ECLI:EU:C:2017:789

Provisional text

JUDGMENT OF THE COURT (Fifth Chamber)

19 October 2017 (*)

(Reference for a preliminary ruling — Directive 92/85/EEC — Article 4(1) — Protection of the safety and health of workers — Breastfeeding worker — Risk assessment of her work — Challenged by the worker concerned — Directive 2006/54/EC — Article 19 — Equal treatment — Discrimination on grounds of sex — Burden of proof)

In Case C-531/15,

REQUEST for a preliminary ruling under Article 267 TFEU from the Tribunal Superior de Justicia de Galicia (High Court of Justice of Galicia, Spain), made by decision of 17 July 2015, received at the Court on 8 October 2015, in the proceedings

Elda Otero Ramos

v

Servicio Galego de Saúde,

Instituto Nacional de la Seguridad Social,

THE COURT (Fifth Chamber),

composed of J.L. da Cruz Vilaça, President of the Chamber, A. Tizzano, Vice-President of the Court, A. Borg Barthet, M. Berger and F. Biltgen (Rapporteur), Judges,

Advocate General: E. Sharpston,

Registrar: M. Ferreira, Principal Administrator,

having regard to the written procedure and further to the hearing on 19 October 2016,

after considering the observations submitted on behalf of:

– Elda Otero Ramos, by F. López López, abogado,

– the Servicio Galego de Saúde, by S. Carballo Marcote, letrada,

– the Instituto Nacional de la Seguridad Social, by A. Lozano Mostazo and P. García Perea, letradas,

– the Spanish Government, by A. Gavela Llopis and V. Ester Casas, acting as Agents,

– the European Commission, by J. Guillem Carrau, C. Valero, A. Szmytkowska and I. Galindo Martín, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 6 April 2017,

gives the following

Judgment

1 This reference for a preliminary ruling concerns the interpretation of Article 19 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 (OJ 2006 L 204, p. 23) and Article 5(3) 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 (OJ 1992 L 348, p. 1).

2 The reference was made in the course of proceedings between Ms Elda Otero Ramos and the Instituto Nacional de la Seguridad Social (National Institute for Social Security, Spain, 'the INSS') and the Servicio Galego de Saúde (Health Service for the Autonomous Region of Galicia, Spain) concerning the refusal to issue a certificate stating that the performance by Ms Otero Ramos of the tasks relating to her work posed a risk to breastfeeding her child for the purposes of the grant of a financial allowance in respect of risk during breastfeeding.

Legal context

EU law

Directive 92/85

3 Recitals 1, 8 to 11 and 14 of Directive 92/85 state:

'Whereas Article 118a [TEC] 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 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 protection of the safety and health of pregnant workers, workers who have recently given birth or workers who are breastfeeding should not treat women on the labour market

unfavourably nor work to the detriment of directives concerning equal treatment for men and women;

Whereas some types of activities may pose a specific risk, for pregnant workers, workers who have recently given birth or workers who are breastfeeding, of exposure to dangerous agents, processes or working conditions; whereas such risks must therefore be assessed and the result of such assessment communicated to female workers and/or their representatives;

Whereas, further, should the result of this assessment reveal the existence of a risk to the safety or health of the female worker, provision must be made for such [a] worker to be protected;

…

Whereas the vulnerability of pregnant workers, workers who have recently given birth or who are breastfeeding makes it necessary for them to be granted the right to maternity leave of at least 14 continuous weeks, allocated before and/or after confinement, and renders necessary the compulsory nature of maternity leave of at least 2 weeks, allocated before and/or after confinement;

...'

4 Article 1(1) and (2) of Directive 92/85 provides:

'1. The purpose of this Directive, which is the 10th individual Directive within the meaning of Article 16(1) 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)], 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.

2. The provisions of [Directive 89/391], except for Article 2(2) thereof, shall apply in full to the whole area covered by paragraph 1, without prejudice to any more stringent and/or specific provisions contained in this Directive.'

5 Article 2 of that directive, headed 'Definitions', provides:

'For the purposes of this Directive:

…

(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 3 of the directive provides:

'1. In consultation with the Member States and assisted by the Advisory Committee on Safety, Hygiene and Health Protection at Work, the Commission shall draw up guidelines on the assessment of the chemical, physical and biological agents and industrial processes considered hazardous for the safety or health of workers within the meaning of Article 2.

The guidelines referred to in the first subparagraph shall also cover movements and postures, mental and physical fatigue and other types of physical and mental stress connected with the work done by workers within the meaning of Article 2.

2. The purpose of the guidelines referred to in paragraph 1 is to serve as a basis for the assessment referred to in Article 4(1).

To this end, Member States shall bring these guidelines to the attention of all employers and all female workers and/or their representatives in the respective Member State.'

7 The guidelines mentioned in Article 3 of Directive 92/85, in the version applicable to the present case, are set out in Commission Communication of 20 November 2000 on the Guidelines on the assessment of chemical, physical and biological agents and industrial processes considered hazardous for the safety or health of pregnant workers and workers who have recently given birth or are breastfeeding (COM(2000) 466 final/2, 'the Guidelines').

8 As regards the risk assessment and informing workers of that assessment, Article 4 of Directive 92/85 provides:

'1. For all activities liable to involve a specific risk of exposure to the agents, processes or working conditions of which a non-exhaustive list is given in Annex I, the employer shall assess the nature, degree and duration of exposure, in the undertaking and/or establishment concerned, of workers within the meaning of Article 2, either directly or by way of the protective and preventive services referred to in Article 7 of [Directive 89/391], in order to:

– assess any risks to the safety or health and any possible effect on the pregnancies or breastfeeding of workers within the meaning of Article 2,

– decide what measures should be taken.

2. Without prejudice to Article 10 of [Directive 89/391], workers within the meaning of Article 2 and workers likely to be in one of the situations referred to in Article 2 in the undertaking and/or establishment concerned and/or their representatives shall be informed of the results of the assessment referred to in paragraph 1 and of all measures to be taken concerning health and safety at work.'

9 As regards action further to the risk assessment, Article 5(1) to (3) of that directive provides:

'1. Without prejudice to Article 6 of [Directive 89/391], if the results of the assessment referred to in Article 4(1) reveal a risk to the safety or health or an effect on the pregnancy or breastfeeding of a worker within the meaning of Article 2, the employer shall take the necessary measures to ensure that, by temporarily adjusting the working conditions and/or the working hours of the worker concerned, the exposure of that worker to such risks is avoided.

2. If the adjustment of her working conditions and/or working hours is not technically and/or objectively feasible, or cannot reasonably be required on duly substantiated grounds, the employer shall take the necessary measures to move the worker concerned to another job.

3. If moving her to another job is not technically and/or objectively feasible or cannot reasonably be required on duly substantiated grounds, the worker concerned shall be granted leave in

accordance with national legislation and/or national practice for the whole of the period necessary to protect her safety or health.'

10 Article 12 the directive, headed 'Defence of rights', provides:

'Member States shall introduce into their national legal systems such measures as are necessary to enable all workers who consider themselves wronged by failure to comply with the obligations arising from this Directive to pursue their claims by judicial process (and/or, in accordance with national laws and/or practices) by recourse to other competent authorities.'

Directive 2006/54

11 Article 1 of Directive 2006/54, headed 'Purpose', provides:

'The purpose of this Directive is to ensure the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation.

To that end, it contains provisions to implement the principle of equal treatment in relation to:

(a) access to employment, including promotion, and to vocational training;

(b) working conditions, including pay;

(c) occupational social security schemes.

It also contains provisions to ensure that such implementation is made more effective by the establishment of appropriate procedures.'

12 Article 2 of that directive, headed 'Definitions', provides:

'1. For the purposes of this Directive, the following definitions shall apply:

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

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

…

2. For the purposes of this Directive, discrimination includes:

…

(c) any less favourable treatment of a woman related to pregnancy or maternity leave within the meaning of [Directive 92/85].'

13 Article 14(1) of the directive extends the prohibition of discrimination, inter alia, in working conditions and provides as follows:

‘There shall be no direct or indirect discrimination on grounds of sex in the public or private sectors, including public bodies, in relation to:

…

(c) employment and working conditions, including dismissals, as well as pay as provided for in Article 141 [TEC];

…’

14 As regards the burden of proof and access to the courts in the event of direct or indirect discrimination, Article 19(1) and (4) of the directive provides:

‘1. Member States shall take such measures as are necessary, in accordance with their national judicial systems, to ensure that, when persons who consider themselves wronged because the principle of equal treatment has not been applied to them establish, before a court or other competent authority, facts from which it may be presumed that there has been direct or indirect discrimination, it shall be for the respondent to prove that there has been no breach of the principle of equal treatment.

…

4. Paragraphs 1, 2 and 3 shall also apply to:

(a) the situations covered by Article 141 [TEC] and, in so far as discrimination based on sex is concerned, by [Directive 92/85] and [Council Directive] 96/34/EC [of 3 June 1996 on the framework agreement on parental leave concluded by UNICE, CEEP and the ETUC (OJ 1996 L 145, p. 4)];

(b) any civil or administrative procedure concerning the public or private sector which provides for means of redress under national law pursuant to the measures referred to in (a) with the exception of out-of-court procedures of a voluntary nature or provided for in national law.

…’

15 Article 28 of Directive 2006/54 states that the directive is without prejudice to provisions concerning the protection of women, particularly as regards pregnancy and maternity, and that it applies without prejudice to the provisions of Directives 96/34 and 92/85.

Spanish law

16 The social benefit in respect of risk during breastfeeding was incorporated into Spanish law by Ley Orgánica 3/2007 para la igualdad efectiva de mujeres y hombres (Organic Law 3/2007 on effective equality between women and men) of 22 March 2007 (BOE No 71, p. 12611, of 23 March 2007, ‘Law 3/2007’).

17 The object of Law 3/2007 is to promote the integration of women into the workplace by enabling them to reconcile their work life with their private and family life.

18 The 12th supplementary provision of that law amended Article 26 of Ley 31/1995 de Prevención de Riesgos Laborales (Law 31/1995 on the Prevention of Occupational Risks) of

8 November 1995 (BOE No 269 of 10 November 1995, p. 32590, ‘Law 31/1995’) by providing for the protection of female workers and their newborn children in situations of risk during breastfeeding when the conditions of employment are liable to have an adverse effect on the health of the worker or the child.

19 Article 26 of Law 31/1995 is worded as follows:

‘1. The assessment of the risks [for the safety and health of workers] referred to in Article 16 of this Law must include determination of the nature, degree and duration of exposure of pregnant workers or workers who have recently given birth to agents, processes or working conditions liable to have an adverse effect on the health of the workers or the foetus in any activity likely to present a specific risk. If the results of the assessment reveal a risk to safety or health or a possible effect on the pregnancy or breastfeeding of such workers, the employer shall adopt the measures necessary to avoid exposure to that risk by adjusting the working conditions and the working hours of the worker concerned.

Such measures shall include, where necessary, the non-performance of night work or shift work.

2. Where the adjustment of working conditions or working hours is not feasible or where, despite such adjustment, working conditions are liable to have an adverse effect on the health of the pregnant worker or the foetus and a certificate to that effect is issued by the medical department of the [INSS] or the mutual insurer, depending on the entity with which the undertaking has agreed cover for occupational risks, together with a report from the Servicio Nacional de Salud [National Health Service, Spain] general practitioner who treats the worker, the latter will have to perform a different job or role compatible with her condition. After consultation with the workers’ representatives, the employer must determine the list of jobs that are risk-free for those purposes.

A move to another job or role shall be effected in accordance with the rules and criteria applied in cases of functional mobility and shall take effect until such time as the state of health of the worker allows her to return to her previous job.

…

3. If such a move to another job is not technically or objectively feasible or cannot reasonably be required on substantiated grounds, the worker concerned may have her contract suspended on the grounds of risk during pregnancy, pursuant to Article 45(1)(d) [of Real Decreto Legislativo 1/1995, por el que se aprueba el texto refundido de la Ley del Esatatuto de los Trabajadores (Royal Legislative Decree 1/1995 approving the consolidated text of the Law on the Workers’ Statute) of 24 March 1995 (BOE No 75 of 29 March 1995, p. 9654)], for the period necessary for the protection of her safety and health and for as long as it remains impossible for her to return to her previous job or move to another job compatible with her condition.

4. The provisions of paragraphs 1 and 2 of this article shall also be applicable during the period of breastfeeding if the working conditions are liable to have an adverse effect on the health of the woman concerned or her child and a certificate to that effect is issued by the medical department of the [INSS] or the mutual insurer, depending on the entity with which the company has agreed cover for occupational risks, together with a report from the National Health Service general practitioner who treats the worker or her child. In addition, the worker concerned may have her contract suspended on the grounds of risk while breastfeeding children under nine months old, pursuant to Article 45(1)(d) of [Royal Legislative Decree 1/1995], if the conditions set out in paragraph 3 of this article are satisfied.

…’

20 The 18th supplementary provision of Law 3/2007 amended the Spanish legislation in such a way that the period of breastfeeding was expressly recognised as one of the situations covered by Ley General de la Seguridad Social — Real Decreto Legislativo 1/1994 por el que se aprueba el texto refundido de la Ley General de la Seguridad Social (Royal Legislative Decree 1/1994 approving the consolidated text of the General Law on Social Security) of 20 June 1994 (BOE No 154 of 29 June 1994, p. 20658, ‘the General Law on Social Security’).

21 Article 135a of the General Law on Social Security provides:

‘Protected situation. — For the purposes of the financial allowance in respect of risk during breastfeeding, the period of suspension of the employment contract shall be deemed a protected situation in cases where, because the female worker has to move from one job to another compatible with her condition, as provided for in Article 26(4) of [Law 31/1995], such a move to another job is not technically or objectively feasible or cannot reasonably be required on substantiated grounds.’

22 Article 135b of the General Law on Social Security provides:

‘Financial allowance. — A female worker shall be granted, in accordance with the terms and conditions laid down in this Law governing the financial allowance in respect of risk during pregnancy, the financial allowance in respect of risk during breastfeeding, which shall cease when the child reaches the age of nine months, unless the recipient returns before then to her previous job or to another job compatible with her condition.’

23 As regards procedural law, Article 96(2) of Ley 36/2011, reguladora de la jurisdicción social (Law 36/2011 governing the social courts) of 10 October 2011 (BOE No 245, p. 106584, of 11 October 2011) provides:

‘Burden of proof in the case of discrimination and accidents at work

…

2. In proceedings concerning liability for accidents at work and occupational diseases, it shall be for those responsible for safety and those persons who contributed to the creation of the harmful situation to prove that the necessary measures were taken to prevent or avoid the risk and to prove any other factor excluding or mitigating their liability. Liability may not be avoided on the ground of minor fault on the part of the worker or fault attributable to the ordinary performance of the work in question or to the confidence inspired by the latter.’

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

24 According to the order for reference, Ms Otero Ramos is employed as a nurse in the accident and emergency unit of the Centro Hospitalario Universitario de A Coruña (University Hospital of A Coruña, Spain; ‘the University Hospital’), which is a public hospital within the Health Service for the Autonomous Region of Galicia.

25 On 22 December 2011, Ms Otero Ramos gave birth to a child who was then breastfed.

26 On 19 March 2012, Ms Otero Ramos informed her employer that she was feeding her child on breast milk and that the tasks required by her work were liable to have an adverse effect on that milk and expose her to health and safety risks, due inter alia to a complex shift rotation system, ionising radiation, healthcare-associated infections and stress. She therefore lodged a request for her working conditions to be adjusted and for preventative measures to be put in place.

27 On 10 April 2012, the management of the University Hospital issued a report stating that Ms Otero Ramos's work did not pose any risk to breastfeeding her child and rejecting the request lodged by Ms Otero Ramos.

28 On 8 May 2012, Ms Otero Ramos requested, for the purposes of the grant of a financial allowance in respect of risk during breastfeeding, a medical certificate from the Dirección Provincial del Instituto Nacional de la Seguridad Social de A Coruña (Provincial Directorate of the INSS of A Coruña, Spain) stating that there was a risk to the breastfeeding of her child.

29 For the purposes of examining that request, the Provincial Directorate of the INSS of A Coruña took into account, first, the statement given by the director of human resources at the University Hospital certifying that Ms Otero Ramos's work, namely, that of a nurse in the accident and emergency unit, had been included in the list of risk-free jobs drawn up by the University Hospital after consultation with the workers' representatives. Second, it took account of the report of a doctor in the department of preventive medicine and for occupational risks, who confirmed that Ms Otero Ramos had been examined and declared that she was fit to carry out the tasks relating to her work.

30 On the basis of those documents, the INSS took the view, by decision of 10 May 2012, that it had not been shown that Ms Otero Ramos's work posed a risk for the breastfeeding of her child and therefore rejected her request.

31 On 11 July 2012, Ms Otero Ramos challenged that decision before the Juzgado de lo Social No 2 de A Coruña (Social Court No 2, A Coruña, Spain) on the ground that her work posed a risk to breastfeeding her child. She provided, in support of her claim, a letter signed by her line manager, namely, the senior consultant of the University Hospital's accident and emergency unit stating, in essence, that the work of a nurse in that unit posed physical, chemical, biological and psychosocial risks to a breastfeeding worker and to her child.

32 By decision of 24 October 2013, that court dismissed the action brought by Ms Otero Ramos on the ground that it had not been shown that her work posed the alleged risks. Furthermore, the court considered that the case before it was similar to other cases in which both the Tribunal Supremo (Supreme Court, Spain) and the referring court, the Tribunal Superior de Justicia de Galicia (High Court of Justice of Galicia, Spain), had adopted a strict approach in evaluating evidence of the existence of a relevant risk for the purposes of granting the allowance and that, in the present case, no new factor justified it departing from that approach.

33 Ms Otero Ramos appealed against that decision before the referring court.

34 That court asks, in essence, whether the rules on the burden of proof laid down in Article 19 of Directive 2006/54 may be applied in order to prove that there is a situation of risk during breastfeeding within the meaning of Article 26(3) of Law 31/1995, which transposed Article 5(3) of Directive 92/85 into national law.

35 According to the referring court, those rules apply to such a question in so far as the grant of leave referred to in Article 5(3) of Directive 92/85 may be characterised as 'employment and working conditions' within the meaning of Article 14(1)(c) of Directive 2006/54. It considers that the fact that, under Article 2(2)(c) of Directive 2006/54, discrimination within the meaning of Directive 92/85 includes any less favourable treatment of a woman related to pregnancy or maternity leave also supports such an interpretation.

36 Assuming that Article 19 of Directive 2006/54 is applicable to a case such as that in the main proceedings, the referring court asks how those rules are to be applied and, in particular, how the burden of proof should be divided between the parties. In particular, that court asks, first, whether a report, written by the worker's line manager stating the risks for lactation, is evidence supporting a presumption of discrimination on grounds of sex, within the meaning of that provision, and, second, whether a list of risk-free jobs drawn up by the employer, in conjunction with a report issued by the department of preventive medicine certifying, without further explanation, that the female worker is fit for work is sufficient to establish that there has been no breach of the principle of equal treatment.

37 In the event that there is evidence capable of proving the alleged risk, the question also arises of who, between the breastfeeding worker or the employer, must prove that the adjustment of the former's working conditions or working hours is not feasible or that, despite such adjustment, the working conditions of the breastfeeding worker are liable to have an adverse effect on her health or that of her child, within the meaning of Article 26(2) of Law 31/1995, which transposed Article 5(2) of Directive 92/85, and that moving her to another job is not technically or objectively feasible, or cannot reasonably be required of the employer on duly substantiated grounds within the meaning of Article 26(3) of that law, which transposed Article 5(3) of the directive.

38 In those circumstances, the Tribunal Superior de Justicia de Galicia (High Court of Justice of Galicia) decided to stay the proceedings and to refer the following questions to the Court for a preliminary ruling:

'(1) Are the rules on the burden of proof laid down in Article 19 of [Directive 2006/54] applicable to the situation of risk during breastfeeding referred to in Article 26(4), read in conjunction with Article 26(3), [of Law 31/1995], that provision of Spanish law having been adopted to transpose Article 5(3) of [Directive 92/85]?

(2) If question 1 is answered in the affirmative, can the existence of risks to breastfeeding when working as a nurse in a hospital accident and emergency unit, established by means of a report, with reasons, issued by a doctor who is also the senior consultant of the accident and emergency unit of the hospital where the worker is employed, be considered to be facts from which it may be presumed that there has been direct or indirect discrimination within the meaning of Article 19 of Directive 2006/54?

(3) If question 2 is answered in the affirmative, can the fact that the job performed by the worker is included in the list of risk-free jobs drawn up by the employer after consulting the workers' representatives and the fact that the department of preventive medicine and for occupational risks of the hospital in question has issued a declaration that the worker is fit for work, without those documents including any further information regarding how those conclusions were reached, be considered to prove, in every case and without possibility of challenge, that there has been no breach of the principle of equal treatment within the meaning of Article 19 of Directive 2006/54?

(4) If question 2 is answered in the affirmative and question 3 is answered in the negative, which of the parties — the applicant female worker or the defendant employer — has, in accordance with Article 19 of Directive 2006/54, the burden of proving, once established that performance of the job creates risks to the mother or the breast-fed child, that the adjustment of working conditions or working hours is not feasible or that, despite such adjustment, the working conditions are liable to have an adverse effect on the health of the pregnant worker or breast-fed child (Article 26(2), read in conjunction with Article 26(4), of [Law 31/1995], which transposed Article 5(2) of Directive 92/85), and that it is not technically or objectively feasible to move the worker to another job or that such a move cannot reasonably be required on substantiated grounds (Article 26(3), read in conjunction with Article 26(4), of [Law 31/1995], which transposed Article 5(3) of Directive 92/85)?'

Consideration of the questions referred

Preliminary observations

39 According to settled case-law, in the procedure laid down by Article 267 TFEU providing for cooperation between national courts and the Court of Justice, it is for the latter to provide the national court with an answer which will be of use to it and enable it to determine the case before it. To that end, the Court may have to reformulate the questions referred to it. The Court has a duty to interpret all provisions of European Union law which national courts require in order to decide the actions pending before them, even if those provisions are not expressly indicated in the questions referred to the Court by those courts (judgments of 19 September 2013, *Betriu Montull*, C-5/12, EU:C:2013:571, paragraph 40 and the case-law cited, and of 13 February 2014, *TSN and YTN*, C-512/11 and C-513/11, EU:C:2014:73, paragraph 32).

40 Consequently, even if, formally, the referring court has limited its questions to the interpretation of Article 19 of Directive 2006/54 and of Article 5(2) and (3) of Directive 92/85, that does not prevent this Court from providing the referring court with all the elements of interpretation of European Union law that may be of assistance in adjudicating in the case pending before it, whether or not the referring court has referred to them in the wording of its questions. It is, in this regard, for the Court to extract from all the information provided by the national court, in particular from the grounds of the decision to make the reference, the points of European Union law which require interpretation in view of the subject matter of the dispute (see, to that effect, judgments of 19 September 2013, *Betriu Montull*, C-5/12, EU:C:2013:571, paragraph 41 and the case-law cited, and of 13 February 2014, *TSN and YTN*, C-512/11 and C-513/11, EU:C:2014:73, paragraph 33).

41 In the present case, according to the order for reference and the case file before the Court, Ms Otero Ramos challenges, before the referring court, the risk assessment of her work, on which the decision of the INSS is based, in that she claims that the assessment was not conducted in accordance with Article 4(1) of Directive 92/85.

42 In the light of those considerations, the questions referred must be reformulated to the effect that, by its first question, the referring court wishes to know, in essence, whether Article 19(1) of Directive 2006/54 applies to a situation such as that at issue in the main proceedings, in which a female worker challenges, before a court or other competent authority of the Member State concerned, the risk assessment of her work inasmuch as she claims that the assessment was not conducted in accordance with Article 4(1) of Directive 92/85.

43 If so, the referring court asks, by its second, third and fourth questions, how Article 19(1) of Directive 2006/54 should be applied to a situation such as that at issue in the main proceedings.

The first question

44 For the purpose of providing a useful answer to the first question, as reformulated in paragraph 42 above, the requirements which must be fulfilled by the risk assessment of the work of a breastfeeding worker under Article 4(1) of Directive 92/85 must first be outlined.

45 In that context, it is to be noted that Article 4(1) of Directive 92/85 requires the employer, either directly or by way of protective and preventive services, to assess the nature, degree and duration of exposure of workers within the meaning of Article 2 of that directive, to the agents, processes or working conditions of which a non-exhaustive list is given in Annex I thereto, for all activities liable to involve a specific risk in that regard. The assessment is made in order to be in a position to assess any risks to the safety or health and any possible effect on the pregnancy or breastfeeding of the worker concerned, and to decide what measures should be taken.

46 For the purposes of interpreting Article 4(1) of Directive 92/85, account must be taken of the Guidelines, for they are intended, in accordance with Article 3(2) of that directive, to serve as the basis for the assessment referred to in Article 4(1) thereof.

47 According to pages 6 and 7 of the Guidelines, a risk assessment is a ‘systematic examination of all aspects of work’ which comprises at least three phases.

48 The first phase consists of identification of hazards (physical, chemical and biological agents; industrial processes; movements and postures; mental and physical fatigue; other physical and mental burdens). The second phase provides for identification of worker categories (pregnant workers, workers who have recently given birth or workers who are breastfeeding) which are exposed to one or several of those risks. The third phase, namely, the qualitative and quantitative risk assessment, represents ‘the most delicate phase in the process, in that the person carrying out the assessment must be competent and take due account of relevant information ... in applying appropriate methods in order to be able to conclude whether or not the hazard identified entails a risk situation for workers’.

49 The Guidelines expressly state, on pages 11 and 12, that ‘there could be different risks depending on whether workers are pregnant, have recently given birth or are breastfeeding’. As regards, in particular, breastfeeding women, employers will need, for as long as those women continue to breastfeed, to review the risks regularly to ensure that such female workers are not exposed, or exposed as little as possible, to risks that could damage health or safety, in particular, exposure to certain substances such as lead, organic solvents, pesticides and antimitotics. A certain number of those substances are excreted through breast milk, and the child is presumed to be particularly sensitive. The Guidelines also state that professional advice from occupational health specialists may be required in special cases.

50 In addition, the Guidelines contain, on pages 13 to 35, two detailed tables. The first relates to risk assessment of generic hazards and associated situations to which most pregnant women, new/or breastfeeding mothers are likely to be exposed. The second, headed ‘Specific hazards’ notes, by way of introduction, that since pregnancy is a dynamic state involving continuous changes and developments, the same working conditions may raise different health and safety issues for different women at various stages of pregnancy, and similarly on returning to work after childbirth or whilst breastfeeding. Some of these issues are predictable and apply generally; others will depend on individual circumstances and personal medical history.

51 It is thus clear from the Guidelines that, in order to be in conformity with the requirements of Article 4(1) of Directive 92/85, the risk assessment of the work of a breastfeeding worker must include a specific assessment taking into account the individual situation of the worker in question in order to ascertain whether her health or safety or that of her child is exposed to a risk.

52 Second, under Article 19(1) of Directive 2006/54, Member States are to take such measures as are necessary, in accordance with their national judicial systems, to ensure that, when persons who consider themselves wronged because the principle of equal treatment has not been applied to them establish, before a court or other competent authority, facts from which it may be presumed that there has been direct or indirect discrimination, it must be for the defendant to prove that there has been no breach of the principle of equal treatment.

53 Article 19(4)(a) of Directive 2006/54 states, inter alia, that the rules reversing the burden of proof in Article 19(1) also apply to situations covered by Directive 92/85 in so far as discrimination on grounds of sex is concerned.

54 It must therefore be determined whether a situation such as that in the main proceedings constitutes discrimination on grounds of sex within the meaning of Directive 2006/54.

55 In that regard, the point must be made that, for the purposes of Article 2(2)(c) of Directive 2006/54, discrimination includes, inter alia, ‘any less favourable treatment of a woman related to pregnancy or maternity leave within the meaning of Directive [92/85]’.

56 As is expressly provided for in Article 1 of Directive 92/85, the purpose of that directive 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.

57 As the Court has already held, the objective pursued by the rules of EU law governing equality between men and women is, with regard to the rights of pregnant women and women who have given birth and breastfeeding mothers, to protect those women before and after they give birth (judgment of 11 November 2010, *Danosa*, C-232/09, EU:C:2010:674, paragraph 68 and the case-law cited).

58 Furthermore, it is clear from recital 14 and Article 8 of Directive 92/85 that ‘the vulnerability of pregnant workers, workers who have recently given birth or who are breastfeeding makes it necessary for them to be granted the right to maternity leave of at least 14 continuous weeks, allocated before and/or after confinement, and renders necessary the compulsory nature of maternity leave of at least 2 weeks, allocated before and/or after confinement’. Thus maternity leave is intended to protect pregnant workers, workers who have recently given birth or who are breastfeeding.

59 It follows that, the condition of a breastfeeding woman being intimately related to maternity, and in particular ‘to pregnancy or maternity leave’, workers who are breastfeeding must be protected on the same basis as workers who are pregnant or have recently given birth.

60 Accordingly, any less favourable treatment of a female worker due to her being a breastfeeding woman must be regarded as falling within the scope of Article 2(2)(c) of Directive 2006/54 and therefore constitutes direct discrimination on grounds of sex.

61 It should be noted, in that context that, as regards the protection of women in connection with pregnancy and maternity, the Court has repeatedly held that, by reserving to Member States the

right to retain or introduce provisions intended to ensure that protection, Article 2(2) of Directive 2006/54 recognises the legitimacy, in terms of the principle of equal treatment of the sexes, first, of protecting a woman's biological condition during and after pregnancy and, second, of protecting the special relationship between a woman and her child over the period which follows childbirth (judgment of 30 September 2010, *Roca Álvarez*, C-104/09, EU:C:2010:561, paragraph 27 and the case-law cited).

62 As the Advocate General stated in point 57 of her Opinion, where the risks posed by the work of a breastfeeding worker have not been assessed in conformity with the requirements of Article 4(1) of Directive 92/85, the worker concerned and her child are deprived of the protection they should receive under that directive, since they are likely to be exposed to the potential risks the existence of which was not correctly established in the course of the risk assessment of the work of the worker in question. In that regard, a breastfeeding worker may not be treated in the same way as any other worker, since her specific situation necessarily requires special treatment on the part of the employer.

63 Accordingly, failure to assess the risk posed by the work of a breastfeeding worker in accordance with the requirements of Article 4(1) of Directive 92/85 must be regarded as less favourable treatment of a woman related to pregnancy or maternity leave within the meaning of that directive and constitutes, as appears from paragraph 60 above, direct discrimination on grounds of sex within the meaning of Article 2(2)(c) of Directive 2006/54.

64 In accordance with Article 14 of Directive 2006/54, such discrimination is covered by the prohibition provided for by that directive, in so far as it is related to the employment and working conditions of the worker in question within the meaning Article 14(1)(c) of that directive. It follows from Article 5 of Directive 92/85 that the finding, following the assessment referred to in Article 4 thereof, of a risk to the health or safety of that worker or of an effect on breastfeeding, will result in adjustment of her working conditions and/or working hours, a move to another job, or leave from work for the whole of the period necessary to protect her safety or health.

65 In the light of those considerations, the answer to the first question referred is that Article 19(1) of Directive 2006/54 must be interpreted as applying to a situation, such as that at issue in the main proceedings, in which a breastfeeding worker challenges, before a court or other competent authority of the Member State concerned, the risk assessment of her work in so far as she claims that the assessment was not conducted in accordance with Article 4(1) of Directive 92/85.

Questions 2 to 4

66 By its second, third and fourth questions, as reformulated in paragraph 43 above, the referring court asks, in essence, how Article 19(1) of Directive 2006/54 should be applied to a situation such as that at issue in the main proceedings.

67 It should be pointed out, in that regard, that the rules of evidence provided for in that provision do not apply at the time that the worker in question requests an adjustment of her working conditions or, as in the case in the main proceedings, a financial allowance in respect of risk during breastfeeding, requiring a risk assessment of her work to be carried out in accordance with Article 4(1) of Directive 92/85. It is only at a later stage, when a decision relating to that risk assessment is challenged by the worker in question before a court or any other competent authority, that those rules are to be applied.

68 Nevertheless, in accordance with Article 19(1) of Directive 2006/54, it is for a female worker who considers herself wronged because the principle of equal treatment has not been applied to her to establish, before a court or any other competent authority, facts or evidence from which it may be presumed that there has been direct or indirect discrimination (see, to that effect, judgment of 21 July 2011, *Kelly*, C-104/10, EU:C:2011:506, paragraph 29).

69 In a situation such as that at issue in the main proceedings, that means that the worker in question must present, before a court or any other competent authority of the Member State in question, facts or evidence capable of showing that the risk assessment of her work was not conducted in accordance with Article 4(1) of Directive 92/85 and that she was therefore discriminated against.

70 It is only when the worker in question has established such facts or evidence that the burden of proof is shifted back and that it is for the defendant to prove that there has been no breach of the principle of non-discrimination (see, to that effect, judgment of 21 July 2011, *Kelly*, C-104/10, EU:C:2011:506, paragraph 30).

71 In the present case, it should be noted that the letter provided by Ms Otero Ramos, signed by her line manager, namely, the senior consultant of the University Hospital's accident and emergency unit, seems to suggest, with reasons, that Ms Otero Ramos's work poses physical, chemical, biological and psychosocial risks to lactation, and therefore seems to contradict the results of the risk assessment of her work on which the decision of the INSS is based and which that worker challenges.

72 As the Advocate General stated in points 46 and 47 of her Opinion, the documents on which that risk assessment is based do not contain any substantiated explanation on how its conclusions were reached.

73 In those circumstances, it should be noted that, a priori, the letter provided by Ms Otero Ramos constitutes evidence capable of showing that the risk assessment of her work did not include a specific assessment taking into account her individual situation and that, as appears from paragraph 51 above, that assessment was therefore not conducted in conformity with the requirements of Article 4(1) of Directive 92/85. It will, however, be for the referring court — which alone has jurisdiction to assess the facts and the relevant evidence in accordance with the national rules of procedure — to verify whether that is in fact the case.

74 It will therefore be for the defendant to prove that the risk assessment provided for in Article 4 of Directive 92/85 was conducted in accordance with the requirements of that provision, bearing in mind that documents such as a certificate from the employer according to which the work is classified as 'risk-free', in conjunction with a certificate according to which the worker in question is 'fit' to work, without any explanations capable of substantiating those conclusions, cannot alone provide an irrebutable presumption that such is the case. Otherwise both that provision and the rules of evidence provided for in Article 19 of Directive 2006/54 would be deprived of all practical effect.

75 In addition, it should be noted that the same rules of evidence apply in the context of Article 5 of Directive 92/85. In particular, in so far as a breastfeeding worker requests leave from work for the whole of the period necessary to protect her safety or health and provides evidence capable of showing that the protective measures provided for in Article 5(1) and (2), namely, an adjustment of the working conditions of the worker in question or a move to another job was impracticable, it is

for the employer to establish that those measures were technically or objectively feasible and could be reasonably required.

76 It follows from the foregoing considerations that the answer to the second, third and fourth questions is that, on a proper construction of Article 19(1) of Directive 2006/54, in a situation such as that at issue in the main proceedings, it is for the worker in question to provide evidence capable of suggesting that the risk assessment of her work had not been conducted in accordance with the requirements of Article 4(1) of Directive 92/85 and from which it can therefore be presumed that there was direct discrimination on grounds of sex within the meaning of Directive 2006/54, which it is for the referring court to ascertain. It would then be for the defendant to prove that that risk assessment had been conducted in accordance with the requirements of that provision and that there had, therefore, been no breach of the principle of non-discrimination.

Costs

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

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

1. Article 19(1) 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 must be interpreted as applying to a situation such as that at issue in the main proceedings, in which a breastfeeding worker challenges, before a court or other competent authority of the Member State concerned, the risk assessment of her work in so far as she claims that the assessment was not conducted in accordance with Article 4(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.

2. On a proper construction of Article 19(1) of Directive 2006/54, in a situation such as that at issue in the main proceedings, it is for the worker in question to provide evidence capable of suggesting that the risk assessment of her work had not been conducted in accordance with the requirements of Article 4(1) of Directive 92/85 and from which it can therefore be presumed that there was direct discrimination on grounds of sex within the meaning of Directive 2006/54, which it is for the referring court to ascertain. It would then be for the defendant to prove that that risk assessment had been conducted in accordance with the requirements of that provision and that there had, therefore, been no breach of the principle of non-discrimination.

[Signatures]

* Language of the case: Spanish.