

Case C-314/23

Summary of the request for a preliminary ruling pursuant to Article 98(1) of the Rules of Procedure of the Court of Justice

Date lodged:

22 May 2023

Referring court:

Audiencia Nacional (Spain)

Date of the decision to refer:

17 March 2023

Applicant:

Sindicato de Tripulantes Auxiliares de Vuelo de Líneas Aéreas (STAVLA)

Defendants:

Air Nostrum, Líneas Aéreas del Mediterráneo, S. A.

Federación de Servicios de Comisiones Obreras (CCOO)

Unión General de Trabajadores (UGT)

Unión Sindical Obrera (USO)

Comité de empresa de Air Nostrum Líneas Aéreas del Mediterráneo, S. A.

Dirección General de Trabajo

Instituto de las Mujeres

Dirección General de Igualdad de la Comunidad de Madrid

Ministerio Fiscal

Subject matter of the main proceedings

Challenge to a collective agreement – Cabin crew – Provision regulating the daily subsistence allowance – Indirect discrimination on grounds of sex compared to pilots

Subject matter and legal basis of the request

Article 267 TFEU – Request for a preliminary ruling on interpretation – Directive 2006/54/EC – Indirect discrimination on grounds of sex

Question referred for a preliminary ruling

Does the fact that the company AIR NOSTRUM compensates a group such as cabin crew, where the majority of the individuals making up the group are women, for the expenses which they have to meet when travelling, other than those related to transport and accommodation, with an amount smaller than that received for the same expenses by another group of employees, such as pilots, in which the majority are men, constitute an instance of indirect discrimination on grounds of sex in relation to working conditions, contrary to European Union law and prohibited under Article 14(1)(c) of Directive 2006/54, where the reason for such different treatment lies in the fact that each group is subject to a different collective agreement, both negotiated by the same company but with different union representatives, pursuant to Article 87 of the Estatuto de los Trabajadores (Spanish Workers' Statute; 'the Workers' Statute')?

Provisions of European Union law relied on

Treaty on the Functioning of the European Union, Article 8.

Charter of Fundamental Rights of the European Union, Articles 23 and 28.

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, Articles 2(1)(b) and 14(1)(c).

Provisions of national law relied on

1. Spanish Constitution

Article 14: 'Spanish people are equal before the law; there may be no discrimination on grounds of birth, race, sex, religion, opinion or any other condition or personal or social circumstance.'

Article 37(1): ‘The law shall guarantee the right to collective bargaining between workers’ representatives and employers, as well as the binding force of the agreements.’

2. Ley Orgánica 3/2007, de 22 de marzo, para la igualdad efectiva de mujeres y hombres (Organic Law 3/2007, of 22 March 2007 on effective equality between women and men).

Article 5: ‘Equal treatment and opportunities as regards access to employment, vocational training and promotion and working conditions.

The principle of equal treatment and opportunities for men and women, applicable to private-sector and public-sector employment, shall, in accordance with the applicable regulations, be guaranteed as regards access to employment, including self-employment, vocational training, career advancement, working conditions, including pay and dismissal, and membership of and involvement in trade unions and employers' organisations, or any organisation whose members carry on a particular profession, including the benefits granted by such organisations.

A difference of treatment which is based on a characteristic related to sex shall not constitute discrimination as regards access to employment, including the necessary training, where, by reason of the nature of the particular occupational activities concerned, or of the context in which they are carried out, such a characteristic constitutes a genuine and determining occupational requirement, provided that the objective is legitimate and the requirement is proportionate.’

Article 6(2): ‘Where an apparently neutral provision, criterion or practice puts persons of one sex at a particular disadvantage compared with persons of the other sex, unless that provision, criterion or practice is objectively justified by a legitimate aim, and the means of achieving that aim are necessary and appropriate, it is considered to be indirect discrimination on grounds of sex.’

3. Ley 15/2022, de 12 de julio, integral para la igualdad de trato y la no discriminación (Law 15/2022, of 12 July on equal treatment and non-discrimination,).

This law also contains, in essence, provisions relating to the prohibition of discrimination, inter alia, on grounds of sex.

4. Real Decreto Legislativo 2/2015, de 23 de octubre, por el que se aprueba el texto refundido de la Ley del Estatuto de los Trabajadores (Royal Legislative Decree 2/2015, of 23 October 2015, approving the consolidated text of the Workers’ Statute).

Article 17(1), first subparagraph: ‘Any regulatory provisions, clauses of collective agreements, individual agreements and unilateral decisions of the employer which, as regards employment, remuneration, working hours or other working conditions, give rise to unfavourable situations of direct or indirect discrimination on grounds of age or disability, or to situations of direct or indirect discrimination on grounds of sex, origin, including racial or ethnic origin, marital status, social standing, religion or beliefs, political views, sexual orientation and identity, gender expression, sexual characteristics, membership or otherwise of trade unions and participation or otherwise in their agreements, family ties with individuals belonging to or connected with the company, or language, within the Spanish state, shall be regarded as void and without effect.’

Article 26(2): ‘Sums received by a worker by way of compensation or allowances for expenses incurred as a consequence of his or her work, social security benefits and allowances and compensation for relocation, suspension or dismissal shall not be regarded as salary.’

Article 87(1), fourth subparagraph: ‘In agreements aimed at a group of workers with a specific occupational profile, the trade union branches which have been designated by a majority of the individuals they represent by means of personal, free, direct and secret ballot, shall have the authority to negotiate.’

5. IV Convenio Colectivo de Air Nostrum, Líneas Aéreas del Mediterráneo, S. A., (personal de tierra y TCP'S) (4th Collective Agreement of Air Nostrum, Líneas Aéreas del Mediterráneo, S. A., (ground staff and cabin crew); ‘the Collective Agreement for Ground Staff and Cabin Crew’), which was published in the Boletín Oficial del Estado (Official State Gazette) on 14 January 2019 and was signed by the company’s management, on the one hand, and by the trade unions Unión General de Trabajadores (General Workers’ Union; ‘the UGT’), Federación de Servicios de Comisiones Obreras (Workers’ Commissions Services Federation; ‘the CCOO’) and Unión Sindical Obrera (Workers’ Syndical Union; ‘the USO’), on the other.

In that agreement, the daily subsistence allowance is defined as the amount which compensates members of cabin crew for expenses, other than those related to transport and accommodation, occasioned by travel forming an integral part of the content of the services they provide.

Cabin crew are entitled to half of the daily subsistence allowance if they provide their services for four hours or less and the full daily subsistence allowance if they provide their services for more than four full hours. The amounts of the daily subsistence allowance appear in Annex I to that collective agreement:

‘ANNEX I

Cabin crew salary tables

Professional group IV: Cabin crew

1		Tier 1	Tier 2	Tier 3	Tier 4	Tier 5
National overnight	with	39.37	39.37	39.37	39.37	39.37
National overnight	no	37.06	37.06	37.06	37.06	37.06
International with overnight		59.06	59.06	59.06	59.06	59.06
International overnight	no	56.74	56.74	56.74	56.74	56.72

6. Convenio Colectivo de Air Nostrum LAM, S.A., (Pilotos) (Collective Agreement of Air Nostrum LAM, S. A., (Pilots); ‘the Collective Agreement for Pilots’), which was published in the Boletín Oficial del Estado (Official State Gazette) on 13 May 2020 and was signed by the company’s management, on the one hand, and the branches of the trade unions Sindicato Español de Pilotos de Líneas Aéreas (Spanish Airline Pilots’ Union; ‘SEPLA’) and Unión Profesional de Pilotos de Aerolíneas (Professional Airline Pilots’ Union; ‘the UPPA’), on the other.

That collective agreement defines the daily subsistence allowance as the amount payable to the pilot, in order to meet expenses, other than accommodation and transport, arising from travel undertaken for the needs of the company or from staying away from his or her base.

The agreement provides that the pilot is entitled to the daily subsistence allowance on flight days. It also states that if, after five days of service, the pilot is away from his or her base, he or she is entitled to double the daily subsistence allows from the sixth day, inclusive. The amount of the daily subsistence allowance appears in Annex A:

‘ANNEX A

Period		Payments	Amount
		Annual	
National			
Allowance	day	Variable	€65.00

International

Allowance day Variable €100.00'

Succinct presentation of the facts and procedure in the main proceedings

- 1 On 14 January 2019, the Collective Agreement for Ground Staff and Cabin Crew was published in the Boletín Oficial del Estado (Official State Gazette).
- 2 On 8 November 2022, the Sindicato de Tripulantes Auxiliares de Vuelo de Líneas Aéreas (Airline Flight Attendants' Union: 'STAVLA') brought a claim in the Audiencia Nacional (National High Court, Madrid) seeking to have the amounts of the daily subsistence allowance appearing in that collective agreement declared invalid. According to STAVLA, cabin crew (the vast majority of whom are women) as a group suffer indirect discrimination on grounds of sex compared to pilots (the vast majority of whom are men) as a group.
- 3 Being unsure how to resolve the dispute, the National High Court decided to submit this request for a preliminary ruling.

The essential arguments of the parties in the main proceedings

- 4 According to STAVLA, cabin crew (94% of whom are women) as a group suffer indirect discrimination on grounds of sex compared to pilots (93.71% of whom are men) as a group with regard to the daily subsistence allowance. STAVLA notes that, according to Spanish employment legislation, the daily subsistence allowance does not constitute salary, but rather compensation paid on account of having to incur expenses while travelling, such as eating daily meals away from the usual place of residence. That implies that, for the purposes of comparison, the higher or lower value of the work done cannot be taken into consideration as a justification for the difference.
- 5 The Ministerio Fiscal (Public Prosecutor's Office) agrees with STAVLA. It also notes that the judgment of the Court of Justice of 8 September 2011, *Hennigs and Mai* (C-297/10 and C-298/10, EU:C:2011:560), which held that the exercise of collective bargaining does not justify discriminatory treatment, is applicable to the present case.
- 6 Air Nostrum and the trade union SEPLA (which negotiated the collective agreement for pilots) contest the claim. First, they dispute the notion that the groups are comparable, as they do not do work of equal value, which justifies different treatment as regards remuneration. Second, they maintain that the difference in treatment is, in any case, justified by the legitimate exercise of the right to collective bargaining, since, given that national legislation authorises what is known as a 'convenio colectivo de franja' (literally, a 'band' collective

agreement; a collective agreement solely applicable to workers having a specific professional profile, such as pilots), it is a logical consequence of the fact that two negotiation processes are carried out separately that the working and employment conditions applicable to the different groups of workers are different. Consequently, they assert that STAVLA is proposing the partial application of a collective agreement to a group that is not included in its scope.

- 7 The Abogacía del Estado (Legal Service of the Spanish Government) supports this argument.

Succinct presentation of the reasoning in the request for a preliminary ruling

- 8 First, within Air Nostrum, a group mostly made up of women receives, as compensation for the expenses which they have to meet when travelling, other than those related to transport and accommodation, a smaller amount than that received by another group of employees, mostly made up of men, for the same expenses.
- 9 In order for the different treatment described not to constitute indirect discrimination on grounds of sex, Air Nostrum would have to show that it serves a legitimate aim and that the means of achieving that aim are appropriate and necessary.
- 10 The amounts which Air Nostrum pays both to cabin crew and to pilots are not regarded as salary, either from the perspective of Spanish employment legislation, as they are expressly excluded from that concept by Article 26(2) of the Workers' Statute, or from the point of view of EU law (Article 157 TFEU and Article 2(1)(e) of Directive 2006/54/EC). That is because those amounts are not paid for specific work calculated by unit of time or unit of work, which implies that the different value of the work done by pilots and by cabin crew cannot be a factor that justifies such different treatment.
- 11 The origin of the different treatment lies in the fact that the working conditions of each of the two groups are governed by specific collective agreements, which were negotiated by the same company but with different union representatives, in conformity with Spanish legislation.
- 12 There could be no doubting the existence of indirect discrimination on grounds of sex if the different compensation for each of the two groups as regards the daily subsistence allowance had been established in the same collective agreement. The uncertainty arises because the origin of the different treatment lies in the fact that, within the company, two different collective agreements, negotiated with different union representatives, are applied. Furthermore, it must be supposed that, in each collective bargaining negotiation with the company, the union representatives concerned prioritised certain demands over others and that each agreement is the product of a different negotiation in which the representatives in question put certain demands ahead of others.

- 13 Therefore, we do not consider the case-law expressed in the judgment of the Court of Justice of 8 September 2011, *Hennigs and Mai* (C-297/10 and C-298/10, EU:C:2011:560) to be applicable to the present case, as that judgment deals with a case of discrimination on grounds of age arising from the negotiation of a single collective agreement, unlike the situation in the present case.
- 14 Lastly, we must point out one significant fact, namely that, when Air Nostrum negotiated the collective agreement for pilots, the agreement which is now being challenged had already been signed; that is, Air Nostrum was fully aware of the amounts which had been agreed for cabin crew as regards the daily subsistence allowance.

WORKING DOCUMENT