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Equal treatment for domestic workers – one more step on a long and winding road

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Comment on CJEU judgment of December 19, 2024 – Case C-531/23 *Loredas* ECLI:EU:C:2024:1050

In many jurisdictions, domestic workers are still excluded from key areas of labour and social security law. Where ILO Domestic Workers Convention 189 (that was brought about by an international movement of domestic workers[1]) established the principle of equal treatment for domestic workers, there is still a long way to go in many countries before such rights are realized.[2]

With this second decision on domestic workers in *Loredas*, EU law has taken a pivotal role in this discussion. The CJEU has taken a further step towards equal treatment. However, the CJEU now takes a slightly different approach than in the first decision (*TGSS*), by downplaying anti-discrimination law and focussing on the general scope of the obligation to record actual time worked, arising from the Working Time Directive 2003/88/EC.

The *Loredas* case

Both CJEU decisions on domestic workers concerned Spanish cases. As is typical for many European countries, domestic workers in Spain are mostly migrant women of middle or older age who care for mostly elderly people in their homes (where the domestic workers typically also live). While live-in workers in Spain usually come from Latin America, in other European countries they often migrate from (often neighbouring) Eastern European countries.[3]

The *Loredas* case concerns HJ, who had been working as a domestic worker since September 2020 and was dismissed in February 2021. (Her working conditions are illustrated by the fact that she claims to have worked, for a gross monthly salary of 2.363,04 EUR, 46 hours per week in the first month, and 79 hours per week thereafter. In addition to protection against dismissal, she claimed overtime pay and compensation for days of leave not taken. The Basque court in charge of the case rejected the latter claims on the basis that the worker had not provided evidence of the number of hours worked: There were no daily records of the time worked.

This is where EU law came into play. Following the CJEU judgment in *CCOO*, the Spanish Labour Code (Art. 34 (9) Estatuto de los Trabajadores) now requires employers to set up a system enabling the duration of time worked each day to be measured. However, domestic workers have remained excluded; in any case, courts and authorities have understood the 2011 Spanish regulation on the special employment relationships of domestic workers[4] to be *lex specialis* vis-à-vis the new regulation.[5]

In the present judgment, the CJEU finds that this interpretation "clearly" ("manifiestamente") violates the Working Time Directive 2003/88, as interpreted in *CCOO*. Furthermore, the CJEU ties in with its earlier *TGSS* decision by pointing out the possibility that indirect gender discrimination may also be present. I will get into both aspects below.

Clear infringement of the Working Time Directive

In its first part, the judgment confirms and reinforces *CCOO*, according to which Member States have to require employers to set up "an objective, reliable and accessible system enabling the duration of time worked each day to be measured", in order to ensure the effectiveness of Arts. 3, 5 and 6 of the Working Time Directive 2003/88/EC (para. 65). In *Loredas*, the CJEU now stresses that this also applies to domestic workers; on this occasion, it reiterates the reasons why this requirement may not be interpreted restrictively, including references to Art. 31(2) of the Charter of Fundamental Rights (CFR-EU) (paras. 27/28).

The court also points out that Member States may lay down "specific features either because of the sector of activity concerned or because of the specific characteristics of certain employers, in particular their size" (paras. 34, 50). With this remark the CJEU implicitly invites Members States to consider special regulations for domestic workers (provided they also ensure effective guarantees of, for example, maximum weekly working hours).

Another argument in the same direction can be found in the court's reference to Art. 17(1) of the Working Time Directive, according to which the Member States are permitted to derogate from Art. 3 to 6, "when, on account of the specific characteristics of the activity concerned, the duration of the working time is not measured and/or predetermined or can be determined by the workers themselves". While the Basque court, in their request for a preliminary ruling, only mentioned Art. 17(1)(b) of the Directive, which refers to family workers and was therefore not applicable in the present case, the CJEU now suggests that the general idea of Art. 17(1) could nevertheless apply to

domestic workers. In addition, possible derogations for "activities involving periods of work split up over the day, particularly those of cleaning staff" (Art. 17(4)(b) of the Working Time Directive) are indirectly addressed by the CJEU ("derogations in respect of overtime and part-time work" – "provided [they] do not render the legislation in question devoid of substance") (para. 51).

The CJEU refers these matters back to the national court. Given that such derogations are susceptible to discrimination, it is rather unfortunate that the CJEU does not mention antidiscrimination law in this context. Moreover, the way the court explicitly handles antidiscrimination law in the case invites critique.

Indirect Discrimination?

Unlawful discrimination of domestic workers was the legal issue of the *TGSS* case. It concerned a derogation from general rules for unemployment benefits. As this area of the law, unlike working time, has not been harmonised under EU law, the unlawfulness of an exception for domestic workers was evaluated only according to anti-discrimination law. The CJEU found the derogation constituting indirect discrimination under Directive 79/7/EEC,[6] based on the fact that women and men are in general roughly equally represented in Spanish social security, while 95,53% of those covered by the special regulation for domestic workers were women (*TGSS* para 45).

At the time, the CJEU also found no objective reasons unrelated to gender discrimination that could have justified the exception. Domestic workers did not differ "in a meaningful way from other categories of workers who are not excluded from it", but also work in private homes and with comparable "rates of occupation, skill and pay", "such as gardeners and chauffeurs or agricultural workers and workers employed by cleaning companies" (*TGSS* paras. 62/63).[7]

Since the concept of indirect discrimination in Directive 79/7/EEC "must be understood […] in the same way as in the context of Directive 2006/54" (*TGSS* para. 40), it now seemed obvious that a comparable examination would also be carried out in the *Loredas* case – especially since it was again a Spanish case for which the figures presented and used in *TGSS* could again be relevant. The CJEU accordingly points out that there would be indirect discrimination on grounds of sex if there were no objective reasons for the exception that had nothing to do with discrimination on grounds of sex. With the Spanish government having refrained from commenting on the issue,[8] the CJEU left it to the referring court to examine the issue of indirect discrimination in this case (*Loredas* paras. 57 et seq).

As such, the referral is understandable. However, there are some wordings in the decisions which seem like a strange choice in the context. The CJEU chose to start by looking at the "alleged indirect discrimination" (para. 52). Moreover, the court locates the protection against discrimination exclusively in secondary law, without referring to Arts. 20, 21 CFR-EU. This is all the more strange as it mentions not only Directive 2003/88/EC, but also Art. 31 (2) EU-GRC for the law on working hours.

One may suspect that this approach helps the CJEU to avoid any if only implicit questioning of EU law which itself in some instances contains exemptions for domestic workers from labour law protection. For example, Art. 3a) of the OSH Framework Directive 89/389/EEC and Art. 1 (7) of Directive 2019/1152 on transparent and predictable working conditions probably have to be considered unlawful indirect discrimination.[9]

Similar legal risks exist for Member State regulations that make use of Art. 17 (1)b) or (4)b) of the

Working Time Directive 2003/88/EC, i.e. those very provisions the CJEU here suggests Member States apply to domestic work. Not only these EU law regulations themselves, but also their use will have to stand the test of indirect gender discrimination. In other words: Any special regulation on the recording of working hours that predominantly affects domestic workers must be scrutinized to see whether it really covers, in a coherent and systematic manner, precisely the very categories of workers for whom special features actually exist.

Perspectives

ILO Convention 189 concerning Decent Work for Domestic Workers has been a huge step forward in establishing equal rights and visibility for domestic workers. It does allow for exceptions and transition periods (for example Art. 2(2), Art. 13(2), Art. 14(2), Art. 17(2)), but it always requires at least equivalent protection or progressive application of measures. The EU recommends that Member States ratify the convention.[10] With its second decision concerning domestic workers, the CJEU and EU law could now also play an important role in this area of law. However, not only the CJEU would have to take standards of non-discrimination more seriously in the future; the EU legislator should look into aligning EU law with ILO Convention 189.

References

[1] Cf. *Blackett*, Everyday Transgressions: Domestic Workers' Transnational Challenge to International Labor Law, 2019.

[2] For the empirical and legal situation in six EU Member States, see the reports of the *Care4Care EU Horizon Project*, Comparative and National Reports on Care Workers Job Quality and Inclusive Working Conditions, Deliverable No. D2.3, 2024; *this same*., Comparative and National Discrimination Map Reports, Deliverable No. D3.3, 2024.

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[4] Royal Decree 1620/2011, of November 14, 2011, regulating the special employment relationships of domestic workers (BOE No. 277, of November 17, 2011, p. 119046.

[5] The Spanish government had taken a different view of the relationship between the regulations (*Loredas*, paras. 42 et seq).

[6] Consenting: *Rönnmar*, International Labour Law Reports 42 (2023); *Chieregato*, European Law Review 47 (2022).

[7] In his opinion of 30 September 2021 – C-389/20 – *TGSS*, para. 72 et seq., AG Szpunar dealt extensively and in detail with the social policy objectives put forward in the case, and found that the exception could not be justified by the objective of combating illegal employment or facilitating law enforcement.

[8] It had interpreted Spanish law differently (and in a non-discriminatory way) from the outset,

see above footnote 5.

[9] *Novitz/Syrpis*, European Labour Law Journal 6 (2015), 104 et seq.; *Pavlou*, European Law Review 3 (2016), 379 et seq.; *Scheiwe*, ZIAS 2021, 1 et seq. As for a possible objective justification, reference should also be made here to the considerations that GA Szpunar had set out in his opinion of September 30, 2021 – C-389/20 – *TGSS* on the comparability of domestic workers with other groups of employees.

[10] Council decision of 28 January 2014 authorising Member States to ratify, in the interests of the European Union, the conventionconcerning decent work for domestic workers, 2011, of the International Labour Organisation (Convention No 189) (2014/51/EU). So far, Convention 189 has been ratified in the EU by Belgium, Finland, Germany, Ireland, Italy, Malta, Portugal, Spain, Sweden, and by 27 non-EU countries.

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