dismissing pregnant workers and workers who have recently given birth or are breastfeeding, be interpreted as not corresponding to the expression "… one or more reasons not related to the individual workers concerned …" referred to in Article 1(1)(a) of Directive 98/59, but rather as being more restricted than the latter?

(2) In the event of collective redundancy, in order to decide whether there are exceptional cases which justify the dismissal of pregnant workers and workers who have recently given birth or are breastfeeding, pursuant to Article 10(1) of Directive 92/85, is there a requirement that the worker

concerned cannot be reassigned to another work post or is it sufficient for her dismissal to be based on proof of economic or technical reasons or reasons relating to production that affect her work post?

(3) Is national legislation, such as that in force in Spain, which, in order to transpose the prohibition laid down in Article 10(1) of Directive 92/85 on dismissing pregnant workers and workers who have recently given birth or are breastfeeding, does not prohibit such a dismissal (preventative protection), but provides that the dismissal is to be declared void (reparative protection), where the undertaking concerned fails to provide reasons which justify the worker's dismissal, compatible with Article 10(1) of that directive?

(4) Is national legislation, such as that in force in Spain, which makes no provision in cases of collective redundancy for pregnant workers and workers who have recently given birth or are breastfeeding to be afforded priority retention in the undertaking concerned compatible with Article 10(1) of Directive 92/85?

(5) Is national legislation compatible with Article 10(2) of Directive 92/85 if it treats as sufficient a letter such as that in the main proceedings dismissing a pregnant worker in the context of a collective redundancy procedure without making reference to the existence of any exceptional grounds for her dismissal over and above those on which the collective redundancy is based?'

Consideration of the questions referred

Admissibility of the request for a preliminary ruling

Compliance with national procedural rules

29 Bankia submits that the reference for a preliminary ruling is inadmissible on the ground that the referring court failed to comply with the national procedural rules. In the context of the dispute in the main proceedings, Ms Porras Guisado claimed breach of Directive 92/85 only on appeal. However, according to national procedural rules, a new cause of action, separate from those set out in the document instituting the proceedings, cannot be accepted.

30 It is Bankia's view that, in any case, in accordance with the case-law of the Spanish courts, Ms Porras Guisado, as an individual bringing an action against her dismissal, has no standing to challenge the criteria for establishing priority status in relation to being retained, as agreed between Bankia and the workers' representatives and set out in the agreement of 8 February 2013.

31 In that regard, it should be borne in mind, first, that in the context of Article 267 TFEU the Court has no jurisdiction to rule either on the interpretation of provisions of national laws or national regulations or on their conformity with EU law and, second, that it is not for the Court to determine whether the decision whereby a matter is brought before it was taken in accordance with the rules of national law governing the organisation of the courts and their procedure (judgment of 7 July 2016, *Genentech*, C-567/14, EU:C:2016:526, paragraph 22 and the case-law cited).

32 Therefore, the argument alleging failure to comply with national procedural rules cannot, in the present case, cause the request for a preliminary ruling to be dismissed as inadmissible.

The hypothetical nature of the questions referred

33 Bankia submits that, at the time of her dismissal, Ms Porras Guisado had not informed it of her pregnancy. In those circumstances, in the light of the definition of 'pregnant worker' set out in Article 2(a) of Directive 92/85, that directive is not applicable to the dispute in the main proceedings. Accordingly, the questions referred by the national court are hypothetical.

34 In that regard, it must be borne in mind that, in the context of the instrument of cooperation between the Court of Justice and national courts that is established by Article 267 TFEU, questions concerning EU law enjoy a presumption of relevance. The Court may refuse to give a ruling on a question referred by a national court for a preliminary ruling, under Article 267 TFEU, only where, for instance, the requirements concerning the content of a request for a preliminary ruling, set out in Article 94 of the Rules of Procedure of the Court of Justice, are not satisfied or where it is quite obvious that the interpretation of a provision of EU law, or the assessment of its validity, which is sought by the national court, bears no relation to the actual facts of the main action or to its purpose or where the problem is hypothetical (judgment of 28 March 2017, *Rosneft*, C-72/15, EU:C:2017:236, paragraph 50 and the case-law cited).

35 In the present case, as stated in paragraph 27 of the present judgment, the referring court has specifically stated that the request for a preliminary ruling seeks to ascertain whether the Spanish regulation constitutes a correct transposition of Article 10 of Directive 92/85, which prohibits, except in exceptional cases, the dismissal of pregnant workers.

36 It is not disputed that Ms Porras Guisado was pregnant at the time of her dismissal. Furthermore, it is clear from the file before the Court that she submitted, in the context of the national proceedings, that she had informed her colleagues and superiors of her pregnancy at that time.

37 In those circumstances and in the absence of any information to the contrary from the referring court, it must be held that the referring court assumes that Article 10 of Directive 92/85 applies to Ms Porras Guisado.

38 As a result, the questions asked do not appear to be manifestly hypothetical or devoid of any connection with the facts or purpose of the dispute in the main proceedings.

39 In those circumstances, the request for a preliminary ruling must be declared admissible.

The first question

40 By its first question, the referring court asks whether Article 10(1) of Directive 92/85 must be interpreted to the effect that the 'exceptional cases not connected with their condition which are permitted under national legislation and/or practice …', as an exception to the prohibition against dismissing pregnant workers and workers who have recently given birth or are breastfeeding, do not correspond to the '… one or more reasons not related to the individual workers concerned …' referred to in Article 1(1)(a) of Directive 98/59, but are more restricted than the latter.

41 According to Article 10(1) of Directive 92/85, Member States are to 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.

42 Article 1(1)(a) of Directive 98/59 states that 'collective redundancies' refers to dismissals effected by an employer for one or more reasons not related to the individual workers concerned, provided that certain conditions concerning numbers and periods of time are satisfied (see judgment of 10 December 2009, *Rodríguez Mayor and Others*, C-323/08, EU:C:2009:770, paragraph 35).

43 When a pregnant worker, or a worker who has recently given birth or is breastfeeding is dismissed within the context of a collective redundancy procedure, she belongs both to the group of workers protected under Directive 92/85 and to the group of workers protected under Directive 98/59. On that basis, she should benefit, at the same time, from the rights provided for by both of those directives, which are complementary, as the Advocate General noted in point 53 of her Opinion.

44 As regards the combined application of those directives, the referring court wishes to know, in essence, whether Article 10(1) of Directive 92/85 precludes national legislation which allows the dismissal of a pregnant worker on account of a collective redundancy, within the meaning of Article 1(1) of Directive 98/59.

45 In that regard, it must be noted that the prohibition of dismissal laid down in Article 10(1) of Directive 92/85 aims, as is clear from the 15th recital in the preamble to that directive, to prevent the harmful effects on the physical and mental state of pregnant workers and workers who have recently given birth or who are breastfeeding which the risk of dismissal for reasons associated with their condition may cause.

46 It is precisely in view of the harmful effects which the risk of dismissal may have on the physical and mental state of workers who are pregnant, have recently given birth or are breastfeeding, including the particularly serious risk that pregnant women may be prompted voluntarily to terminate their pregnancy, that, pursuant to Article 10 of Directive 92/85, the EU legislature provided for special protection for women, by prohibiting dismissal during the period from the beginning of pregnancy to the end of maternity leave, save in exceptional cases not connected with their condition, provided that the employer gives substantiated grounds for the dismissal in writing (see, to that effect, judgment of 11 November 2010, *Danosa*, C-232/09, EU:C:2010:674, paragraphs 60 and 61).

47 Thus, when the dismissal decision is taken for reasons essentially connected with the worker's pregnancy, it is incompatible with the prohibition on dismissal laid down in Article 10 of that directive (see, to that effect, judgment of 11 November 2010, *Danosa*, C-232/09, EU:C:2010:674, paragraph 62).

48 By contrast, a dismissal decision taken during the period from the beginning of pregnancy to the end of the maternity leave for reasons unconnected with the worker's pregnancy would not be contrary to Article 10 of Directive 92/85, provided, however, that the employer gives substantiated grounds for dismissal in writing and that the dismissal of the person concerned is permitted under the relevant national legislation and/or practice, in accordance with Article 10(1) and (2) of Directive 92/85 (see, to that effect, judgment of 11 November 2010, *Danosa*, C-232/09, EU:C:2010:674, paragraph 63).

49 It follows that a reason or reasons, not related to the individual workers concerned, for making the collective redundancies within the meaning of Article 1(1) of Directive 98/59 fall within the exceptional cases not related to the condition of pregnant workers within the meaning of Article 10(1) of Directive 92/85.

50 In the light of the foregoing considerations, the answer to the first question is that Article 10(1) of Directive 92/85 must be interpreted as not precluding national legislation which permits the dismissal of a pregnant worker because of a collective redundancy within the meaning of Article 1(1)(a) of Directive 98/59.

The fifth question

51 By its fifth question, which should be examined next, the referring court asks whether Article 10(2) of Directive 92/85 must be interpreted as precluding national legislation which allows an employer to dismiss a pregnant worker in the context of a collective redundancy without giving her any grounds other than those justifying the collective redundancy and without informing her of exceptional circumstances.

52 According to Article 10(2) of Directive 92/85, when a worker is dismissed during the period from the beginning of her pregnancy to the end of her maternity leave, the employer must cite duly substantiated grounds for her dismissal in writing.

53 Thus the employer must inform a pregnant worker, whom he is preparing to dismiss or has already dismissed, in writing, of the reasons not related to that worker for making collective redundancies within the meaning of Article 1(1)(a) of Directive 98/59. Those reasons can be, inter alia, economic, technical or relating to the undertaking's organisation or production.

54 The employer must, in addition, inform the pregnant worker of the objective criteria chosen to identify the workers to be made redundant.

55 In those circumstances, the answer to the fifth question is that Article 10(2) of Directive 92/85 must be interpreted as not precluding national legislation which allows an employer to dismiss a pregnant worker in the context of a collective redundancy without giving her any grounds other than those justifying the collective redundancy, provided that the objective criteria chosen to identify the workers to be made redundant are cited.

The third question

56 By its third question, the referring court asks, in essence, whether Article 10(1) of Directive 92/85 must be interpreted as precluding national legislation which does not, in principle, prohibit the dismissal of a worker who is pregnant, has recently given birth or is breastfeeding, as a preventative measure, but which provides, by way of reparation, only for that dismissal to be declared void when it is unlawful.

57 As a preliminary remark, it should be noted that it follows from Article 288 TFEU that Member States are required, when transposing a directive, to ensure that it is fully effective, but they retain a broad discretion as to the choice of ways and means of ensuring that the directive is implemented. That freedom of choice does not affect the obligation imposed on all Member States to which the directive is addressed to adopt all the measures necessary to ensure that the directive concerned is fully effective in accordance with the objective which it seeks to attain (judgments of 6 October 2010, *Base and Others*, C-389/08, EU:C:2010:584, paragraphs 24 and 25, and of 19 October 2016, *Ormaetxea Garai and Lorenzo Almendros*, C-424/15, EU:C:2016:780, paragraph 29).

58 As regards the wording of Article 10 of Directive 92/85, first, according to paragraph 1 of that article, Member States must take the necessary measures to prohibit, in principle, the dismissal of those workers. Second, paragraph 3 of that article states that Member States must take the necessary measures to protect such workers from consequences of dismissal which is unlawful by virtue of paragraph 1 of that article.

59 Article 10 of Directive 92/85 thus makes an express distinction between protection against dismissal itself, as a preventative measure, and protection, by way of compensation, from the consequences of dismissal. Therefore, proper implementation of that article requires Member States to establish such double protection.

60 As regards the preventive protection of pregnant workers and workers who have recently given birth or are breastfeeding, it must be noted that this is of particular importance in the context of Directive 92/85.

61 According to the 15th recital of that directive, the risk of dismissal for reasons associated with their condition may have harmful effects on the physical and mental state of pregnant workers and workers who have recently given birth or who are breastfeeding and provision should be made for such dismissal to be prohibited.

62 It is in view of the harmful effects which the risk of dismissal may have on the physical and mental state of workers who are pregnant, have recently given birth or are breastfeeding, including the particularly serious risk that pregnant women may be prompted voluntarily to terminate their pregnancy, that, pursuant to Article 10 of Directive 92/85, the EU legislature provided for special protection for women, by prohibiting dismissal during the period from the beginning of pregnancy to the end of maternity leave (see judgments of 14 July 1994, *Webb*, C-32/93, EU:C:1994:300, paragraph 21, and of 11 November 2010, *Danosa*, C-232/09, EU:C:2010:674, paragraph 60).

63 Having regard to the objectives pursued by Directive 92/85 and, more specifically, to those pursued by Article 10 of that directive, the protection granted by that provision to workers who are pregnant and who have recently given birth or who are breastfeeding precludes both the taking of a decision to dismiss as well as the steps of preparing for the dismissal, such as searching for and finding a permanent replacement for the relevant employee on the grounds of the pregnancy and/or the birth of a child (see, to that effect, judgment of 11 October 2007, *Paquay*, C-460/06, EU:C:2007:601, paragraph 33).

64 In view of the risk to the physical and mental state of pregnant workers, workers who have recently given birth or who are breastfeeding, protection by way of reparation, even if it leads to the reintegration of the worker dismissed and the payment of wages not received because of dismissal, cannot replace protection by way of prevention.

65 As a result, in order to ensure the faithful transposition Article 10 of Directive 92/85, and the protection of pregnant workers and workers who have recently given birth or are breastfeeding from the risk of dismissal, Member States cannot confine themselves to providing, by way of reparation, only for that dismissal to be declared void when it is not justified.

66 Having regard to the above considerations, the answer to the third question is that Article 10(1) of Directive 92/85 must be interpreted as precluding national legislation which does not prohibit, in principle, the dismissal of a worker who is pregnant, has recently given birth or is breastfeeding, as a preventative measure, but which provides, by way of reparation, only for such a dismissal to be declared void when it is unlawful.

The second and fourth questions

67 By its second and fourth questions, which it is appropriate to examine together and last, the referring court asks, in essence, whether Article 10(1) of Directive 92/85 must be interpreted as precluding national legislation which, in the context of a collective redundancy within the meaning of Directive 98/59, makes no provision for pregnant workers and workers who have recently given birth or are breastfeeding to be afforded, prior to that dismissal, priority status in relation to being either retained or reassigned to another post.

68 According to Article 10(1) of Directive 92/85, Member States ‘shall take the necessary measures’ to prohibit, in principle, the dismissal of workers during the period from the beginning of their pregnancy to the end of the maternity leave.

69 As regards whether pregnant workers and workers who have recently given birth or are breastfeeding are to have priority for retention, in its decision the referring court notes that, according to Spanish legislation, workers' legal representatives are to have priority as regards being retained in the undertaking over other workers affected by the collective redundancy procedure, and workers belonging to other groups, such as workers with dependants, older workers or workers with disabilities, may also enjoy priority status in relation to being retained when that has been agreed through negotiation.

70 The referring court infers from that regulation that pregnant workers enjoy priority status in relation to being retained in the undertaking only when such a status is agreed through collective bargaining. The referring court adds that workers with priority status for being retained may be dismissed, but that, in such a case, the employer must justify exceptional grounds different to those on which the collective redundancy is based.

71 In the present case, in accordance with the answer given to the first question, Article 10(1) of Directive 92/85 must be interpreted as not precluding national legislation which permits the dismissal of a pregnant worker because of a collective redundancy within the meaning of Article 1(1)(a) of Directive 98/59.

72 In that regard it is true, as noted by the European Commission, that Directive 92/85 — in particular Article 10(1) — does not require Member States to grant pregnant workers and workers who have recently given birth or are breastfeeding priority status for retention and redeployment, applicable prior to the collective redundancy.

73 Nevertheless, that directive, which only contains minimum requirements, in no way prevents Member States from providing higher protection for pregnant workers, workers who have recently given birth and workers who are breastfeeding (see, to that effect, judgment of 4 October 2001, *Jiménez Melgar*, C-438/99, EU:C:2001:509, paragraph 37).

74 Accordingly, the answer to the second and fourth questions is that Article 10(1) of Directive 92/85 must be interpreted as not precluding national legislation which, in the context of a collective redundancy within the meaning of Directive 98/59, makes no provision for pregnant workers and workers who have recently given birth or who are breastfeeding to be afforded, prior to that dismissal, priority status in relation to either being retained or redeployed, but as not excluding the right of Member States to provide for a higher level of protection for such workers.

Costs

75 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Third Chamber) hereby rules:

1. **Article 10(1) 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) must be interpreted as not precluding national legislation which permits the dismissal of a pregnant worker because of a collective redundancy within the meaning of Article 1(1)(a) of Directive 98/59/EC of 20 July 1998 on the approximation of the laws of the Member States relating to collective redundancies.**

2. **Article 10(2) of Directive 92/85 must be interpreted as not precluding national legislation which allows an employer to dismiss a pregnant worker in the context of a collective redundancy without giving any grounds other than those justifying the collective dismissal, provided that the objective criteria chosen to identify the workers to be made redundant are cited.**

3. **Article 10(1) of Directive 92/85 must be interpreted as precluding national legislation which does not prohibit, in principle, the dismissal of a worker who is pregnant, has recently given birth or is breastfeeding as a preventative measure, but which provides, by way of reparation, only for that dismissal to be declared void when it is unlawful.**

4. **Article 10(1) of Directive 92/85 must be interpreted as not precluding national legislation which, in the context of a collective redundancy within the meaning of Directive 98/59, makes no provision for pregnant workers and workers who have recently given birth or who are breastfeeding to be afforded, prior to that dismissal, priority status in relation to being either retained or redeployed, but as not excluding the right of Member States to provide for a higher level of protection for such workers.**

[Signatures]