SPAIN

Supreme Court (Social Chamber)

Decision of 1 June 1999

Indirect sex discrimination – burden of proof- equal treatment in the labour promotion- equal pay

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HEADNOTES

Facts

The Federation of Cataluña of the CCOO (Comisiones Obreras) union of banking employees sued the employer, the Caixa of Cataluña, before the High Court of Cataluña seeking a declaration that such Savings Bank's practice of suggesting predominantly male employees to apply for the post of branch director, where the appointment does not require to sit competitive exams, constituted discrimination on ground of sex. The union claimed also for economic loss and injury to feelings.

It was proved during the procedure that traditionally only those who had been invited by the Bank to apply for the promotion, were in fact allowed to do so, in the knowledge that this invitation involved the future employer's support to be appointed to the post. In addition, this invitation was not based on the employees' annual evaluation made by their superiors. Consequently, the percentage (5%) of men who had reached that post from 1986 to 1998 was considerably higher than the percentage (1,5%) of women, in relation to the number of those who had joined the company in the referred period.

As a result, in its decision of 21 October1998 the High Court of Cataluña gave judgment for the plaintiffs. The court held the existence of sex discrimination in the promotion process. The damages claim was, however, rejected.

That decision was appealed to the Supreme Court by the Bank employer.

Decision

The Supreme Court rejected the appeal in cassation and affirmed the judgment of the High Court of Cataluña. Having considering well applied the rules regarding the burden of proof, it upheld the finding that the employer's practice constituted indirect sex discrimination in the labour promotion, which in turn involved another in the remuneration, since it depended on the position in the company.

Law Applied

Spanish Constitution of 27 December 1978

Article 14: The Spanish are equal before the law, without any discrimination which prevails by reason of birth, race, sex, religion, opinion or any other personal or social condition or circumstance.

Article 35.1: All the Spanish have the duty to work and the right to work, to free election of profession and job, to promotion through work and to a sufficient remuneration in order to satisfy their own and their family's needs, without any discrimination by reason of sex.

Workers' Statute (Consolidating Text approved by Royal Legislative Decree 1/1995 of 24 March)

Article 4.2.c): In the employment relationship, workers have the right: [...] c) Not to be discriminated against in access to jobs, or once employed, by reasons of sex, civil status, by age within the bounds framed by this Act, race, social origin, political or religious ideas, in joining or not a trade union, as by reason of language within the Spanish State. Nor they shall be discriminated against by reason of their physical, mental, or sensory disabilities, provided that they are suitable to perform the work or job in question.

Article 17.1: It shall be deemed null and void executive rules, clauses of collective agreements, individual contracts and unilateral decisions of the employer, which contain unfavourable discrimination by reason of age or when they contain favourable or adverse discriminations in employment, as in matter of remuneration, working time and the rest of work conditions for circumstances of sex, origin, civil state, race, social origin, religious or political ideas, joining or not trade unions and their agreements, relationship to other employees of the enterprise and language within the Spanish State.

Procedural Labour Act (Consolidating Text approved by Royal Legislative Decree 2/1995 of 7 April)

Article 96: In those proceedings where from the plaintiff's declarations it may be deduced the existence of pieces of circumstantial evidence of sex discrimination, it will be to the respondent the presentation of an objective and reasonable justification, of adopted steps and of their proportionality.

JUDGMENT

(Please translate these parts of the judgment written below in italics).

5. ... El derecho a no ser discriminado está consagrado de manera general en el art. 14 CE, que también prohíbe (art. 35.1) la discriminación por razón de sexo en la relación laboral, tanto en lo relativo a la promoción profesional como en lo atinente a la remuneración, y así mismo los arts. 4.2.c) y 17.1 del Estatuto de los Trabajadores proscriben tal discriminación. Por otra parte, la carga de la prueba acerca de su realidad, que a tenor del art. 1214 del Código Civil estaría atribuida a la parte actora, ha quedado mitigada, dada la dificultad de conseguirla de forma plena, por la norma general contenida en el art. 96 Procedural Labour Act (PLA), en cuya virtud a dicha parte le basta con introducir la existencia de indicios de discriminación por razón de sexo, correspondiendo al demandado la aportación de una justificación acerca de que las aparentes medidas discriminatorias no lo son realmente, por responder a criterios objetivos y razonables que justifiquen tales medidas. [...]

Aclarado lo anterior, debe decirse que la sentencia recurrida no ha infringido al valorar la prueba el citado art. 96 PLA, por cuanto razona suficientemente (F. 2º, 3º, 4º, 5º y 6º) cuáles son los vehementes indicios acerca de la existencia de trato desigual en función del sexo que de la prueba se deducen, así como que los datos que la demandada aportó y las razones que adujo en pro de su tesis de no discriminación carecían de la suficiente consistencia para justificar la gran diferencia existente entre el número de varones y el de mujeres que en el territorio de Cataluña acceden en la empresa demandada al cargo de director de sucursal.

6. Por lo que se refiere a la cuestión relativa a si estamos en presencia de una práctica empresarial constitutiva de discriminación por razón de sexo [lo que supondría un quebrantamiento por parte de la empresa demandada de los arts. 14 y

35.1 CE y arts. 4.2.c) y 17.1 ET], para llegar a la conclusión afirmativa basta con acudir al relato de los hechos probados de la sentencia recurrida, donde, entre otros extremos, se constata que "es práctica empresarial constante, invitar sugerir o recomendar a determinadas personas empleadas que cursen la solicitud para el cargo de delegado o subdelegado en la Caixa de Catalunya, antes de que efectivamente los empleados la formalicen; en el entendido de que ello es un paso previo que avala la solicitud, resultando inusual y extraño presentarla si no ha mediado la indicación de hacerlo. Tales sugerencias e indicaciones son al margen de los informes anuales que se efectúan sobre los empleados por los jefes inmediatos" (hecho probado décimo). Así como que del colectivo de hombres y mujeres que entraron a "Caixa Catalunya" desde 1986 hasta el 15 de junio de 1998 han accedido al cargo de delegados 40 de los 799 hombres (5% respecto del colectivo de varones) y 12 de las 780 mujeres (1,5% del colectivo femenino) que habían sido contratados durante el expresado período (hecho probado undécimo). No se produce la desigualdad de trato en el momento de seleccionar para el cargo a los solicitantes, pues tal como se dice en la fundamentación jurídica de la resolución recurrida con valor de hecho probado (F.4º), de 95 hombres peticionarios del cargo de delgado lo obtuvieron 40, y de 31 mujeres que lo solicitaron accedieron a él 12, lo que arroja un porcentaje del 42,10 % de varones y del 38, 71 % de mujeres, entre cuyos porcentajes no existe una diferencia llamativa. Sin embargo, la discriminación se lleva a cabo por vía indirecta, y estriba en que de hecho solicitan el puesto muchas menos mujeres que hombres, debido a la práctica empresarial (carente de aval en la reglamentación interna y también de justificación por razones objetivas) inveterada de que sólo se permite "de facto" la petición del cargo –independientemente de cuál fuera el sentido de los informes anuales emitidos sobre los empleados por sus jefes inmediatos- a aquellas personas a las que previamente se les ha sugerido que lo hagan; y como el puesto de referencia conlleva no sólo una mayor responsabilidad sino también una superior retribución que hace variar sustancialmente los ingresos con respecto a los subdelegados (hecho probado duodécimo), resulta que la discriminación en el plano laboral comporta asimismo otra en el estrictamente salarial. Por consiguiente, la Sala de instancia no ha cometido las infracciones del ordenamiento jurídico que la recurrente le atribuye, procediendo en consecuencia la desestimación de este motivo, y con él la del recurso...

[Source: Repertorio de Jurisprudencia Aranzadi, 1999, 5057.]

ANNOTATION

Besides other procedural matters, two main points are dealt with in the reported decision. The first one refers to the problem of the burden of proof (F. 5º). The latter, which is the substantive matter risen in the dispute, regards whether or not the employer's practice involves discrimination on ground of sex (F. 6º). In order not to be repetitive, both of them will be discussed together below.

As related before, the object of this dispute was an employer's practice which consisted in inviting mostly male employees to apply for promotion to branch director. It is known that unequal treatment by reason of sex is forbidden, not only in access to employment but also to promotion within the company, as it is expressly stated in national law, by article 35.1 Spanish Constitution and articles 4.2.c) and 17.1 Workers Statute. Similarly, article 3.1 European Directive 76/207/EC (not quoted though in the judgment) provides that "application of the principle of equal treatment means that there shall be no discrimination whatsoever on grounds of sex in the conditions, including selection criteria, for access to all jobs or posts, whatever the sector or branch of activity, *and to all levels of the occupational hierarchy*" (emphasis added).

The key issue then is to determine whether the described practice falls within the scope of discrimination forbidden by the above referred provisions. It is a matter of proof of the existence of an unlawful unequal treatment, which in respect to the employer's intention is very difficult, given that it is a subjective circumstance. Therefore, article 96 LPA provides that when from the plaintiff's declarations may be deduced the existence of pieces of circumstantial evidence of sex discrimination, the respondent employer will have to justify on objective and reasonable grounds the unequal treatment and its proportionality. However, this rule does not exonerate the plaintiff from the duty to prove the discrimination. Indeed, it is not enough to claim being discriminated against, since as a general rule set by article 1214 of Spanish Civil Code of 1889, it is for the plaintiff to discharge the burden of the proof of facts alleged by him (*those who assert must prove*). In the words of the judgment, article 96 means that the plaintiff's burden of proof *"has been mitigated"*, so that he does not have to give proof beyond doubt of the existence of sex discrimination, but only some *prima*

facie pieces of evidence that lead the tribunal to believe there may have been discrimination.

As regards the evidence required, the plaintiff must provide a comparison, which shows a relevant degree of disparate effect between men and women. In the case here reported, it was done by comparing the percentages of men (5%) and women (1,5%), who had reached the post of branch director within a certain period, in relation to the total number of those men and women employed during the same time. The disproportionate impact upon women was significant and relevant enough to create an evidence of sex discrimination.

As a result, there was a burden on the employer to justify the disparity on objective and reasonable grounds, as required by article 96 PLA (also by article 4.1 Directive 97/80/EC), in order to make inoperative the evidence that it was due to the reason of sex. The Savings Bank did not do so. It is worth going back to the employer's allegations contained in the judgment of the High Court of Cataluña. Accordingly, those were the grounds quoted by the Savings Bank: firstly, that under the collective agreement the appointment to branch director constituted a discretionary decision by the employer, from among those who, having the requirements set by the agreement, had applied for that post; secondly, that the female employees had not been forbidden to apply for the promotion; and thirdly, that since more men had applied for the job the result was proportional. No objective reason was given, however, to justify the fact that the invitation to apply for the higher post had been made mainly to male employees; on the contrary it was proved not to be based on the employees' annual evaluation made by their superiors. Furthermore, the Savings Bank's counsel stated that if fewer women applied than men for the promotion, it was because of their domestic responsibilities, which would hinder them in coping with the high pressure involving the post of director. Finally, it was said that the women were very young and such position was too daunting, as if it were the women who had excluded themselves from the promotion's application.

In conclusion, even though it was difficult to prove the will or intention to discriminate, the comparison results showed an unfavourable situation regarding the group of workers predominantly of one sex to whom the employer's practice excluded access to promotion, constituting a strong evidence not disproved by the employer, which was deemed as indirect discrimination in the promotion on ground of sex by the

lower court, and subsequently upheld by the Supreme Court. Both tribunals clarified also that the conduct involving discrimination was not the appointment to branch director itself, but in a prior stage the invitation to apply for the promotion.

Although not quoted in the present judgment, it appears clearly the application of the ECJ doctrine of indirect discrimination (e.g. in *Bilka-Kaufhaus GmbH v. Weber von Hartz* [1986], *Enderby v. Frenchay Health Authority & Secretary of State for Health* [1993], and *Hill and Stapleton v. Revenue Commisioners and Department of Finance* [1998]), which in order to conclude the existence of an unlawful unequal treatment as regards an apparently lawful practice from a formal point of view, focuses on the unfavourable impact of an employer's practice upon the female collective. This doctrine has recently been summarised by the Directive 97/80/CE, article 2.2 of which states that "... indirect discrimination shall exist where an apparently neutral provision, criterion or practice disadvantages a substantially higher proportion of the members of one sex unless that provision, criterion or practice is appropriate and necessary and can be justified by objective factors unrelated to sex". Its article 4.2 also places upon the employer the burden of the proof, once the employee has submitted an evidence of discrimination.

It must also be borne in mind that the concept of indirect discrimination had been developed under the Sex Discrimination Act of 1975 (sections 1 (1) (b) and 3 (1) (b) of which embodies a definition of indirect discrimination), by British tribunals through a complete doctrine about the scope of comparison to be provided by the employees concerned and the degree of disparate effect required to amount to indirect discrimination (a.o. *Price v. Civil Service Commision* [1977] IRLR 291, *Perera v. Civil Service* Commission [1983] ICR 428; recently *London Underground Ltd. v. Edwa*rds [1998] IRLR 364, and *R v. Secretary of State for Employment, ex parte Seymour-Smit*h [1997] ICR 371, HL 17 February 2000) and the grounds to be justified by the employer (*Meeks v. National Union of Agricultural and Allied Workers* [1976], *Steel v. The Post Office* [1977] IRLR 288, and Strathclyde Regional Council & ors. v. Wallace & ors. [1998] ICR 205, *Barry v. Midland Bank plc* [1998] IRLR 138). The Act in turn had been much influenced by the decisions of the Federal Supreme Court of the USA [e.g. in the early *Griggs v. Duke Power Co.* (1971) 401 US 424], setting clearly the facts to be proved by plaintiff and employer, and even establishing a percentage of women less

than 20 % in the analysed post, in order to conclude the existence of sex discrimination [more recently, see *Watson v. Fort Worth Bank and Trust* (1988) 487 US 977, 995 n. 3].

Finally, the Supreme Court in the instant judgment added that such discrimination also involved another discrimination concerning remuneration, given that the wages depended on the position in the company, and the post of branch director was predominantly reached by male employees. This view is to be regarded in the light of two prior decisions of the Spanish Constitutional Court 145/1991, of 1 July and 58/1994, of 28 February, the latter relying on the precedent set in *Enderby* by the ECJ, which considered cases of indirect discrimination in the remuneration by reason on sex. Nevertheless, it might well be argued that those decisions referred to work of equal value, which is not the case of the reported decision.