



INFORMATION NOTE No. 43/2014

THE TC GRANTS PROTECTION TO A CIVIL SERVANT WHOSE SENIORITY WAS NOT RECOGNISED GIVEN THAT HER DUE DATE COINCIDED WITH THE COMMENCEMENT DATE OF A MANDATORY SELECTION COURSE

Chamber One of the Spanish Constitutional Court has granted protection to a woman who was unable to take office as a civil servant of the Autonomous Community of Madrid at the same time as her colleagues because the commencement date of a mandatory selection course coincided with her due date. This circumstance resulted in an economic disadvantage since the Autonomous Administration did not recognise her seniority. The judgment, where judge Encarnación Roca acted as Reporting Judge, upholds a breach of the appellant's right of non-discrimination on the grounds of gender (Art 14 of the Spanish Constitution –CE).

The Resolution adopted by the Autonomous Community of Madrid had rejected the appellant's requested retroactive acknowledgement of her economic and administrative rights, based on the Regulations on hiring, recruitment positions and professional promotion (ratified by Royal Decree 1451/2005 of 7 December). Article 24.6 of said Royal Decree states that *“those who are unable to attend or compete a selection or training course for reasons of force majeure, will lose their status as practising civil servants, and may be reappointed in the immediately following course of the same kind that is held (...)”*.

In other words, the Autonomous Community of Madrid considered maternity to be equivalent to a case of *“force majeure”* since there were no specific provisions covering situations where birth and/or maternity leave prevent the completion of a course.

The Resolution was challenged before the Contentious-Administrative Courts, which ruled in favour of the plaintiff on the grounds that rendering her situation (failure to take a course due to imminent childbirth) equivalent to *majeure* meant that *“the solution adopted by analogy was unfair for the plaintiff and detrimental to her fundamental right not to be discriminated on the grounds of gender”*. The Autonomous Community of Madrid lodged an appeal before the High Court of Justice of Madrid (TSJM), which overruled the instance judgment.

According to the TC, the TSJM had resolved the appeal *“as simply a matter of ordinary law”* without considering *“the constitutional issue inherent to the claim”*. The TSJM believed that administrative Resolution conformed to law because it was covered by Art. 24.6 of said Royal Decree 1451/2005.

Thus, according to the TC, the TSJM had overlooked constitutional case-law whereby *“if different treatment is claimed based on circumstances considered discriminatory under Art. 14 CE, the court cannot just evaluate whether the different treatment is, in abstract terms, objectively and reasonably justified, as if it were a general equality matter, but must analyse, specifically, whether what appears to be a reasonable formal differentiation does not conceal or enable the concealment of discrimination contrary to Art. 14 CE”*.

In this case, maternity *“was the grounds of the employment disadvantage cased, specifically the failure to recognise her economic and administrative rights retroactively, from the date her colleagues took over office; a failure to foresee a deferral of a training course due to childbirth and/or maternity by Royal Decree 1451/2005 cannot justify this administrative and judicial response”*.

The TC recalls that *“it corresponds initially to the Administration to offer alternative and reasonable measures in a specific situation involving a civil servant facing childbirth, in order to ensure that the principle of non-discrimination of Art. 14 CE is not infringed”*.

As a consequence, states the TC, the decisions of the Autonomous Community of Madrid and the TSJM *“breached Art. 14 CE since they did not take into account the fact that the civil servant’s biological condition and health must be compatible with the An underestimation, or as is the case, damage caused by maternity, eventually materialized in the failure to recognise economic and administrative rights of the applicant for constitutional protection on a retrospective basis, to be equated with those obtained by her colleagues, constituting discrimination on the grounds of gender”*. The TC overruled the judgment issued by the TSJM and upheld the judgment issued by the Contentious-Administrative Court.

Madrid, 13 May 2014.