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JUDGMENT OF THE COURT (Eighth Chamber)

14 July 2016 (*)

(Reference for a preliminary ruling — Social policy — Article 119 of the EC Treaty (subsequently Article 141 EC) — Directive 75/117/EEC — Equal pay for men and women — Article 1 — Directive 92/85/EEC — Measures to improve the safety and health at work of pregnant workers and workers who have recently given birth or are breastfeeding — Article 11(2)(b) and Article 11(3) — National law providing for an allowance for ordinary magistrates in respect of expenses which they incur in the performance of their professional functions — No entitlement for an ordinary magistrate to that allowance in the case of compulsory maternity leave taken prior to 1 January 2005)

In Case C-335/15,

REQUEST for a preliminary ruling under Article 267 TFEU from the Consiglio di Stato (Council of State, Italy), made by decision of 13 May 2015, received at the Court on 3 July 2015, in the proceedings

Maria Cristina Elisabetta Ornano

v

Ministero della Giustizia, Direzione Generale dei Magistrati del Ministero,

THE COURT (Eighth Chamber),

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

Advocate General: H. Saugmandsgaard Øe,

Registrar: A. Calot Escobar,

having regard to the written procedure,

after considering the observations submitted on behalf of:

- the Italian Government, by G. Palmieri, acting as Agent, assisted by G. De Socio, avvocato dello Stato,
- the European Commission, by C. Cattabriga and A. Szmytkowska, acting as Agents,

having decided, after hearing the Advocate General, to proceed to judgment without an Opinion,

gives the following

Judgment

1 This request for a preliminary ruling concerns the interpretation of Article 119 of the EC Treaty (subsequently Article 141 EC), Article 120 of the EC Treaty (subsequently Article 142 EC), Article 23 of the Charter of Fundamental Rights of the European Union, Article 11 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 Articles 2, 14 and 15 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).

2 The request has been made in proceedings between Ms Maria Cristina Elisabetta Ornano and the Ministero della Giustizia, Direzione Generale dei Magistrati del Ministero (Ministry of Justice, Directorate-General for the Magistracy, Italy; ‘the Ministry of Justice’) concerning the refusal to allow an ordinary magistrate to benefit, during periods of compulsory maternity leave taken prior to 1 January 2005, from payment of an allowance to cover costs that ordinary magistrates incur in the performance of their professional functions.

Legal context

EU law

Directive 75/117/EEC

3 Article 1 of Council Directive 75/117/EEC of 10 February 1975 on the approximation of the laws of the Member States relating to the application of the principle of equal pay for men and women (OJ 1975 L 45, p. 19) provides:

‘The principle of equal pay for men and women outlined in Article 119 of the [EC] Treaty, hereinafter called “principle of equal pay”, means, for the same work or for work to which equal value is attributed, the elimination of all discrimination on grounds of sex with regard to all aspects and conditions of remuneration.

In particular, where a job classification system is used for determining pay, it must be based on the same criteria for both men and women and so drawn up as to exclude any discrimination on grounds of sex.’

4 That directive was repealed by Directive 2006/54 with effect from 15 August 2009. However, the facts in the main proceedings predate the repeal of Directive 75/117.

Directive 76/207/EEC

5 According to the second and third recitals 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):

‘... with regard to pay, the Council adopted on 10 February 1975 Directive [75/117]

... Community action to achieve the principle of equal treatment for men and women in respect of access to employment and vocational training and promotion and in respect of other working conditions also appears to be necessary; ... equal treatment for male and female workers constitutes one of the objectives of the Community, in so far as the harmonisation of living and working conditions while maintaining their improvement are inter alia to be furthered; ... the Treaty has not provided the necessary specific powers for this purpose’.

6 Directive 76/207 was repealed by Directive 2006/54 with effect from 15 August 2009. However, the facts in the main proceedings predate the repeal of Directive 76/207.

Directive 92/85

7 According to the 9th, 16th, 17th and 18th recitals of Directive 92/85:

‘... 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;

...

... measures for the organisation of work concerning the protection of the health of pregnant workers, workers who have recently given birth or workers who are breastfeeding would serve no purpose unless accompanied by the maintenance of rights

linked to the employment contract, including maintenance of payment and/or entitlement to an adequate allowance;

... moreover, provision concerning maternity leave would also serve no purpose unless accompanied by the maintenance of rights linked to the employment contract and/or entitlement to an adequate allowance;

... the concept of an adequate allowance in the case of maternity leave must be regarded as a technical point of reference with a view to fixing the minimum level of protection and should in no circumstances be interpreted as suggesting an analogy between pregnancy and illness’.

8 Article 2 of Directive 92/85, entitled ‘Definitions’, provides:

‘For the purpose of this Directive:

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

9 Article 8 of that directive, entitled ‘Maternity leave’, provides:

- ‘1. 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 a least 14 weeks allocated before and/or after confinement in accordance with national legislation and/or practice.
- 2. The maternity leave stipulated in paragraph 1 must include compulsory maternity leave of at least two weeks allocated before and/or after confinement in accordance with national legislation and/or practice.’

10 Paragraphs 1 to 3 of Article 11 of Directive 92/85, entitled ‘Employment rights’, provide:

‘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:

- 1. in the cases referred to in Articles 5, 6 and 7, the employment rights relating to the employment contract, including the maintenance of a payment to, and/or entitlement to

an adequate allowance for, workers within the meaning of Article 2, must be ensured in accordance with national legislation and/or national practice;

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;

3. the allowance referred to in point 2(b) shall be deemed adequate if it guarantees income at least equivalent to that which the worker concerned would receive in the event of a break in her activities on grounds connected with her state of health, subject to any ceiling laid down under national legislation.’

Italian law

11 Article 3(1) of legge n. 27, provvidenze per il personale di magistratura (Law No 27 on allowances for Magistracy personnel) of 19 February 1981 (GURI No 52 of 21 February 1981; ‘Law No 27/81’), provides for payment of a special judicial allowance for Italian ordinary magistrates to cover expenses that they incur in the performance of their professional functions (‘the special judicial allowance’).

12 Until 31 December 2004, ordinary magistrates on compulsory maternity leave were not entitled to receive that allowance. In that regard, Article 3(1) of Law No 27/81 (‘the initial version of Article 3(1) of Law No 27/81’) provided:

‘Until the adoption of a new regime for the remuneration of personnel laid down in Law No 97 of 2 April 1979, there shall be for ordinary magistrates, in respect of expenses that they incur in the performance of their functions, from 1 July 1980, a special allowance that does not give access to pension rights, of ITL 4 400 000 per annum, to be paid monthly, with the exception of periods of extraordinary leave, special leave on any grounds, and compulsory or optional leave laid down in Articles 4 to 7 of Law No 1204 of 30 December 1971, or of suspension from service for any reason.’

13 That provision was amended by Article 1(325) of legge n. 311, Disposizioni per la formazione del bilancio annuale e pluriennale dello Stato (legge finanziaria 2005) (Law No 311 laying down provisions for drawing up the annual and multiannual State budget (Finance Law 2005) of 30 December 2004 (Ordinary Supplement to GURI No 306 of 31 December 2004), which extended the right to the special judicial allowance to the case of compulsory maternity leave of ordinary magistrates (the ‘modified version of Article 3(1) of Law No 27/81’). This latter version entered into force on 1 January 2005.

The dispute in the main proceedings and the question referred

14 On 23 February 2007, Ms Ornano, a judge at the Tribunale di Cagliari (District Court, Cagliari, Italy), made a request to the Ministry of Justice for payment of, inter alia, the special judicial allowance in respect of two periods of compulsory maternity leave which she had taken during the years 1997/1998 and 2000/2001.

15 By a decision of 30 March 2007, the Ministry of Justice rejected Ms Ornano's request on the ground that the two periods of maternity leave predated the date of entry into force of the amended version of Article 3(1) of Law No 27/81, namely 1 January 2005, and that that amendment was not retroactive.

16 On 30 July 2007, Ms Ornano contested that decision by lodging an extraordinary petition with the Presidente della Repubblica (President of the Republic, Italy). In respect of such an action, the court that has jurisdiction is the Consiglio di Stato (Council of State, Italy).

17 In the context of that petition, Ms Ornano submitted that the amended version of Article 3(1) of Law No 27/81 applied to circumstances arising before that provision entered into force and which, as in the present case, had not yet become time-barred.

18 On 9 October 2007, the Ministry of Justice ruled out retroactive application of the amended version of Article 3(1) of Law No 27/81. It noted that the Consiglio di Stato (Council of State) had raised the question of the constitutionality of that amended version and that, on several occasions, in particular in an order of 13 April 2007, the Corte costituzionale (Constitutional Court, Italy) had held that that provision was not contrary to the Italian Constitution.

19 By letter of 13 April 2015, the Ministry of Justice sent to the Consiglio di Stato (Council of State) an order of the Corte costituzionale (Constitutional Court) of 14 May 2008, in which the latter had declared to be manifestly unfounded the question whether the initial version of Article 3(1) of Law No 27/81, in that it excluded the right to a special judicial allowance during compulsory maternity leave, was compliant with the Italian Constitution. In that regard, the Corte costituzionale (Constitutional Court) held that the amended version of Article 3(1) of Law No 27/81 could not apply to periods before that version had entered into force.

20 According to the Consiglio di Stato (Council of State) there remains the issue of whether the initial version of Article 3(1) of Law No 27/81 is compatible with EU law as contained in the various provisions designed to protect maternity and to ensure non-discrimination between the sexes, in particular as regards the remuneration of workers.

21 In that regard, the referring court observes that the case-law of the Court of Justice seeks to ensure that maternity does not place the female workers concerned in a position which is less favourable than that of their male colleagues in the context of the employment relationship.

22 The referring court added, also with regard to the case-law of the Court, that as regards remuneration specifically, the worker on maternity leave, even if she is not entitled to the maintenance of her remuneration in full, must retain not only her basic salary but also the right to the benefits attached to her professional status.

23 In the present case, it states, the special judicial allowance was implicitly recognised by the Italian legislature as being an ‘unconditional element’ of the remuneration of ordinary magistrates and, in any event, as being independent of the placement on compulsory leave, as stated by Law No 311 of 30 December 2004 laying down provisions for drawing up the annual and multiannual State budget (‘the Finance Law 2005’), which granted the right to that allowance for periods of service spent on compulsory maternity leave.

24 In those circumstances, the Consiglio di Stato (Council of State) decided to stay the proceedings and to refer the following question to the Court for a preliminary ruling:

‘Do Article 11, first paragraph, subparagraphs 1, 2(b) and (3), and the last and penultimate recitals of Directive 92/85 and Article 119 of the EC Treaty (subsequently Article 141 EC), Article 120 of the EC Treaty (subsequently Article 142 EC), where it requires that “Member States shall endeavour to maintain the existing equivalence between paid holiday schemes”, Articles 2(2)(c) and 14(1)(c) of Directive 2006/54, read together, and Article 15 and recitals 23 and 24 of that directive, and, finally, Article 23 of the Charter of Fundamental Rights of the European Union preclude national legislation which, by virtue of the initial version of Article 3(1) of Law No 27/81, does not allow payment of the allowance provided for therein for periods of compulsory maternity leave prior to 1 January 2005?’

25 By order of the President of the Court of 12 August 2015, the referring court’s request that the present reference for a preliminary ruling be dealt with under the expedited procedure provided for in Article 23a of the Statute of the Court of Justice of the European Union and Article 105 of the Court’s Rules of Procedure was refused.

The question referred

26 By its question, the referring court asks, in essence, whether EU law must be interpreted as precluding a national law, such as that at issue in the main proceedings, which, in the case of a period of compulsory maternity leave prior to 1 January 2005, excludes an ordinary magistrate from entitlement to an allowance in respect of expenses that ordinary magistrates incur in the performance of their professional functions.

27 First of all, it must be observed that, as the order for reference makes clear, the facts concerned in the main proceedings occurred in the years 1997/1998 and 2000/2001, during which Ms Ornano took periods of compulsory maternity leave. In those circumstances, the question referred must be examined having regard to the provisions of EU law in force during those periods, in particular Directive 92/85, Article 119 of the EC Treaty (subsequently Article 141 EC) and Directive 75/117.

Directive 92/85

28 In the present case, since Ms Ornano took two periods of compulsory maternity leave, it is appropriate to interpret Article 11(2)(b) and Article 11(3) of Directive 92/85 on maternity leave, without any need to refer to Article 11(1), which is also mentioned by the referring court. Article 11(1), which refers to Articles 5 to 7 of the directive, concerns pregnant and breast-feeding workers and therefore situations which differ from those at issue in the main proceedings.

29 In that regard, Article 11(2)(b) of Directive 92/85 provides that, in the case of maternity leave, the maintenance of a payment to, and/or entitlement to an adequate allowance for, workers must be ensured. Article 11(3) of Directive 92/85 provides that the allowance referred to in paragraph 2(b) is to be deemed adequate if it guarantees income at least equivalent to that which the worker concerned would receive in the event of a break in her activities on grounds connected with her state of health, subject to any ceiling laid down under national legislation.

30 The concept of ‘pay’ used in Article 11 of Directive 92/85, like the definition in Article 119 of the EC Treaty (subsequently Article 141 EC), encompasses the consideration paid directly or indirectly by the employer during the worker’s maternity leave in respect of her employment. By contrast, the concept of an ‘allowance’ to which Article 11 also refers includes all income received by the worker during her maternity leave which is not paid to her by her employer pursuant to the employment relationship (see, to that effect, judgments of 27 October 1998 in *Boyle and Others*, C-411/96, EU:C:1998:506, paragraph 31, and 1 July 2010 in *Parviainen*, C-471/08, EU:C:2010:391, paragraph 35).

31 According to the Court’s settled case-law, workers cannot, however, usefully rely on Article 11(2) and (3) of Directive 92/85 to claim that they should continue to receive full pay while on maternity leave as though they were actually working, like other workers (see, to that effect, judgments of 13 February 1996 in *Gillespie and Others*, C-342/93, EU:C:1996:46, paragraph 20; 30 March 2004 in *Alabaster*, C-147/02, EU:C:2004:192, paragraph 46; and 1 July 2010 in *Gassmayr*, C-194/08, EU:C:2010:386, paragraph 82).

32 It is thus necessary to distinguish the concepts of ‘payment’ referred to in Article 11(2) and (3) of Directive 92/85 from the concept of ‘full pay’ received when the person is actually working and which, in the present case, includes the special judicial allowance related to expenses that ordinary magistrates incur in the performance of their professional functions.

33 In that regard, as is clear from Directive 92/85 and the case-law of the Court, the legislature of the European Union wished to ensure that, during her maternity leave, the worker should receive an income of an amount at least equivalent to that of the allowance provided for by national social security legislation in the event of a break in her activities on health grounds (see, to that effect, judgments of 27 October 1998 in *Boyle and Others*,

C-411/96, EU:C:1998:506, paragraph 32; 1 July 2010 in *Gassmayr*, C-194/08, EU:C:2010:386, paragraph 83; and 13 February 2014 in *TSN and YTN*, C-512/11 and C-513/11, EU:C:2014:73, paragraph 36).

34 When a worker is absent from work because she is on maternity leave, the minimum protection required by Article 11(2) and (3) of Directive 92/85 does not therefore require that the person concerned should continue to receive full pay (judgment of 1 July 2010 in *Gassmayr*, C-194/08, EU:C:2010:386, paragraph 86).

35 Furthermore, Directive 92/85, which contains only minimum requirements, does not in any way prevent Member States from providing for a higher level of protection for those workers by maintaining or laying down more favourable measures for the protection of workers provided that they are compatible with the provisions of EU law. No provision of that directive therefore prevents the Member States or, where appropriate, management and labour from providing that a pregnant worker should continue to receive all the pay components and allowances to which she was entitled before her pregnancy and maternity leave (judgments of 1 July 2010 in *Gassmayr*, C-194/08, EU:C:2010:386, paragraph 88, and 13 February 2014 in *TSN and YTN*, C-512/11 and C-513/11, EU:C:2014:73, paragraph 37).

36 Consequently, it follows from Article 11(2)(b) and Article 11(3) of Directive 92/85 that, in the event that the Member State concerned has not provided for the maintenance of all the elements of pay to which an ordinary magistrate was entitled before her maternity leave, the employer of that worker, in the case of a period of compulsory maternity leave taken prior to 1 January 2005, is not required to pay her an allowance in respect of expenses that ordinary magistrates incur in the performance of their professional functions, provided that the worker in question received during that period an income at a level at least equivalent to that which she would have received under national social security legislation in the event of a break in her professional activities on grounds connected with her state of health, this being a matter for the referring court to determine.

Article 119 of the EC Treaty (subsequently Article 141 EC) and Directive 75/117

37 At the outset, it must be recalled that during Ms Orlando's periods of maternity leave Article 119 of the EC Treaty was in force, which subsequently became, with effect from 1 May 1999, Article 141 EC.

38 As stated in paragraph 30 above, since they are based on the employment relationship, the benefits which the employer pays, whether under legislative provisions or an employment contract, to a worker on maternity leave constitute pay within the meaning of Article 119 of the EC Treaty (subsequently Article 141 EC) and Article 1 of Directive 75/117 (judgments of 13 February 1996 in *Gillespie and Others*, C-342/93, EU:C:1996:46, paragraph 14, and 27 October 1998 in *Boyle and Others*, C-411/96, EU:C:1998:506, paragraph 38).

39 According to the Court's settled case-law, however, discrimination involves the application of different rules to comparable situations or the application of the same rule to different situations (judgment of 13 February 1996 in *Gillespie and Others*, C-342/93, EU:C:1996:46, paragraph 16 and the case-law cited). However, women taking maternity leave provided for by national legislation are in a special position which requires them to be afforded special protection, but which is not comparable either to that of a man or to that of a woman actually at work (judgment of 13 February 1996 in *Gillespie and Others*, C-342/93, EU:C:1996:46, paragraph 17).

40 Therefore, the principle of equal pay between men and women laid down in Article 119 of the EC Treaty (subsequently Article 141 EC) and set out in detail in Directive 75/117 neither requires that women should continue to receive full pay during their maternity leave nor lays down specific criteria for determining the amount of benefit payable to them during that period, provided that the amount is not set so low as to jeopardise the purpose of maternity leave. However, to the extent that it is calculated on the basis of pay received by a woman before the commencement of maternity leave, the amount of benefit must include pay rises awarded between the beginning of the period covered by the reference pay and the end of maternity leave, as from the date on which they take effect (judgment of 13 February 1996 in *Gillespie and Others*, C-342/93, EU:C:1996:46, paragraph 25).

41 It follows from that case-law that the mere fact that an ordinary magistrate was not entitled to the special judicial allowance during a period of compulsory maternity leave, unlike her male colleagues who were working, does not constitute discrimination on the grounds of sex within the meaning of Article 119 of the EC Treaty (subsequently Article 141 EC) and Article 1 of Directive 75/117.

42 It should be added that, having regard to the case-law cited in paragraph 40 above, in circumstances where the worker concerned received an income in an amount at least equivalent to that of the allowance provided for by national social security legislation in the event of a break in her activities on health grounds, within the meaning of Article 11(2)(b) and Article 11(3) of Directive 92/85, this being a matter for the national court to determine, that income must not be regarded as set at a level such as to jeopardise the purpose of maternity leave.

43 Furthermore, since, as recalled in paragraph 38 above, the benefits that the employer pays during maternity constitute pay within the meaning of Article 119 of the EC Treaty (subsequently Article 141 EC) and Article 1 of Directive 75/117, that pay cannot be covered by Directive 76/207. It is clear in particular from the second recital of Directive 76/207 that the latter does not cover pay (see, to that effect, judgments of 13 February 1996 in *Gillespie and Others*, C-342/93, EU:C:1996:46, paragraph 24, and 27 October 1998 in *Boyle and Others*, C-411/96, EU:C:1998:506, paragraph 38). That being so, it is unnecessary to examine this case in the light of Directive 76/207.

44 Having regard to the foregoing considerations, the answer to the question referred is that Article 119 of the EC Treaty (subsequently Article 141 EC), Article 1 of Directive

75/117, and Article 11(2)(b) and 11(3) of Directive 92/85 must be interpreted, in a situation where the Member State concerned did not provide for the maintenance of all the elements of pay to which an ordinary magistrate was entitled before her maternity leave, as not precluding a national law, such as that at issue in the main proceedings, under which, in the case of a period of compulsory maternity leave taken prior to 1 January 2005, an ordinary magistrate is not entitled to receive an allowance in respect of costs that ordinary magistrates incur in the performance of their professional functions, provided that that worker received, during that period, an income in an amount at least equivalent to that of the benefit provided for under national social security legislation which she would have received in the event of a break in her activities on grounds connected with her state of health, this being a matter for the national court to determine.

Costs

45 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 (Eighth Chamber) hereby rules:

Article 119 of the EC Treaty (subsequently Article 141 EC), Article 1 of Council Directive 75/117/EEC of 10 February 1975 on the approximation of the laws of the Member States relating to the application of the principle of equal pay for men and women, and Article 11(2)(b) and 11(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 (tenth individual directive within the meaning of Article 16(1) of Directive 89/391/EEC) must be interpreted, in a situation where the Member State concerned did not provide for the maintenance of all the elements of pay to which an ordinary magistrate was entitled before her maternity leave, as not precluding a national law, such as that at issue in the main proceedings, under which, in the case of a period of compulsory maternity leave taken prior to 1 January 2005, an ordinary magistrate is not entitled to receive an allowance in respect of costs that ordinary magistrates incur in the performance of their professional functions, provided that that worker received, during that period, an income in an amount at least equivalent to that of the benefit provided for under national social security legislation which she would have received in the event of a break in her activities on grounds connected with her state of health, this being a matter for the national court to determine.

[Signatures]

* Language of the case: Italian.

