BlogDUE

Are we halfway there or are we living on a prayer? – CJ *v Tesorería General de la Seguridad Social (TGSS)* and the Court of Justice reluctance in acknowledging stereotype and stigma in sex discrimination cases

Elena Gualco (Senior Lecturer in EU Law, University of Bedfordshire) – 13 July 2022

SUMMARY: 1. Introduction – 2. The case at the main proceeding – 3. The features of indirect discrimination: a new chapter in the sex equality book – 4. Embedding stereotype and stigma in the equality discourse: when will the CJEU be ready to take the leap?

1. In a case decided earlier this year, the Court of Justice of the European Union (CJEU) has been asked to examine whether a Spanish provision excluding domestic workers from receiving unemployment benefits triggered a disparate effect on grounds of sex that ultimately disclosed a discrimination on that ground.

Notwithstanding the EU jurisprudence on sex equality being at time abundant and innovative, the CJ v Tesorería General de la Seguridad Social (TGSS) ruling (hereinafter "CJ"), and the Advocate General (AG) Opinion on the related case, are worth being investigated for two reasons at least.

First, as a contribution to the investigation on the features and boundaries of indirect discrimination: as will be discussed in section 3, the CJEU ruling shed a further light on the assessment of apparently neutral, and well-established, provisions that actually have a discriminatory impact. Second, and this is where the AG Opinion comes at stake, because this decision would have constituted an excellent opportunity to elevate the conversation on the discriminatory effect the law can have when it acquiesces in existing stereotypes – and to factor these variables in the equation (section 4).

2. The factual scenario that led to the ruling is quite simple: it involved, on the one side, CJ, a domestic worker employed by a natural person; on the

other side, the General Social Security Fund as the Spanish body in charge of paying contributions compensating situations of unemployment.

In November 2019, after collecting their employer's written agreement, CJ filed a request to contribute to the unemployment contributions scheme, so that she would be able to benefit from it should a condition of unemployment arise. Such an application was subsequently rejected by TGSS on the basis that CJ was registered within the Special Scheme on Domestic Workers and was thus subject to Art. 251(d) of the General Law on Social Security, according to which "the protection afforded by the special scheme for domestic workers shall not include protection in respect of unemployment" (Point 10, AG Opinion). In light of this latter rule, both CJ's application and the administrative appeal were rejected.

The matter was then brought before the Administrative Court No 2, Vigo, and that Court decided to trigger a preliminary reference procedure under Art. 267 TFEU to ask the CJEU the following questions: first, whether the exclusion under Art. 251(d) of domestic workers from the possibility to receive unemployment protection constituted a breach of Directive 79/7/EEC on the principle of equal treatment in matters of social security and, possibly, of Directive 2006/54/EC that implements the principle of equal opportunities and equal treatment between men and women in matters of employment and occupation. Second, provided the affirmative answer to the first preliminary question, whether the circumstance that the addressees of the Spanish provision were almost exclusively women resulted into a discrimination on grounds of sex and thus a violation of Art 9(1)(e) and/or (k) of Directive 2006/54.

3. Once established the admissibility – out of a presumption of relevance – of the request for a preliminary ruling, the CJEU immediately clarified that only Directive 79/7, and not Directive 2006/54, applied in the case at stake (Paras 36 and 37). While the unemployment contributions foreseen in Art. 251(d) of the General Law on Social Security do fall under the scope of application of Directive 79/7 as this provision applies to all schemes related to protection against unemployment (Art. 3(1) Directive 79/7), they do not trigger the applicability of Directive 2006/54. As pointed by both the Advocate General and the Court, "the concepts of 'working conditions' and 'pay'" that are used in Directive 2006/54, "cannot be extended to encompass social security schemes or benefits" (Point 30, AG Opinion).

After this clarification, both the AG and the CJEU focus on assessing the main issue arising from the case at the main proceeding, i.e. whether the Spanish provision excluding domestic workers from contributing to and thus

accessing employment benefits results in an indirect discrimination on grounds of sex.

As is common practice in the area of equality and non-discrimination law (on this, *ex multis*, see E. ELLIS, P. WATSON, *EU Anti-discrimination Law*, Cambridge, 2012; C. FAVILLI, *La non discriminazione nell'Unione europea*, Bologna, 2008), the ascertainment as to whether a given provision constitutes a discrimination entails a two-step assessment (para 40 ruling).

As a first step, the disparate impact resulting from the enactment of a provision needs to be established: while in the case of direct discrimination such an investigation is often very straightforward, in the case of indirect discrimination, the investigation requires a solid degree of depth and accuracy. The concept of indirect discrimination does in fact involve those scenarios where the contested provision is apparently neutral, i.e. non-discriminatory, but, once applied, leads to discrimination (the very first para-normative definition of indirect discrimination was provided within the Commission Proposal for a Council Directive on the burden of proof in cases of discrimination based on sex, where it is explained 'as [a] discrimination which, although it does not actually refer to sex, has effects in practice which are no different to unequal treatment which is expressly linked to sex'. Such definition echoed the one offered by AG Mancini in C-30/85, *J. W. Teuling v. Bestuur van de Bedrijfsvereniging voor de Chemische Industrie*, p. 2511). Because they trump the eye, these phenomena are often described as 'hidden' or 'covert' discrimination (e.g. CJEU, 12 February 1974, C-152/73, *G.M. Sotgiu v. Deutsche Bundespost*, para 11).

The second step of the investigation involves the analysis of the treatment vis-à-vis the goal that such treatment aims at achieving and the way in which such a goal is attained. As explained within the 'equality' directives (Art. 2(1)(b) Directive 2006/54, Art. 2(2)(b) Directive 2000/43/EC and Art. 2(2)(b)(i) Directive 2000/78/EC), a disparate impact possibly leading to an indirect discrimination could be 'tolerated' under EU law if two conditions are met: first, the provision has been adopted in pursuance of a legitimate goal; second, the means to achieve the abovementioned goal are appropriate and necessary (in other words, reasonable and proportionate).

In line with its well-established jurisprudence (e.g. CJEU 13 May 1986, C-170/84, *Bilka-Kaufhaus GmbH v. Karin Weber von Hartz*), the CJ ruling too follows a two-step investigation.

The first part of the analysis carried out by the CJEU thus focused on establishing whether the neutrality of the Spanish provision had nonetheless the effect of putting a specific category of people, women in this instance, into a particular disadvantage. Given the availability of statistical data, confirming

that more that 95% of domestic workers are female, leaving the male component of this category of workers at less than 5%, the Court had no difficulty in acknowledging that the Spanish provision excluding domestic workers from accessing social benefits in case of unemployment does have a discriminatory effect on workers depending on their sex (para 46).

In turn, the second part of the analysis aimed to check, on the one side, whether the rationale and goal behind the Spanish normative provision were legitimate; on the other, if their implementation occurred in compliance with the principles of reasonability and proportion. According to the Spanish government, the contested national provision particularly served two main purposes: accommodating the specific characteristic of that particular category of workers as well as the status of their employers; and contributing towards employee protection by ensuring the level of employment and combating illegal work and fraud. As recalled by the Advocate General (point 68 AG Opinion), Member States enjoy a certain degree of discretion when identifying the social policy aims that could possibly compress equal treatment on grounds of sex without resulting in discrimination. In this specific circumstance, the Court was thus of the view that the objectives pursued by the Spanish provision were to be held legitimate and could then be justified.

Following what has now become a routinely approach of the CJEU, the core of the ruling is to be found in the observations focusing on the means that have been adopted at national level so to pursue the aims mentioned above. In other words, the Court has the task to assess whether such means are appropriate and necessary to achieve the social policy objectives they seek. Under this point, the reasoning carried out by the CJEU appears quite straightforward: the first aspect is easily evaluated by the Court pointing out how several other categories of workers (such as gardeners, para 63) sharing similar features and working conditions with the ones belonging to domestic workers, are nonetheless entitled to being protected in case of unemployment. As a result, it can be concluded that the Spanish legislation seems to lack coherence and consistency with other domestic provisions tackling similar categories of workers and with the social security system as a whole.

Should the referring Court be of a different view, thus finding the domestic provision appropriate to the goals it pursues, the CJEU lastly pointed out that such provision would anyway represent a breach of EU anti-discrimination law in so far as it goes beyond what would be necessary in order to achieve its goals. As clearly explained in paras 69 and 70, the choice to exclude domestic workers from the protection against unemployment triggered in fact the further consequence of precluding this category of workers from accessing

other protection mechanisms (e.g. the permanent incapacity benefit) that could possibly make up for the lack of unemployment benefits but whose entitlement is – quite absurdly – subject to the preliminary enjoyment of an unemployment benefit. To conclude, what looked like an arbitrary exclusion, reveals itself as the doorway towards the destitution of domestic workers: considering that this category of workers is predominately composed by women, the end result is a discrimination on grounds of sex.

4. As mentioned above, the CJ ruling piles up on a considerable stack of decisions where the CJEU has been confronted with the need to understand the features and limits of indirect discrimination (C. TOBLER, *Indirect Discrimination. A Case Study into the Development of the Legal Concept of Indirect Discrimination under EC Law*, Antwerpen, 2005, pp. 1-516, at p. 99 ff). There are however a couple of points worthy of being further discussed.

Both points relate to the interpretation and assessment of what constitutes a 'legitimate objective', i.e. a goal suitable to justify an indirect discrimination, under EU law (on this, see M. A. MOREAU, *Les justifications des discriminations*, in *Droit Social*, 2002, p. 1112). While the CJEU assessment on the reasonability and proportion of the contested national measure is typically quite thorough, the Court's evaluation on the legitimacy of the aims the domestic provision is seeking to achieve is often blurred (see N. BAMFORTH, M. MALIK, C. O'CINNEIDE, *Discrimination Law: Theory and Context: Text and Materials*, London, 2008, pp. 1-1300, at p. 115). In this respect, this ruling confirms such trend: in its recent decision, the CJEU indeed missed the opportunity, first, to clarify the boundaries (if any) States have when identifying social policy objectives and balancing them with the respect of equality; secondly, to explain the role of stereotyping and stigma in appreciating the legitimacy of a social policy objective.

Both aspects could and should have been properly tackled by the ruling, yet only the Advocate General attempted to address them.

When it comes down to the identification of those policy reasons that may amount to 'legitimate objectives', the AG quite correctly pointed out how the extent of Member States' discretion is yet to be established once and for all (point 68): while in the past the CJEU would only allow for a 'reasonable' margin of appreciation belonging to Member States (e.g. CJEU 12 July 1984, C-184/83, Ulrich Hofmann v Barmer Ersatzkasse, para 27), its more recent approach is towards allowing for a 'broad' degree of discretion (e.g. CJEU 1 February 1996, C-280/94, Y. M. Posthuma-van Damme v Bestuur van de Bedrijfsvereniging voor Detailhandel, Ambachten en Huisvrouwen and N. Oztürk v Bestuur van de Nieuwe Algemene Bedrijfsvereniging, para 26).

Further to pointing out that such inconsistency is to the detriment of those individuals who are subject to a disparate treatment or suffer the disparate effect of an apparently neutral provision, it should also be stressed that it pretty much nullifies the meaning of having a two-step test to assess the respect of equality under EU law. Hence, the concerns moved by some academic commentators (see more recently J. MULDER, *Indirect sex discrimination in employment: Theoretical analysis and reflections on the CJEU case law and national application of the concept of indirect sex discrimination*, Luxembourg: Publications Office of the European Union, 2021, pp. 1-154) are to be vigorously echoed.

The second main remark that can be moved towards this recent ruling is somehow cascading from the CJEU's regrettably loose approach towards the identification of policy aims which might constitute legitimate objectives. Apart from briefly recalling that those aims should always be unrelated to any discrimination on grounds of sex (para. 72), the ruling did not mention the possibility that some policy aims might formally comply with equality on grounds of sex, yet be grounded on stereotype (to be defined as 'a generalised belief about the characteristics of a group' by G. V. BODENHAUSEN, J. A. RICHESON, *Prejudice, Stereotyping, and Discrimination*, in R. F. BAUMEISTER, E. J. FINKEL (eds.), *Social Psychology. The State of the Science*, Cambridge, 2010, pp. 341-384, at p. 345) and stigma. In the case at the main proceeding, for instance, the AG quite clearly pointed out how the Spanish provision seemed in fact rooted into a very old-fashioned and outdated belief: that women are very rarely providing for the subsistence of their families and thus their role in supporting the family is always marginal to the one of men (point 77 AG Opinion). Such conception – being behind the social policy reasons 'legitimising' the exclusion of domestic workers from unemployment benefits – has to be flagged as paradoxical and misleading at time.

The CJEU's dismissal of the relevance of such stereotype *de facto* triggering indirect discrimination is paradoxical in that it clashes with the foundation of the whole of the EU jurisprudence on equality. As a matter of fact, in *Defrenne* II (CJEU 8 April 1976, case 43/75, Gabrielle Defrenne v Société anonyme belge de navigation aérienne Sabena), when the CJEU referred to the existence of a social component under Art. 119 EEC Treaty (now Art. 157 TFEU), it was actually dealing with a provision whose express goal was economic – i.e. to give men and women a right to equal pay for equal work in order to attract women into employment – having the additional effect of questioning the common belief that women were not supposed to provide for their family. It can easily be pointed out here that after more than 50 years of emancipation and despite the EU recent commitment towards dismantling

such stereotype (see the Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, *A Union of Equality: Gender Equality Strategy 2020-2025*, 5 March 2020, COM(2020) 152 final), the phenomenon of women in occupation is still somehow perceived as a peculiar event; and that the recognition of working women's contribution to the subsistence of their family is still minimised by some Member States' laws.

On the other hand, the lack of engagement shown by the CJEU in this ruling leads to the understanding that not only stereotypes, but stigma, could be taken into consideration when addressing and drafting a piece of legislation meant to compress the principle of equality. As happened in the case at the main proceeding, a provision excluding a category of workers almost entirely composed of female workers from access to all unemployment benefits results in something more that the mere 'accommodation' of stereotypes. It seems in fact that a legislation like the one adopted by the Spanish government goes beyond being based on a genuine (?) misconception over a given group of workers (and people), having the additional shortcoming of *de facto* 'targeting' that group to the point of accommodating stigma as a legal rationale.

In the EU legal order, that has long been advocating for a union of equality, the acceptance of stigma in Member States' policy discourse should not be tolerated. Otherwise, the message that will then be channelled is along the lines of 'sex discrimination is illegitimate – unless hidden in plain sight': this way, the public opinion will not spot it and EU equality law will *prima facie* be observed.