



Reports of Cases

JUDGMENT OF THE COURT (Second Chamber)

3 September 2014*

(Reference for a preliminary ruling — Directive 79/7/EEC — Equal treatment for men and women in matters of social security — Accident insurance for workers — Amount of a lump-sum compensation for permanent incapacity — Actuarial calculation based on average life expectancy by sex of the recipient of that compensation — Sufficiently serious infringement of EU law)

In Case C-318/13,

REQUEST for a preliminary ruling under Article 267 TFEU from the Korkein hallinto-oikeus (Finland), made by decision of 7 June 2013, received at the Court on 11 June 2013, in the proceedings brought by

X,

THE COURT (Second Chamber),

composed of R. Silva de Lapuerta (Rapporteur), President of the Chamber, J.L. da Cruz Vilaça, G. Arestis, J.-C. Bonichot and A. Arabadjiev, Judges,

Advocate General: J. Kokott,

Registrar: C. Strömholm, Principal Administrator,

having regard to the written procedure and further to the hearing on 2 April 2014,

after considering the observations submitted on behalf of:

- X, by K. Kuusi, asianajaja,
- the Finnish Government, by H. Leppo, acting as Agent,
- the Greek Government, by E.-M. Mamouna and M. Tassopoulou, acting as Agents,
- the European Commission, by D. Martin and I. Koskinen, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 15 May 2014,

gives the following

* Language of the case: Finnish.

Judgment

- 1 This request for a preliminary ruling concerns the interpretation 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 a dispute between X and the Ministry of Social Affairs and Health ('the Ministry') concerning the grant of lump-sum compensation paid following an accident at work.

Legal context

EU law

- 3 Pursuant to Article 3(1)(a) of Directive 79/7, that directive applies to statutory schemes which provide protection against the risks, inter alia, of accidents at work.
- 4 Under Article 4(1) of the directive:

'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 to them;
 - 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.'

Finnish law

- 5 The implementation of the accident insurance is a public management task which, in Finland, is carried out by private insurance companies. Employers, in order to satisfy their obligation to provide for their workers' safety as regards accidents at work, are required to take out insurance with an insurance company approved to insure the risks covered by the Law on accident insurance (tapaturmavakuutuslaki) of 1982, as amended in 1992 ('the Law on accident insurance'). The costs of the statutory accident insurance are covered by the insurance premiums paid by the employers.
- 6 Compensation for long-term health-related injury (disability allowance) is one of the benefits of the accident insurance. It is part of the statutory social security system. Its purpose is to compensate the worker for that injury resulting from an accident at work or an occupational disease, that is to say, a reduction in his functional capacity for the rest of his life.
- 7 Paragraph 14(1)(1) of that law provides for the payment, in particular, of compensation for an injury or illness caused by an accident at work.
- 8 Paragraph 18b(1) of the Law on accident insurance provides that compensation is paid either as a lump sum or continuously. Under Paragraph 18b(3), the lump sum compensation is calculated in the form of capital corresponding to the value of the disability allowance, taking into account the employee's age according to criteria approved by the Ministry.

- 9 Decision No 1662/453/82 of the Ministry of 30 December 1982 on the criteria for capital values of statutory accident insurance continuous payments or, where continuous payments are not made, for a lump sum payable in their place, has laid down the criteria by which the latter compensation is to be calculated.
- 10 In that regard, the annex to that decision lays down the following formulae:
- ‘The applicable mortality rate shall be (TLE-82) with an extension on account of age of 3 years, namely
- $$u_x = 0.0000797 e^{0,0875 (x+3)} (man)$$
- $$u_x = 0.0000168 e^{0,1000 (y+3)} (woman).’$$
- 11 The harm caused by the injuries or illnesses are divided, for the purposes of quantification of the general long-term disability, into 20 categories according to their medical nature and their seriousness. The amount of the compensation granted is a function of the category of the harm. The compensation for less serious injuries and illnesses, which are in categories 1 to 10, is always paid as a lump sum. In the case of categories 11 to 20, the insured persons may opt to have a lump-sum payment or a lifelong monthly pension.

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

- 12 X, born in 1953, was injured in an accident at work which occurred on 27 August 1991. The vakuutusoiikeus (Insurance Court), by a decision issued on 18 October 2005, held that he was entitled to a lump-sum payment of compensation for long-term disability, pursuant to the Law on accident insurance.
- 13 Following that decision, the competent insurance company, by decisions issued on 16 December 2005, granted X the lump-sum amount of EUR 4 197.98, including all interest, in respect of that compensation.
- 14 X brought an action against those decisions, submitting that the compensation paid as a lump sum for long-term disability ought to be calculated on the basis of the same criteria as those laid down for women. The action was dismissed on 31 August 2006 by the Board of appeal for accidents at work. That decision was upheld by the vakuutusoiikeus on 27 May 2008.
- 15 In a letter sent on 13 October 2008 to the Ministry, X claimed that the lump sum paid to him as compensation for his long-term disability had been determined in disregard of the provisions of EU law on equal treatment of men and women. X therefore claimed EUR 278.89, together with late-payment interest thereon. That amount corresponds to the difference between the compensation received by X and that payable to a woman of the same age and in a comparable situation. On 27 May 2009, the Ministry refused to pay the sum claimed.
- 16 On 17 June 2009, X brought an action before the Helsingin hallinto-oikeus (Helsinki Administrative Court), seeking an order that the Finnish State pay him the sum in question. By a decision of 2 December 2010, the Helsingin hallinto-oikeus declared that action inadmissible on the ground that it did not have jurisdiction.
- 17 X then brought an appeal against that decision before the Korkein hallinto-oikeus (Supreme Administrative Court), which, on 28 November 2012, set aside the decision of the Helsingin hallinto-oikeus.

- 18 As regards the substance, the referring court asks whether the provisions of EU law on equal treatment between men and women and in particular Article 4(1) of Directive 79/7 preclude national legislation on the basis of which the amount of a statutory social benefit payable due to an accident at work varies for men and women on account of sex-based actuarial factors.
- 19 The referring court also notes that if Article 4(1) of Directive 79/7 is to be interpreted as precluding national legislation, such as that in dispute in the main proceedings, the question arises whether the conditions for the liability of the Member State concerned for a breach of EU law are met.
- 20 It is on that basis that the Korkein hallinto-oikeus decided to stay proceedings and to refer the following questions to the Court for a preliminary ruling:
- ‘1. Is Article 4(1) of Directive [79/7] to be interpreted in such a way that it precludes national legislation on the basis of which the different life expectancies of men and women are applied as an actuarial calculation criterion for a statutory social benefit payable due to an accident, when, by applying this criterion, the lump sum benefit paid to a man is smaller than that paid to a woman of the same age and in a similar situation in other respects?
 2. If the answer to the first question is affirmative, does the case involve a sufficiently serious breach of EU law, this being a condition for Member State liability, particularly when account is taken of the following:
 - in its case-law, the Court of Justice has not taken a specific position on the question of whether sex-based actuarial factors may be taken into account in the determination of statutory social security benefits falling within the scope of application of Directive [79/7];
 - in its judgment issued in *Association belge des Consommateurs Test-Achats and Others* (Case C-236/09, EU:C:2011:100), the Court of Justice has stated that Article 5(2) of Council Directive 2004/113/EC of 13 December 2004 implementing the principle of equal treatment between men and women in the access to and supply of goods and services [(OJ 2009 L 373, p. 37)], which allows such factors to be taken into consideration, is invalid but has stipulated a transitional period prior to the provision becoming invalid; and
 - in Directives [2004/113] and 2006/54/EC of the European Parliament and of the Council of 5 July 2006 on the implementation of the principle of equal opportunity and equal treatment of men and women in matters of employment and occupation [(OJ 2006 L 204, p. 23)] the EU legislature has allowed, on certain conditions, sex-based actuarial factors to be taken into account in the calculation of benefits referred to in these directives, and on the basis of this the national legislature has assumed that these factors can also be considered in the area of statutory social security referred to in this case?’

The jurisdiction of the Court

- 21 The Finnish Government pointed out at the hearing that the facts of the case, namely the accident at work to X, occurred in 1991, that is to say, before the accession of the Republic of Finland to the European Union. Despite the fact that the lump-sum compensation in question seeks to remedy the long-term harm caused by that accident at work, only the date of the material fact behind that harm matters for the purpose of the applicability of EU law. In those circumstances, the Finnish Government is of the opinion that the Court of Justice does not have jurisdiction to answer the referring court.

- 22 In that regard, it must be noted that the legal act which is the subject-matter of the main proceedings was adopted in 2008 by the decision of the vakuutusosasto. Nor is it in dispute that the compensation for long-term harm in question seeks to remedy the consequences of X's accident for the rest of his life.
- 23 It follows that the subject-matter of the main proceedings is not a situation which had produced all its effects before the accession of the Republic of Finland to the European Union.
- 24 Accordingly, the Court of Justice has jurisdiction to answer the referring court.

Consideration of the questions referred

The first question

- 25 In order to answer the first question, it must be noted, first of all, that, although it is true that the compensation at issue in the main proceedings is paid by a private insurance company, the accident insurance of employees in Finland and the criteria for the grant of that compensation form part of the 'statutory' schemes which ensure protection against the risks of accidents at work within the meaning of Article 3(1)(a) of Directive 79/7. Consequently, the compensation at issue in the main proceedings falls within the scope of that directive.
- 26 It must be borne in mind that Article 4(1) of Directive 79/7 prohibits, in particular, any discrimination whatsoever on ground of sex either directly or indirectly in the calculation of the benefits referred to therein.
- 27 It follows from the order for reference that the main proceedings concern the method of calculation of the amount of compensation due in respect of harm resulting from an accident at work, which is paid as a single payment in the form of a lump sum. That calculation must be carried out on the basis, *inter alia*, of the age of the worker and his remaining average life expectancy. In order to determine the latter factor, the worker's sex is taken into account.
- 28 It is not in dispute that, by virtue of the method of calculating the lump-sum compensation at issue in the main proceedings, a woman of the same age as X who suffered, on the same day as he, an identical accident at work causing the same injuries is entitled to a higher lump-sum compensation than that paid to X.
- 29 However, the Finnish Government argues that such a woman and X are not in a comparable situation. In that regard, it submits that the method of calculating the compensation paid as a single payment for the compensation for long-term harm, laid down in national legislation, is intended to set the amount thereof at a level equivalent to the overall amount of that compensation were it to be paid as a life-long pension. Given that the life expectancy period of men and women is different, the application of an identical mortality coefficient for both sexes would mean that the compensation paid as a single payment to an injured female worker would no longer correspond to the remaining average life expectancy of its recipient.
- 30 The Finnish Government specifies that the differentiation on account of sex is necessary to avoid placing women at a disadvantage compared to men. Since women have a statistically longer life expectancy than men, the lump-sum compensation to remedy the harm suffered for the remainder of the injured person's life must be higher for women than for men. Thus, in its view, the provisions do not discriminate between men and women.

- 31 In that regard, and as the Advocate General noted in point 29 of her Opinion, it must be noted that such a line of argument could, at most, justify the unequal treatment of men and women in the grant of a benefit such as that at issue in the main proceedings, but it would not, as the Finnish Government accepted at the hearing, be such as to challenge the actual unequal treatment to which the application of the provisions of the national law leads, in that they result, in identical circumstances, in different compensation amounts.
- 32 It must therefore be held that the provisions of the accident insurance scheme at issue in the main proceedings entail an inequality of treatment likely to constitute discrimination contrary to Article 4(1) of Directive 79/7.
- 33 In those circumstances, it must be ascertained whether that unequal treatment can be justified.
- 34 As regards the possible grounds for derogation from the principle of equal treatment set out in Article 4(1) of Directive 79/7, it must be noted that the taking into account of a factor based on remaining life expectancy is not provided for either in Article 4(2) of that directive, which concerns the provisions on the protection of women on the grounds of maternity or in Article 7(1) of that directive, which enables the Member States to exclude from its scope a certain number of rules, advantages and benefits as regards social security.
- 35 Moreover, it does not follow from the wording of Article 7(1) of Directive 79/7 that the grounds for derogation set out therein are not exhaustive and that the Member States are free to develop other grounds for derogation from the principle of equal treatment. The fact that the taking into account of such a factor is not expressly prohibited by that directive cannot be interpreted as authorising the national legislature to provide for that factor as an element in the calculation of a benefit such as that at issue in the main proceedings.
- 36 However, the Finnish Government submits that the difference in the amount of that compensation according to the sex of the worker concerned can be justified by the objective difference in the average life expectancy of men and women. Any other solution would lead to women, whose life expectancy is greater than that of men, being disadvantaged, since the payment of the lump-sum compensation is intended to compensate for the consequences of the harm for all the remaining lifetime of the person injured.
- 37 In that regard, it must be noted that, despite the fact that the lump-sum compensation is provided for in a scheme which also lays down the benefits for harm due to an accident at work which are paid for the remainder of the lifetime of the person injured, the calculation of that compensation cannot be made on the basis of a generalisation as regards the average life expectancy of men and women.
- 38 Such a generalisation is likely to lead to discriminatory treatment of male insured persons as compared to female insured persons. Among other things, when account is taken of general statistical data, according to sex, there is a lack of certainty that a female insured person always has a greater life expectancy than a male insured person of the same age placed in a comparable situation.
- 39 It follows from those considerations that the national scheme at issue in the main proceedings cannot be justified.
- 40 The answer to the first question is therefore that Article 4(1) of Directive 79/7 must be interpreted as precluding national legislation on the basis of which the different life expectancies of men and women are applied as an actuarial factor for the calculation of a statutory social benefit payable due to an accident at work, when, by applying this factor, the lump-sum compensation paid to a man is less than that which would be paid to a woman of the same age and in a similar situation.

The second question

- 41 By its second question, the referring court asks, in essence, whether an infringement of Article 4(1) of Directive 79/7, such as that at issue in the main proceedings, must be classified as a ‘sufficiently serious’ infringement of EU law constituting one of the conditions for the Member State concerned to be deemed liable.
- 42 In that regard, it must be borne in mind that the Court, in paragraph 56 of its judgment in *Brasserie du pêcheur and Factortame* (C-46/93 and C-48/93, EU:C:1996:79), stated that the factors which the referring court may be required to take into consideration include the clarity and precision of the rule infringed, the scope of the discretion conferred by the rule on the national or EU authorities, whether the infringement and the damage caused were intentional or involuntary, whether any error of law was excusable or inexcusable, and the fact that the position taken by an EU institution may have contributed to the omission, adoption or maintenance of national measures or practices contrary to EU law.
- 43 The Court has also pointed out that it is, in principle, for the national courts to apply the criteria for establishing the liability of Member States for damage caused to individuals by breaches of EU law, in accordance with the guidelines laid down by the Court for the application of those criteria (see judgment in *Test Claimants in the FII Group Litigation*, C-446/04, EU:C:2006:774, paragraph 210 and the case-law cited).
- 44 It follows that the Court cannot substitute its assessments for those of the national courts (see judgment in *Brasserie du pêcheur and Factortame*, EU:C:1996:79, paragraph 58). Nevertheless, the Court can provide the national courts with guidelines and indications for the application of that principle (see judgment in *Köbler*, C-224/01, EU:C:2003:513, paragraph 100).
- 45 As regards the present case, three factors must be taken into account for the purposes of the answer to the question whether the provisions of national law at issue must be regarded as a ‘sufficiently serious’ infringement of Article 4(1) of Directive 79/7.
- 46 Firstly, the scope of the principle of equal treatment set out in Article 4(1) of that directive and its interpretation have not, to date, been dealt with in a judgment of the Court. In addition, the infringement of EU law found above as regards X did not become definitive until 2008, by the final decision of the vakuutusosasto.
- 47 Secondly, neither the Finnish legislation at issue in the main proceedings nor any other national legislation has, to date, been the subject-matter of an action for failure to fulfil obligations under Article 258 TFEU for an infringement of Article 4(1) of Directive 79/7.
- 48 Thirdly, it must be noted that, with regard to acts adopted by the EU legislature to implement the principle of equal treatment of men and women, Article 5(2) of Directive 2004/113 entitled the Member States to decide before 21 December 2007 to permit proportionate differences in individuals’ premiums and benefits where the use of sex is a determining factor in the assessment of risk based on relevant and accurate actuarial and statistical data. In addition, in Article 9(1)(h) of Directive 2006/54, the EU legislature, while deciding that a certain number of provisions in the field of occupational social security systems based on sex are contrary to the principle of equal treatment, nevertheless included in the derogations from that principle, in certain cases, the use of actuarial factors differing according to sex.
- 49 As regards the first of those provisions, the Court has held, on 1 March 2011, in paragraph 32 of the judgment in *Association belge des Consommateurs Test-Achats and Others* (EU:C:2011:100), that enabling the Member States to maintain without temporal limitation an exemption from the rule of

unisex premiums and benefits works against the achievement of the objective of equal treatment between men and women, which is the purpose of Directive 2004/113, stating that that provision, due to its discriminatory nature, must therefore be considered to be invalid.

- 50 In the light of the foregoing, it is for the national court to ascertain whether, in the present case, the infringement of EU law must be considered as being ‘sufficiently serious’.
- 51 Accordingly, the answer to the second question is that it is for the referring court to assess whether the conditions for the Member State to be deemed liable are met. Similarly, as regards whether the national legislation at issue in the main proceedings constitutes a ‘sufficiently serious’ infringement of EU law, that court will have to take into consideration, inter alia, the fact that the Court has not yet ruled on the legality of taking into account a factor based on average life expectancy according to sex in the determination of a benefit paid under a statutory social security system and falling within the scope of Directive 79/7. The national court will also have to take into account the right granted to the Member States by the EU legislature, set out in Article 5(2) of Directive 2004/113, and Article 9(1)(h) of Directive 2006/54. In addition, that court should bear in mind that the Court has held, on 1 March 2011 (C-236/09, EU:C:2011:100), that the first of those provisions is invalid, since it infringes the principle of equal treatment between men and women.

Costs

- 52 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 (Second Chamber) hereby rules:

1. **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 national legislation on the basis of which the different life expectancies of men and women are applied as an actuarial factor for the calculation of a statutory social benefit payable due to an accident at work, when, by applying this factor, the lump-sum compensation paid to a man is less than that which would be paid to a woman of the same age and in a similar situation.**
2. **It is for the referring court to assess whether the conditions for the Member State to be deemed liable are met. Similarly, as regards whether the national legislation at issue in the main proceedings constitutes a ‘sufficiently serious’ infringement of EU law, that court will have to take into consideration, inter alia, the fact that the Court has not yet ruled on the legality of taking into account a factor based on average life expectancy according to sex in the determination of a benefit paid under a statutory social security system and falling within the scope of Directive 79/7. The national court will also have to take into account the right granted to the Member States by the EU legislature, set out in Article 5(2) of Council Directive 2004/113/EC of 13 December 2004 implementing the principle of equal treatment between men and women in the access to and supply of goods and services, and Article 9(1)(h) of 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. In addition, that court should bear in mind that the Court has held, on 1 March 2011 (C-236/09, EU:C:2011:100), that the first of those provisions is invalid, since it infringes the principle of equal treatment between men and women.**

[Signatures]