Provisional text

JUDGMENT OF THE COURT (Fourth Chamber)

4 October 2024 (*)

(Reference for a preliminary ruling – Social policy – Equal treatment between men and women in matters of employment and occupation – Directive 2006/54/EC – Article 2(1)(e) – Concept of 'pay' – Article 4 – Prohibition of indirect discrimination on grounds of sex)

In Case C-314/23,

REQUEST for a preliminary ruling under Article 267 TFEU from the Audiencia Nacional (National High Court, Spain), made by decision of 17 March 2023, received at the Court on 22 May 2023, in the proceedings

Sindicato de Tripulantes Auxiliares de Vuelo de Líneas Aéreas (STAVLA),

Ministerio Fiscal

v

Air Nostrum, Líneas Aéreas del Mediterráneo SA,

Federación de Servicios de Comisiones Obreras (CCOO),

Unión General de Trabajadores (UGT),

Unión Sindical Obrera (USO),

Comité de empresa de Air Nostrum Líneas Aéreas del Mediterráneo SA,

Dirección General de Trabajo and Instituto de las Mujeres,

other parties:

Sindicato Español de Pilotos de Líneas Aéreas (SEPLA),

Sindicato Unión Profesional de Pilotos de Aerolíneas (UPPA),

THE COURT (Fourth Chamber),

composed of C. Lycourgos, President of the Chamber, O. Spineanu-Matei, J.-C. Bonichot, S. Rodin and L.S. Rossi (Rapporteur), Judges,

Advocate General: M. Szpunar,

Registrar: A. Calot Escobar,

having regard to the written procedure and further to the hearing on 19 March 2024,

after considering the observations submitted on behalf of:

– the Ministerio Fiscal, by M. Campoy Miñarro, acting as Agent,

– Air Nostrum, Líneas Aéreas del Mediterráneo SA, by N. Navarro Moreno, abogada,

– the Unión General de Trabajadores (UGT), by C. Cortés Suárez, abogada,

– the Sindicato Español de Pilotos de Líneas Aéreas (SEPLA), by E. López García and Ó. Orgeira Rodríguez, abogados,

– the Spanish Government, by A. Gavela Llopis and M. Morales Puerta, acting as Agents,

– the Danish Government, by D. Elkan, M. Jespersen, J. Kronborg and C.A.-S. Maertens, acting as Agents,

– the Swedish Government, by H. Eklinder and C. Meyer-Seitz, acting as Agents,

– the European Commission, by I. Galindo Martín and E. Schmidt, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 6 June 2024,

gives the following

Judgment

1 This request for a preliminary ruling concerns the interpretation of Article 14(1)(c) 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 the Sindicato de Tripulantes Auxiliares de Vuelo de Líneas Aéreas (STAVLA) (trade union representing cabin crew) and the Ministerio Fiscal (Public Prosecutor's Office, Spain), on the one hand, and Air Nostrum, Líneas Aéreas del Mediterráneo SA ('Air Nostrum'), the Federación de Servicios de Comisiones Obreras (CCOO), the Unión General de Trabajadores (UGT), the Unión Sindical Obrera (USO), the Comité de empresa de Air Nostrum Líneas Aéreas del Mediterráneo SA, the Dirección General de Trabajo and the Instituto de las Mujeres, on the other, concerning the collective agreement applicable to Air Nostrum cabin crew members.

Legal context

European Union law

3 Recital 9 of Directive 2006/54 states:

'In accordance with settled case-law of the Court of Justice, in order to assess whether workers are performing the same work or work of equal value, it should be determined whether, having regard to a range of factors including the nature of the work and training and working conditions, those workers may be considered to be in a comparable situation.'

4 Article 2 of that directive, entitled 'Definitions', provides, in paragraph 1 thereof:

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

…

(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;

…

(e) "pay": the ordinary basic or minimum wage or salary and any other consideration, whether in cash or in kind, which the worker receives directly or indirectly, in respect of his/her employment from his/her employer;

…'

5 Article 4 of that directive, entitled 'Prohibition of discrimination', is worded as follows:

'For the same work or for work to which equal value is attributed, direct and indirect discrimination on grounds of sex with regard to all aspects and conditions of remuneration shall be eliminated.

…'

6 Article 14 of that directive, entitled 'Prohibition of discrimination', provides in paragraph 1 thereof:

'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 of the Treaty;

…'

Spanish law

7 The Real Decreto Legislativo 2/2015 por el que se aprueba el texto refundido de la Ley del Estatuto de los Trabajadores (Royal Legislative Decree 2/2015 approving the consolidated text of the Law on the Workers' Statute) of 23 October 2015 (BOE No 255 of 24 October 2015) ('the Workers' Statute'), provides in Article 3 thereof, entitled 'Sources of the employment relationship':

'1. Rights and obligations concerning the employment relationship are regulated by:

(a) national laws and regulations;

(b) collective agreements;

…'

8 Article 4(2)(c) of the Workers' Statute provides:

'Workers have the right, in their employment:

…

(c) not to be discriminated against, directly or indirectly, when seeking employment or once in employment, on the basis of sex, marital status, age within the limits laid down by this law, racial or ethnic origin, social condition, religion or belief, political beliefs, sexual orientation and identity, gender expression, sexual characteristics, whether or not they belong to a trade

union, or for linguistic reasons, within the Spanish State.'

9 Under Article 26(2) of that statute:

'Sums received by a worker by way of reimbursement or allowances for expenses incurred as a consequence of his or her work, social security benefits and allowances and compensation for relocation, suspension or dismissal shall not be regarded as salary.'

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

10 The employment relationship between Air Nostrum and its ground staff and cabin crew are governed by a collective agreement, signed by the management of that undertaking and certain trade unions and published in the *Boletín Oficial del Estado* (BOE) on 14 January 2019 ('the Cabin Crew Agreement').

11 The employment relationship between Air Nostrum and its pilots is governed by another collective agreement, signed by the management of that undertaking and other trade unions and published in the BOE on 13 May 2020 ('the Flight Crew Agreement').

12 Article 93 of the Cabin Crew Agreement and Article 16.19 of the Flight Crew Agreement govern the daily subsistence allowances covering expenses, other than those relating to accommodation and transport, incurred by cabin crew and pilots respectively during their work-related travels ('daily subsistence allowances').

13 On 8 November 2022, STAVLA brought an action before the referring court, the Audiencia Nacional (National High Court, Spain), seeking, inter alia, annulment of Article 93 of the Cabin Crew Agreement. According to STAVLA, supported by the public prosecutor's office, that article introduces indirect discrimination on grounds of sex in working conditions, which is prohibited by Article 14(1)(c) of Directive 2006/54.

14 In that regard, the referring court states, first of all, that the amount of the daily subsistence allowances provided for by the Cabin Crew Agreement is significantly lower than that provided for by the Flight Crew Agreement. Next, various studies show that 94% of cabin crew members are female whereas 93.71% of pilots are male. Lastly, the daily subsistence allowances cannot be regarded as salary, both under Spanish employment law, in view of Article 26(2) of the Workers' Statute, which expressly excludes them from the scope of that concept, and under EU law, in particular Article 157 TFEU and Article 2(1)(e) of Directive 2006/54. As these allowances do not remunerate specific work, they are related to working conditions, and therefore the different value of the work carried out by pilots and cabin crew members cannot justify a difference in the amount of those allowances.

15 In those circumstances, the Audiencia Nacional (National High Court) decided to stay the proceedings and to refer the following question to the Court of Justice for a preliminary ruling:

'Does the fact that the company [Air Nostrum] compensates a group [of workers] such as cabin crew, where the majority of the individuals making up the group are women, for the expenses which they have to meet when travelling, other than those related to transport and accommodation, with an amount smaller than that received for the same expenses by another group of employees, such as pilots, in which the majority are men, constitute an instance of indirect discrimination on grounds of sex in relation to working conditions, contrary to [EU] law and prohibited under Article 14(1)(c) of Directive 2006/54, where the reason for such different treatment lies in the fact that each group is subject to a different collective agreement, both negotiated by the same company but with different union representatives, pursuant to Article 87 of the Estatuto de los Trabajadores [(Law on the Workers' Statute)]?'

Whether the dispute in the main proceedings has retained its purpose

16 In its observations lodged at the Court Registry on 29 September 2023, the Sindicato Español de Pilotos de Líneas Aéreas (SEPLA) contends that there is no longer any need to rule on the request for a preliminary ruling on the ground that STAVLA withdrew its action before the referring court on 21 September 2023.

17 However, it is apparent from the documents before the Court that, by order of 26 October 2023, the referring court decided that, notwithstanding STAVLA's withdrawal, the proceedings before it were not devoid of purpose, as national procedural law allowed the public prosecutor's office to take the place of STAVLA as applicant.

18 It follows that, as the dispute in the main proceedings has retained its purpose, it is necessary to rule on the request for a preliminary ruling.

Consideration of the question referred

19 As a preliminary point, it must be noted that the question raised by the referring court is based on three premisses.

20 Thus, first, that court notes that, within Air Nostrum, the vast majority of cabin crew members are female workers and the vast majority of pilots are male workers.

21 Second, the referring court notes that the amount of the daily subsistence allowances paid at a flat rate to cabin crew members for certain expenses incurred by them in the performance of the services provided for in their contracts of employment is significantly lower than the amount of the daily subsistence allowances paid at a flat rate to pilots for the same expenses.

22 It is not for the Court, in the context of a reference for a preliminary ruling, to verify the accuracy of those two factual premises, as any assessment of the facts of the case is a matter for the national court (see, to that effect, judgments of 1 July 2008, *MOTOE*, C-49/07, EU:C:2008:376, paragraph 30 and of 13 June 2024, *Adient*, C-533/22, EU:C:2024:501, paragraph 33).

23 However, the question raised is based on a third premiss namely that, having regard to their purpose, the daily subsistence allowances at issue in the main proceedings form part of the working conditions of the workers concerned, within the meaning of both national law and Article 14(1)(c) of Directive 2006/54, and not their pay, within the meaning of Article 157 TFEU and Article 2(1)(e) and Article 4 of that directive.

24 In the procedure laid down in Article 267 TFEU, which provides for cooperation between national courts and the Court of Justice, it is for the latter to provide the referring court with an answer which will be of use to it and enable it to decide the case before it. With that in mind, the Court may have to reformulate the questions referred to it. The fact that a national court has worded a question referred for a preliminary ruling with reference to certain provisions of EU law does not prevent the Court from providing the national court with all the points of interpretation which may be of assistance in adjudicating on the case pending before it, whether or not that court has referred to them in its questions. In that regard, it is for the Court to extract from all the information provided by the national court, in particular from the grounds of the decision referring the questions, the points of EU law which require interpretation, having regard to the subject matter of the dispute (judgment of 21 September 2023, *Juan*, C-164/22, EU:C:2023:684, paragraph 24 and the case-law cited).

25 Furthermore, while Article 14(1) of Directive 2006/54 prohibits any indirect discrimination on grounds of sex in employment and working conditions, Article 4 of that directive prohibits a

difference in treatment in the remuneration of workers only in so far as it relates to the same work or work to which equal value is attributed.

26 In order to provide a useful answer to the referring court, it is therefore necessary to verify the premiss on which the question referred is based, namely that the allowances at issue in the main proceedings do not form part of the pay of the pilots and the cabin crew, within the meaning of Directive 2006/54.

27 In those circumstances, it must be considered that, by its question, the referring court asks, in essence, whether Article 2(1)(e) and Article 4 of Directive 2006/54 must be interpreted as meaning that (i) daily subsistence allowances compensating, at a flat rate, for certain expenses incurred by workers as a result of their work-related travel form part of their pay or, on the contrary, their working conditions and (ii) a difference in treatment in the amount of those allowances, depending on whether they are granted to a group of workers consisting mainly of men or to a group of workers consisting mainly of women, constitutes indirect discrimination on grounds of sex prohibited by that directive.

28 In that regard, it must be noted that the concept of 'pay' defined in Article 2(1)(e) of Directive 2006/54 is an autonomous concept of EU law which must be given a broad interpretation (see, by analogy, judgments of 7 March 1996, *Freers and Speckmann*, C-278/93, EU:C:1996:83, paragraph 16, and of 19 September 2018, *Bedi*, C-312/17, EU:C:2018:734, paragraph 33).

29 It follows from the very wording of Article 2(1)(e) that, within the meaning of that provision, 'pay' covers not only the wage or salary, but also 'any other consideration, whether in cash or in kind, which the worker receives directly or indirectly, in respect of his/her employment from his/her employer'.

30 Daily subsistence allowances, such as those at issue in the main proceedings, clearly constitute economic consideration paid in cash directly by the employer to the worker, intended to compensate, at a flat rate, for certain expenses which the worker may have incurred in the performance of the obligations arising from his or her employment contract.

31 The fact, emphasised by the referring court, that those daily subsistence allowances do not remunerate specific work calculated per unit of time or per unit of work is not sufficient to exclude those daily subsistence allowances from the scope of the concept of 'pay', within the meaning of Article 2(1)(e) of Directive 2006/54.

32 It is not apparent from that provision that that concept requires that the consideration received from the employer must remunerate specific work, since that consideration must merely be received 'in respect of [the worker's] employment' (see, by analogy, judgment of 19 September 2018, *Bedi*, C-312/17, EU:C:2018:734, paragraph 34).

33 In the present case, it is apparent from the order for reference that the purpose of the daily subsistence allowances is to compensate, at a flat rate, for certain expenses incurred by the workers concerned because of travel in the context of their contract of employment, that is to say, in respect of their employment.

34 Contrary to the observations of the European Commission, that interpretation is not called into question by the case-law resulting from the judgment of 15 September 2011, *Williams and Others* (C-155/10, EU:C:2011:588, paragraph 25), according to which the components of the worker's total remuneration which are intended exclusively to cover occasional or ancillary costs arising at the time of performance of the tasks which the worker is required to carry out under his or her contract of employment need not be taken into account in the calculation of the payment to be made during annual leave.

35 In that judgment, which did not concern Directive 2006/54 but Directive 2003/88/EC of the European Parliament and of the Council of 4 November 2003 concerning certain aspects of the organisation of working time (OJ 2003 L 299, p. 9), the Court merely held that remuneration may consist of several components, some of which must not be taken into account in calculating the sums to be paid to the employee in respect of his or her annual leave. The Court did not, however, in any way consider that those components did not form part of the worker's remuneration.

36 It is also irrelevant to the present case that, as emphasised by the Commission, the Court held in the judgment of 8 July 2021, *Rapidsped* (C-428/19, EU:C:2021:548, paragraph 54), that the second subparagraph of Article 3(7) of Directive 96/71/EC of the European Parliament and of the Council of 16 December 1996 concerning the posting of workers in the framework of the provision of services (OJ 1997 L 18, p. 1), must be interpreted as meaning that a daily allowance, the amount of which varies according to the duration of the worker's posting, constitutes an allowance specific to the posting and is part of the minimum wage, unless, inter alia, it is paid in reimbursement of expenditure actually incurred on account of the posting, such as expenditure on travel, board or lodging.

37 In addition to the fact that that judgment also did not concern Directive 2006/54, the fact that an allowance paid in order to reimburse expenditure actually incurred on account of the posting does not form part of the minimum wage in no way precludes flat-rate allowances, such as those at issue in the main proceedings, from constituting an element of pay within the meaning of Article 2(1)(e) of Directive 2006/54, which, as is apparent from paragraph 29 above, is not limited solely to the wage or salary.

38 In the light of the foregoing, it must be held that, although it is true that daily subsistence allowances, such as those at issue in the main proceedings, are not paid in return for work done, the fact remains that they constitute consideration granted by the employer to the workers concerned in respect of their employment and fall within the scope of the concept of 'pay', as defined in Article 2(1)(e) of Directive 2006/54, and not that of working conditions, within the meaning of Article 14(1)(c) of that directive.

39 In the present case, the referring court infers the existence of an indirect difference in treatment on grounds of sex from the fact that, first, the vast majority of the cabin crew are female workers and the vast majority of the pilots are male workers and, second, the amount of the daily subsistence allowances paid to cabin crew members is significantly lower than the amount of the daily subsistence allowances paid to pilots.

40 However, it follows from Article 4 of Directive 2006/54 that such a difference in treatment, as regards the pay of the workers at issue in the main proceedings, can constitute indirect discrimination on grounds of sex, prohibited by that provision, only if that pay were paid 'for the same work or for work to which equal value is attributed'.

41 In that regard, as is apparent from recital 9 of Directive 2006/54, in order to assess whether workers are performing the same work or work of equal value, account should be taken of a range of factors, including the nature of the work and training and working conditions.

42 Cabin crew members and pilots clearly do not perform the same work. Furthermore, in view of the training required to perform the work of a pilot and the responsibilities associated with it, the work of pilots cannot be considered to be of equal value to the work of cabin crew members, within the meaning of Article 4 of Directive 2006/54.

43 In those circumstances, the indirect difference in treatment referred to in paragraph 39 of the present judgment cannot be regarded as indirect discrimination on grounds of sex, within the meaning of Directive 2006/54.

44 It follows that there is no need to answer the question whether such an indirect difference in treatment can be justified on the basis that the allowances at issue are provided for by separate collective agreements concluded between different parties.

45 In the light of the foregoing, the answer to the question raised is that Article 2(1)(e) and Article 4 of Directive 2006/54 must be interpreted as meaning that (i) daily subsistence allowances compensating, at a flat rate, for certain expenses incurred by workers as a result of their work-related travel constitutes an element of their pay and (ii) a difference in the amount of those allowances, depending on whether they are granted to a group of workers consisting mainly of men or to a group of workers consisting mainly of women, is not prohibited by that directive where those two groups of workers do not perform the same work or work to which equal value is attributed.

Costs

46 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the referring 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 (Fourth Chamber) hereby rules:

Article 2(1)(e) and Article 4 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 meaning that (i) daily subsistence allowances compensating, at a flat rate, for certain expenses incurred by workers as a result of their work-related travel constitutes an element of their pay and (ii) a difference in the amount of those allowances, depending on whether they are granted to a group of workers consisting mainly of men or to a group of workers consisting mainly of women, is not prohibited by that directive where those two groups of workers do not perform the same work or work to which equal value is attributed.

[Signatures]

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* Language of the case: Spanish.