

Reference for a preliminary ruling
Relação Lisboa
(Lisbon Intermediate Court -
Portugal) lodged on 15 September
2016 — Maria Pereira v.
Worldwide Sweets & Ana Martínez
v. Turrões Sweets

(Case C-107/16)

Language of the case: Portuguese

Referring court

Relação Lisboa

Parties to the main proceedings

Applicants: Maria Pereira, Ana Martínez

Defendants: Worldwide Sweets, Turrões Sweets

Questions referred

1. In a case such as the one at hand, is the Portuguese court bound to the decision by the Spanish court assuming the jurisdiction of the Portuguese courts?
2. If the answer to question 1 is to the negative, can the Portuguese court transfer the action of the second claimant back to the Spanish courts on application of the employee?
3. Is the Italian judgment binding for the Portuguese courts in a case such as the one at hand?
4. If the answer to question 3 is to the negative, do payment rules differentiating on gender like those in the case at hand infringe EU law, even if they are intended to reach a commercial goal?
5. Is the EU Charter applicable to dress regulations like those in the case at hand?
6. If the answer to question 5 is to the affirmative, do dress regulations like those in the case at hand infringe the personality rights provided for in the EU Charter?

Reference for a preliminary ruling
from the Cour de Cassation, France
lodged on 16 September 2015 —
Sandrine Bonnaire v Huxiyun Ltd

(Case C-297/15)

Language of the case: French

Referring court

Cour de Cassation, France

Parties to the main proceedings

Applicants: Sandrine Bonnaire, Nicolas Duvauchelle

Defendant: Huxiyun Ltd

Questions referred

1. Taking into account that Huxiyun Ltd is a Japanese enterprise, does a policy of measuring the basic pay in individual salary groups by age categories and gender categories, infringe the primary-law prohibition of age discrimination and gender discrimination (now Article 21(1) of the CFREU) as given expression by Directive 2000/78/EC?
2. Taking into account the right of parties to a collective agreement to collective bargaining which is guaranteed by primary law
3. Taking into account that Huxiyun Ltd is a Japanese enterprise, does a policy of measuring the basic pay in individual salary groups by age categories and gender categories, infringe the primary-law prohibition of age discrimination and gender discrimination (now Article 21(1) of the CFREU) as given expression by Directive 2000/78/EC?
4. Taking into account that Huxiyun Ltd is a Japanese enterprise, does a policy of measuring the basic pay in individual salary groups by age categories and gender categories, infringe the primary-law prohibition of age discrimination and gender discrimination (now Article 21(1) of the CFREU) as given expression by Directive 2000/78/EC?

All information given on the case and on the content of the Portuguese law is fictitious and should be relied on for the purpose of the Moot.

Background:

On 23 July, 2015, the staff at “Turrões Hermanos García”, a company with its main centre of interests in Jijona (Alicante, Spain) and well known for its worldwide famous recipe of this Spanish sweet (nougat), celebrated the acquisition of the company by an undertaking with its main centre of interests in Portugal (“**Worldwide Sweets**”) and presence in Greece and Italy too. From that moment on, the company “Turrões Hermanos García” was to be called “**Turrões Sweets**”. Turrões Sweets had all their employees sign an addendum to their labour contracts stating that Portuguese Law is applicable and that Portuguese Courts have jurisdiction over all legal disputes regarding the labour contract. They also told their staff, that they now would be under the collective agreement of the parent company (drafted in accordance to Portuguese Law). This collective agreement contains, amongst other, the following provisions:

[...]

(11) The employer is permitted to pay different salaries for the same kind of work for a restricted period of time as a measure of positive discrimination for important commercial reasons.

[...]

(17) Regarding employees in the distribution department, the employer is permitted to make dress regulations.

In 2015, “Worldwide Sweets” had been sued by one of its employees, Sofia Loren (full time worker) in Italy, who, after getting to know that her male co-workers that had her same position earned a higher salary than she did, brought forward the charges of gender-based discrimination against the company. “Worldwide Sweets” was sentenced for discrimination in Italy, but had always argued that the procedures were not notified with enough time to prepare its defence.

On 2 February, 2016, Maria Pereira, full time worker in the distribution department of “Worldwide Sweets” in Portugal and member of the trade union who signed the collective bargaining agreement, sues the company for the same ground before the competent Portuguese court, which is the Relação Lisboa. Maria Pereira also complains against the new dress regulations of Worldwide Sweets. She has been ordered to wear skirts that end at least 15 centimetres above the knee, colourful narrow tops and a cap with bunny ears. In her view, this is infringing her personality rights under the EU Charter and is an additional discrimination.

The company argues that the payment of different salaries is in compliance with the collective agreement. Here, the reason is as follows: The Company has recently opened a department of sweets for men, using black chocolate and sweet alcoholic fillings. This new brand is created and commercialized by men and this means that they need more men to work for that department. As men are rare in the field of chocolate production, they are luring them with better salaries. The Company claims that the dress regulations comply with Portuguese Labour Law and with the collective agreement. Here, the costume is intended to promote a new product in the men’s product line called “Black Rabbit”.

Maria Pereira, on the other hand, considers that such a provision is discriminatory and the new brand for men is no valid justification. Additionally she brings forward the Italian judgment that ruled against that company and ascertained the discrimination regarding salaries.

On 12 March, 2016, Ana Martínez, who has been working full time for “Turrões Sweets” in Spain since 2010, sues the company before the Spanish courts for quite similar reasons. She earns less than her male colleague (Antonio Barrera) who does exactly the same work. She claims that the collective agreement is not valid for her. Turrões Sweets puts forward that they only have 8% of male workers and, because they want a better gender mix, pay them 5% more.

The Spanish court stays the proceedings under Art. 30 Brussels I bis regulation and simultaneously rejects its competence to deal with the matter at hand on the grounds that it finds the choice-of-court agreement included in the addendum to Ana's labour contract to be valid. It holds that Portuguese courts have jurisdiction. Consequently, in applying national rules, the Spanish judge transfers the case to the Relação Lisboa and sends the file there.

After the Spanish decision has become final, the Relação Lisboa joins the Martínez lawsuit to the pending Pereira lawsuit according to Art. 74 et seq. of the Portuguese Civil Procedure Code. Ana Martínez is not happy with this development. She applies to the Relação Lisboa for a separation of the lawsuits and for a re-transfer of her lawsuit back to Spanish courts.

RELEVANT PROVISIONS

Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation

Article 2 Concept of discrimination

1. For the purposes of this Directive, the "principle of equal treatment" shall mean that there shall be no direct or indirect discrimination whatsoever on any of the grounds referred to in Article 1.

2. For the purposes of paragraph 1:

(a) direct discrimination shall be taken to occur where one person is treated less favourably than another is, has been or would be treated in a comparable situation, on any of the grounds referred to in Article 1;

(b) indirect discrimination shall be taken to occur where an apparently neutral provision, criterion or practice would put persons having a particular religion or belief, a particular disability, a particular age, or a particular sexual orientation at a particular disadvantage compared with other persons unless:

(i) that provision, criterion or practice is objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary, or

(ii) as regards persons with a particular disability, the employer or any person or organisation to whom this Directive applies, is obliged, under national legislation, to take appropriate measures in line with the principles contained in Article 5 in order to eliminate disadvantages entailed by such provision, criterion or practice.

3. Harassment shall be deemed to be a form of discrimination within the meaning of paragraph 1, when unwanted conduct related to any of the grounds referred to in Article 1 takes place with the purpose or effect of violating the dignity of a person and of creating an intimidating, hostile, degrading, humiliating or offensive environment. In this context, the concept of harassment may be defined in accordance with the national laws and practice of the Member States.

4. An instruction to discriminate against persons on any of the grounds referred to in Article 1 shall be deemed to be discrimination within the meaning of paragraph 1.

5. This Directive shall be without prejudice to measures laid down by national law which, in a democratic society, are necessary for public security, for the maintenance of public order and the prevention of criminal offences, for the protection of health and for the protection of the rights and freedoms of others.

Article 7 Positive action

1. With a view to ensuring full equality in practice, the principle of equal treatment shall not prevent any Member State from maintaining or adopting specific measures to prevent or compensate for disadvantages linked to any of the grounds referred to in Article 1.

2. With regard to disabled persons, the principle of equal treatment shall be without prejudice to the right of Member States to maintain or adopt provisions on the protection of health and safety at work or to measures aimed at creating or maintaining provisions or facilities for safeguarding or promoting their integration into the working environment.

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 (recast)

Article 1 Purpose

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;

Article 4 Prohibition of discrimination

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.

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

NATIONAL LAW: PORTUGUESE LAW (fictitious)

Portuguese Employment Act 2010 (after having transposed Council Directive 2000/78/EC and Directive 2006/54/EC)

Article 1

Given the same working conditions, collective agreements shall offer same opportunities and salaries to men and women.

Article 3

The employer has the right to determine the working conditions.

Article 22

Collective agreements can offer economic incentives in order to reach certain commercial or social advantages. In particular, higher wages may be offered if needed to create a balanced gender mix in fields where one gender is structurally underrepresented.

Portuguese Code of Civil Procedure 2009

Article 74 Purpose of consolidation of actions

By virtue of consolidation of actions, these shall be heard in a single proceeding and shall be terminated by a single judgment.

Article 75 Legal standing to request the consolidation of actions. Consolidation of actions ex -officio.

Any party of any of the proceedings that are intended to be consolidated shall have grounds to request the consolidation. It can also be determined ex - officio by the Court, provided that one of the situations set out in the following article is fulfilled:

Article 76 Cases in which actions can be consolidated.

The consolidation of actions shall be adopted whenever:

- 1.º The judgment in one of the proceedings may result in preliminary rulings as to the other, and
- 2.º There is such a connection between the objects of the causes of action that if they are heard separately, this could result in contradictory, incompatible or exclusionary judgments.