Constitutional Court Judgment No. 229/1992, of December 14 (Unofficial translation)

The Plenum of the Constitutional Court comprising Senior Judges Miguel Rodríguez-Piñero y Bravo-Ferrer, President, Fernando García-Mon y González-Regueral, Carlos de la Vega Benayas, Vicente Gimeno Sendra, Rafael de Mendizábal Allende and Pedro Cruz Villalón, have declared

IN THE NAME OF THE KING

the following

JUDGMENT

In appeal number 2.281/89, lodged by the Court Agent (Procuradora) Pilar Rodríguez de la Fuente, on behalf and in representation of Concepción Rodríguez Valencia, assisted by legal counsel Lucía Ruano Rodríguez, against the Judgment of the Employment Chamber of the High Court of Justice of Madrid, on 11 July 1989. The organisation Hulleras del Norte, S.A. (HUNOSA), was party in this case, represented by the Court Agent Rafael Ortiz de Solórzano y Arbex and assisted by legal counsel Francisco Lavandera Sánchez. The Public Prosecutor entered an appearance. The Rapporteur was Miguel Rodríguez-Piñero y Bravo-Ferrer, President of the Court, who expressed the opinion of the Chamber.

II. Legal conclusions

1. The complaint was filed for an infringement of the right to non-discrimination on grounds of sex, acknowledged in art. 14 S.C. because the contested Judgments have dismissed the claimant's petition for recognition of her right to occupy a post of assistant miner in equal conditions to the male workers in the national company Hulleras del Norte, S.A. (HUNOSA), which she had been denied, despite her having passed the appropriate admission examinations, due to application of the Decree of 26 July 1957, art. 1 of which in connection with the additional first list thereof establishes a prohibition on women working in mines based on the grounds of "Special working conditions" and danger of accidents.
According to the representatives of HUNOSA, the basic argument in question in the appeal is the constitutionality of the regulatory provision applied to the case, which would, in their opinion, be irrelevant as, apart from and irrespective of this issue, the court judgments would still have been dismissed, as the dismissal of the claim was also based on other grounds, namely the fact that the lawsuit was not properly filed, if it was a claim against a punishable offence, or conversely, the impossibility of lodging a declaratory claim, apart from having failed to attest to the right to be contracted by HUNOSA for work in the post of assistant miner. In this way, they state, this appeal would be attempting to cover an abstract appeal of constitutionality, for which the party is not legitimised.
This allegation of the claimant's insufficient legal standing must be rejected. It is clear and incontrovertible that the appellant was not contracted by HUNOSA as assistant miner in application of the Decree of 26 July 1957, in accordance with the preceding judgments. At no time in the proceedings a quo, or in this constitutional process has an attempt been made to prove, as grounds for failing to contract the claimant, the equal or better right of other specific males selected and then contracted by the company, nor has it been shown that in failing to contract the appellant, the fact of her being a woman was of no consequence. Rather, the fact of being a woman in the petition was the decisive factor in her failure to obtain the job as opposed

to other male workers who, along with her, passed the corresponding selection procedure and were subsequently contracted. The judgments considered that there was inequality in the treatment on grounds of sex, however, that it did not constitute the discrimination contained in art. 14 of the SC, being based on the application of a legal prohibition which would be constitutionally legitimate, given that its objective was to protect women. This is the ratio decidendi of the dismissal of the appellant's claim, although it is accompanied by other complementary reasoning and arguments, which in themselves cannot serve as justification of the possible lack of protection in the event of the discriminatory treatment that was the source of her complaint in this case.

Therefore, neither does the claim raise an abstract question of unconstitutionality nor is it in any way irrelevant for the judgment in this appeal to determine whether the application to the appellant of the prohibition on women working in underground mines has violated her right to non- discrimination on grounds of sex, pursuant to art. 14 S.C.

2. As mentioned, the failure to contract the appellant as an assistant miner was due to the fact that she was a woman, in application of a provision which has not been formally repealed, and which prohibits females from working in mines. Both the Judgment of instance and that of appeal have considered that the precept is in conformance with art. 14 S.C. as it is a protective measure in favour of women which, furthermore, assumes the internal application of Convention 45 of the International Labour Organisation of 1935 (ratified by Instrument of 12 June 1958, "Official State Gazette " of 21 August 1959) and art. 8.4b) of the European Social Charter (ratified by Instrument of 29 April 1980, Official State Gazette" 26 June) which requires States to "to prohibit the employment of women workers in underground mining".

We therefore need to examine whether this prohibition on women working in underground mines is compatible with the right to non- discrimination of art. 14 C.E.

In contrast to the generic principle of equality which does not postulate parity as either a means or an end, but only requires reasonability in the regulatory difference of treatment, the prohibition on discrimination between the sexes implies a judgment of unreasonableness in making the differentiation already established ex Constitutione which is imposed as a purpose and generally as a means of creating parity, so that the distinction between the sexes may only exceptionally be used as a criterion for legal differentiation of treatment between men and women, also in matters of employment.

Despite the two dimensional nature of the regulation for creating parity between the sexes, it has to be acknowledged that it is women who have been victims of discriminatory treatment, thus the prohibition on discrimination also implies, in connection, moreover, with art. 9.2 S.C., the possibility of measures which attempt to ensure effective equal opportunities and treatment for men and women. In order to achieve that objective of equality between men and women it is possible to establish an "egalitarian unequal right" that is, the adoption of rebalancing measures for pre-existing discriminatory social situations in order to obtain substantial and effective parity for women, who are socially disadvantaged, compared to men, in order to ensure effective enjoyment of women's right to equality (JCC 128/1987 and 19/1989). Thus, measures are constitutionally justified when they are employed to the advantage of women and when they are designed to remove obstacles which effectively prevent the implementation of equal opportunities for men and women at work, as those obstacles can be removed by means of providing advantages to or support for women which will ensure real equal opportunities and they can be used to the detriment of women.

Without doubt the prohibition on women working in underground mines, although it responds historically to a protective purpose, cannot be qualified as a measure of positive action or support or advantage in order to achieve real equality of opportunities, as it does not favour women, but instead restricts them by preventing women from accessing specific jobs.

3. The existence of jobs which are closed to women is an historic response to the exploitation of

the female workforce. This explains that, from the start, labour legislation established protective measures for women, which included the prohibition on some specific jobs, one of which was working underground in mines. These national protective measures were designed to be generalised within the framework of the International Labour Organisation, through Convention 45 of 1935, which is subsequently contained in art. 8.4 b) of the European Social Charter of 1961. This said, social developments of non-discriminatory policy from the time that those laws were promulgated have led to an examination with particular reserve of a type of protective measure which is based on unfounded prejudice and which responds to a sexist division of work, or which due to social and productive development and improvements in health and safety conditions in the work place such as mines, are no longer valid. Although the differences in conditions of access to employment and working conditions based on natural biological order are constitutionally legitimate for those in which sex cannot be irrelevant, for this biological difference to justify the disparity in treatment, it is necessary to adequately measure the reasons for that protection, taking particular care to ascertain whether the protection may also be currently or potentially detrimental to women's' interests.

Obviously, those provisions which tend to protect working women in respect of pregnancy and maternity are not contrary to the Constitution, nor those referred to in art. 2.3 of EEC Directive 76/207 and which are the main factors in permitting different treatment in order to protect women. In this respect, case law of the Court of Justice of the European Communities, [Judgments of 12 July 1984 (Hofmann) and 15 May 1986 (Johnston)], has justified measures favourable to women in these cases in order to ensure, on one hand, the protection of women's biological condition during their pregnancy and following childbirth, and on the other, the specific relations between the mother and her new born baby. In other cases, protection of women and women's health based on sex should be examined with extreme caution and even with mistrust, due to the negative repercussions which, either directly or indirectly, this may have on effectively achieving equality between the sexes. In this respect it is appropriate to recall the Convention on elimination of all forms of discrimination against women of 1979, ratified by an Instrument of 16 December 1983 («Official State Gazette» of 21 March 1984) which, in art. 11.3 establishes that protective legislation relating to employment questions "shall be examined periodically in the light of scientific and technological knowledge and shall be revised, repealed or amplified as appropriate".

In this regard, attention should be drawn to the recent revision of the prohibition on night work for women, maintenance of which the European Court of Justice has deemed has no justification in the protective concern which originally inspired it, as there is no reason or need which would justify, except in cases of pregnancy or maternity, that disadvantages caused by night work are any different in the case of men than in women (Judgment of 25 July 1991, (Stoeckel case) so that in compliance with art. 5 of the Directive 76/207 the member states cannot legally prohibit women from working at night unless they also prohibit it for men as well.

4. The non-discrimination mandate on grounds of sex contained in art. 14 S.C., consequential with the principle of equality of rights between the sexes, obviously requires the elimination of those legal norms which (excepting pregnancy and maternity), although they historically responded to a need to protect women as the physiologically weaker sex, assumed the endorsement or reinforcement of a sexist division of work and functions, by imposing on women apparently advantageous restrictions but which actually hinder their access to the job market. In many cases, this originally protective legislation, responds to prejudices and to preconceived opinions which play an important role in the formation and continuance of discrimination. In this case that prejudice arises in the lesser physical strength and greater weakness of women compared to men, as something which is just a fact of life, and it is on the basis of this prejudice that it is possible to make the unfounded assumption that the physical difference between men and women is sufficient to justify a prohibition on women working in underground mines.

Irrespective of whether or not this is an incorrect or erroneous assumption or an anachronistic one, given social developments, it is clear that this type of prohibition is the result of stereotyping rather than real, natural or biological difference, and in any case it produces effects in the labour market which are clearly discriminatory since it imposes on women a specific limitation or disadvantage. Unlike men, women are not allowed the possibility lf working in underground mines, thus establishing exclusion linked directly to difference between the sexes. There are no conclusive reasons which would lead to the assumption that the especially arduous conditions of work in an underground mine or the risk to health or of accidents is increased in every case by the constitution and conditions of women with respect to men. Although the special difficulty of this work may require particular demands of strength and physical conditions, these must be required to an equal degree from men as well as from women, irrespective of the factor of sex, with the fact that more men than women are likely in this particular case to meet these requirements having no relevance in this regard. Having ascertained this fact, there is no reason (except when the issue involves pregnancy or maternity, which is not the case here) to justify the absolute exclusion of women from this type of work. It is true that by maintaining this provision, access is prevented to this type of work by women whose particular physical conditions or health might make them unfit for this type of work, however, there are also adequate means for ensuring that this necessary protection be made sexually neutral, which is also to the advantage of weaker or less physically apt male workers, without denying women access to these jobs, as the Decree of 26 July 1957 effectively does.

Protection against the consequences for health and physical integrity and quality of working life of working in underground mines, has a solid constitutional support (art. 40.2 S.C.) and therefore needs adequate limitations, requirements and health controls however, without it being necessary and essential to prohibit women from working in underground mines, a prohibition which, furthermore, reduces the possibilities of employment for women in a productive sphere from which they do not wish to be excluded. It is pertinent to recall in this respect that the Government itself seems to have been aware of the lack of actual basis for this prohibition having denounced in the Instrument of 6 May 1991 («Official State Gazette» of 10 May), art. 8.4 b) of the European Social Charter on the prohibition on female employment in underground mining work, which has been rendered ineffective in Spain since 5 June 1991.

Although this prohibition is subject to historical reasons which might well have justified it at the time, these are not currently sufficient basis to warrant their continuance. Thus, this rule does not respect the constitutional requirement of equality of rights between men and women, and therefore, the appellant's claim must be considered to be correct in that a regulatory provision has been applied to her which the Courts should have deemed to be repealed by the Constitution due to its incompatibility with the prohibition on discrimination on grounds of sex in art. 14 S.C.

In this way, the contested judgments -by dismissing the claimant's petition- have not recognised her right not to be discriminated against on the grounds of being a woman as recognised in art. 14 C.E., and therefore, the appeal should be upheld. Since the company against whom the claim is lodged has neither alleged nor proved in the proceedings a quo , nor in these proceedings, that it failed to contract the claimant, who was subjected to unequal treatment compared to the men who, like her, successfully completed the entrance tests including the medical examinations, for no other reason than that she was a woman and the circumstance of having to work in the mines, in order to re-establish fully the rights of the appellant we are required to recognise, in accordance with the petition of her claim, her right to take up the post she had applied for of assistant miner, which should be in equal working and salary conditions, including seniority, as the male workers who successfully completed the access tests at the same time as the claimant.

RULING

In the light of the foregoing, the Constitutional Court, WITH THE AUTHORITY CONFERRED BY THE CONSTITUTION OF THE SPANISH NATION

Has decided

1. To recognise the right of Concepción Rodríguez Valencia not to be discriminated against on grounds of her sex.

2. To overturn the Judgment of the Employment Tribunal no. 2 of Oviedo of 21 October 1987 (proceedings nos. 1.569/87) and the Judgment of the High Court of Justice of Madrid of 11 July 1989.

3. To recognise the right to take up the post of assistant miner in HUNOSA in equal conditions to the males who had passed the appropriate access tests at the same time

This judgment shall be published in the «Official State Gazette».

Given in Madrid, on the fourteenth of December of nineteen hundred and ninety two.