JUDGMENT OF THE COURT (Sixth Chamber)
18 March 2004 *

In Case C-342/01,

REFERENCE to the Court under Article 234 EC by the Juzgado de lo Social No 33 de Madrid (Spain) for a preliminary ruling in the proceedings pending before that court between

María Paz Merino Gómez

and

Continental Industrias del Caucho SA,

on the interpretation of Article 7(1) of Council Directive 93/104/EC of 23 November 1993 concerning certain aspects of the organisation of working time (OJ 1993 L 307, p. 18), of Article 11(2)(a) 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) and of Article 5(1) of Council Directive 76/207/EEC of 9 February 1976 on the implementation of

* Language of the case: Spanish.

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),

THE COURT (Sixth Chamber),

composed of: J.N. Cunha Rodrigues, acting for the President of the Sixth Chamber, J.-P. Puissochet, R. Schintgen, F. Macken and N. Colneric (Rapporteur), Judges,

Advocate General: J. Mischo,
Registrar: R. Grass,

after considering the written observations submitted on behalf of:

— Ms Merino Gómez, by G.J. Gonzalez Gil, abogada,

— the Spanish Government, by R. Silva de Lapuerta, acting as Agent,

— the Italian Government, by I.M. Braguglia, acting as Agent, and by G. Fiengo, avvocato dello Stato,

— the Commission of the European Communities, by N. Yerrel and I. Martínez del Peral, acting as Agents,

having regard to the report of the Judge-Rapporteur,

after hearing the Opinion of the Advocate General at the sitting on 3 April 2003,

gives the following

Judgment

By order of 3 September 2001, received at the Court on 12 September 2001, the Juzgado de lo Social No 33 de Madrid referred to the Court for a preliminary ruling pursuant to Article 234 EC two questions on the interpretation of Article 7 (1) of Council Directive 93/104/EC of 23 November 1993 concerning certain aspects of the organisation of working time (OJ 1993 L 307, p. 18), of Article 11 (2)(a) 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), and of Article 5(1) of Council Directive 76/207/EEC of 9 February 1976 on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions (OJ 1976 L 39, p. 40).

2 Those questions were raised in proceedings between Ms Merino Gómez and Continental Industrias del Caucho SA ('Continental Industrias') concerning a request for annual leave made by Ms Merino Gómez, whose maternity leave coincided with one of the periods for annual leave in her workshop, agreed in a collective agreement.

Legal background

Community law

3 Article 7 of Directive 93/104 provides:

'Annual leave

1. Member States shall take the measures necessary to ensure that every worker is entitled to paid annual leave of at least four weeks in accordance with the conditions for entitlement to, and granting of, such leave laid down by national legislation and/or practice.

2. The minimum period of paid annual leave may not be replaced by an allowance in lieu, except where the employment relationship is terminated.'

Article 15 of Directive 93/104 provides;

'More favourable provisions

This Directive shall not affect Member States' right to apply or introduce laws, regulations or administrative provisions more favourable to the protection of the safety and health of workers or to facilitate or permit the application of collective agreements or agreements concluded between the two sides of industry which are more favourable to the protection of the safety and health of workers.'

The 14th recital in the preamble to Directive 92/85 states that the vulnerability of pregnant workers, workers who have recently given birth or workers who are breastfeeding makes it necessary for them to be granted the right to maternity leave.

Article 2 of Directive 92/85 defines, for the purposes of the directive, 'pregnant worker', 'worker who has recently given birth' and 'worker who is breastfeeding' by referring to national legislation and/or practice.

Article 8(1) of Directive 92/85 provides;

'Member States shall take the necessary measures to ensure that workers within the meaning of Article 2 are entitled to a continuous period of maternity leave of at least 14 weeks allocated before and/or after confinement in accordance with national legislation and/or practice.'

8 Article 11 of Directive 92/85 provides

'Employment rights

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

...

2. in the case referred to in Article 8, the following must be ensured:

(a) the rights connected with the employment contract of workers within the meaning of Article 2, other than those referred to in point (b) below;

(b) maintenance of a payment to, and/or entitlement to an adequate allowance for, workers within the meaning of Article 2;

...'

9 Under Article 2(1) and (3) of Directive 76/207:

'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.

...

3. This Directive shall be without prejudice to provisions concerning the protection of women, particularly as regards pregnancy and maternity.'

10 Article 5 of Directive 76/207 provides that:

'1. Application of the principle of equal treatment with regard to working conditions, including the conditions governing dismissal, means that men and women shall be guaranteed the same conditions without discrimination on grounds of sex.

2. To this end, Member States shall take the measures necessary to ensure that:

...

(b) any provisions contrary to the principle of equal treatment which are included in collective agreements, individual contracts of employment, internal rules of undertakings or in rules governing the independent occupations and professions shall be, or may be declared, null and void or may be amended;

...'

National law

Relevant law

11 Article 38 of the Estatuto de los Trabajadores (Workers' Statute), approved by Legislative Royal Decree No 1/1995 of 24 March 1995 (*BOE* No 75 of 29 March 1995, p. 9654; 'the Workers' Statute'), provides that:

'1. The period of paid annual leave, which may not be replaced by an allowance in lieu, shall be that agreed in collective agreements or individual contracts. In no circumstances shall the period of leave be less than thirty calendar days.

2. The period or periods during which leave may be taken shall be fixed by mutual consent between the employer and the workers, in accordance, where appropriate, with the provisions of the collective agreements on the annual planning of leave.

...'

12 Article 48(4) of the Workers' Statute provides:

'In the case of childbirth, the contract shall be suspended for an uninterrupted period of sixteen weeks, which may be extended where there are multiple births by two weeks per child, starting with the second child. The leave shall be allocated in accordance with the wishes of the woman concerned, provided that at least six weeks is taken immediately following the birth...'

The collective agreement

13 Relations between Continental Industrias, a tyre manufacturer, and its staff are regulated by the collective agreement for the chemicals sector. Article 46 of the agreement, which concerns suspension of the employment contract by reason of maternity, provides for a period of sixteen weeks, the same as the statutory period.

14 Article 43 of the agreement regulates the taking and duration of annual leave. The holiday entitlement is 30 calendar days, with the requirement that a continuous period of at least 15 days must be taken between June and September.

The collective agreement between the employer and the workforce

15 By a collective agreement concluded on 7 May 2001 between Continental Industrias and its workers' representatives, following conciliation reached in a collective dispute settlement procedure instigated at the request of those representatives, two general periods were established within which all staff could take leave, the first running from 16 July to 12 August 2001 and the second from 6 August to 2 September 2001.

16 That agreement also provided, by way of exception, that six workers could take holiday in September. Priority for the exceptional leave period was given to those who had not been able to choose their holiday period the previous year.

The main proceedings

17 Ms Merino Gómez has been employed as a factory worker by Continental Industrias since 12 September 1994. She was on maternity leave from 5 May 2001 to 24 August 2001.

18 Ms Merino Gómez had been able to choose her holiday period in 2000 and, accordingly, she should not have been able to take her annual leave in September 2001 during the exceptional period.

19 She none the less applied to take that leave from 25 August to 21 September 2001 or, alternatively, from 1 September to 27 September 2001, that is to say during a period following her maternity leave.

20 Continental Industrias did not allow Ms Merino Gómez's request.

21 On 6 June 2001, Ms Merino Gómez brought proceedings against Continental Industrias before the Juzgados de lo Social de Madrid in respect of her application for leave.

The questions referred for a preliminary ruling

22 According to the national court, the Spanish courts have already been seised of cases such as the dispute in the main proceedings, namely cases in which the period of maternity leave overlaps with the period collectively agreed for staff holidays. It points out that various higher courts, in particular the Tribunal Supremo (Supreme Court) in its judgments of 30 November 1995 and 27 June 1996, the Tribunal Superior de Justicia de Navarra (High Court of Justice, Navarre) in its judgment of 10 February 2000, the Tribunal Superior de Justicia, Andalusia, in its judgment of 7 December 1999, and the Tribunal Superior de Justicia, Madrid, in its judgment of 13 July 1999, have held that in such cases the

worker is not entitled to take her annual leave during a period other than the one fixed by the collective agreement concluded in the undertaking, since compliance with what has thereby been agreed takes precedence over the individual right of the worker to take leave.

23 The referring court does not share that view. It points out that in the light of the Court of Justice's decision on Article 7 of Directive 93/104 in Case C-173/99 *BECTU* [2001] ECR I-4881, its decision on Article 8 of Directive 92/85 in Case C-411/96 *Boyle and Others* [1998] ECR I-6401 and its decision on Directive 76/207 in Case C-136/95 *Thibault* [1998] ECR I-2011, the principle of equality of treatment for and non-discrimination of women who are pregnant or breastfeeding means that a worker must be able to take her annual leave during a period other than the period of her maternity leave, if the dates of annual leave, fixed in advance by a collective agreement between the undertaking and the workers' representatives, coincide with those of her maternity leave. Allowing the two periods of leave to overlap would entail one of them being lost, in this case the annual holiday.

24 According to the referring court, such a finding is not precluded by the fact that the holiday dates for the entire workforce were fixed in advance by collective agreement. In order to comply with Community rules guaranteeing the principle of equal treatment and non-discrimination and the entitlement to annual leave, the agreement of 7 May 2001 should have made provision for the special situation of pregnant women at the undertaking by safeguarding their dual entitlement to maternity leave and annual leave. Relying on the judgment in Case C-333/97 *Lewen* [1999] ECR I-7243, the referring court takes the view that by failing to provide that safeguard, the agreement infringes Community law.

25 If its first question is answered in the affirmative, that is to say in the event of its interpretation of Community law being endorsed, the referring court submits that there is a second question to be settled in this case. In that regard, it observes that female workers are entitled, under national legislation, to a period of maternity

leave which exceeds by two weeks the minimum laid down in Article 8(1) of Directive 92/85 and that national legislation also entitles them to annual leave of 30 calendar days, namely two days more than the four weeks (28 days) provided for by Article 7 of Directive 93/104.

26 Since national law is more favourable to workers than Directive 92/85, the referring court is of the view that the worker must be entitled to annual leave of 30 calendar days, as provided for by national legislation and by the relevant collective agreement.

27 It was in those circumstances that the Juzgado de lo Social No 33 de Madrid decided to stay the proceedings and to refer the following questions to the Court for a preliminary ruling:

'1. Where collective agreements between an employer and workers' representatives fix the timing of leave for the entire workforce, and where the dates concerned coincide with those of a worker's maternity leave, do Article 7(1) of Directive 93/104, Article 11(2)(a) of Directive 92/85 and Article 5(1) of Directive 76/207 guarantee that worker's entitlement to take annual leave during a period other than the one agreed, which does not coincide with her period of maternity leave?

2. If the first question is answered in the affirmative, what is the substantive scope of the entitlement to annual leave? Does it cover exclusively the four weeks' leave referred to in Article 7(1) of Directive 93/104, or does it extend to the 30 calendar days laid down by national legislation in Article 38(1) of the Workers' Statute?'

The questions referred for a preliminary ruling

The first question

28 Under Article 7(1) of Directive 93/104 Member States are to take the necessary measures to ensure that every worker is entitled to paid annual leave of at least four weeks in accordance with the conditions for entitlement to, and granting of, such leave laid down by national legislation and/or practice.

29 The entitlement of every worker to paid annual leave must be regarded as a particularly important principle of Community social law from which there can be no derogations and whose implementation by the competent national authorities must be confined within the limits expressly laid down by Directive 93/104 (*BECTU*, paragraph 43).

30 It is significant in that connection that the directive also embodies the rule that a worker must normally be entitled to actual rest, with a view to ensuring effective protection of his health and safety, since it is only where the employment relationship is terminated that Article 7(2) permits an allowance to be paid in lieu of paid annual leave (*BECTU*, paragraph 44).

31 Article 7(1) of Directive 93/104, by virtue of which the Member States are to take the necessary measures 'in accordance with the conditions for entitlement to, and granting of, such leave laid down by national legislation and/or practice', must be

understood as meaning that the national implementing rules must in any event take account of the right to paid annual leave of at least four weeks.

32 The purpose of the entitlement to annual leave is different from that of the entitlement to maternity leave. Maternity leave is intended, first, to protect a woman's biological condition during and after pregnancy and, second, to protect the special relationship between a woman and her child over the period which follows pregnancy and childbirth (see Case 184/83 *Hofmann* [1984] ECR 3047, paragraph 25, *Thibault*, paragraph 25, and *Boyle*, paragraph 41).

33 Article 7(1) of Directive 93/104 must thus be interpreted as meaning that where the dates of a worker's maternity leave coincide with those of the entire workforce's annual leave, the requirements of the directive relating to paid annual leave cannot be regarded as met.

34 Furthermore, Article 11(2)(a) of Directive 92/85 provides that the rights connected with the employment contract of a worker, other than the rights referred to in Article 11(2)(b), must be ensured in a case of maternity leave.

35 Therefore, that must be the case so far as the entitlement to paid annual leave is concerned.

36 The determination of when paid annual leave is to be taken falls within the scope of Directive 76/207 (see, as regards the beginning of the period of maternity leave, *Boyle,* paragraph 47).

37 The directive is intended to bring about equality in substance rather than in form. The exercise of rights conferred on women as referred to in Article 2(3) of Directive 76/207 by provisions intended to protect women in relation to pregnancy and maternity cannot be made subject to unfavourable treatment regarding their working conditions (see *Thibault*, paragraph 26).

38 It follows that Article 5(1) of Directive 76/207 is to be interpreted as meaning that a worker must be able to take her annual leave during a period other than the period of her maternity leave.

39 It would be no different if the period of maternity leave coincided with the general period of annual leave fixed, by a collective agreement, for the entire workforce.

40 It should also be borne in mind that under Article 5(2)(b) of Directive 76/207, the Member States are to take the measures necessary to ensure that provisions

contrary to the principle of equal treatment which are included in collective agreements are, or may be declared, null and void or may be amended.

41 In view of all the foregoing considerations, the answer to the first question must be that Article 7(1) of Directive 93/104, Article 11(2)(a) of Directive 92/85 and Article 5(1) of Directive 76/207 are to be interpreted as meaning that a worker must be able to take her annual leave during a period other than the period of her maternity leave, including in a case in which the period of maternity leave coincides with the general period of annual leave fixed, by a collective agreement, for the entire workforce.

The second question

42 By its second question, the referring court asks in essence whether the number of days of annual leave to which a worker is entitled in circumstances such as those of the case in the main proceedings is the number laid down as a minimum by Community law or the higher number laid down by national law.

43 By virtue of Article 15 of Directive 93/104, the latter does not affect Member States' right to apply or introduce laws, regulations or administrative provisions more favourable to the protection of the safety and health of workers or to facilitate or permit the application of collective agreements or agreements

concluded between the two sides of industry which are more favourable to the protection of the safety and health of workers.

44 Where a Member State has chosen to provide for a longer annual leave entitlement than the minimum period prescribed by the directive, Article 11(2)(a) of Directive 92/85 applies in respect of the entitlement to longer annual leave for women who have taken maternity leave coinciding with the period of annual leave for all staff.

45 The answer to the second question must therefore be that Article 11(2)(a) of Directive 92/85 is to be interpreted as also applying to the entitlement of a worker in circumstances such as those of the case before the referring court to a longer period of annual leave, provided for by national law, than the minimum laid down by Directive 93/104.

Costs

46 The costs incurred by the Spanish and Italian Governments and by the Commission, which have submitted observations to the Court, are not recoverable. Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court.

On those grounds,

THE COURT (Sixth Chamber),

in answer to the questions referred to it by the Juzgado de lo Social No 33 de Madrid by order of 3 September 2001, hereby rules:

1. Article 7(1) of Council Directive 93/104/EC of 23 November 1993 concerning certain aspects of the organisation of working time, of Article 11(2)(a) 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) and of Article 5(1) of Council Directive 76/207/EEC of 9 February 1976 on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions are to be interpreted as meaning that a worker must be able to take her annual leave during a period other than the period of her maternity leave, including in a case in which the period of maternity leave coincides with the general period of annual leave fixed, by a collective agreement, for the entire workforce.

2. Article 11(2)(a) of Directive 92/85 is to be interpreted as also applying to the entitlement of a worker in circumstances such as those of the case before the

referring court to a longer period of annual leave, provided for by national law, than the minimum laid down by Directive 93/104.

Cunha Rodrigues Puissochet Schintgen

Macken Colneric

Delivered in open court in Luxembourg on 18 March 2004.

R. Grass

Registrar

V. Skouris

President